**SUPREME COURT**
**STATE OF WISCONSIN**

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**JAMES A. BLACK, GLEN J. PODLESNIK AND STEVEN J. VAN ERDEN,**
Plaintiffs-Respondents-Petitioners,
**MILWAUKEE PROFESSIONAL FIRE FIGHTERS ASSOCIATION LOCAL 215,**
Intervenor-Plaintiffs-Respondent-Petitioners,
**MILWAUKEE POLICE ASSOCIATION and MICHAEL V. CRIVELLO,**
Plaintiffs-Respondents-Cross-Appellants-Petitioners,

v.

**CITY OF MILWAUKEE,**
Defendant-Appellant-Cross-Respondent.

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# PETITIONERS JOINT BRIEF AND APPENDIX

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**FROM THE DISTRICT 1 COURT OF APPEALS DECISION DATED AND FILED JULY 21, 2015, REVERSING IN PART AND AFFIRMING IN PART THE TRIAL COURT'S JUDGMENT**

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**COURT OF APPEALS CASE NO. 2014-AP-400**
**TRIAL COURT CASE NO. 2013-CV-5977**

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**CITY OF MILWAUKEE,**
Defendant-Appellant-Cross-Respondent.

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## ISSUES PRESENTED FOR REVIEW

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1. Does the Home Rule Amendment to the Wisconsin Constitution Require a Statute to Uniformly *"Impact"* and *"Effect"* Each and Every Municipality in Order to Trump an Ordinance Addressing a Matter Primarily of Local Concern – as Opposed to the Uniform *"Affect"* Specifically Contained in the Amendment Itself?

   Answered by the Trial Court: "No."

   Answered by the Court of Appeals: "Yes."
   Although the Court of Appeals acknowledged the proper legal standard (i.e., uniform "affect"), it interpreted *"affect"* as being synonymous with *"impact"* and *"effect."* In so doing, the Court greatly expanded the scope and application of the Home Rule Amendment and

made Legislative action on a matter primarily of local concern a literal impossibility (as a statute will never be able to "impact" or "effect" each and every Wisconsin municipality in a uniform manner).

2. Does §66.0502, Stats., Create a Constitutionally Protected Liberty Interest in Being Free from "Residency" Being Used as a Condition of Municipal Employment?

Answered by the Trial Court: "Yes."

Answered by the Court of Appeals: "No."
Without any analysis whatsoever, the Court of Appeals concluded that §66.0502, Stats., did not create a liberty interest. It appears to have done so given its conclusion that the City had home rule authority over residency.

3. May a Municipality Disregard The Legislative Prohibition On Residency Being Used as a Condition of Municipal Employment, Without First Seeking a Declaratory Ruling as to the Rights and Obligations of the Parties?

Answered by the Trial Court: "No."

Answered by the Court of Appeals: Impliedly, "Yes."
The impetus for initiating this action was a City ordinance enacted in direct opposition to §66.0502, Stats., and which directed all City officials to continue to enforce the City's "residency rule" regardless of the prohibitions contained in §66.0502, Stats.

Unfortunately, the Appellate Court failed to address a municipality's authority to disregard the law – and order municipal officials to act in direct opposition to the law – without first seeking a judicial determination as to the rights and obligations of the parties under §66.0502,

Stats., and the Home Rule Amendment.

It therefore appears that municipalities have the Court's *imprimatur* to disregard the law without consequence, by simply asserting home rule authority over the matter at issue.

4. Should a Municipality Be Required to Prove "Beyond a Reasonable Doubt" That a Statute Is an Unconstitutional Overreach of its Authority under the Home Rule Amendment?

Answered by the Trial Court: Not Answered.

Answered by the Court of Appeals: Not answered. The Court of Appeals accepted the City's argument that §66.0502, Stats., was an unconstitutional overreach on its home rule authority. The essence of that conclusion was that §66.0502, Stats, was unconstitutional. Even though this issue was briefed, the Court of Appeals did not address whether the City was required to meet the burden associated with asserting that a statute is unconstitutional (i.e., beyond a reasonable doubt).

## STATEMENT OF THE CASE

**Nature of the Case:**

This case involves the interpretation of §66.0502, Stats. It was filed by Petitioners as a declaratory judgment under §806.04, Stats. *R-1.* Petitioners sought to establish three things: 1) that the City of Milwaukee ("City") lacked constitutional home rule over the issue of residency being required as a

condition of municipal employment; 2) that §66.0502, Stats., created a constitutionally protected liberty interest in being free from residency being required as a condition of employment, and; 3) that the City's decision to disregard §66.0502, Stats. – and enforce its residency rule regardless of the prohibitions contained in §66.0502, Stats. – wrongly deprived City employee's of their substantive due process right to be free from residency being required as a condition of municipal employment. Petitioners, Milwaukee Police Association, Michael V. Crivello, James A. Black, Glen J. Podlesnik and Steven J. Van Erden also sought damages and fees under 42 U.S.C. §1983 and §1988, respectively. *Id.*

**Statement of Facts:**

The City's residency rule is contained in §5-02 of the Milwaukee City Charter. *R-27, Ex. C.* That rule requires all City employees to reside within the City as a condition of employment, and mandates discharge for any employee living outside the City's jurisdictional limits. *Id.* It provides in pertinent part:

> 5-02. Residency Requirements.
> 1. RESIDENCY REQUIRED. All

> employees of the city of Milwaukee are required to establish and maintain their actual bona fide residences within the boundaries of the city. Any employee who does not reside within the city shall be ineligible for employment by the city and his employment shall be terminated in the manner hereinafter set forth. *Petitioners' Appendix ("P-App"), 151.* (Emphasis added).
>
> * * *
>
> 5. ACTION BY DEPARTMENT HEAD. Whenever a department head finds that an employee is not a resident of the city within the meaning of this section, the department head shall immediately file a written complaint against the employee to effectuate the separation of that employee from the service. *P-App., 152*

Section 1270 of 2013 Wisconsin Act 20 created §66.0502, Stats. *R-27, Ex. A.* It was signed by Governor Walker on June 30, 2013, and took effect July 2, 2013. *Id.* Entitled "Employee Residency Requirements Prohibited," it provides:

> 1. The legislature finds that public employee residency requirements are a matter of statewide concern.

2. In this section, "local governmental unit" means any city, village, town, county, or school district.

3. (a) Except as provided in sub. (4), no local governmental unit may require, as a condition of employment, that any employee or prospective employee reside within any jurisdictional limit.

(b) If a local governmental unit has a residency requirement that is in effect on the effective date of this paragraph .... [LRB inserts date], the residency requirement does not apply and may not be enforced.

4. (a) This section does not affect any statute that requires residency within the jurisdictional limits of any local governmental unit or any provision of law that requires residency in this state.

(b) Subject to par. (c), a local governmental unit may impose a residency requirement on law enforcement, fire, or emergency personnel that requires such personnel to reside within 15 miles of the jurisdictional boundaries of the local governmental unit.

(c) If the local governmental unit is a county, the county may impose a residency

> requirement on law enforcement, fire, or emergency personnel that requires such personnel to reside within 15 miles of the jurisdictional boundaries of the city, village, or town to which the personnel are assigned. *§66.0502, Stats (emphasis added.)*

The Milwaukee City Charter requires the City's Mayor to adhere to and enforce state law. It provides:

> **§3-01. Mayor.** The mayor shall take care that the laws of the state and the ordinances of the city are duly observed and enforced; and that all officers of the city discharge their respective duties.

However, the very same day that §66.0502, Stats., became law – *and in direct response to the enactment of that provision* – the City's Common Council enacted a resolution directing all City officials to continue enforcing the City's "residency rule," regardless of the prohibitions contained in §66.0502, Stats. *P-App., 157; R-27, Ex. B.*

Milwaukee Resolution File No. 130376, Entitled "Substitute Resolution Directing All City Officials to Continue Enforcement of s. 5-02 of the Milwaukee City Charter Relating to Residency" ("Substitute Resolution"), provided that

regardless of the existence of §66.0502, Stats., " . . . *all City officials are directed to continue enforcement, by executive order or otherwise, of s. 5-02 of the Milwaukee City Charter"* (i.e., the City's "residency rule."). *P-App., 157; R-27, Ex. B.*

The City's Mayor signed the Substitute Resolution into law on July 2, 2013, prior to seeking any judicial determination as to the rights and obligations of the parties with respect to the Home Rule Amendment. It was thereafter the official policy of the City to enforce its residency rule despite the existence of §66.0502, Stats.

The City's Mayor then publicly pronounced that the City would continue to terminate any employee found in violation of its residency rule, regardless of the fact that §66.0502, Stats., prohibited residency from being required as a condition of municipal employment. *R-1, ¶18; R-28, ¶5.*

Between July 2, 2013 (the effective date of the statute and the date the City passed its Substitute Resolution) and July 12, 2013 (when the Circuit Court entered a temporary restraining order), all City employees were faced with the choice of exercising their right to live outside the City's jurisdictional

limits (and be discharged), or refrain from exercising that right so as to keep their job.

During that time, at least one Milwaukee Police Association ("MPA") member chose not to exercise his rights under §66.0502, Stats., so as to avoid discharge. Petitioner Michael Crivello averred:

> Prior to passage of §66.0502, Stats., my wife and I had agreed that, in the event the City's "residency rule" was no longer in effect, we would give serious consideration to moving our residence outside the jurisdictional limits of the City of Milwaukee.
>
> When §66.0502, Stats., was passed, my wife and I began actively searching for a new residence outside the City of Milwaukee.
>
> However, on July 2, 2013, when the City passed the entitled "Substitute Resolution Directing All City Officials to Continue Enforcement of s. 5-02 of the Milwaukee City Charter Relating to Residency" regardless of the existence of §66.0502, Stats., my wife and I became concerned that the City would discharge me from my employment in the event we acted on the rights provided under §66.0502, Stats., and moved our residence outside the City's limits.

> That fear was confirmed when I became aware that Mayor Barrett publicly announced that the City would terminate any City employee found to be in violation of that "rule" regardless of the fact that §66.0502, Stats., prohibited residency from being required as a condition of municipal employment.
>
> From that point in time (July 2, 2013) and until the MPA successfully obtained a Temporary Restraining Order prohibiting the City from enforcing its residency rule (July 12, 2013), I was provided two choices – neither of which were reasonable:
>
> - I could exercise my right under §66.0502, Stats., to move out of the City and lose my job, or;
>
> - Keep my job by declining to exercise my right to live outside the City's limits.
>
> That "Hobson's choice" forced me to not exercise my rights under §66.0502, Stats., so as to ensure continued employment with the City and the Milwaukee Police Department. *P-App, 160-62.*

The City submitted no evidence to counter the assertions of Detective Crivello.

**Procedural Status:**

This action was commenced on July 10, 2013 seeking a declaration as to the rights and obligations of the parties with respect to §66.0502, Stats. *R-1*. On July 12, 2013, the Hon. Daniel Noonan signed a Stipulation and Temporary Restraining Order preventing the City from enforcing its residency rule prior to a hearing on a preliminary injunction. *R-27, Ex. D.* That was later amended to remain in force until a final decision on the merits by the Court of Appeals.[1] *R-22.*

On January 27, 2014, the Hon. Paul Van Grunsven issued a written decision in Petitioners' favor, holding that there existed no constitutional home rule with respect to residency, and that §66.0502, Stats., created a constitutionally protected liberty interest in being free from residency being used as a condition of employment. *P-App.,* at 150. However, the Circuit Court dismissed Petitioners' claims under 42 U.S.C. §1983, given the fact that no MPA member had been disciplined or discharged for exercising that liberty interest. *Id.*

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1. Subsequent to the Court of Appeals Decision, the parties further stipulated that the City would not enforce its residency rule until the later of either: 1) a denial of the Petition for Review, or; 2) this Court's final decision on the merits.

On February 17, 2014, the City timely appealed the issues as to the lack of constitutional home rule and the creation of a constitutionally protected liberty interest. On February 20, 2014, the MPA and Detective Crivello timely filed a cross-appeal with respect to the dismissal of their claims under 42 U.S.C. §§1983 and 1988.

On July 21, 2015, the Court of Appeals issued a decision reversing the trial court with respect to its conclusions as to home rule and the creation of a liberty interest. *P-App.,* 125, *Decision,* at ¶35. The Court of Appeals also affirmed that portion of the trial court's decision that concluded that there had been no deprivation of liberty. *Id.,* 125-26, *Decision,* ¶35.

## ARGUMENT

### 1. SECTION 66.0502, STATS., PROHIBITS "RESIDENCY" FROM BEING USED AS A CONDITION OF MUNICIPAL EMPLOYMENT THROUGHOUT WISCONSIN, AND TRUMPS THE CITY'S CLAIM OF "HOME RULE."

Wisconsin municipalities have no inherent powers. *City of Madison v. Schultz,* 98 Wis.2d 188, 195, 295 N.W.2d 798, 801 (Wis. App. 1980). While municipalities are authorized to regulate local affairs by means of constitutional home rule, those

regulations take a back seat to legislative enactments addressing "a matter of statewide concern" that "uniformly affects" municipalities in Wisconsin. *State ex rel. Ekern v. Milwaukee,* 190 Wis. 633, 637-639, 209 N.W. 860-861 (1926).

Constitutional home rule was adopted in Wisconsin via constitutional amendment in 1924. *Art. XI, Sec. 3, Wis. Const.* The Amendment states, in pertinent part:

> "Cities and villages organized pursuant to state law may determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of statewide concern as with uniformity shall affect every city or every village." *Wis. Const. Art. XI, §3(1). (emphasis added.)*

The Amendment was intended to operate as a limitation on the powers of the legislature to deal with the local affairs of cities and villages. *Van Gilder v. City of Madison,* 222 Wis. 58, 267 N.W. 25, 35 (1936). However, the Amendment also clarifies that, when legislation pertains to a matter of statewide concern and/or uniformly affects all municipalities, the legislative enactment will "trump" any municipal legislation to the contrary. *Wis. Const. Art. XI, §3(1); Also, State ex rel.*

*Michalek v. LeGrand,* 77 Wis.2d 520, 526, 253 N.W.2d 505 (1977).

The question is therefore whether §66.0502, Stats., constitutes "a matter of statewide concern" and/or whether the statute "uniform[ly] affect[s] every city or village" in Wisconsin. The answer to both questions is "yes." The reasons are plain.

### A. Section 66.0502, Stats., Constitutes a Matter Primarily of Statewide Concern.

Section 66.0502, Stats., constitutes a matter primarily of statewide concern for two reasons. First, when enacting §66.0502, Stats., the legislature expressly identified that municipal residency requirements are a matter of statewide concern. *§66.0502(1), Stats., Supra,* at 5. Such an affirmative legislative assertion ***must*** be given great weight. *Wisconsin Ass'n of Food Dealers v. City of Madison,* 97 Wis.2d 426, 431, 293 N.W.2d 540, 543 (1980), citing *Van Gilder v. City of Madison,* 222 Wis. 58, 73-74, 267 N.W. 25 (1936).

Second, the "uniform affect" of §66.0502, Stats., confirms the existence of statewide concern with respect to "residency." *Roberson v. Milwaukee County,* 2011 WI App. 50, ¶21, 332 Wis.2d 787, 798 N.W.2d 356. (If a legislative

enactment uniformly affects every county, then it is a matter of statewide concern.); *Adams v. State Livestock Facilities Siting Review Bd.,* 2012 WI 85, ¶¶ 29,36, 342 Wis.2d 444, 820 N.W.2d 404 (While municipalities may adopt ordinances regulating issues of both statewide and local concern, the legislature has the authority to withdraw this power by creating uniform state standards that all political subdivisions must follow); *City of West Allis v. Cnty. of Milwaukee,* 39 Wis.2d 356, 366, 159 N.W.2d 36 (1968) (When the matter enacted by the legislature is primarily of local concern, a municipality can escape the strictures of the legislative enactment unless the enactment applies with uniformity to every city and village); *State v. Baxter,* 195 Wis. 437, 449, 219 N.W. 858 (1928) (Where municipal legislation comes in conflict with state legislation, the legislation of the city prevails over the state legislation, unless the state legislation affects uniformly every city of the state).

The Court of Appeals criticized the Legislature for not identifying the specific basis for statewide concern. *P-App.,* 116, *Decision,* at ¶21. ("The argument that residency requirements are a matter of statewide concern simply because

the legislature said so is not persuasive . . . ") However, Petitioners have found *no* authority requiring the Legislature to affirmatively state the reason for asserting statewide concern.

The Court of Appeals also completely disregarded the Legislature's statement as to statewide concern, simply because the Court viewed it as not having been "substantiated." *P-App.,* 116, *Decision,* at ¶21. ("Because the legislature's claim that residency requirements are a matter of statewide concern, see 66.0502(1), is unsubstantiated, it does not influence our decision.") However, there exists no "substantiation" requirement when it comes to the legislature's assertion as to the existence of statewide concern.[2]

In disregarding the Legislature's assertion as to the existence of statewide concern, the Court of Appeals dismissed nearly 80 years of precedent requiring that the legislature's

2. Strangely, the Court of Appeals cited to *Hartung v. Hartung,* 102 Wis.2d 58, 66, 306 N.W.2d 16 (1981) – a divorce case – to support its contention that there needed to be support for the existence of statewide concern. (". . . even when this court reviews matters under an extremely deferential standard, we still require the decisions we review to be supported by some reasoning.") *P-App.,* 116, *Decision,* at 14. However, and with all due respect to the Court of Appeals, a discretionary determination by a trial court with respect to spousal maintenance is completely different from a conclusion of the Legislature when it creates public policy throughout the state.

assertion must be given "great weight." *Wisconsin Ass'n of Food Dealers,* 97 Wis.2d at 431, 293 N.W.2d at 543; also, *Van Gilder,* 222 Wis. at 73-74,

Nor have Petitioners found any case where a Court has questioned the basis for the legislature's assertion of statewide concern. That is not surprising, as the judiciary may not second guess policy decisions of the legislature. *Progressive Northern Ins. Co. v. Romanshek,* 2005 WI 67, ¶60, 281 Wis.2d 300, 697 N.W.2d 417, quoting *Borgnis v. Falk Co.,* 147 Wis. 327, 351, 133 N.W. 209 (1911). ("[W]hen the legislature has acted, 'the judiciary is limited to applying the policy the legislature has chosen to enact, and may not impose its own policy choices.'")

Moreover, it is entirely reasonable for the Legislature to "weigh in" on whether residency should be required as a condition of municipal employment in Wisconsin. The Legislature does, after all, have a history of determining what may not be lawfully required as a condition of employment when it comes to public welfare. Examples include:

> 1. Uniformly prohibiting employers from using HIV testing as a condition of employment. *§103.15(3), Stats.*

> 2. Uniformly prohibiting "honesty testing" as a condition of employment. *§111.37(2)(c), Stats.*
>
> 3. Uniformly prohibiting adverse employment consequences for an employee who obtains genetic testing. *§111.372(1)(b), Stats.*

The legislature's express conclusion in §66.0502(3), Stats., that residency can no longer be required as a condition of municipal employment in Wisconsin (and that any existing requirement is unenforceable), is no different than the legislative prohibition on requiring HIV testing or honesty testing as a condition of employment. In each instance, the legislature concluded that *public policy* required statewide regulation as to what may not be required as a condition of employment; and it is the legislature that determines public policy in Wisconsin. *State v. Williams,* 2013 WI App 74, ¶16, 350 Wis. 2d. 311, 833 N.W.2d. 846, citing *Marlowe v. IDS Prop. Cas. Ins. Co.,* 2013 WI 29, ¶37 n. 17, 346 Wis.2d 450, 828 N.W.2d 812.

The Court of Appeals rejected these examples as irrelevant, reasoning that the prohibition on "residency" (as opposed to HIV testing, honesty testing, etc.) was not enacted

with the public welfare in mind. (". . . there is no evidence in the record that §66.0502 was drafted with the public's health, safety or welfare in mind . . . the sole reason we can delineate for the statute's existence is the gutting of Milwaukee's long-standing residency requirement. We cannot conclude that such a measure involves the health, safety or welfare of the people of Wisconsin in any demonstrable way.") *P-App.,* 117, *Decision,* at ¶22.

However, what may not be used as a condition of municipal employment does implicate the public welfare. Given the enactment of §66.0502, Stats., it is entirely reasonable to presume that the Legislature viewed the use of "residency" as having negatively impacted the "welfare" of municipal employees; and that the "welfare" of those employees necessitated the ability to reside outside the jurisdictional limits of their municipal employers.

The bottom line is this. As the issue of "residency" is primarily a matter of statewide concern, the Home Rule Amendment is not implicated, and the decision below should be reversed. *Madison Teachers, Inc. v. Walker,* 2014 WI 99, ¶101,

358 Wis. 2d 1, 68, 851 N.W.2d 337, 370 ("In sum, our home rule case law instructs us that, when reviewing a legislative enactment under the home rule amendment, we apply a two-step analysis . . . as a threshold matter, the court determines whether the statute concerns a matter of primarily statewide or primarily local concern. If the statute concerns a matter of primarily statewide interest, the home rule amendment is not implicated and our analysis ends.")

The Court of Appeals should have ended its analysis there. It did not. Instead, it not only found that residency was not primarily related to statewide concern, it appears to have concluded that it was primarily a matter of local concern.[3] *P-App.,* 119, *Decision,* at ¶26.

However, even if the issue of municipal residency requirements is either a "mixed bag" of statewide and local

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3. Wisconsin courts have held that there are three types of legislative enactments: 1) those which are exclusively of state-wide concern; 2) those which may be fairly classified as entirely of local character, and; 3) those where it is not possible to fit exclusively into one or the other of these two categories (i.e., a "mixed bag."). *Michalek,* 77 Wis.2d at 527, 253 N.W.2d at 507.

However, the Court of Appeals never specifically identified whether it viewed "residency" as a "mixed bag" of state and local concerns, or a matter primarily of local concern.

concerns, or primarily of local concern, the statute still trumps the City's claims to constitutional home rule.

### B. Section 66.0502, Stats., Uniformly "Affects" Each and Every Municipality In Wisconsin.

Regardless of whether this Court concludes that "residency" is either a "mixed bag" of statewide and local concerns, or primarily related to local concerns, §66.0502, Stats., nevertheless trumps any claim of constitutional home rule, as it uniformly affects every city, village, town and county in Wisconsin.

The reason is simple. Uniform "affect," in and of itself, *is* sufficient to defeat a claim of constitutional home rule. *MTI v. Walker,* 2014 WI 99, ¶99, 358 Wis. 2d 1, 66-67, 851 N.W.2d 337, 369. (". . . our case law has consistently held that the legislature may still enact legislation that is under the home rule authority of a city or village if it with uniformity "affect[s] every city or every village.") Also, *Adams,* 2012 WI 85, ¶¶29,36; *West Allis,* 39 Wis.2d 356, 366; *Van Gilder,* 222 Wis. at 84, and; *Baxter,* 195 Wis. 437, 449.

Once again, the language of §66.0502, Stats., is key. The statute defines a "local governmental unit" as including "any

city, village, town, county or school district." *§66.0502(2), Stats., Supra,* at 6. It then prohibits every "local governmental unit" from making residency a condition of employment, *§66.0502(3)(a), Stats.,* and voids *any* residency rule existing at the time of the statute's enactment. *§66.0502(3)(b), Stats., Supra,* at 6.

As a result – and according to its very terms – §66.0502, Stats., constitutes the precise type of exception to "home rule" recognized by the Constitution; one which uniformly affects all Wisconsin municipalities. It therefore trumps the City's claim of home rule, regardless of the extent of local concern.

Had the Court of Appeals applied this principle, it would have necessarily concluded that constitutional home rule did not exist with respect to "residency." Instead, it employed an analysis which equated uniform *"affect"* with uniform *"impact"* and *"effect"* – an analysis this Court debunked almost eight decades ago. In so doing, the Court of Appeals wrongly expanded the scope and application of home rule beyond the plain language of the Amendment itself. That requires reversal.

### C. The Court of Appeals Improperly Expanded the Scope and Application of the Home Rule Amendment to Require a Statute to Have a Uniform *"Impact"* and *"Effect"* on Each and Every Municipality in Wisconsin – as Opposed to the Uniform *"Affect"* Specifically Contained in the Amendment Itself.

While the Decision below identified the proper standard to be used when analyzing home rule with regard to a matter that is primarily of local concern (i.e., uniform *"affect"*), the Court of Appeals wrongly interpreted the term *"affect"* as synonymous with uniform *"impact"* and *"effect."* However, this Court has already recognized that a statute will never be able to *"impact"* or *"effect"* each and every municipality in a uniform manner. As explained in *Van Gilder*:

> A law uniform in its application might work out one way in one city and in another way in another city depending on the local situation and the way in which it was administered and so 'affect' them differently. *Van Gilder,* 222 Wis 58, 267 N.W. 25, at 28. (Emphasis added.)

*Van Gilder* therefore appreciated that the Amendment itself implicitly recognized that a statute could never have uniform "effect" or "impact" on each and every municipality.

That reasoning does, of course, make imminent sense, as the term *"affect"* is quite different from the terms *"impact"* and *"effect."*[4]

*Blacks* defines the verb "affect" as: "[m]ost generally, to produce an effect on; to influence in some way." *Blacks Law Dictionary, Eighth Ed., (1999),* at 62. However, *Blacks* defines the noun "effect" as "*[t]hat which is produced* by an agent or cause; *a result, outcome or consequence*." *Id.,* at 554. *(Emphasis added.)* In other words, while the verb "affect" equates to the process by which something is influenced or "effected," the noun "effect" connotes the outcome of that process, and is synonymous with "impact." It is therefore wholly inappropriate to equate uniform *"affect"* with uniform *"impact"* or *"effect."*

The Court of Appeals compounded the problem by wrongly focusing on the "impact" of §66.0502, Stats., on the

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4. A prime example of how a statute can uniformly "affect" each and every municipality, while also "effecting" and "impacting" municipalities differently, is 2011 Wisconsin Act 10, and the savings each municipality and school district realized after its implementation. Given the differences in the number of municipal employees from municipality to municipality (and school district to school district), the *"impact"* or *"effect"* of Act 10 (i.e., monetary savings) necessarily varied greatly throughout the state. However, the *"affect"* of Act 10, was plainly "uniform" in nature.

City exclusively. ("There is no dispute that, while the statute does not overtly single out any particular municipality, it will have an outsize impact on the City of Milwaukee . . . [r]egardless of what the statute's language says, the facts in the record make it clear that only one city – Milwaukee – will be deeply and broadly affected."). *P-App.,* at 125, ¶33. *(Emphasis added.)* By focusing on the impact to a single municipality – as opposed to uniform affect on all municipalities – the Court of Appeals missed the forest for the trees.

*Van Gilder* also recognized that the "tension" between the Legislature's policy determinations and a municipality's home rule authority will necessarily require one or the other to "give way." *Van Gilder* reasoned that – even when addressing a matter primarily of local concern – the Legislature's policy determinations must control:

> When cities under their constitutional power enact legislation, that legislation supplants in that city all enactments of the Legislature with which it comes in conflict, unless such enactments of the Legislature affect all cities with uniformity. . . *It is true this leaves a rather narrow field in which the home rule*

> *amendment operates freed from legislative restriction, but there is no middle ground. Either the field within which the home-rule amendment operates must be narrowed or the field within which the Legislature may operate must be narrowed, and* as was pointed out in the Baxter case, *the amendment clearly contemplates legislative regulation of municipal affairs* and there was no intention on the part of the people adopting the home rule amendment to create a state within a state, an *imperium in imperio*." *Van Gilder,* 267 N.W. 25 at 34. *(Emphasis added.)*

As a result, even if this Court were to construe "residency" as being a matter primarily of local concern (which it is not), the uniformity of §66.0502, Stats., still trumps the City's claim with respect to constitutional home rule. The reason is simple. The uniform affect of §66.0502, Stats., trumps any claim as to home rule – regardless of the extent of local concern present. *MTI,* 2014 WI 99, ¶99. *Supra,* at 21.

The Court of Appeals appears to have crafted this "effect" and "impact" analysis due to its concern that allowing the Legislature to address a matter of local concern would somehow "obliterate" the Amendment. *P-App.,* 124, *Decision,*

at ¶32. ("The Police Association's reading of the uniformity requirement would all but obliterate the home rule amendment, which is not only illogical but also contrary to law.") However, that concern was plainly misplaced, as ". . . the [home rule] amendment clearly contemplates legislative regulation of municipal affairs . . ." *Van Gilder,* 267 N.W. at 34.

The decision below is also in conflict with *Thompson v. Kenosha County,* 64 Wis.2d 673, 221 N.W.2d 845 (1974), which recognized that a statute need only be "facially" uniform:

> ". . . even assuming arguendo that the statute concerns primarily local affairs, thus making the uniformity requirement applicable, that requirement is not violated. [The statute] is, on its face, uniformly applicable throughout the state." *Id.,* 64 Wis.2d at 687, 221 N.W.2d at 853. *(Emphasis added.)*

Not only did the Court of Appeals fail to recognize this standard, it appears to have purposefully *disregarded the plain language of the statute itself,*[5] and instead chose to determine what it presumed to be legislative intent. (Reasoning that "[t]he

5. The Court reasoned that "[r]egardless of what the statute's language says, the facts in the record make it clear that only one city – Milwaukee – will be deeply and broadly affected." *P-App.,* at 125, ¶33. *(Emphasis added.)*

facts in the record, exemplified by the Legislative Fiscal Bureau paper, make it clear that the goal of Wis. Stats 66.0502, was to target the City of Milwaukee.) *P-App.,* 116, *Decision,* at ¶21.

However, any analysis that disregards a statute's plain language, and instead proceeds to determine legislative intent, is directly at odds with this Court's directives as to statutory interpretation. *State ex rel Kalal v. Circuit Court of Dane County,* 2004 WI 58, ¶45, 271 Wis.2d 633, 681 N.W.2d 846. ("[S]tatutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.'")

By applying a legal standard previously debunked by this Court – and disregarding the plain language of §66.0502, Stats. – the decision below is at odds with this Court's history of home rule analysis and the language of the Amendment itself, as well as controlling decisions of this court with respect to statutory analysis. That requires reversal.

In the end, as §66.0502, Stats., plainly affects each and every Wisconsin municipality in a uniform manner, it "trumps" any claim that the City has to home rule with respect to

residency being required as a condition of municipal employment. That also requires reversal.

### D. The Court of Appeals' "Impact" Analysis Leads to Absurd Results.

The decision below turns the concept of home rule on it head, by making it a literal impossibility for the Legislature to ever address a matter primarily of local concern (as a statute's "impact" or "effect" will necessarily be unique to each and every municipality).

The Court of Appeals "impact" analysis has also led to the absurd result of making a statute which is uniform on its face apply to only some municipalities, but not others. According to the Court of Appeals, §66.0502, Stats., has no application to Milwaukee,[6] but appears to apply everywhere else in Wisconsin.

## 2. THE DECISION BELOW WRONGLY GRANTS MILWAUKEE CO-EQUAL POWERS WITH THE LEGISLATURE.

Unfortunately, the Court of Appeals addressed only one

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6. The Court only considered the application of §66.0502, Stats., to Milwaukee; "[t]he City of Milwaukee may continue to enforce City Ordinance 5-902, which remains good law," *P-App.,* 105, *Decision,* at ¶3, "[w]e reverse the trial court's decision that Milwaukee Ordinance 5-02 is unenforceable, and conclude that the City ordinance is still good law; and *we conclude that § 66.0502 does not apply to the City of Milwaukee*." *P-App.,* 125, Decision, at ¶35. (Emphasis added.)

aspect of this litigation. Namely, whether §66.0502, Stats., controlled municipal residency requirements throughout the State (or, conversely, whether the City possessed home rule over "residency").

However, the impetus in commencing this litigation (and an issue briefed extensively below), was whether the City could disregard the legislatively imposed prohibition on requiring residency as a condition of municipal employment – *and continue to enforce its residency rule regardless of the statutory prohibitions to the contrary* – without first obtaining a judicial determination as to the rights and obligations of the parties. The Court of Appeals' failure to address that issue creates significant potential problems throughout the state.

### A. By Refusing to Address the City's Continued Enforcement of its Residency Rule Regardless of the Prohibitions Contained in §66.0502, Stats., the Court of Appeals Appears to have Condoned the City's Unlawful Actions.

Because the Court of Appeals failed to address this important issue, municipalities appear to enjoy the Court's *imprimatur* to disregard the Legislature's commands, as long as the municipality enacts an ordinance disputing the state's public

policy, and asserts home rule authority to do so.

The Court of Appeals has thereby at least tacitly telegraphed its approval of a municipality acting in direct opposition to the law. That has arguably resulted in what this very Court has warned about – a municipality being considered a "state within a state." *Van Gilder,* 267 N.W. 25, at 34. *Supra,* at 24.

Clarification is therefore necessary as to whether a municipality has an obligation to adhere to the Legislature's commands unless and until it either convinces the Legislature to modify them, or obtains a judicial determination as to the rights and obligations of the parties *vis-a-vis* the home rule amendment. Petitioners respectfully request that such clarification include confirmation that municipalities are obligated to conform with state law unless and until they obtain a judicial determination as to the existence of home rule.

### 3. SECTION 66.0502, STATS., CREATES A CONSTITUTIONALLY PROTECTED LIBERTY INTEREST IN BEING FREE FROM "RESIDENCY" BEING REQUIRED AS A CONDITION OF MUNICIPAL EMPLOYMENT.

The due process clause of the Fourteenth Amendment is

a guarantee of "more than [simply] fair process." *County of Sacramento v. Lewis,* 523 U.S. 833, 840, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) (quoting *Washington v. Glucksberg,* 521 U.S. 702, 719, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997)). It contains "a substantive sphere as well, barring certain government actions regardless of the fairness of the procedures used to implement them." *Id.,* quoting *Daniels v. Williams,* 474 U.S. 327, 331, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986).

Substantive due process addresses "the content of what government may do to people under the guise of the law." *Reginald D. v. State,* 193 Wis.2d 299, 307, 533 N.W.2d 181 (1995). It protects against governmental action that either "shocks the conscience ... or interferes with rights implicit in the concept of ordered liberty." *State v. Jorgensen,* 2003 WI 105, ¶33, 264 Wis.2d 157, 667 N.W.2d 318. (Emphasis added.) It also protects against a governmental act that is arbitrary or oppressive, regardless of whether the procedures applied to implement the action were fair. *See Monroe County Dep't of Human Serv's. v. Kelli B.*, 2004 WI 48, ¶19, 271 Wis.2d 51, 678 N.W.2d 831. Substantive due process is the standard by which

to measure and enforce liberty interests. *Dowhower v. West Bend Mut. Ins. Co.,* 2000 WI 73, ¶14, 236 Wis.2d 113, 613 N.W.2d 557.

Liberty interests can arise from two sources: the due process clause itself, or the laws of a state. *Hewitt v. Helms,* 459 U.S. 460, 466, 103 S.Ct. 864,869, 74 L.Ed.2d 675 (1983). For a liberty interest to be created by statute, the statute must place "substantive limits on official discretion." *Olim v. Wakinekona,* 461 U.S. 238, 249, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983). That is, it must use "language of an unmistakably mandatory character, requiring that certain procedures 'shall,' 'will,' or 'must' be employed absent specified substantive predicates." *Hewitt,* 459 U.S. at 471–72.

Section 66.0502, Stats., certainly secures a "benefit" for municipal employees. The reason is plain; the prohibition on residency being required as a condition of municipal employment necessarily provides municipal employees with the privilege of being free from "residency" impacting their lives.

Section 66.0502, Stats., also satisfies the "mandatory character" analysis of *Hewitt* and *Olim*. By prohibiting

residency requirements, it places firm limits on what would otherwise be municipal discretion. It also employs language which is unmistakably mandatory in character, and which not only prohibits the use of municipal residency requirements, *§66.0502(3)(a), Stats.,* but makes any existing residency requirement unenforceable. *§66.0502(3)(b), Stats. Supra, at 6.*

However, liberty interests must also contain "specific directives to the decision maker that if the regulation's substantive predicates are present, a particular outcome must follow . . . " *Russ v. Young,* 895 F.2d 1149, 1153 (7th Cir.1989), quoting *Kentucky Department of Corrections v. Thompson,* 490 U.S. 454, 463, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989). Whether a statute creates a protected liberty interest therefore hinges on the statute's actual language. *Russ,* 895 F.2d at 1153, citing *Cain v. Lane,* 857 F.2d 1139, 1144 (7th Cir. 1988).

Section 66.0502, Stats., satisfies the "specific directives" and "substantive predicates" of *Russ*. The statute's "substantive predicates" are clear; municipalities <u>*cannot*</u> require residency as a condition of employment. *§66.0502(3)(a), Stats.* The "specific directives" are just as clear; any existing residency requirement

"does not apply and may not be enforced." *§66.0502(3)(b), Stats.*

The bottom line is this. When enacting §66.0502, Stats., the legislature determined that public policy required the abolition of municipal residency rules (except in the narrow sense that police and fire could be required to reside within 15 miles of the municipality's jurisdictional boundaries). As the policy articulated in §66.0502, Stats., satisfies the tests articulated in *Hewitt, Olim* and *Russ*, it *is* enforceable as a constitutionally protected liberty interest.

Unfortunately, and without any analysis whatsoever, the Court of Appeals concluded "that §66.0502, Stats., does not create a protectible liberty interest . . ." *P-App.,* 125, *Decision,* at ¶35. Given that lack of analysis, Petitioners are left to guess as to the reasoning underlying that aspect of the Court's decision.

While most cases addressing liberty interests arise from statutes dealing with prison regulations, that is not true in all situations. *Woods v. City of Michigan City, Indiana,* 940 F.2d 275 (1991). In *Woods*, the plaintiff asserted that Indiana law

created a protected liberty interest in being released from detention upon a signature promising to appear in court. *Id.,* 940 F.2d at 276. The Seventh Circuit noted that the statute "arguably" created a liberty interest, as the "substantive predicates" were satisfied and the "outcome" was expressed in "explicitly mandatory language." *Id.,* 940 F.2d at 281.

Moreover, to the extent the Court of Appeals viewed *Hewitt* and *Olim* as being premised on a duty derived from the fundamental right of being free from a "prior restraint on liberty," §66.0502, Stats., is arguably similarly derived. When enacting §66.0502, Stats., the Legislature struck down what is essentially a prior restraint on liberty (in terms of the ability to reside outside municipal jurisdictional limits). As a result, *Hewitt, Olim* and other "incarceration cases" provide guidance as to how state law can create a constitutionally protected liberty interest outside the "incarceration" context.

**4. PETITIONERS WERE DEPRIVED OF THEIR LIBERTY INTEREST IN BEING FREE FROM "RESIDENCY" BEING REQUIRED AS A CONDITION OF MUNICIPAL EMPLOYMENT.**

The Circuit Court incorrectly concluded that the Petitioners had demonstrated no deprivation of liberty, as no

employee had been discharged for exercising their statutory privilege to reside outside the City's jurisdictional limits. *P-App.,* at 149. ("There has been no demonstration of an actual deprivation of liberty by the City because no City employee involved in this case has been terminated or disciplined based on failure to comply with the residency rule."). The Court of Appeals affirmed that portion of the Circuit Court's decision. *P-App.,* 125-26, *Decision,* at ¶35.

The Circuit Court appears to have confused a deprivation of property (which would come from a loss of wages and/or employment), with a deprivation of liberty (which would come with the government unreasonably and arbitrarily constraining an individual from exercising a recognized right/privilege.) However, Petitioners have never asserted a deprivation of property; only a liberty interest in being free from having residency being used as a condition of municipal employment.[7]

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7. *Blacks* defines liberty as: 1. Freedom from arbitrary or undue external restraint. 2. A right, privilege, or immunity enjoyed by prescription or by grant; the absence of a legal duty imposed on a person. *Blacks Law Dictionary,* Eighth Ed., 937.

As §66.0502, Stats., made residency unlawful, that means City employees enjoyed the "privilege" of being free from residency, as well as "immunity" for exercising that right.

The facts are clear. Between July 2, 2013 (the effective date of the statute and the date the City passed its Substitute Resolution) and July 12, 2013 (when the Circuit Court entered a temporary restraining order), all City employees were presented with the same "Hobson's Choice" identified by Detective Crivello. Namely, exercise their right to live outside the City's jurisdiction limits (and be terminated) or refrain from exercising that right in order to keep their job.

By placing employees in that position, the City effectively prevented all but a brave few employees from exercising the liberty provided by means of §66.0502, Stats. That was wrong, and should not be allowed to stand.

## 5. THAT DEPRIVATION VIOLATED SUBSTANTIVE DUE PROCESS.

### A. There Was No Legitimate Governmental Interest for the City's Substitute Resolution to Continue Enforcing It's Residency Rule, Precisely Because it Directly Conflicts with §66.0502, Stats.

Simply put, it is impossible for the City to assert a "legitimate governmental interest" in enforcing its residency rule after enactment of §66.0502, Stats. The reasons are twofold. First, the City's Substitute Resolution directs the

City's police chief to violate state law in order to enforce a residency rule which the Legislature had deemed unlawful.[8] Second, it is in direct opposition to the Mayor's obligation to adhere to and enforce Wisconsin law. The City's Charter does, after all, provide:

> **§3-01. Mayor.** The mayor shall take care that the laws of the state and the ordinances of the city are duly observed and enforced; and that all officers of the city discharge their respective duties.

Admittedly, prior to enactment of §66.0502, Stats., the City did have the ability to assert a "legitimate governmental interest" as to residency. That all changed with §66.0502, Stats. After its enactment, no legitimate governmental interest could exist in refusing to comply with the law. Absent a legitimate governmental interest, the City's residency rule, as well as its Substitute Resolution to enforce it, must be considered "constitutionally deficient."

In fact, after §66.0502, Stats, the City's options were really quite limited; comply with the law unless and until: 1) it

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8. Something a law enforcement officer is obviously prohibited from doing.

convinced the Legislature to change it, or ; 2) convinced a court that it possessed home rule over the issue. Its refusal to do either – coupled with a resolution directing City officials to act in direct opposition to the law – was simply not a "lawful" option.

### B. The City's Substitute Resolution Was an Arbitrary and Capricious Use of the City's Police Powers.

Whether a municipal ordinance constitutes a lawful exercise of police power depends on whether it is rationally related to furthering a proper public purpose. *City of Milwaukee v. Kilgore,* 185 Wis.2d 499, 519, 517 N.W.2d 689 (Ct.App. 1994), citing *State v. McManus,* 152 Wis.2d 113, 130, 447 N.W.2d 654, 660 (Ct.App.1989). That is determined by a two-step analysis.

First, does the ordinance promote a proper public purpose? *Id.* As the rights set forth in §66.0502, Stats., are not "fundamental" rights,[9] the question is whether the City's Substitute Resolution is rationally related to furtherance of a proper public purpose. *Id.* The answer to that question is "no."

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9. Although §66.0502, Stats., *is* at least arguably premised on the fundamental right of being free from prior restraints on liberty.

Second, is the regulatory scheme reasonably related to the accomplishment of that purpose? While courts will not interfere with the municipal exercise of police power unless the exercise is clearly illegal, *J & N Corp. v. City of Green Bay,* 28 Wis.2d 583, 585, 137 N.W.2d 434, 436 (1965), the actions of the City's Mayor, as well as its Common Council, satisfy that test.

**i. The Mayor's Actions.**

Substantive due process is violated by *executive action* when it "can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense." *Collins v. Harker Heights,* 503 U.S. 115, 128, 112 S.Ct. 1061, 1070, 117 L.Ed.2d 261 (1992). Conduct shocks the conscience when it is so offensive that it does not comport with traditional ideas of fair play and decency. *Whitley v. Albers,* 475 U.S. 312, 327, 106 S.Ct. 1078, 1088, 89 L.Ed.2d 251 (1986). Conduct intended by a government to injure in some unjustifiable way is the type of official action that is most likely to rise to the level of conscience-shocking. *Daniels,* 474 U.S. at 331, 106 S.Ct. at 665, 88 L.Ed2d 662 (1998).

In the context of municipal government, there is little that could "shock the conscience" more than what happened here. Namely, a mayor signing an ordinance that was directly at odds with the law – *and with the stated purpose to disregard the law* – so as to enforce something that the Legislature deemed unlawful, without first seeking a declaration as to the rights and obligations of the parties *vis-a-vis* home rule.

In fact, the Mayor's act of signing the Substitute Resolution into law (and then publicly pronouncing that the City would continue to discharge employees under the City's residency rule, regardless of the existence of §66.0502, Stats.), can only be described as a "deliberate" decision to deprive City employees of the rights/privileges provided by means of §66.0502, Stats.

Given the Mayor's obligation to uphold the law, his actions not only "shock the conscious," they strongly suggest an abuse of power . . . or the use of power as an "instrument of oppression." That is something the Due Process Clause was plainly intended to prevent. *Collins,* 503 U.S. at 126, 112 S.Ct. at 1069.

### ii. The Common Council's Actions.

Substantive due process is violated by *legislative action* and can properly be characterized as arbitrary or conscience shocking, when its sweep is unnecessarily broad and invades a protected freedom. *Griswold v. Connecticut,* 381 U.S. 479, 485, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

The City's Substitute Resolution satisfies this test. It was "arbitrary," precisely because it was at odds with state law (and enacted in direct opposition to state law), prior to the City seeking a court's declaratory judgment as to home rule. It was "conscious shocking," as it required City officials to violate the law, as well as violate their obligation to uphold and enforce the law. It invaded a "protected freedom," as it is in direct opposition to the privileges granted by the Legislature under §66.0502, Stats. Finally, it is unnecessarily broad, because it sought to punish City employees for exercising a legislatively created privilege (when the legislature had already provided a limited exception to its residency prohibition when it came to police, fire and emergency personnel). *§66.0502(4)(b), Stats., Supra,* at 6.

## 6. THE CIRCUIT COURT SHOULD HAVE HELD A TRIAL AS TO DAMAGES, AND DETERMINED REASONABLE ATTORNEY'S FEES.

Under 42 U.S.C. 1983, only two elements are required to state a claim: 1) that the defendant's actions were taken under color of state law, and; 2) that the plaintiffs' were deprived of a right secured by the Constitution or the laws of the United States. *Kramer v. Horton,* 125 Wis.2d 177, 184, 371 N.W.2d 801 (Ct.App 1985), rev. on other grounds, 128 Wis.2d 404, 383 N.W.2d 54 (1985).

There is no question that the City's actions were taken under color of law, as the City's Substitute Resolution was the direct product of municipal legislation. *Monell v. N.Y. City Dept. of Soc. Servs.,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). (A municipality is liable under §1983 when a deprivation of constitutional rights is caused by a municipal policy or custom.)

The question should then have been: 1) whether any MPA member had been deprived of the liberty interest created by §66.0502, Stats., and; 2) whether that deprivation resulted in compensatory damages.

While a plaintiff may not recover damages for a "presumed" deprivation of a constitutional right, a plaintiff may certainly recover compensatory damages. Section 42 U.S.C. §1983 creates " 'a species of tort liability' in favor of persons who are deprived of 'rights, privileges, or immunities secured' to them by the Constitution." *Carey v. Piphus*, 435 U.S. 247, 253, 98 S.Ct. 1042, 1047, 55 L.Ed.2d 252 (1978), quoting *Imbler v. Pachtman,* 424 U.S. 409, 417, 96 S.Ct. 984, 988, 47 L.Ed.2d 128 (1976). When a §1983 plaintiff seeks damages for a constitutional violation, damages are determined according to principles derived from the common law of tort. *See Smith v. Wade,* 461 U.S. 30, 34, 103 S.Ct. 1625, 1628, 75 L.Ed.2d 632 (1983); *Carey,* 435 U.S., at 257–258, 98 S.Ct., at 1048–1049.

Compensatory damages in tort cases are designed to provide "compensation for the injury caused to plaintiff by defendant's breach of duty." *Carey,* 435 U.S., at 255, 98 S.Ct., at 1047; *see also Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388, 395, 397, 91 S.Ct. 1999, 2004, 2005, 29 L.Ed.2d 619 (1971). Compensatory damages include mental anguish and suffering. *Gertz v. Robert Welch, Inc.,* 418 U.S.

323, 350, 94 S.Ct. 2997, 3012, 41 L.Ed.2d 789 (1974). *See also Carey* 435 U.S., at 264, 98 S.Ct., at 1052.

The dismissal of Petitioners' claims under 42 U.S.C. §1983 not only precluded them from demonstrating a deprivation of liberty, it also prevented them from proving the damages that naturally flowed therefrom. One such category of damages would have been any mental stress and/or anguish Detective Crivello (and others like him) encountered during the 10 days between July 2, 2013 (when the Substitute Resolution was passed and the Mayor pledged to discharge any City employee violating the City's Residency Rule), and June 12, 2013 (when the parties stipulated to a TRO preventing the City from taking adverse action against City employees for exercising rights under §66.0502, Stats.)

Importantly in this regard, is the fact that the Circuit Court did not grant summary judgment to the City in any respect. *P-App.,* 150. ("The City's Motion for Summary Judgment is DENIED.") *(Emphasis original).* It simply dismissed Petitioners' claim for relief under 42 U.S.C. §1983. *Id*. The Circuit Court therefore determined that Petitioners had

failed to state a claim.

When addressing a motion to dismiss for failure to state a claim, the facts set forth in the complaint must be taken as true and the cause of action dismissed *only* if it appears *certain* that no relief can be granted under any set of facts that the plaintiffs might prove . . .” *Northridge Co. v. W.R. Grace & Co.,* 162 Wis.2d 918, 923, 471 N.W.2d 179 (1991).

Given that the City did not contest the existence of the deprivations claimed by Detective Crivello, it cannot be “certain” that no relief can be granted under any set of facts that the Petitioners might prove to support their allegations.

In fact, being forced to choose between exercising a liberty interest (and being discharged for doing so), or not exercising that privilege in order to retain employment, plainly creates sufficient constitutional “tension” to give rise to a claim for damages; something Petitioners should have been allowed to pursue. The Circuit Court’s failure to allow that constitutes reversible error.

Moreover, as Petitioners established the existence of a constitutionally protected liberty interest, *P-App.,* 150, they must

be considered a "prevailing party" and entitled to an award of reasonable fees and costs associated therewith. *Hensley v. Eckerhart,* 461 U.S.424, 433, 103 S.Ct. 1933, 76 L.Ed.2d. 40 (1983). ("plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit."). *Also, Id.,* 461 U.S., at 435 ("the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit.")

**7. THE CITY SHOULD HAVE BEEN HELD TO THE "BEYOND A REASONABLE DOUBT" BURDEN OF PROOF WHEN ASSERTING THAT §66.0502, STATS., UNCONSTITUTIONALLY INFRINGED ON ITS HOME RULE AUTHORITY.**

While the City has avoided outright asserting that §66.0502, Stats., is unconstitutional, that <u>*is*</u> the core of its position. The City's entire argument is, after all, premised on the statute being an over-reach of its constitutional home rule. The City should therefore have had the burden of proving §66.0502, Stats., unconstitutional. *ABC Auto Sales v. Marcus,* 255 Wis. 325, 330, 38 N.W.2d 708 (1949). (A statute is presumed constitutional and "the burden of establishing the

unconstitutionality of a statute is on the person attacking it, who must overcome the strong presumption in favor of its validity.")[10]

While Petitioners have found no precedent addressing this burden of proof in the context of a home rule challenge to a statute, there appears no reason why the City should not have been held to that burden given its unequivocal position that §66.0502, Stats., infringed on its constitutional home rule authority.

## CONCLUSION

For all the above reasons, Petitioners respectfully request that this Court: reverse the Court of Appeals decision in its entirety; reverse that portion of the Circuit Court's decision that dismissed Petitioners' claims under 42 U.S.C. §1983, and; remand with directions to provide for discovery and to determine the appropriate amount of damages (if any), as well and fees under 42 U.S.C. §1983 and §1988.

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10. That burden is monumental. "A person contending that a statute is unconstitutional . . . must establish beyond a reasonable doubt that the statute is constitutionally infirm, and [courts] are required to give to the statute every reasonable presumption in favor of its validity." *State v. Ransdell,* 2001 WI App 202, ¶5, 247 Wis.2d 613, 619-20, 634 N.W.2d 871, 874.

Dated at Milwaukee, this 3rd day of December, 2015.

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## CERTIFICATION AS TO FORM AND LENGTH

Pursuant to §809.19(8)(d), Stats., I hereby certify that this Brief conforms to the rules contained in §§809.19(8)(b) and (c), Stats., for a Supreme Court Brief produced with a proportional serif font. The length of this Petition is 9,157 words.

/s/_____
Jonathan Cermele
State Bar No. 1020228

## CERTIFICATE OF MAILING

I, Crystal Lewzader, of Cermele & Matthews, S.C., 6310 West Bluemound Road, Suite 200, Milwaukee, Wisconsin, 53213, being sworn and upon oath do state that on December 3rd, 2015, I placed in the United States Mail three copies of this brief to:

Grant Langley and Miriam Horwitz
Milwaukee City Attorney's Office
200 East Wells Street, Room 800
Milwaukee, WI 53202-3515

Dated this 3rd day of December, 2015.

/s/_____
Crystal Lewzader

Subscribed and sworn to before me
this 3rd day of December, 2015.

/s/ Jonathan Cermele
Notary Public, State of Wisconsin
My commission is permanent.

## ELECTRONIC BRIEF CERTIFICATION

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of §809.19(2), Stats. I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

/s/_____
Jonathan Cermele
State Bar No. 1020228

## INDEX TO APPENDIX

## ELECTRONIC APPENDIX CERTIFICATION

I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of §809.19(13), Stats. I further certify that this electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

/s/_____
Jonathan Cermele
State Bar No. 1020228

## PETITIONERS' APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. §809.19(2)(a), and that contains, at a minimum:

1. A table of contents;

2. The findings or opinion of the circuit court, and;

3. Portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

/s/_____
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**STATE OF WISCONSIN**
**IN THE SUPREME COURT**

JAMES A. BLACK, GLEN J. PODLESNIK AND
STEVEN J. VAN ERDEN,

Plaintiffs-Respondents-Petitioners,

MILWAUKEE PROFESSIONAL FIRE FIGHTERS
ASSOCIATION LOCAL 215,

Intervenor-Plaintiff-Respondent-Petitioner,

MILWAUKEE POLICE ASSOCIATION AND
MICHAEL V. CRIVELLO,

Plaintiffs-Respondents-Cross-Appellants,
Petitioners,

v.

CITY OF MILWAUKEE,

Defendant-Appellant-Cross-Respondent.

# BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-CROSS-RESPONDENT, CITY OF MILWAUKEE

**From the District 1 Court of Appeals Decision Dated and Filed July 21, 2015, Reversing in Part and Affirming in Part the Trial Court's Judgment**

**Court of Appeals Case No. 2014-AP-400**
**Trial Court Case No. 2013-CV-5977**

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## ISSUES PRESENTED FOR REVIEW

1. Whether the home rule amendment, Wis. Const. art. XI § 3(1), provides the City of Milwaukee with authority to control its "local affairs and government" as reflected in the City's longstanding Charter Ordinance § 5-02, requiring residency for its employees, since Wis. Stat. § 66.0502 is not a legislative enactment of "statewide concern as with uniformity [affects] every city or every village."

The circuit court answered "no." The Court of Appeals answered "yes."

2. Whether the Milwaukee Police Association and Michael V. Crivello can seek damages under 42 U.S.C. § 1983 by claiming a federal constitutionally protected liberty interest arising from Wis. Stat. § 66.0502 to "b[e] free from residency" requirements, where there is no fundamental right or substantive due process violation present.

The circuit court answered "no," on the ground that, while there was a protected liberty interest, there was no deprivation to be redressed. The Court of Appeals answered "no."

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are warranted in this case given the significance of the state constitutional provision involved and the federal constitutional redress sought by the Milwaukee Police Association and Michael Crivello as a matter of substantive due process.

## NATURE OF THE CASE

The Wisconsin Supreme Court is asked to determine (a) the meaning of Article XI, Section 3(1) of the Wisconsin Constitution, the home rule amendment, as applied to a matter of local affairs of the City of Milwaukee embodied in Milwaukee Charter Ordinance §5-02; and (b) for Wis. Stat. § 66.0502, whether a local employee residency requirement can trigger a federal constitutional violation as a matter of substantive due process permitting damages under 42 U.S.C. § 1983. The City submits that the Court of Appeals was correct in its decision in both respects: the home rule amendment invests the City of Milwaukee with the authority to continue with its longstanding residency Charter Ordinance, and Wis. Stat. § 66.0502 does not create a protectable liberty interest giving rise to a federal constitutional violation necessitating redress under Section 1983.

The control by cities and villages over "local affairs and government" dates from 1924, after two successive Wisconsin legislatures passed and the people of the State of Wisconsin ratified Article XI, Section 3(1) of the Wisconsin Constitution: i.e., the home rule amendment. The amendment's purpose was to give local control to cities and villages through a "direct grant of legislative power to municipalities." *State ex rel. Ekern v. Milwaukee*, 190 Wis. 633, 637-38, 209 N.W. 860, 861 (1926). This "local affairs" authority under the amendment is limited only by "this constitution and . . . such enactments of the legislature of statewide concern as with uniformity shall affect every city or every village." Wis. Const., art. XI, § 3(1). For the reasons explained below, the home rule

amendment authorizes the City to proceed with Charter Ordinance § 5-02. Residency of city employees is a matter of the City's "local affairs." Further, the statute at issue, Wis. Stat. § 66.0502 does not address a "statewide concern" and does not with "uniformity . . . affect every city or every village" because it does not operate equally upon the City of Milwaukee.

This Court also should conclude that Wis. Stat. § 66.0502 does not provide grounds for the claim by the Milwaukee Police Association ("the MPA") and Michael Crivello of a federally cognizable and enforceable liberty right to be free from residency requirements. A continuing residency requirement such as Milwaukee's Charter Ordinance § 5-02 is fully consistent with federal constitutional law. Moreover, as the Wisconsin Court of Appeals properly determined, as a matter of federal law, a state statute cannot create a protectable liberty interest where no fundamental right exists, and no basis for claiming a violation of federal substantive due process law is presented under the circumstances of this case.

## STATEMENT OF THE CASE

The residency of city employees has been the subject of the "local affairs" of the City of Milwaukee since 1938. Consistently with the "method of such determination . . . prescribed by the legislature," as set forth in Article XI, Section 3(1) and enacted as Wis. Stat. § 66.0101, the City passed charter ordinances as a matter of constitutional home rule. Charter Ordinance § 5-02, which requires Milwaukee employees as a continuing matter to reside within the

City's boundaries, is an ordinance enacted as a matter of constitutional home rule. (R. 30, Exh. A; App. 151-156.)[1]

The City employs more than 7,000 people and spends approximately $366.8 million on employee salaries annually. (R. 30, Exh. B. ¶ 5.) Given the longstanding nature of the Charter Ordinance, each employee accepted employment from the City of Milwaukee with the knowledge that he or she was subject to the residency requirement. (R. 30, Exh. A; App. 151-156.)

"About 50% of the City's employees are fire and police employees; 50% of its employees serve the City in other capacities." (R. 30, Exh. B. ¶ 5.) For some time, the unions of police and fire employees have sought to eliminate the City of Milwaukee's residency requirements.[2]

City employees residing in the City of Milwaukee are a "stabilizing force" in their neighborhoods, as Mayor Tom Barrett has explained. (R. 30, Exh. B. ¶ 14.) "The annual average income of City employees is approximately $16,000 higher than the annual average income of employed City residents." (R. 30, Exh. B. ¶ 13b.) City of Milwaukee employees buy real estate: "City employees have an

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[1] (R. __) refers to the appeal record; (App. ___) refers to petitioners' joint appendix; (City App. ___) refers to the City's appendix.

[2] *See generally* "Walker Wrong on Residency Issue," *Milwaukee Business Journal*, March 8, 2013 (stating residency is a "local issue," its inclusion in the budget is "unusual," and it involves the Milwaukee police and fire unions), www.bizjournals.com/milwaukee/print-edition/2013/03/08/walker-wrong-on-residency-issue.html; Opinion, "Our View: Budget Is the Wrong Place to Change Residency Rules," *Milwaukee Journal Sentinel*, February 23, 2013 (stating that changing residency rule is a "major policy change" and noting that "there is good reason to believe it was done primarily at the request of police and firefighter unions in Milwaukee"), www.jsonline.com/news/opinion/budget-is-the-wrong-place-to-change-residency-rules-lv8sc1g-192614961.html.

81% home ownership rate, whereas all City residents have a 42% home ownership rate." (R. 30, Exh. B. ¶13c.)[3]

The Legislative Fiscal Bureau, in Paper #554, titled "Local Government Employee Residency Requirements" and prepared on May 9, 2013 for the Joint Committee on Finance, weighed in on this point as well: the "higher salary levels carry through to the value of homes owned by [City of Milwaukee] employees, which . . . are 20% higher than the average home value in the city." (R. 30, Exh. D, 5; City App. 5.) Mayor Barrett stated more specifically in his affidavit that "City employees' houses have an average assessed value of $116,241, whereas the average assessed value of houses owned by all City residents is $88,402." (R. 30, Exh. B. ¶ 13d.)

The City of Milwaukee may lose 60 percent of its employees as residents over an eleven-year period if the City's residency rule is eliminated. (R. 30, Exh. B ¶ 16.) The Legislative Fiscal Bureau Paper #554 compares an out-migration of City of Milwaukee employees to the exodus of city workers in other Midwestern cities such as Detroit, where 53 percent of the police force moved outside the City, and Minneapolis, where 70 percent of its employees reside outside the city. (R. 30, Exh. D, 6; City App. 6.)

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[3] These statistics come from a report written by SB Friedman Development Advisors, which was commissioned by the City's budget office to ascertain the effect of the residency requirement. (R. 30, Exh. B. ¶¶ 11-12.) Plaintiffs moved to strike the report and portions of the affidavit of Mayor Barrett; their motion was denied by the circuit court. (R. 33-34, 44; App. 150.)

Not only will this out-migration affect real estate ownership and tax rolls, but "the projected out-migration of City employees will result in a substantial reduction in the gross sales of goods and services of retailers and service providers located in the City." (R. 30, Exh. B. ¶ 13f.) "The Friedman report projects a total loss of 3,940 employee households to the suburbs over an eleven-year period resulting in a reduction in the tax base of $622 million and reduced consumer expenditure within the City of $57 million." (R. 30, Exh. B ¶ 20.) As Mayor Barrett explained, such "a decline in real estate taxes will inevitably result in a decline in the ability of the City to fund municipal services and maintain the quality of life for City residents." (R. 30, Exh. B ¶ 10.)

Nonetheless, in 2013, in taking up the governor's proposed budget, the Wisconsin Legislature considered a provision to eliminate local government residency requirements. *See* Executive Budget (Shared Revenue and Tax Relief), http://doa.wi.gov/Documents/DEBF/Budget/Biennial%20Budget/2013-15%20Executive%20Budget/835-2013-15ExecutiveBudget.pdf. The Legislative Fiscal Bureau in Paper #554 emphasizes that the legislation operates to the detriment of the City of Milwaukee. (R. 30, Exh. D, 4-8; City App. 4-8.) Yet the legislature passed the provision (Section 1270) as part of 2013 Act 20; it became Wis. Stat. § 66.0502. The Milwaukee Common Council followed with Resolution 130376, expressing its legal view that Charter Ordinance § 5-02 was passed consistently with Article XI, Section 3(1) of the Wisconsin Constitution. (R. 30, Exh. C, App. 157-159.)

The Milwaukee Police Association, Michael V. Crivello, James A. Black, Glen J. Podlesnik, and Steven J. Van Erden filed suit in Milwaukee County Circuit Court on July 10, 2013, seeking a "declaration as to the rights and obligations of the parties under § 66.0502, Stats," a writ of mandamus, and an injunction to stop the City of Milwaukee from enforcing its longstanding residency requirement. (R. 1, 4-9.) Plaintiffs further sought compensatory and punitive damages as well as attorneys' fees, arguing that any residency requirement was a "deprivation of liberty" and thus a violation of their substantive due process rights "to be free from residency requirements." (R. 1, 4, 12-15.) The Milwaukee Professional Fire Fighters Association Local 215 intervened with the same demands. (R. 19.)

The City of Milwaukee answered, asserted affirmative defenses, and requested a declaration "that the enactment and continued enforcement of Milwaukee Charter Ordinance § 5.02, the City's residency ordinance, is a matter of local affairs and government, and, accordingly, a lawful exercise of the City's constitutional home rule authority granted to the City by Article XI, § 3, Wis. Const." (R. 11, 17.) The City denied that a claim under 42 U.S.C. § 1983 could be premised on Wis. Stat. § 66.0502. (R. 11, 14-16.) In a stipulation entered two days after plaintiffs filed suit (and ten days after enactment of Wis. Stat. § 66.0502), the parties agreed that the City would not act to enforce the Charter Ordinance's residency requirement. (R. 9.) The stipulation later was extended to encompass the period while the case was pending in the circuit court and court of

appeals and has been extended throughout the pendency of the case in this Court. (R. 22.)

The parties filed cross motions for summary judgment. (R. 23-30, 36-42.) In its decision dated January 27, 2014, the circuit court held that the requirements for declaratory action had been satisfied. (R. 44, 10, App. 139.) It granted plaintiffs' summary judgment motion in part, ruling that "Wis. Stat. § 66.0502 relates to a matter primarily of statewide concern and applies uniformly to all local government units in this state." (R. 44, 21, App. 150.) The circuit court further declared that "Wis. Stat. § 66.0502 creates a constitutional liberty interest in being free from residency requirements as a condition of municipal employment." *Id.* But the circuit court dismissed plaintiffs' claim for relief under 42 U.S.C. § 1983 as it found that no deprivation had occurred. *Id.* The circuit court dismissed plaintiffs' petition for a writ of mandamus. *Id.*

The City appealed. (R. 45.) Only the MPA and Michael Crivello cross-appealed, seeking to reverse the circuit court's dismissal of the 42 U.S.C. § 1983 claim and the denial of a trial as to damages. (R. 46.) The other plaintiffs did not challenge the circuit court's ruling that dismissed their claim under 42 U.S.C. § 1983. *Id.*

The Wisconsin Court of Appeals reversed the circuit court's grant of summary judgment and its declarations as to Wis. Stat. § 66.0502, the home rule amendment, and Milwaukee's Charter Ordinance § 5-02, as well as the determination that Wis. Stat. § 66.0502 gives rise to a "protectable liberty

interest." (App. 105.) The Court of Appeals affirmed the circuit court's determination that "the City of Milwaukee did not violate any of the constitutional rights of the Police Association" and thus decided that the Milwaukee Police Association and Michael V. Crivello could not recover under 42 U.S.C. § 1983. *Id.*

Specifically, the court held that the City of Milwaukee has authority under the home rule amendment to act consistently with the City's residency ordinance. As the Wisconsin Court of Appeals determined, "because Wis. Stat. § 66.0502 does *not* involve a matter of statewide concern and does *not* affect all local governmental units uniformly, it does not trump the Milwaukee ordinance." (App. 105.) As for the claim of a "protectable liberty interest," the Court of Appeals rejected the claim that a federally protected right to be free from residency requirements was created by Wis. Stat. § 66.0502, where a continuing residency requirement like that in City Charter Ordinance § 5-02 has been upheld as constitutional. (App. 118-119.) The Court of Appeals reversed the circuit court on the existence of a federally protected liberty interest and affirmed the court's conclusion that there had been no deprivation of a substantive due process right. (App. 105.)

On November 4, 2015, this Court granted the petition for review of James A Black, Glen J. Podlesnik, Steven J. Van Erden, Milwaukee Professional Firefighters Association Local 215, MPA, and Michael V. Crivello ("police and fire petitioners"). However, the portion of the appeal before this Court pertaining

to the claim under 42 U.S.C. § 1983 is advanced only by the MPA and Michael Crivello, who cross-appealed the adverse judgment on that claim to the Court of Appeals. (Petition for Review and Appendix at 22.)

## ARGUMENT

### I. The Home Rule Amendment Authorizes the City of Milwaukee to Control the Residency of City Employees As a Matter of "Local Affairs And Government" Where There Is No "Enactmen[t] of Statewide Concern As With Uniformity Shall Affect Every City or Every Village."

The City of Milwaukee enacted Milwaukee Charter Ordinance § 5-02 as a matter of "local affairs and government" under the constitutional home rule amendment. This case does not ask the Court to wade in political waters, determining whether a residency rule is "best," sound, or unsound public policy. *Compare In re Fond du Lac Metropolitan Sewerage Dist.*, 42 Wis. 2d 323, 332, 166 N.W.2d 225, 229 (1969). Rather, this case focuses on the interpretation of a state constitutional provision, viz., the home rule amendment, which the Court reviews *de novo*. *See Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶ 16, 295 Wis. 2d 1, 25, 719 N.W.2d 408, 420.

#### A. Constitutional Home Rule Authorizes the City to Proceed With Its Residency Charter Ordinance.

The City of Milwaukee seeks declaratory relief permitting enforcement of its residency Charter Ordinance § 5-02 as a matter of constitutional home rule. A declaratory judgment is appropriate here where the parties (and the lower courts) have agreed that there is a "justiciable controversy" in which the parties have

adverse legal interests and the controversy is "ripe for judicial determination." *Loy v. Bunderson*, 107 Wis. 2d 400, 410, 320 N.W.2d 175, 182 (1982). Summary judgment on this declaratory claim (as well as on the 42 U.S.C. § 1983 claim below) is reviewed *de novo* by this Court. *See Olson v. Town of Cottage Grove,* 2008 WI 51, ¶¶ 39, 309 Wis. 2d 365, 385, 749 N.W.2d 211, 221.

The home rule amendment provides as follows:

> Cities and villages organized pursuant to state law may determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of statewide concern as with uniformity shall affect every city or every village. The method of such determination shall be prescribed by the legislature.

Wis. Const., art. XI, § 3(1).

In interpreting a constitutional amendment, the Court "is to give effect to the intent of the framers and of the people who adopted it." *State v. Cole*, 2003 WI 112, ¶ 10, 264 Wis. 2d 520, 530, 665 N.W.2d 328, 332 (citations omitted). Here, that intent comes from the 1921 and 1923 legislatures as well as the ratification by the people of the State of Wisconsin in 1924. *See generally State ex rel. Ekern v. City of Milwaukee,* 190 Wis. 633, 637, 209 N.W. 860, 861 (1926).

The purpose of the home rule amendment is to protect cities and villages against actions of the state legislature which override the political and economic interests of local governments in local affairs.[4] It "makes a direct grant of

[4] The investiture of authority in local government can be seen in the terms of Article XI, Section 3(1), in which "[c]ities and villages" now may determine their "local affairs and

legislative power to municipalities" and "limits the legislature in the exercise of its general grant of legislative power." *State ex rel. Ekern*, 190 Wis. at 637-638, 209 N.W. at 861. Indeed, "[t]he recognized purpose of this amendment was to confer upon cities and villages a measure of self-government not theretofore possessed." *State ex rel. Sleeman v. Baxter,* 195 Wis. 437, 445, 219 N.W.2d 858, 861 (1928). With this *constitutional* authority, a local government can weigh public policy concerns and render determinations that are more closely tailored to the values and norms of local citizens.

This is precisely what the City of Milwaukee has sought to do with its residency Charter Ordinance. As the home rule amendment authorizes and as will be discussed below, the City's Charter Ordinance § 5-02 is the result of a determination of "local affairs and government" that does not fall within the constitutional exceptions to home rule. *See* Wis. Const., art. XI, § 3(1) (home rule is "subject only to this constitution and to such enactments of the legislature of statewide concern as with uniformity shall affect every city or every village").

And it is the centrality of the constitutional home rule amendment to this case that renders incorrect the last-raised contention of police and fire petitioners (*see* Issue Presented for Review 4, and argument, Petitioners Joint Brief and

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government" subject to the stated limitations, whereas, before the adoption of the home rule amendment, legislative action was required to manage even the most direct of city affairs. Previously, Article XI, Section 3(1) provided: "It shall be the duty of the legislature, and they are hereby empowered, to provide for the organization of cities and incorporated villages, and to restrict the power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent abuses in assessments and taxation, and in contracting debts by such

Appendix ("petitioners' brief") at 48-49), that the City should have to meet a higher standard and show the unconstitutionality of Wis. Stat. § 66.0502. Police and fire petitioners, as filers of this suit, rely on Wis. Stat. § 66.0502. *See* petitioners' brief at 3. But the constitutional *authority provided* by Article XI, Section 3(1) for the Charter Ordinance's residency requirement and the consequent invalidity of § 66.0502 against that ordinance are what this case turns upon.

This Court has stated that, when faced with the application of a constitutional provision and a statute,

> the constitution or a constitutional amendment is of the highest dignity and prevails over legislative acts and court rule to the contrary. Ordinary acts of the legislature, whether adopted before or after the date of the constitution, cannot be given effect if to do so would contravene a substantive provision in the constitution.

*Schmeling v. Phelps*, 212 Wis. 2d 898, 908-909, 569 NW.2d 784, 788 (Ct. App. 1997), *quoted with approval in Cole*, 2003 WI 112, ¶ 14, 264 Wis. 2d at 533-534, 665 N.W.2d at 334 (emphasis omitted).

Because the City of Milwaukee duly enacted a Charter Ordinance under the home rule amendment and its implementing legislation, Wis. Stat. § 66.0101, "the question is whether the state legislature, by enacting [Wis. Stat. § 66.0502], has impermissibly infringed on the City of Milwaukee's home rule authority."

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municipal corporations." *State ex rel. Sleeman v. Baxter*, 195 Wis. 437, 444, 219 N.W. 858, 861 (1928).

*Madison Teachers, Inc. v. Walker*, 2014 WI 99, ¶ 89, n. 27, 358 Wis. 2d 1, 63, 851 N.W.2d 337, 367.

### B. Constitutional Home Rule Requires a Different Analysis from Statutory Home Rule.

The City of Milwaukee used its home rule authority to enact City Charter Ordinance § 5-02 as provided in Wis. Stat. § 66.0101. That this ordinance arises under constitutional home rule separates it from ordinances (including other residency ordinances) that have been adopted under statutory home rule. For instance, in *Adams v. State Livestock Facilities Siting Review Board*, 2012 WI 85, 342 Wis. 2d 444, 820 N.W.2d 404, the zoning ordinance and revised zoning ordinance passed by the Town of Magnolia were not charter ordinances*, see id.* ¶¶ 9-10. 342 Wis. 2d at 453-454, 820 N.W.2d at 407-408 ("Magnolia, Wis., Ordinance").

Because charter ordinances were not involved, this Court reviewed the Magnolia ordinance under the test announced in *Anchor Sav. & Loan Ass'n v. Equal Opportunities Comm'n*, 120 Wis. 2d 391, 355 N.W.2d 234 (1984), a statutory home rule case. *See Adams*, 2012 WI 85, ¶¶ 32-33, 342 Wis. 2d at 464-465, 820 N.W.2d at 414-415. In *Anchor*, the court reviewed the City of Madison's general ordinances (again, not a charter ordinance that would give rise to a constitutional home rule analysis) and identified the statutory home rule "question before this court [as] whether sec. 62.11(5) provides the city of Madison with the power to enact and enforce the ordinance" or whether state legislation is

preemptive because the legislature has withdrawn power from the municipality or conflicting actions exist. *Id.* at 395-396, 355 N.W. 2d at 237-238.

As *Anchor* instructs, it is with *statutory* home rule that this Court "should assess whether express statutory language has withdrawn, revoked, or restricted the city's power" and consider whether "the challenged ordinance is logically inconsistent with state legislation . . . [or] infringes the spirit of a state law or general policy of the state." *Id.* at 396, 355 N.W.2d at 237. *See also U.S. Oil, Inc. v. City of Fond du Lac*, 199 Wis. 2d 333, 339, 544 N.W.2d 589, 591 (Ct. App. 1996) (ordinance analyzed for preemption under Wis. Stat. § 62.11(5)); *West Allis v. County of Milwaukee*, 39 Wis. 2d 356, 368, 159 N.W.2d 36, 42 (1968) (municipalities did not "exercise their home-rule powers by charter ordinance"). Therefore, in this case where the City's residency rule is embodied in a charter ordinance adopted under constitutional as opposed to statutory home rule, the *Anchor* test constructed for statutory home rule ordinances does not apply.

### C. Milwaukee Charter Ordinance § 5-02 Involves A Matter of Local Affairs.

The applicability of the home rule amendment, as explained in *Madison Teachers, Inc.*, 2014 WI 99, 358 Wis. 2d 1, 851 N.W.2d 337, involves a two-part test, which was applied by the Court of Appeals in this case. (App. 112-113.) Specifically, the inquiry first requires a determination whether a matter of "local affairs" or statewide affairs is primary. It is only as a secondary matter that the

court may consider "uniformity." *See Madison Teachers, Inc.*, 2014 WI 99, ¶ 94, 358 Wis. 2d at 64, 851 N.W.2d at 368.

Here, the City of Milwaukee's residency Charter Ordinance controls a matter of "local affairs." As this Court recognized in *Madison Teachers, Inc.*, 2014 WI 99, ¶¶ 124-128, 358 Wis. 2d at 80-82, 851 N.W.2d at 376-377, an inquiry into whether the matter is of "local affairs" does not turn wholly on whether the statute in question has denoted the legislation as one of local or statewide interest. The legislature can state, as with Wis. Stat. § 66.0502(1), that something is of "statewide concern" (and petitioners' brief so indicates at 14), but the legislature's statement, while receiving "great weight," is not dispositive. *See Van Gilder v. Madison*, 222 Wis. 58, 73-75, 267 N.W. 25, 31 (1936). Otherwise, this Court would have decided differently in *Madison Teachers*, *Inc.,* since Wis. Stat. § 62.623 deals with an employee retirement system, which is a matter of direct concern to local government. The Court instead decided that the pension was "primarily a matter of statewide interest." *See Madison Teachers, Inc.,* 2014 WI 99, ¶ 123, 358 Wis. 2d at 83, 851 N.W.2d at 377. As this Court has explained, the applicability of constitutional home rule, including the issue of "statewide" or "local" concern, is a matter to be decided by the courts not the legislature. *Id.*, ¶ 128, 358 Wis. 2d at 83, 851 N.W. 2d at 377.

The court's inquiry as to "local" or "statewide" concerns considers the essentials of the governmental interests involved: are the matters "(1) Those that are exclusively of state-wide concern; (2) those that may be fairly classified as

entirely of local character; [or] (3) those which it is not possible to fit . . . exclusively into one or the other of these two categories." *State ex rel. Michalek v. Le Grand*, 77 Wis. 2d 520, 527-28, 253 N.W. 2d 505, 507 (1977) (quotations omitted). Should the third category apply, the court is charged with determining which concerns are paramount: state or local. *Id.*

The City's residency matters in this case are properly classified as local in character. They are "intimately connected with the exercise by the city of its corporate functions." *Van Gilder*, 222 Wis. at 81, 267 N.W. at 34 (quoting *Adler v. Deegan*, 251 N.Y. 467, 489, 167 N.E. 705, 713 (1929)); *see also State ex rel. Michalek,* 77 Wis. 2d at 527 n. 7, 253 N.W. 2d at 507. The residency rule serves the City's legitimate fiscal interests, such as paying employee salaries to residents, the common investment of city's employees as residents in their community, and the importance of efficiently provided services. Simply stated, matters related to residency "affect the municipalit[y] directly and intimately." *State ex rel. Ekern*, 190 Wis. at 640, 209 N.W. at 862.

Police and fire petitioners do not seem to dispute the City's interest in residency as a matter of "local affairs." In their issue presented to this Court, they concede the point: "Does the Home Rule Amendment to the Wisconsin Constitution Require a Statute to Uniformly 'Impact' and 'Effect' Each and Every Municipality *in Order to Trump an Ordinance Addressing an Issue Primarily of*

*Local Concern,* As Opposed to the Uniform 'Affect' Specifically Contained in the Amendment Itself?"[5] (Petition for Review and Appendix at 1) (italics added).

The local character of the City's residency interests is also the conclusion of the Court of Appeals, which reached its finding after a detailed consideration of the factual record. (R. 124.)

### 1. The City's Fiscal Management is a Matter of "Local Affairs."

One of the primary "local affairs" directly involving residency is the fiscal management of the City. This management includes maintaining a tax base from which to draw revenues. For instance, in *City of Beloit v. Kallas*, 76 Wis. 2d 61, 66-67, 250 N.W.2d 342, 345 (1977), this Court acknowledged "interests [that] are matters of purely local concern relating to the tax base." *See also Nankin v. Village of Shorewood*, 2001 WI 92 ¶ 16, 245 Wis. 2d 86, 100, 630 N.W.2d 141, 147 (municipalities are "primary units of property tax administration in Wisconsin").

Equally necessary to a local government's continuing viability is its ability to budget and to control the "purse strings" or payments. City residents have a strong interest in determining how their tax dollars are spent. *See Beardsley v. City of Darlington*, 14 Wis. 2d 369, 373, 111 N.W.2d 184, 186-187 (1961) (city

[5] Since Wis. Stat. § 809.62(2) requires that all issues for review by this Court be raised in the "statement of issues" to this Court and the matter of "local affairs" is conceded rather than disputed in police and fire petitioners' issues presented, police and fire petitioners have not properly contested before this Court whether the Charter Ordinance's residency requirement is a local affair.

spends taxpayer money). Mayor Barrett explained in his affidavit that "[a]mong [his] duties is to prepare an annual executive budget that accounts for all City revenues and expenditures, and ensures that those revenues and expenditures are balanced." (R. 30, Exh. B ¶ 3.) In *Madison Teachers, Inc.*, 2014 WI 99, ¶ 114, 358 Wis. 2d at 75, 851 N.W.2d at 373, it was found that "the regulation of local budgetary policy and spending have long been considered matters of purely local concern." This Court explained in *Van Gilder*, 222 Wis. at 82, 268 N.W. at 35 that, "[t]here are some affairs intimately connected with the exercise of the city of its corporate functions . . . . Most important of all perhaps is the control of the locality over payments from the local purse." (quoting *Adler*, 251 N.Y. at 489, 167 N.E. at 713); *see also State ex rel. Michalek*, 77 Wis. 2d at 527 & n.7, 253 N.W.2d at 507.

Proper local government fiscal management requires that a City have control over matters, such as residency of its employees, that have a strong impact on its finances. This explains why—since 1938—the City has taken steps to do so. The City and its residents have substantial concerns about maintaining a large, healthy, stable tax base from which revenues can be drawn. City workers have a high percentage of home ownership and stabilize the tax base in Milwaukee neighborhoods, as Mayor Barrett explained in his affidavit. (R. 30, Exh. B ¶¶ 13-15.)

Without a residency rule, many current City employees and many new City hires will not live in the City. Resident departures could approach 60 percent of

City employees. (R. 30, Exh. B ¶¶ 13a, 16-20.) With an exodus of employees, a glut of housing, and a reduction in tax rolls, the Common Council has stated its concern that "[o]ver time the reduction in property values would likely decrease Milwaukee property tax receipts, diminishing the ability of the City to provide services and continue to pay family supporting wages . . . to City employees." (R. 30, Exh. C, 2; App. 59.)

There is, then, a direct connection between the tax base and City expenditures. Specifically, as the Mayor has explained, the City has a substantial interest in employing, and paying salaries from its revenues to, residents. (R. 30, Exh. B, ¶ 22a.) The City employs over 7,000 individuals and spends $366.8 million annually for its employee salaries. (R. 30, Exh. B ¶ 5.)

The City's fiscal management is entirely a matter of its local affairs. However, to the extent that it appears "mixed," the legal test calls for balancing the City's "local affairs" against any identified "statewide concern" (with an understanding that there may be some overlap) to determine which interest is primary: local government or state. *State ex rel. Michalek*, 77 Wis. 2d at 527-528, 253 N.W.2d at 507; *Madison Teachers, Inc.*, 2014 WI 99, ¶ 111, 358 Wis. 2d at 73, 851 N.W.2d at 372. In this case it has been argued that state legislators are more suited to make a residency determination. But a local government unit is better suited to make determinations that "directly and intimately" affect its fiscal viability, such as how its monies will be budgeted to pay for its employees—thus making this a matter of "local concern" even where these matters may affect

people of the state "remotely and indirectly." *State ex rel. Ekern*, 190 Wis. at 640, 209 N.W. at 862.

The Legislative Fiscal Bureau Paper #554 gives policy considerations for and against residency requirements. (R. 30, Exh. D, 4, 7-10.) Importantly, those considerations are directed to individual concerns of public employees, which is scarcely a "statewide concern" as defined in *State ex rel. Ekern*, 190 Wis. at 640, 209 N.W. at 862, involving legislation with a direct effect on "the people and state at large."

### 2. The City's Interest That Its Employees Share a Common Community Investment as City Residents Is a Matter of "Local Affairs."

Likewise, the City is better suited to determining local values and the investment to be made in its employees and the nature of the local community within which they will pursue their employment. The City's requirement that employees live in the City and thus have a personal stake in its progress is central to building the "identity" of the City and proceeding onward. While not as visible as, for instance, physical buildings, which are regulated by the City as a matter of local affairs, the composition of the City's resident population also reflects the City's "identity" and is therefore a local affair. *See State ex rel. Ekern*, 190 Wis. at 640, 209 N.W. at 862 (concluding zoning ordinance is a "local affair" since it is "such an affair or subject matter as grows out of and is presented by and because of [its] being such city or village as distinguished from a rural or pastoral community"); *see also Adler*, 251 N.Y. at 485, 167 N.E. at 711 ("A zoning

resolution in many of its features is distinctly a city affair, a concern of the locality, affecting as it does, the density of the population, the growth of city life and the course of city values"), *cited approvingly in Van Gilder*, 222 Wis. at 81, 267 N.W. at 34.

The City's residency requirement ensures that the more than 7,000 City employees know the specific needs and concerns of City residents. (R. 30, Exh. B ¶ 22b). As this Court noted in *Davis v. Grover*, 166 Wis. 2d 501, 528, 480 N.W.2d 460, 469 (1992), "cities of the first class [the City of Milwaukee] by virtue of their large population and concentration of poverty are substantially distinct from other cities." The residency requirement helps strengthen residents' confidence and trust in City employees. *See generally* Mayor Barrett affidavit (R. 30, Exh. B, ¶ 22). The community connection with and its trust in City employees are particularly important for law enforcement officers, given our country's current societal climate, a need discussed at length by the Court of Appeals in its decision. (App. 122-124.) As Police Chief Edward Flynn of the City of Milwaukee stated in his affidavit, "officers' residency in the community that they police creates a visceral and instinctive connection among the officers and community residents that cannot be created by other means." (R. 30, Exh E, ¶¶ 4.)

As stated succinctly by the Common Council in noting its policy concerns in Resolution File No. 130376: "Having police, fire department, health, water utilities, neighborhood services, and City development personnel, among other employees, live in the City provides them with better knowledge of the challenges

facing the City, increased understanding of neighborhoods and enhanced relationships with residents." (R. 30, Exh. C, 2, App. 158).

### 3. The Efficient Delivery of City Services Is a Matter of "Local Affairs."

The City's residency requirement seeks to ensure that City employees are readily and reliably available to succeed in their employment with the City. The Common Council explained why in Resolution File No. 130376: "Factors unique to the City, including both population and geography, contribute to the need to ensure that sufficient staff are able to respond in a timely way to weather and other emergency conditions, homeland security events, and other events requiring prompt service from road and maintenance crews, police, and fire personnel." (R. 30, Exh. C, 2, App. 158.) That may be particularly the case for law enforcement personnel. The residence of police officers in the community means that they are available to the community they serve and protect.[6] For instance, Milwaukee Police Department Rule 4-025.00 provides that "[members of the police force] are always subject to orders from proper authority and to call from civilians. The fact that they may be technically 'off duty' shall not be held as relieving them from the

[6] Wis. Stat. § 66.0502(4)(b) permits a no-more-than15-miles-out requirement for residency of law enforcement, fire, or emergency personnel, but, for the City of Milwaukee, the expansive geographical area (96 square miles), the number of miles travelled, and traffic translate into travel times that would not adequately serve the needs of City residents in remotely the same way as a residency rule. *See* Mayor Barrett Affidavit (R. 30, Exh. B. ¶ 22e).

responsibility of taking required police action in any matter coming to their attention at any time."

#### 4. Local Concerns Predominate in Milwaukee Charter Ordinance § 5-02.

Local concerns are at the core of Milwaukee's residency requirement. Police and fire petitioners try to fit residency requirements into a broad category of "condition[s] of employment" that the state should regulate. *See* petitioners' brief at 17. But residency is not a discriminatory employment practice like those sought to be avoided in the provisions cited by petitioners. *See id.* at 17-18 (citing Wis. Stat. § 103.15(3) (HIV testing); § 111.37(2)(c) (honesty testing); § 111.372(1)(b) (genetic testing)).

To the extent that petitioners are looking at conditions of employment generally, such as wages, the Court's "jurisprudence is consistent with that of other states that have determined that compensating city employees is primarily a matter of local concern." *Madison Teachers, Inc.*, 2014 WI 99, ¶ 225 & n. 16, 358 Wis. 2d at 122, 851 N.W.2d at 397 (dissenting opinion) (collecting cases from non-Wisconsin jurisdictions finding that salaries or wages to city employees are of local concern). Nor can the statute be grounded in state administration of police and fire employees. The employment of *all* local government workers, not just police and firefighters, is affected by Wis. Stat. § 66.0502. For instance, with the City of Milwaukee, only 50 percent of employees are police or fire officers; the

remaining 50 percent of employees "serve the City in other capacities." (R. 30, Exh. B ¶ 5.)

As for health and safety and public welfare (for which petitioners can identify no issues, *see* petitioners' brief at 18-19), the Court of Appeals expressly and correctly stated that it could not conclude from the record that "Wis. Stat. § 66.0502 was drafted with the public's health, safety, or welfare in mind." (App. 117.) On balance, then, the City's residency requirement is a matter of "local affairs and government."

### D. There Is No "Enactment of the Legislature of Statewide Concern As with Uniformity Shall Affect Every City and Every Village" That Limits Milwaukee Ordinance § 5-02.

By its plain terms, in order to restrict a local government's conducting of matters of its "local affairs," the home rule amendment requires an "enactment of the legislature of statewide concern as with uniformity shall affect every city and every village." Wis. Const. art. XI, § 3(1).

Nonetheless, in *Madison Teachers, Inc.*, 2014 WI 99, ¶ 101, 358 Wis. 2d at 68, 851 N.W.2d at 370, this Court read the amendment in a way that is inconsistent with this plain language. The City makes the point respectfully, but there is no doubt concerning it. For the Court there required not "a statewide concern" and "uniformity" but only a state law "with uniformity [that] affect[s] every city or every village." *Id.*, ¶ 109, 358 Wis. 2d at 73, 851 N.W.2d at 372. Yet the terms of the latter half of the amendment expressly couple the need for a "statewide concern" and "with uniformity" and thus dictate a reading of the

amendment that requires a legislative enactment to (1) address a matter of "statewide concern" *and* (2) "with uniformity shall affect every city and every village," in order to overcome a significant local interest.

The point is important and incontestable. As the Court of Appeals stated, "We note that the test articulated in *Madison Teachers* is somewhat at odds with the plain language of the home rule amendment, which does not contemplate a two-step inquiry that 'ends' simply by the existence of a statute concerning primarily a statewide interest." (App. 113.) Two Wisconsin Legislative Council memoranda reach conclusions also relying on an interpretation of the amendment that a matter of "local affairs" does not involve an analysis of uniformity. *See* Wisconsin Legislative Council Memoranda dated April 4, 2013, 6 (City App. 19.) ("If a court were to find that residency requirements are solely a matter of local concern, the court's inquiry would end there, because a charter ordinance imposing a residency requirement on public employees would be within the municipality's constitutional home rule authority.") and Wisconsin Legislative Council Memoranda dated April 15, 2013, 7 (City App. 26.) ("If a court adopts the *Van Gilder* analysis, and finds that residency requirements are a local affair, a state law prohibiting residency requirements only in first-class cities would likely be found unconstitutional."). *Compare Cole*, 2003 WI 112, ¶ 36 & n. 12, 264 Wis. 2d at 547, 665 N.W.2d at 341 ("the legal expertise of these agencies entitles their analysis to some consideration by this court").

Further, that is also the understanding of a commentator: "This must mean that the local exercise [of authority] is valid . . . unless the legislation is both of statewide concern and uniform." Comment, *Conflicts Between State Statute and Local Ordinance*, 1975 Wis. L. Rev. 840, 846.

While the Court in *Madison Teachers,* 2014 WI 99, ¶¶ 102-109, 358 Wis. 2d at 68-73, 851 N.W.2d at 370-371, reviewed home rule amendment precedent, those cases do not solidly support its reading. For instance, in *Thompson v. Kenosha County*, the Court does consider "uniformity" with "local affairs" at one point, *see* 64 Wis. 2d at 686, 221 N.W. 2d at 853, but the Court earlier stressed "two limitations on the legislature's power . . . statewide concern and . . .uniformly affect all cities and villages." 64 Wis. 2d at 683, 221 N.W.2d at 851. In *Van Gilder,* as well, the Court explains the "power to enact an organic law dealing with local affairs and government is subject to such acts of the legislature relating thereto as are of statewide concern and affect with uniformity all cities" 222 Wis. at 73, 267 N.W. at 31, but later states that a "charter ordinance of a city is not subject to an act of the legislature dealing with local affairs unless the act affects with uniformity every city" 222 Wis. at 84, 267 N.W. at 35-36.

In addition to reviewing the plain terms of a constitutional provision for its meaning, this Court looks to the "constitutional debates and the practices in existence at the time of the writing of the constitution," as well as the "earliest interpretation of the provision by the legislature as manifested in the first law passed following adoption." *Thompson v. Craney*, 199 Wis. 2d 674, 680, 546

N.W.2d 123, 127 (1996). Historical review provides an understanding that "uniformity" is paired with statewide concerns, not local affairs.[7] History concerning the meaning of the home rule amendment comes from the "writer" of the Brief of Wisconsin League of Municipalities, as Amicus Curiae, in *State ex rel. Sleeman v.* Baxter, No. 252 (1928), who reportedly "drafted the amendment in the form it appears (as a joint resolution in the legislature)." *Id.* at 2. That writer explains concerning the clause of Article XI, Section 3(1) containing "uniformity": "It does not say—subject to state laws, subject to state laws of state-wide concern, or subject to laws uniformly affecting cities, but it does say—subject *only* to such state laws as are therein defined, and these laws must meet two tests: First—do they involve a subject of state-wide concern and, second—do they with uniformity affect every city or village?" *Id.* at 14 (emphasis in original) (available at the Legislative Reference Bureau, Madison, Wisconsin).

A reading of the home rule amendment that would not give effect to an ordinance on a matter of "local concern" simply because there was a uniform

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[7] The need for both "statewide concern" and "uniformity" also is evident from the context of surrounding constitutional amendments and relevant statutes. At the time that home rule was adopted, the Wisconsin Constitution *already* required that laws operate uniformly in order to supersede a municipal Charter Ordinance. For instance, Wisconsin Constitution Article IV prohibits state legislation from superseding a municipal charter unless the state law operates "uniform[ly]." Specifically, Article IV, Section 31(9) prohibits the legislature from "enacting any special or private laws" to amend a city charter. And Article IV, Section 32 provides the state legislature with authority to amend municipal charters if the law is a "general law" that is "uniform in their operation throughout the state." Nowhere in these amendments is mention made of "statewide concern." The change comes with Article XI, Section 3(1), where statewide concern is added to the language requiring uniformity. Had the drafters of the home rule amendment intended the legislation to rely on mere uniformity to overcome a local government charter ordinance, they could have utilized the prior amendments, with no need for enactment of the home rule amendment.

action by the legislature would strip all force and meaning from the home rule amendment. If, even where a city's actions were found to involve matters of local affairs, those actions could be undone by a legislative act so long as it were "uniform," the home rule amendment would be nugatory. The circumstance would be as it is here: the legislature has enacted Wis. Stat. § 66.0502, which police and fire petitioners claim to have facial uniformity; therefore (the argument goes), a longstanding Charter Ordinance should no longer be given force.

But we know that the home rule amendment is to be liberally construed to give it vitality. *See State ex rel. Ekern*, 190 Wis. at 639, 209 N.W. at 862; *State ex rel. Michalek*, 77 Wis. 2d at 526, 253 N.W.2d at 506. The City respectfully submits, then, that this Court should consider the plain words of the Constitution to afford them their "obvious and ordinary meaning," *State ex rel. Zimmerman v. Dammann*, 201 Wis. 84, 89, 228 N.W. 593, 595 (1930), and, as stated in the amendment, permit limitation of a City's act of "local affairs and government" only where there is a legislative enactment (a) of "statewide concern" (b) with "uniformity."

At a minimum, if notwithstanding the constitutional text this Court maintains the analytical framework of *Madison Teachers, Inc.,* the Court should give a meaningful interpretation to "uniformity." The "duty of the court to discover and give effect to the legislature in [interpreting a statute] . . . is equally applicable to the constitution." *State ex rel. Zimmerman*, 201 Wis. at 88-89, 228 N.W. at 595. And the legal imperative is for constitutional provisions to be read

so as "to save and not destroy." *State v. Dairyland Power Cooperative,* 52 Wis. 2d 45, 51, 187 N.W.2d 878, 881 (1971).

Here, then, a reading must be given to "uniformity" more substantial than a requirement of facial uniformity, which is the interpretation urged by police and fire petitioners. *See* petitioners' brief at 21, 27. The Court of Appeals called petitioners' reading "an extremely low hurdle for competing state legislation to clear." (App. 124.) Their statement that the statute applies to all cities in the state cannot be sufficient. The Court in *Madison Teachers, Inc.* essentially found that it did not matter if there is or is not a statewide interest, so long as there is uniformity. To reconcile this with the plain language of the home rule amendment, "uniformity" must be understood as actually affecting all municipalities in equal measure uniformly.

It is logical for the Court to follow the interpretive approach used in other areas involving "uniformity," such as in the area of school finance in the context of Wisconsin Constitution Article X, Section 3. The Court explained in *Kukor v. Grover,* 148 Wis. 2d 469, 436 N.W.2d 568 (1989), that it looked beyond plain meaning to historical analysis as well as to the earliest legal interpretations of Article X, Section 3. *Id.* at 485, 436 N.W.2d at 574. In applying that analysis, the Court reviewed more than the term "uniformity." It considered how school districts operated—in particular, the "character of the instruction given," *id.* at 486, 436 N.W.2d at 575 (quoting *State ex rel. Zilisch v. Auer*, 197 Wis. 284, 289-90, 221 N.W. 860, 862 (1928)), and, after looking at an historical understanding of

the amendment's purpose, concluded that the "uniformity" requirement in the context of student instruction should be defined as an "equitable" financial division. *Id*. at 490, 436 N.W.2d at 576.

Here, too, with the home rule amendment, a proper understanding of "uniformity" can be appropriately informed by historical perspective. The Court of Appeals appropriately determined, based on the purpose and terms of the home rule amendment, that "the uniformity requirement does not simply mean that a legislative enactment 'applying' to all municipalities passes the test." (App. 114.) An understanding of "uniformity" in the home rule amendment should be understood as requiring equality. And, in fact, in *Thompson*, this Court began with the terms of "uniformity," but it examined the statute more in depth to determine whether it resulted in equality: "Where a statute confers equal legal powers, that would seem sufficient to satisfy the uniformity requirements." 64 Wis. 2d at 687, 221 N.W.2d at 853.

The pairing of "uniformity" and "equality" is consistent with "uniformity" in other areas as well: "[T]here can be no uniform rule which is not at the same time an equal rule, operating alike upon all the taxable property throughout the territorial limits of the state, municipality, or local subdivision of the government." *Knowlton v. Board of Supervisors*, 9 Wis. 410, 421 (1859). *See also Niagara of Wisconsin Paper Co. v. Wisconsin Dep't of Natural Resources,* 84 Wis. 2d 32, 44-45, 48-49, 268 N.W.2d 153, 158-159 (1978) ("circuit courts agreed that sec.

147.021, Stats. stands for a policy of uniformity . . that Wisconsin industries would have an equal footing").

Police and fire petitioners challenge this "equality" language because, they say, it requires an "effect" analysis. *See* petitioners' brief at 23-25. This is not so. The Court is not asked, as in *Van Gilder*, 222 Wis. at 67, 267 N.W.2d at 28, about a law's "application to the city of X with two thousand five hundred population and [whether it would] affect it in the same way it affects the city of Milwaukee, a metropolitan community having a population of six hundred thousand." Rather, the Court is asked to decide whether the landscape upon which Wis. Stat. § 66.0502 was built was "equal." In *Adams v. Beloit*, 105 Wis. 363, 374, 81 N.W. 869, 872 (1900), for example, the court, when considering "uniformity" in context of city classification, asked whether "the law is operative alike."

An examination of the circumstances shows that, from the beginning, "operat[ing] alike" was missing from Wis. Stat. § 66.0502 for the City of Milwaukee. The governor's proposed Executive Budget of 2013 suggested eliminating residency: "The Governor recommends prohibiting local governmental units from requiring that any employee or prospective employee reside within the jurisdictional boundaries of the unit except as provided under state law." The provision further read, "The Governor also recommends that local governmental units be prohibited from bargaining over residency requirements." http://doa.wi.gov/Documents/DEBF/Budget/Biennial%20Budget/2013-

15%20Executive%20Budget/835-2013-15ExecutiveBudget.pdf. This recommendation was consistent with the request of City of Milwaukee police and fire unions, which sought to avoid residency requirements but did not want to bargain over them. (*See supra* note 2.) The elimination of residency was a City of Milwaukee issue.

The Court of Appeals concluded that "the facts in the record, exemplified by the Legislative Fiscal Bureau paper, make clear that the goal of Wis. Stat. § 66.0502 was to target the City of Milwaukee." (App. 116.) And the Legislative Fiscal Bureau, Paper #554, demonstrates that the residency requirement law would *not* operate equally against the City of Milwaukee.[8] Paper #554 focuses on the circumstances of the City of Milwaukee. (R. 30, Exh. D, 4-7, City App. 4-7.) As the Court of Appeals noted, "the Legislative Fiscal Bureau paper makes very clear that the City of Milwaukee would be very severely impacted by legislation prohibiting residency requirements. On the other hand, the impact of a prohibition on residency requirements on the numerous other local governmental bodies in this state is not discussed in any meaningful way." (App. 124-125.) The facts of this case (as contained in the affidavits submitted to the circuit court) show that the City of Milwaukee, in the words of the Court of Appeals, "will be deeply and

[8] "It is the statutory duty of the Legislative Fiscal Bureau to assist the legislature in its deliberations, and to study and recommend alternatives to legislation regarding all state budgetary matters." *Juneau County v. Courthouse Employees, Local 1312*, 221 Wis. 2d 630, 643-644, 585 N.W.2d 587, 592 (1998).

broadly affected" by the statute in a way that is not equal and thus not uniform. (App. 125.)

For all of these reasons, in the words of Article XI, Section 3(1) of the Wisconsin Constitution, the City's Charter Ordinance § 5-02 on residency advances matters of "local affairs and government" and does not fall within the exception of a "statewide concern" with "uniformity." Accordingly, the City should receive its declaration permitting the continued enforcement of its residency requirement.

## II. No Federal Liberty Interest Giving Rise to a Substantive Due Process Violation Arises from Wis. Stat. § 66.0502 Pertaining to Residency.

The MPA and Michael Crivello maintain a 42 U.S.C. § 1983 claim, but there exists neither the necessary underlying substantive right nor a violation. Most fundamentally: There is no fundamental constitutional right upon which to base a substantive due process claim, nor do state statutes create substantive rights in this context. Further, the circuit court properly determined that there was no violation of a right in this case where there has been no harm done to plaintiffs. There "must [be] alleg[ations of] an actual deprivation of rights resulting from the defendant['s] acts," *Reichenberger v. Pritchard,* 660 F.2d 280, 285 (7th Cir. 1981), as is not the case here.

### A. No Protectable Liberty Interest As a Matter of Substantive Due Process Arises from Wis. Stat. § 66.0502.

Under 42 U.S.C. § 1983, redress lies for violations of "rights, privileges, or immunities secured by the Constitution and [federal] laws" occurring under the color of state or local law. Section 1983 "is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred." *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979). There is no federal right to vindicate here where the City's residency requirement complies with federal constitutional law.

The City maintains a continuing residency requirement (*i.e.*, a rule requiring continuing residency as a condition for continuing eligibility for benefits such as employment). A continuing residency requirement, such as that of the City of Milwaukee, has withstood challenges based on an asserted constitutional "right to travel" and on equal protection, among others. *See McCarthy v. Philadelphia Civil Service Comm'n*, 424 U.S. 645, 646-647 (1976); *Detroit Police Officers Ass'n v. City of Detroit*, 405 U.S. 950 (1972). Courts have found the reasons expressed above by the City of Milwaukee to be rational reasons for residency. *See Kiel v. City of Kenosha,* 236 F.3d 814, 816 (7th Cir. 2000) (rational reasons include tax base, interest in community events, and service provision).

More generally, this—*i.e.*, the fact that residency requirements like Milwaukee Charter Ordinance § 5-02 "have been consistently found to be constitutional"—is the reason for the Court of Appeals' conclusion that "the trial

court erred in declaring Wis. Stat. § 66.0502 creates a protectable liberty interest." (App. 118-119.)

As the Court of Appeals properly determined, there is no fundamental constitutional right at issue. The MPA and Michael Crivello have asserted throughout this suit a violation of substantive due process, not procedural due process. *See* petitioners' brief at 31-32. However, substantive due process only protects against violations of "certain fundamental rights and liberty interests" that are "deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997) (citation omitted); *see also Hanes v. Dane County*, 608 F.3d 335, 338 (7th Cir. 2010). This case involves no such fundamental liberty interests (*e.g.*, those involving bodily integrity, the right to marry, marital privacy, the right to have children or the like). *See id.*

The MPA and Michael Crivello must therefore make the impossible contention that a substantive due process violation has occurred here because of "arbitrary" action that is a "shock to the conscience." Petitioners' brief at 32. But the circumstances of this case nowhere involve conduct that approaches the "most egregious conduct" that is constitutionally arbitrary and shocking to the conscience. *Compare County of Sacramento v. Lewis*, 523 U.S. 833, 846-847 (1998).

The bases asserted by the MPA and Michael Crivello for this "shock the conscience" behavior are statements by Mayor Tom Barrett indicating his continued support for the City's residency rule and a resolution passed by the

Common Council, Resolution File No. 130376, which was a general policy directive also championing the City's residency rule. *See* petitioners' brief at 41-43 & 29-31. Neither of these actions was "arbitrary, or conscience, shocking, in a constitutional sense." *Collins v. City of Harker Heights*, 503 U.S. 115, 128 (1992). To the contrary, Mayor Barrett's statements were consistent with the City's longstanding position that its Charter Ordinance § 5-02, which had been properly adopted as a matter of constitutional home rule (Wis. Const. Art. XI, § 3(1)) pursuant to Wis. Stat. § 66.0101, allowed the City to proceed addressing a matter of local affairs. The Common Council members, too, acted consistently with their legal view that the constitutionality of the Home Rule Amendment permits the City's ordinance notwithstanding the 2013 statute, Wis. Stat. § 66.0502.

The Mayor's position and that of the Common Council were adopted by a unanimous Court of Appeals, which determined that "Wis. Stat. 66.0502, does not involve a matter of statewide concern, nor does it affect every city or village uniformly; therefore, it does not, pursuant to the home rule amendment, Wis. Const. art. XI, § 3(1), trump the City of Milwaukee's residency requirement." (App. 125.) Put simply, the Court of Appeals concluded "the City ordinance is still good law; and we conclude that § 66.0502 does not apply to the City of Milwaukee. " (App. 125.)

Even if this Court now rules otherwise on the home rule matter, the Mayor was within his rights to act consistently with the law embodied in Charter

Ordinance 5-02 and thus with his legal obligations that that he "shall take care that the laws of the state and the ordinances of the city are duly observed and enforced." Milwaukee Charter Ordinance § 3-01. The officials of the Common Council similarly "discharge[d] their respective duties" as required by Milwaukee Charter Ordinance § 3-01. Resolution 130376 does not have the force of a charter ordinance and, therefore, does not enact or maintain the residency requirement. Their passage of the resolution was a statement of the common council's rational and legitimate concerns and its view of the legal rights of the City. (R. 30, Exh. C, App. 157-159.) In short, there is nothing that shocks the conscience about the actions of the mayor's and Common Council's actions.[9]

The MPA and Michael Crivello next seek to ground a substantive due process right in Wis. Stat. § 66.0502. *See* petitioners' brief at 33. Established federal law prohibits their argument: a state statute cannot act as the basis for a *substantive* due process right. As the Seventh Circuit flatly stated in *Kraushaar v. Flanigan*, 45 F.3d 1040 (7th Cir. 1995), "[t]he Supreme Court has never held that such state-created interests constitute a fundamental liberty interest protected under a *substantive* due process theory. Rather, the Court has analyzed state-created liberties under a *procedural* due process theory." *Id.* at 1047 (emphasis in original); *see also Russ v. Young*, 895 F.2d 1149, 1153 (7th Cir. 1989) (liberty interest from state statute receives only procedural due process protection).

[9] For these same reasons, police and fire petitioners are wrong when they argue, in their brief at 29-31, that the City somehow acted improperly in stating its position in Resolution No. 130376

This is for good reason, as the formation of a substantive due process right is far different from affirming a procedural due process right. As with cases such as *Roe v. Wade*, 410 U.S. 113, 152-153 (1973), the Court would be engaged in a rare process, for in essence it would be writing a new protectable interest into the federal constitution. As the United States Supreme Court stressed in *Glucksberg,* 521 U.S. at 720, "we 'ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this unchartered area are scarce and open-ended." (quoting *Collins*, 503 U.S. at 125.)

Indeed, the dangers of creating a substantive due process right are illustrated in the very attempts of the MPA and Michael Crivello to patch together a federally protected liberty interest. Their efforts at pages 33-35 of petitioners' brief borrow from imprisonment cases the parameters of "substantive limitations on official discretion," *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983), "language of an unmistakably mandatory character," *Hewitt v. Helms*, 459 U.S. 460, 471-472 (1983), and "specific directives to the decision maker that if the regulation's substantive predicates are present, a particular outcome will follow," *Russ,* 895 F.2d at 1153. However, these parameters are sufficiently vague (particularly when considered out of context) that very few statutes could *not* be asserted to fit these parameters.

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and in this litigation that constitutional home rule supports Milwaukee's residency requirement.

Finally, to the extent that the MPA and Michael Crivello argue that a protected liberty interest arises from "restraint" imposed by a residency requirement, that effort also fails. *See* petitioners' brief at 36. They argue that there is a "similarly derived" duty in the residency statute and in *Helms,* 459 U.S. at 470. But *Helms* relies on a recognized fundamental right not present in the circumstances of this case and Wis. Stat. § 66.0502: a prior restraint on liberty that comes from imprisonment. *See DeShaney v. Winnebago County Dep't of Social Serv.*, 489 U.S. 189, 200 (1989). This difference between residency requirements and incarceration is dispositive.

### B. Because There Was No Deprivation of a Protected Liberty Interest, There Is No Claim Under 42 U.S.C. § 1983.

In addition to there being no fundamental right, there has been no actual *deprivation* of plaintiffs' rights that would support a claim of violation. In *Carey v. Piphus*, 435 U.S. 247 (1978), the United States Supreme Court explained that damages under Section 1983 are available where there are actions in violation of "constitutional rights and [that] have caused *compensable injury*." *Id.* at 255 (citations omitted, emphasis in original). Specifically, actual harm must have been done to a claimed interest or right. *See Henderson v. Sheahan*, 196 F.3d 839, 848 (7th Cir. 1999); *see also Bonner v. Coughlin*, 545 F.2d 565, 567 (7th Cir. 1976) (42 U.S.C. § 1983 deprivation did not exist where no loss was effected by a state actor). The circuit court correctly determined that no such deprivation has occurred in this case.

The MPA and Michael V. Crivello do not (and cannot) claim loss of employment or disciplinary actions arising from enforcement of the City's residency requirement. As the circuit court correctly determined, "[t]here has been no demonstration of an actual deprivation of liberty by the City because no City employee involved in this case has been terminated or disciplined based on failure to comply with the residency rule." (R. 44, 20, App. 149.) The MPA and Michael Crivello have not argued differently. *See* petitioners' brief at 36-38.

At best, they claim that there is a concern about their employment because of the existence of the residency requirement along with Wis. Stat. § 66.0502. However, as the Seventh Circuit made clear in *Reichenberger*, "[t]he mere possibility of remote or speculative future injury or invasion of rights will not suffice," 660 F.2d at 285, as a basis for arguing a Section 1983 violation. *See also Carey*, 435 U.S. at 262 (Section 1983 recovery is for "actua[l]" not "presumed" injury). At present, a stipulation is in place that extends a prior restraining order among the parties, providing that the City "shall not enforce [its] 'residency rule'" and that, during this time, the City will not "investigate or take disciplinary action against members . . . with respect to violations of the City's 'residency rule' and/or Charter Ordinance Section 5.02." (R. 9, 22; *see* petitioners' brief at 11.)

Michael Crivello also asks this Court to look back to the ten-day period between the effective date of Wis. Stat. § 66.0502 and the stipulated injunction (July 2, 2013 to July 12, 2013), when he claims "fear" and "concer[n]" accompanying "serious consideration to moving [his and his wife's] residence

outside the jurisdictional limits of the City of Milwaukee" and "actively searching for a new residence outside the City of Milwaukee." *See* petitioners' brief at 9-10, 47. Contrary to petitioners' brief at 47, the City does challenge the existence of such a claim as it was remote and speculative: there was *no* legal determination of a liberty interest arising from Wis. Stat. § 66.0502.

Further, as the Court stated in *Reichenberger*, 660 F.2d at 284-285, there must be an *actual deprivation of the claimed right* for there to be any basis for a remedy under Section 1983. Michael Crivello's complaints about a lack of *choice* or "tension" do not suffice. *See* petitioners' brief at 47. The circuit court properly did not reach damages, *see* petitioners' brief at 46-47, given that the MPA and Michael Crivello could not show recovery under 42 U.S.C. § 1983 for "the *deprivation* of any rights, privileges, or immunities secured by the Constitution and laws." (Emphasis added.)

The MPA and Michael Crivello lack a protectable liberty interest underlying a substantive due process right violation, and in any event there has been no deprivation of any right. The Court of Appeals properly dismissed the claim under 42 U.S.C. § 1983.

## CONCLUSION

The judgment of the Court of Appeals should be affirmed. The City was entitled to a declaration that "the enactment and continued enforcement of Milwaukee Charter Ordinance § 5-02, the City's residency ordinance, is a matter of local affairs and government, and accordingly, a lawful exercise of the City's

constitutional home rule authority granted to the City by Article XI, § (3) Wis. Const." And, whatever the result on that main issue, the dismissal of the 42 U.S.C. § 1983 claim of the Milwaukee Police Association and Michael Crivello should be affirmed.

Respectfully submitted,

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_____

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## FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c), for a brief and appendix produced with a 13 pt. proportional serif font. The length of this brief is 10,952 words.

Dated at Milwaukee, Wisconsin this 11th day of January, 2016.

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I hereby certify that:

I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

The electronic brief is identical in text, content, and format to the printed form of the brief filed today.

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## CERTIFICATION OF MAILING

Laura M. Bergner herein certifies that she is employed by the City of Milwaukee as an Administrative Specialist, Sr., assigned to duty in the office of the City Attorney, which is located at 841 North Broadway, Suite 716, Milwaukee, Wisconsin 53202; that on the 11th day of January, 2016 she filed an original and ten copies of the Brief and Appendix of Defendant-Appellant-Cross-Respondent, City of Milwaukee, in the above-entitled case, via courier service, and addressed to:

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**SUPREME COURT**
**STATE OF WISCONSIN**

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**JAMES A. BLACK, GLEN J. PODLESNIK AND STEVEN J. VAN ERDEN,**
Plaintiffs-Respondents-Petitioners,
**MILWAUKEE PROFESSIONAL FIRE FIGHTERS ASSOCIATION LOCAL 215,**
Intervenor-Plaintiffs-Respondent-Petitioners,
**MILWAUKEE POLICE ASSOCIATION and MICHAEL V. CRIVELLO,**
Plaintiffs-Respondents-Cross-Appellants-Petitioners,

v.

**CITY OF MILWAUKEE,**
Defendant-Appellant-Cross-Respondent.

---

# PETITIONERS' JOINT REPLY BRIEF

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**FROM THE DISTRICT 1 COURT OF APPEALS DECISION DATED AND FILED JULY 21, 2015, REVERSING IN PART AND AFFIRMING IN PART THE TRIAL COURT'S JUDGMENT**

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**COURT OF APPEALS CASE NO. 2014-AP-400**
**TRIAL COURT CASE NO. 2013-CV-5977**

---

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## ARGUMENT

### 1. SECTION 66.0502, STATS., TRUMPS THE CITY'S CLAIM OF "HOME RULE" BY PROHIBITING "RESIDENCY" FROM BEING USED AS A CONDITION OF MUNICIPAL EMPLOYMENT THROUGHOUT WISCONSIN.

#### A. Section 66.0502, Stats., is Primarily a Matter of Statewide Concern.

There are three reasons §66.0502, Stats., is primarily a matter of statewide concern. First, the legislature specifically identified that residency requirements are a matter of statewide concern. *§66.0502(1), Stats.* That ***must*** be given great weight. *Wisconsin Ass'n of Food Dealers v. City of Madison,* 97 Wis.2d 426, 431, 293 N.W.2d 540, 543 (1980), citing *Van Gilder v. City of Madison,* 222 Wis. 58, 73-74, 267 N.W. 25 (1936).

Second, what may not be used as a condition of municipal employment implicates the public welfare. Given the enactment of §66.0502, Stats., it is reasonable to presume that the Legislature viewed the use of "residency" as negatively impacting the "welfare" of municipal employees (and that their "welfare" necessitated the ability to reside outside the jurisdictional limits of their municipal employers).

Third, the "uniform affect" of §66.0502, Stats., confirms

the existence of statewide concern. *Adams v. State Livestock Facilities Siting Review Bd.,* 2012 WI 85, ¶¶ 29,36, 342 Wis.2d 444, 820 N.W.2d 404 (While municipalities may adopt ordinances regulating issues of both statewide and local concern, the legislature has the authority to withdraw this power by creating uniform standards that all political subdivisions must follow); *also, Roberson v. Milwaukee County,* 2011 WI App. 50, ¶21, 332 Wis.2d 787, 798 N.W.2d 356; *City of West Allis v. County of Milwaukee,* 39 Wis.2d 356, 366, 159 N.W.2d 36 (1968).

The City claims the "individual concerns of public employees . . . is scarcely a 'statewide concern,'" as it does not have a "direct effect on the people and state at large." *City's Br.,* at 21. However, the standard has never been to require legislation to directly effect each person in Wisconsin.

While the City recognizes that the Legislature's conclusion as to the existence of statewide concern is entitled to "great weight," *City's Br.,* at 16, it fails to provide it the weight required. In giving mere lip service to the Legislature's assertion as to statewide concern, the City wrongly dismisses

nearly 80 years of precedent.

### B. The City Wrongly Asserts That Petitioners Have "Conceded" That Residency Is a Matter of Local Affairs.

The City makes the strange assertion that, given the phrasing of an issue in the Petition for Review, Petitioners have somehow conceded that residency is a matter of local affairs. *City's Br.,* at 18. Not only is that incorrect, it is irrelevant. Given the Legislature's assertion as to statewide concern, the standard is not whether something is a matter of local affairs/concern, but whether it is *primarily* a matter of state or local concern. *Madison Teachers, Inc. v. Walker,* 2014 WI 99, ¶101, 358 Wis. 2d 1, 68, 851 N.W.2d 337, 370 (". . . the court determines whether the statute concerns a matter of primarily statewide or primarily local concern. If the statute concerns a matter of primarily statewide interest, the home rule amendment is not implicated and our analysis ends.")

Petitioners have acknowledged that the City's ability to provide efficient delivery of services is a matter of local concern. Petitioners have therefore "conceded" that residency is a "mixed bag" of statewide and local concerns; but have

always asserted that residency is *"primarily"* a matter of statewide concern.

### C. The City's Arguments with Respect to "Fiscal Management" and "Community Investment" Are Overblown.

The City devotes three plus pages of its brief as to how residency impacts its "purse strings" and its "tax base." It does so based upon a *prediction* as to the possibility of a mass out-migration of City employees. *City's Br.*, at 18-21. However, that "prediction" was made prior to enactment of the 2013 legislation in question, and has never come to fruition.[1] As a result, the City has grossly overblown the impact of §66.0502, Stats., on its tax base and/or purse strings.

### D. Section 66.0502, Stats., Uniformly "Affects" Each and Every Municipality In Wisconsin.

Regardless of whether this Court concludes that residency is a "mixed bag" of statewide and local concerns, or even primarily related to local concerns (which it is not),

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1. Of the City's roughly 7,000 employees, only 666 (9.5%) had moved their residence out of the City limits since enactment of §66.0502, Stats.

http://fox6now.com/2015/07/21/latest-state-appeals-court-upholds-milwaukee-residency-requirements/

§66.0502, Stats., still trumps any claim of home rule, as the statute uniformly affects every municipality in Wisconsin.

The reason is simple. Uniform "affect," in and of itself, *is* sufficient to defeat a claim of constitutional home rule. *MTI,* 2014 WI 99, ¶99, 358 Wis. 2d 1, 66-67, 851 N.W.2d 337, 369. (". . . our case law has consistently held that the legislature may still enact legislation that is under the home rule authority of a city or village if it with uniformity 'affect[s] every city or every village.'") Also, *Adams,* 2012 WI 85, ¶¶29,36; *West Allis,* 39 Wis.2d 356, 366; *Van Gilder,* 222 Wis. at 84.

The plain language of §66.0502, Stats., confirms its uniformity. The statute defines a "local governmental unit" to include "any city, village, town, county or school district." *§66.0502(2), Stats., Supra,* at 6. It then prohibits every "local governmental unit" from making residency a condition of employment, *§66.0502(3)(a), Stats.,* and voids *any* residency rule existing as of the statute's enactment. *§66.0502(3)(b), Stats*. Section 66.0502, Stats., therefore constitutes the precise type of exception to "home rule" recognized by the Constitution; one which uniformly affects all Wisconsin municipalities.

Being unable to counter that conclusion, the City resorts to "tweaking" the Court of Appeals analysis (which equated uniform *"affect"* with uniform *"impact"* and *"effect").* For the reasons identified in Petitioners' primary brief, that argument goes nowhere.[2]

The City claims that allowing uniform affect to trump a matter of local concern "would strip all force and meaning from the home rule amendment." *City's Br.,* at 28-29. However, this Court has recognized just the opposite to be true. *Van Gilder* reasoned that – even when addressing a matter primarily of local concern – the Legislature's policy determinations must control if the legislation uniformly affects each municipality:

> ". . . *It is true this leaves a rather narrow field in which the home rule amendment operates freed from legislative restriction, but there is no middle ground. Either the field within which the home-rule amendment operates must be*

2. *Blacks* defines the verb "affect" as: "[m]ost generally, to produce an effect on; to influence in some way." *Blacks Law Dictionary, Eighth Ed., (1999),* at 62. However, *Blacks* defines the noun "effect" as "*[t]hat which is produced* by an agent or cause; *a result, outcome or consequence*." *Id.,* at 554. *(Emphasis added.)* In other words, the verb "affect" equates to the process by which something is influenced or "effected," whereas the noun "effect" connotes the outcome of that process, and is synonymous with "impact." It is therefore wholly inappropriate to equate uniform *"affect"* with uniform *"impact"* or *"effect."*

> *narrowed or the field within which the Legislature may operate must be narrowed, and . . . the amendment clearly contemplates legislative regulation of municipal affairs* . . . " *Van Gilder,* 267 N.W. 25 at 34. *(Emphasis added.)*

The City asserts that uniformity should "be understood as actually affecting municipalities in equal measure uniformly." *City's Br.,* at 29-30. In so doing, the City adopts the Court of Appeals' analysis that wrongly equated the term *"affect"* with *"impact"* and *"effect."* Once again, the City's argument is at odds with precedent. This Court has already recognized that a statute will never be able to *"impact"* or *"effect"* each and every municipality in a uniform manner:

> A law uniform in its application might work out one way in one city and in another way in another city depending on the local situation and the way in which it was administered and so 'affect' them differently. *Van Gilder,* 222 Wis 58, 267 N.W. 25, at 28. (Emphasis added.)

A prime example of how a statute can uniformly "affect" every municipality, while also "effecting" and/or "impacting" municipalities differently, is 2011 Wisconsin Act 10. Given the

differences in the number of employees from municipality to municipality, the *"impact"* or *"effect"* of Act 10 (i.e., monetary savings) varied greatly throughout the state. However, the *"affect"* of Act 10 was plainly "uniform" in nature.

The City's proffered interpretation of uniform affect would also have the absurd result of invalidating not only Act 10, but absolutely *every* piece of legislation, as it is a literal impossibility for a statute to "effect" each municipality "in equal measure."[3] *Van Gilder, Supra,* at 7.

The City's reference to *Kukor v. Grover,* 148 Wis.2d 469, 436 N.W.2d 568 (1989), to support its interpretation of "uniformity" is misplaced. While *Kukor* concluded that the uniformity requirement in the context of public education should be akin to equitable distribution, *Id.,* 148 Wis.2d at 490, 436 N.W.2d at 576, it did not require "equal" distribution (something that would be required under the City's analysis). *Kukor* actually supports Petitioner's argument as to uniformity.

In the end, the City's "uniformity" analysis suffers from the same problem as the Court of Appeals' analysis; it wrongly

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3. Including taxation, as not all residents are subject to income and/or property taxes.

focuses on the "impact" or "effect" of §66.0502, Stats., on the City exclusively. By focusing on the *impact* to a single municipality – as opposed to whether the statute uniformly *affects* all municipalities – the City and the Court of Appeals disregard the plain meaning of the Amendment.

### E. The City Wrongly Focuses on Legislative History, Even Though the Language of the Statute Is Plain on its Face.

The City violates the cardinal rule of statutory construction by resorting to legislative history and what it presumes to be the legislative intent, *City's Br.,* at 32-34, even though the language of §66.0502, Stats., is plain on its face. *State ex rel Kalal v. Circuit Court of Dane County,* 2004 WI 58, ¶45, 271 Wis.2d 633, 681 N.W.2d 846. ("[S]tatutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.'")

As the City disregards both the plain language of §66.0502, Stats., as well as this Court's direction in *Kalal,* the City's arguments cannot possibly carry the day.

## 2. THE CITY'S DECISION TO ENACT AN ORDINANCE DIRECTING CITY OFFICIALS TO ENFORCE ITS RESIDENCY RULE, REGARDLESS OF THE EXISTENCE OF §62.0502, STATS., VIOLATES SUBSTANTIVE DUE PROCESS.

### A. There Was No Legitimate Governmental Interest for the City's Substitute Resolution to Continue Enforcing It's Residency Rule, Precisely Because it Directly Conflicts with §66.0502, Stats.

The City wrongly claims Petitioners cannot maintain a substantive due process claim, because it is "impossible" for the City's "substitute resolution" to be considered an arbitrary action that shocks the conscious. *City's Br.,* at 36-39.

However, what is "impossible," is the City's ability to demonstrate a "legitimate governmental interest" in enforcing its residency rule once §66.0502, Stats., was enacted. The reasons are simple. Enforcing residency would: 1) require the City's police chief to violate the law by enforcing a rule the Legislature declared unlawful, and; 2) place the Mayor in direct conflict with his own Charter obligation to enforce the law.[4]

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4. Section 3-01 of the Milwaukee City Charter provides that "[t]he mayor shall take care that the laws of the state and the ordinances of the city are duly observed and enforced; and that all officers of the city discharge their respective duties."

While the City did have a legitimate public interest as to residency *prior to* §66.0502, Stats., that changed with the enactment of §66.0502, Stats. After that, no legitimate governmental interest could exist in refusing to comply with the law. Absent a legitimate governmental interest, the City's residency rule and its Substitute Resolution must be considered "constitutionally deficient."

After §66.0502, Stats, the City had to comply with the law unless and until: 1) it convinced the Legislature to change it, or ; 2) convinced a court that it possessed home rule. Its refusal to do either – and ordering City officials to act in direct opposition to the law – simply was not a "lawful" option.

### B. The City's Substitute Resolution Was an Arbitrary and Capricious Use of The City's Police Powers.

Whether a municipal ordinance constitutes a lawful exercise of police power depends on whether it is rationally related to furthering a proper public purpose. *City of Milwaukee v. Kilgore,* 185 Wis.2d 499, 519, 517 N.W.2d 689 (Ct.App. 1994), citing *State v. McManus,* 152 Wis.2d 113, 130, 447 N.W.2d 654, 660 (Ct.App.1989). That is determined under a

two-step analysis.

First, does the ordinance promote a proper public purpose? *Id.* The answer to this question must be "no," as the City's decision to act in direct opposition to the law cannot be characterized as a "proper public purpose."[5]

Second, is the regulatory scheme reasonably related to the accomplishment of that purpose? The answer to that question must also be "no," given the actions of the Mayor and the Common Council.

Substantive due process is violated by *executive action* when it "can properly be characterized as arbitrary, or conscience shocking . . . " *Collins v. Harker Heights,* 503 U.S. 115, 128, 112 S.Ct. 1061, 1070, 117 L.Ed.2d 261 (1992). Governmental conduct intended to injure in some unjustifiable way can be characterized as conscience-shocking. *Daniels v. Williams,* 474 U.S. 327, 331, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986).

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5. Nor can the decision to violate the law (by enforcing a residency rule that the Legislature deemed unlawful) somehow constitute a "rational" or "legitimate" concern of the Common Council, as asserted by the City. *City's Br.,* at 38.

In the context of municipal government, there is little that could "shock the conscience" more than a mayor signing an ordinance directly at odds with the law – *and with the express purpose of avoiding the law* – so as to enforce something that the Legislature had deemed unlawful, without first seeking a declaratory judgment. The Mayor's act of signing the Substitute Resolution (and then publicly pronouncing he would continue to discharge employees under the City's residency rule), can only be described as a "deliberate" decision to deprive employees of the privileges provided under §66.0502, Stats.

Given the Mayor's obligation to uphold the law, his actions not only "shock the conscience," but strongly suggest an abuse of power, or at least the use of power as an "instrument of oppression" – something the Due Process Clause was plainly intended to prevent. *Collins,* 503 U.S. at 126, 112 S.Ct. at 1069.

Substantive due process is violated by *legislative action* (and characterized as arbitrary or conscience shocking), when its sweep is unnecessarily broad and invades a protected freedom. *Griswold v. Connecticut,* 381 U.S. 479, 485, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

The City's Substitute Resolution satisfies this test. It was "arbitrary," because it was at odds with the law (and enacted in direct opposition to the law). It was "conscience shocking," because it required City officials to violate the law, as well as their obligation to uphold the law. It invaded a "protected freedom," because it prevented employees from exercising the privileges granted by §66.0502, Stats. It was unnecessarily broad, because it sought to punish those same employees prior to a determination of the rights and obligations of the parties.

### C. Petitioners Were Deprived of the Privileges Provided Under 66.0502, Stats.

The City belittles the "Hobson's choice" provided to its employees between the effective date of §66.0502, Stats., and July 12, 2013 (when the City stipulated that it would be enjoined from taking adverse action against employees). *City's Br.,* at 40-42.

The City asserts there was no actual deprivation because no employees were discharged for exercising their statutory privilege. *Id*. However, because Petitioners have asserted a liberty interest (and not a property interest), a deprivation of property (as would result from a discharge) is unnecessary. All

that is necessary is that the City interfered with the exercise of the freedom provided by §66.0502, Stats. The City's Substitute Resolution, coupled with the Mayor's promise to discharge those who exercised that freedom, did just that.

**D. Damages Are Not Remote or Speculative.**

The City wrongly claims that Petitioners' damages are remote and speculative, and improperly analogizes this case to *Reichenberger v. Pritchard,* 660 F.2d 280 (7th Cir. 1981) (where the mere possibility of remote injury would not amount to a deprivation of rights under §1983.)[6] *City's Br.,* at 41-42.

This case is much more analogous to *Kellog v. City of Gary Indiana,* 562 N.E. 2d 685 (IN 1990), where the Indiana Supreme Court concluded that the Indiana Firearms Act created a constitutionally protected liberty interest. *Id.,* 562 N.E.2d at 694, 696.

*Kellog* distinguished *Reichenberger* on two grounds. First, *Reichenberger* involved only two individuals (as opposed to thousands of residents affected by the City's actions). *Id.,* at

6. *Reichenberger* involved two Wisconsin nightclub owners. Local religious leaders attempted to revoke the liquor licenses. While litigation was pending, plaintiffs filed a §1983 action. However, because the licenses were never actually revoked, the court concluded there had been no deprivation of property.

698. Second, *Reichenberger* involved merely a "threat" of *potential* injury, whereas in *Kellog* the city refused to provide concealed carry firearm applications to residents.

As with *Kellog,* the potential for discharge in our case was neither "remote" nor "speculative" given enactment of the City's Substitute Resolution and the Mayor's directive to discharge those who exercised the privileges created by §66.0502, Stats. Just like Gary Indiana, the City and the Mayor took hard and fast steps to prevent people from exercising a substantive right provided by the legislature.

## CONCLUSION

For all the above reasons, Petitioners respectfully request that this Court: reverse the Court of Appeals decision in its entirety; reverse that portion of the Circuit Court's decision that dismissed Petitioners' claims under 42 U.S.C. §1983, and; remand with directions to provide for discovery and to determine the appropriate amount of damages (if any), as well and fees under 42 U.S.C. §1983 and §1988.

Dated at Milwaukee, this 21st day of January, 2016.

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Attorneys for Plaintiffs-Respondents-Cross-Appellants-Petitioners, Milwaukee Police Association and Michael V. Crivello and Plaintiffs-Respondents-Petitioners, James A. Black, Glen J. Podlesnik and Steven J. Van Erden

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## CERTIFICATION AS TO FORM AND LENGTH

Pursuant to §809.19(8)(d), Stats., I hereby certify that this Brief conforms to the rules contained in §§809.19(8)(b) and (c), Stats., for a Supreme Court Reply Brief produced with a proportional serif font. The length of this Reply Brief is 3,000 words.

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## CERTIFICATE OF MAILING

I, Crystal Lewzader, of Cermele & Matthews, S.C., 6310 West Bluemound Road, Suite 200, Milwaukee, Wisconsin, 53213, being sworn and upon oath do state that on January 21st, 2016, I placed in the United States Mail three copies of this brief to:

Grant Langley and Miriam Horwitz
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Dated this 21st day of January, 2016.

/s/_____
Crystal Lewzader

Subscribed and sworn to before me
this 21st day of January, 2016.

/s/ Jonathan Cermele
Notary Public, State of Wisconsin
My commission is permanent.

## ELECTRONIC BRIEF CERTIFICATION

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of §809.19(2), Stats. I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

/s/_____
Jonathan Cermele
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**SUPREME COURT**
**STATE OF WISCONSIN**

Appeal No. 2014-AP-400

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JAMES A. BLACK, GLEN J. PODLESNIK, AND STEVEN J. VAN ERDEN,
Plaintiffs-Respondents-Petitioners,

MILWAUKEE PROFESSIONAL FIRE FIGHTERS
ASSOCIATION LOCAL 215,
Intervenor-Plaintiff-Respondent-Petitioner,

MILWAUKEE POLICE ASSOCIATION AND MICHAEL V. CRIVELLO,
Plaintiffs-Respondents-Cross-Appellants-Petitioners,

v.

CITY OF MILWAUKEE,
Defendant-Appellant-Cross-Respondent.

---

On Appeal from the District 1 Court of Appeals
Decision Dated July 21, 2015
Court of Appeals Case No. 2014-AP-400
Circuit Court Case No. 2013-CV-5977

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# *AMICUS CURIAE* BRIEF OF THE WISCONSIN INSTITUTE FOR LAW & LIBERTY IN SUPPORT OF PETITIONERS

---

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## Introduction

*Amicus* Wisconsin Institute for Law & Liberty is a nonprofit, public interest law firm dedicated to promoting the public interest in free markets, limited government, individual liberty, and a robust civil society.

*Amicus* filed a brief at the petition stage urging a grant of review, and now files this brief in support of petitioners' position that the uniform regulation of residency requirements for municipal employment imposed by 2013 Wis. Act 20, § 20 is fully valid under the Wisconsin Constitution, overriding all contrary municipal residency restrictions.

## Background

A common feature of urban "machine" politics dating back more than a century was that only people who lived — and voted — in a city could hold city jobs.[1] This empowered local politicians by creating a bloc of voters that would reliably favor bigger government, more pay, and higher

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[1] *See, e.g.*, WILLIAM ANDERSON, AMERICAN CITY GOVERNMENT 455, 465 & n.11 (1925); Peter K. Esinger, *Municipal Residency Requirements and the Local Economy*, 64 SOC. SCI. Q. 85, 86 (1983); David J. Schall, *An Investigation into the Relationship Between Municipal Police Residency Requirements, Professionalism, Economic Conditions and Equal Employment Goals*, 2-4, 23, 29 (1996) (unpublished Ph.D. dissertation, Urban Studies Program, Univ. of Wisconsin–Milwaukee) (available at http://bit.ly/1lCW9HR).

taxes.[2] Beginning in the 1970s, local politicians presiding over decaying urban centers relied on residency restrictions to confine city employees (and their spending power and tax dollars) within city borders to stem the outflow of middle-class families who would otherwise move to the suburbs in search of a higher quality of life and better city services.[3] Limiting exit options reduces pressure on local politicians to reform city governance.[4]

In recent years, legislators in various states, better situated than local politicians to take a broader view of the public interest, have overridden these municipal restraints on employee choice. Their view has been that residents of a state generally should have an equal opportunity both to live and to work where they wish, and that the removal of residency requirements which artificially reduce the average quality of municipal

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[2] *See, e.g.*, Stephen L. Mehay & Kenneth P. Seiden, *Municipal Residency Requirements and Local Public Budgets*, 48 PUB. CHOICE 27, 28 (1986) (residency requirements "bring voters into the city who benefit disproportionately from high levels of public spending"); *id*. at 32 (data indicate "residency-law cities experience approximately 10 percent higher spending per capita").

[3] *See* Esinger, *supra* note 1, at 86-88, 94-95; Schall, *supra* note 1, at 7, 32, 219.

[4] Exit is, of course, a highly valued option for consumers confronted with a deterioration in the quality of any good or service, and a vital means of ensuring that producers of goods and services vigorously compete to maximize consumer welfare. *See generally* ALBERT O. HIRSCHMANN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 1, 5, 21-29 (1970). "The United States owes its very existence and growth to millions of decisions favoring exit," *id*. at 106, and Americans' "belief in exit as a fundamental and beneficial social mechanism has been unquestioning," *id*. at 112.

employees will enhance the overall well being of state residents — a particular concern in states which have substantial shared-revenue programs.[5] Such statutes are currently in force in several nearby Midwestern states: Minnesota, Iowa, Michigan, and Ohio.[6]

The question presented is whether the Wisconsin Constitution somehow renders our Legislature powerless to adopt this reform.

As of 2011, at least 114 Wisconsin municipalities had "some type of restriction on where their employees may reside" (of which thirteen "required all of their employees to live within the municipal limits"), 30 counties imposed residency requirements of some sort, and one school

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[5] Municipal budgets in Wisconsin, of course, have for decades been significantly funded through state shared revenues. *See generally* Wis. Legislative Fiscal Bureau, *Shared Revenue Program* (Informational Paper 18, Jan. 2015) (available at http://1.usa.gov/1Pt7txY). For example, in 2009, 46% of Milwaukee's budget was funded from intergovernmental revenue, Public Policy Forum, *The Tools in Milwaukee's Revenue Toolbox* (July 2011) (available at http://bit.ly/1OCOpA2), at 3 — vastly higher than the 18% average funding level for 15 comparable cities located outside Wisconsin (18%). *Id*. at 5.

[6] By the 1980s, Minnesota in general banned its municipalities from imposing residency requirements on their employees, MINN. STAT. § 415.16, and Iowa only allowed cities to require public-safety employees to live within "a reasonable maximum distance" outside the city. IOWA CODE § 400.17(3). In 1999 Michigan granted all municipal employees the right to live up to 20 miles outside their work jurisdiction. MICH. COMP. LAWS § 15.602. In 2006 Ohio granted (with limited exceptions) all municipal employees "the right to reside any place they desire." OHIO REV. CODE ANN. § 9.481(C).

district (Milwaukee's) had a residency requirement for its employees.[7]

In 2013 the Legislature enacted a simple, uniform rule. In 2013 Wis. Act 20, § 1270, codified at WIS. STAT. § 66.0502, it declared the matter of residency requirements to be one of "statewide concern," § 66.0502(1), and it imposed a uniform ban (applicable to *every* city, village, town, county, and school district, § 66.0502(2)) on residency requirements, § 66.0502(3) — except that public-safety personnel could be required to reside within 15 miles of the locality they serve. § 66.0502(4).

In response, the City of Milwaukee Common Council enacted a charter ordinance asserting that the statute violated Milwaukee's constitutional home-rule authority under WIS. CONST. art. XI, § 3(1), and ordering the continued enforcement of Milwaukee's local residency rule (MILWAUKEE CITY ORDINANCE 5-02).[8] Representatives of the Milwaukee police and fire fighters promptly filed suit. On cross-motions for summary judgment, the trial court rejected Milwaukee's constitutional home-rule

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[7] Legislative Fiscal Bureau, *Local Government Employee Residency Requirements* (Paper # 554) (May 9, 2013), at 3 (available at http://goo.gl/hO94gt).

[8] Court of Appeals slip op. at ¶9 (resolution available at http://bit.ly/1VbFckR). Enactment of a charter ordinance pursuant to WIS. STAT. § 66.0101 was necessary to any assertion by Milwaukee that its constitutional home-rule authority over its "local affairs" overrides state law. *Madison Teachers, Inc. v. Walker*, 2014 WI 99, ¶89 n.27, 358 Wis.2d 1, 851 N.W.2d 337.

argument and invalidated the ordinance.

The court of appeals reversed and reinstated Milwaukee's residency requirement, holding that § 66.0502 invaded Milwaukee's constitutional home-rule authority under WIS. CONST. art. XI, § 3(1) because: (1) contrary to the Legislature's explicit finding, the statute *does not* involve a matter of "statewide concern," slip op. at ¶¶20-30; and (2) despite the statute applying uniformly to *every* city, village, town, county, and school district, it *does not* meet the constitutional requirement that it apply "with uniformity," *id*. at ¶¶31-34.

Although the court of appeals did not strike down § 66.0502 (holding merely that it "does not apply to the City of Milwaukee," slip op. at ¶35), its decision largely guts the reform enacted by the Legislature, as other cities and villages presumably will feel free to pass similar charter ordinances exempting themselves from the statute if this Court leaves the decision below undisturbed. Cities and villages differ in how they are impacted by § 66.0502, so presumably it will be the "worst offenders" (those who have most heavily restricted the residential freedom of their employees), who will enact charter ordinances, complaining of "disproportionate" impact.

## Summary of Argument

The court of appeals' decision is incompatible with this Court's recent decision in *Madison Teachers, Inc. v. Walker*, 2014 WI 99, 358 Wis.2d 1, 851 N.W.2d 337. There, this Court resolved a fundamental disagreement concerning "the proper legal test to employ in determining whether a legislative enactment violates the home rule amendment" of WIS. CONST. art. XI, § 3(1). 2014 WI 99, ¶89. Applying that legal test, it then rejected Milwaukee's home-rule challenge to a provision in Act 10 regulating employee pensions even though: (1) it burdened *only* Milwaukee, and (2) the Legislature had made no legislative finding that this particular pension regulation involved a matter of statewide concern. *Id*., ¶¶102-29; *see also id*., ¶¶217-32 (Bradley, J., dissenting) (describing majority's holding).

Milwaukee's home-rule challenge is even weaker in this case. Here the Legislature, far from singling out Milwaukee for special regulation, has subjected all municipalities, including Milwaukee, to a uniform, statewide limit on residency requirements for municipal employees. And here the Legislature *did* make an explicit finding that this is a matter of statewide concern.

**Part I** of this brief addresses the court of appeals' holding that the Legislature did not act "with uniformity." **Part II** addresses its holding that the Legislature did not act on a matter of "statewide concern."

## ARGUMENT

### I. The Court of Appeals' "With Uniformity" Analysis Is Wrong

Under existing precedent, to sustain its claim that its constitutional home-rule authority trumps the statute, Milwaukee must show: (1) that the matter regulated is not predominantly one of "statewide concern, *and* (2) that the statute does not apply "with uniformity" to "every city or every village." *Madison Teachers*, 2014 WI 99, ¶¶90-95, 99, 101.[9]

We first address the court of appeals' "with uniformity" analysis, which supplies the simplest ground for reversal because it cannot be reconciled with the language of the Constitution and it flouts a decision of this Court cited by petitioners, but ignored by the court of appeals.

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[9] We share Milwaukee's objection (at 25-29) that current jurisprudence ignores the plain language of the Wisconsin Constitution, but due to space constraints we proceed under the framework laid out in *Madison Teachers*. Milwaukee loses regardless of the analytical framework applied, because local ordinances balkanizing the labor market by preventing free movement of workers across municipal lines are clearly a matter of statewide concern, especially given that municipal employment is significantly funded by state shared revenues.

Even though § 66.0502's restriction on residency requirements explicitly applies to *every* city, village, or other local governmental unit, the court nonetheless held that it somehow *does not* apply "with uniformity" to "every city or every village" within the meaning of art. XI, § 3(1). Believing that only Milwaukee "will be deeply and broadly affected" by the statute, the court concluded that it "does not uniformly affect every city or village in this state." Slip op. at ¶33. The court's theory was that it would be "illogical" to limit analysis to whether, on its face, the statute treats every city or village with uniformity — a court should also consider whether the statute will "have an outsize impact" on a particular city or village. *Id*. at ¶¶32-33.

But "impact" is not the word used in the Constitution, and thus the court seizing on the word "affect" to adopt the equivalent of a disparate-impact test for constitutional home-rule analysis is an interpretive contrivance. It is difficult to imagine a uniform law that would *not* impact the hundreds of municipalities in Wisconsin in disparate ways. To read the constitutional language to impose a disparate-impact test would be to read it out of the Constitution. The Legislature could *never* regulate "with uniformity," because all statutes have differing impacts on different cities and villages.

This disparate-impact theory flouts *Thompson v. Kenosha County*, 64 Wis.2d 673, 221 N.W.2d 845 (1974), in which this Court considered a statute that on its face applied to *all* counties in Wisconsin, facilitating the ability of counties to establish their own assessor systems to displace those in the cities, villages, and towns in the county. Kenosha County residents challenging the statute pointed out, correctly, that despite being facially neutral, the *impact* of the statute was not uniform, because only cities, villages, and towns within Kenosha County were affected (all other counties having already established assessor systems). 64 Wis.2d at 683. This Court held that it was enough that the statute was, "on its face, uniformly applicable throughout the state." *Id*. at 687. The "actual effect" of the statute was irrelevant because the statute was "supported by a reasonable justification," given that "achieving uniformity in property taxation and upgrading the quality of the assessment process" were "important public goals." *Id*. at 688.

In its uniformity analysis, the court of appeals ignored *Thompson*, slip op. at ¶¶31-34, even though it was cited by plaintiffs on this exact point. Fire Fighters Resp. Br., Dec. 4, 2014, at 9; Police Resp. Br., Dec. 5, 2014, at 24. Instead, the court relied on *State ex rel. Ekern v. City of*

*Milwaukee*, 190 Wis. 633, 209 N.W. 860 (1926). Slip op. at ¶32. But *Ekern* is the polar opposite of this case. This case involves a statute applicable to *all* municipalities, establishing a statewide policy that generally municipal employees should be free to reside where they wish. *Ekern* involved a statute limiting the height of buildings to 150 feet, not as a matter of statewide policy, but only in Milwaukee. On its face, the statute failed the "with uniformity" aspect of art. XI, § 3(1). Thus, after holding that the height of Milwaukee's buildings was "clearly a local affair," this Court correctly concluded that Milwaukee's constitutional home-rule authority shielded it from the statute. 190 Wis. at 862.

The court of appeals' analysis of the "with uniformity" aspect of art. XI, § 3(1) is wrong.

## II. The Court of Appeals' "Statewide Concern" Analysis Is Wrong

There are two independent reasons why the court of appeals' "statewide concern" analysis is also wrong.

### A. No Weight Given to Legislative Finding

In enacting statewide limits on the ability of municipalities to control the residency of their employees, the Legislature explicitly found this

matter to be of "statewide concern." § 66.0502. Although less deference may be owed to legislative declarations in other contexts, this Court has consistently held that "great weight" must be accorded such findings in cases involving the assertion of constitutional home-rule authority. *E.g.*, *Wis. Ass'n of Food Dealers v. City of Madison*, 97 Wis.2d 426, 431, 293 N.W.2d 540, 543 (1980).

Yet the court of appeals accorded no weight to the Legislature's finding. It reasoned that in enacting § 66.0502, the Legislature did not compile a factual record sufficient to *prove*, to the court's satisfaction, that residency requirements *are*, in fact, a matter of statewide concern — the point was "never substantiated, and only given lip-service with broad policy arguments." Slip op. at ¶21.[10] So the judges below simply disregarded the Legislature's finding. *Id*. ("Because the legislature's claim that residency requirements are a matter of statewide concern, *see* § 66.0502(1), is unsubstantiated, it does not influence our decision.").

[10] The "broad policy arguments" referenced by the court are those set out in a legislative staff report, which listed six reasons why restricting residency requirements might benefit the State and its citizens. *See* Legislative Fiscal Bureau, *supra* note 7, at 4 (they may improve employee applicant pools, may improve quality of life for employees, may improve the ability to promote and retain experienced staff, and they respect fundamental interests of employees to live and travel where they wish).

The decision below, faulting the Legislature for not compiling a legislative record *proving*, to the court's satisfaction, that residency restrictions are a matter of statewide concern, conflicts with numerous decisions in which this Court has found statewide concern based on a general analysis of the subject matter, without any reference to material in the legislative record.[11]

The court below should not have rejected the Legislature's finding without considering whether articles, reports, or other scholarly materials exist which support the grounds for limiting residency restrictions listed in the legislative staff report, see note 7, *supra*, and other grounds that might rationally be advanced for statewide reform of residency restrictions. There is certainly no shortage of readily available research supporting the elimination of residency restrictions.[12]

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[11] *E.g.*, *Madison Teachers*, 2014 WI 99, ¶¶111, 114-123; *Adams v. State Livestock Facilities Siting Review Bd.*, 2012 WI 85, ¶29, 342 Wis.2d 444, 462-64, 820 N.W.2d 404, 413; *Wis. Ass'n of Food Dealers v. City of Madison*, 97 Wis.2d 426, 431, 293 N.W.2d 540, 543 (1980); *Thompson v. Kenosha County*, 64 Wis.2d 673, 683-86, 221 N.W.2d 845, 851-52 (1974).

[12] *E.g.*, Christina Plerhoples, *Municipal Residency Requirement Laws and Their Impact on Cities* (2013) (available at http://bit.ly/1NDH846); Thomas A. Lifvendahl, *The Residency Requirement: City of Milwaukee* (Feb. 4, 2012) (available at http://bit.ly/1JxbPRJ); M. Scott Niederjohn & Mark C. Schug, *The Milwaukee Iron Curtain* (Fall 2006) (available at http://bit.ly/1NJ6vAM); Wis. Policy Research Inst., *The Milwaukee Teacher Residency Requirement: Why It's Bad for Schools, and Why It Won't Go Away* (June 2006) (available at http://bit.ly/1KPheEr); Brian Duncan, *Using Municipal Residency Requirements to Disguise Public Policy*, 33 PUB. FIN. REV. 84 (2005).

But one need not be a social scientist to figure out what the statewide interest served by this reform might be. Dictating where people live might have struck legislators as fundamentally unfair (see note 4, *supra*) — a form of discrimination which, although not constitutionally proscribed, should be banned by legislation. Legislators may have concluded that, just as job seekers are protected from discrimination based on other grounds, they should be able to compete for jobs without being burdened by their place of residence. Further, municipalities, including Milwaukee, receive substantial shared state aid. See note 5, *supra*. Legislators might have concluded that the efficient and effective use of state resources is best advanced by free and open competition for municipal employment.

### B. Perverse Penalization of the Legislature's Consideration of Objections to Proposed Reform

There is a further, independent flaw in the court of appeals' analysis: its penalization of the Legislature's act of taking seriously, and studying, Milwaukee's objections to the proposed legislation. The court of appeals believed that the Legislature's diligent examination of Milwaukee's objections to the proposal somehow proves that the proposal was not of statewide concern, but was only of concern to Milwaukee. Slip op. at ¶¶5-8, 21-22.

This holding is perverse; if upheld, it would mean that the Legislature would be better off simply ignoring all objections to potential home-rule limitations. It also runs contrary to the spirit, if not the letter, of this Court's decisions barring interference with the internal operations of the Legislature, even where it is *undisputed* that the Legislature violated its own rules for considering legislation. *E.g.*, *State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, ¶13, 334 Wis.2d 70, 798 N.W.2d 436. At least as much comity should be accorded the Legislature where, as here, it violated no rule — and yet the court of appeals has, in effect, punished it for giving careful consideration to objections lodged against a bill. Courts should not give legislatures incentives to govern more carelessly.

## Conclusion

The decision below should be reversed.

January 25, 2016

Respectfully submitted,

*/s/ Richard M. Esenberg*

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**With Section 809.19(8)(b) & (c)**

I hereby certify that this brief conforms to the rules contained in Section 809.19(8)(b) & (c) for a brief produced with proportional serif font. This brief is 2,955 words, calculated using the word count function of WordPerfect 12.

Dated: January 25, 2016 *<u>/s/ Kenneth Chesebro</u>*

Kenneth Chesebro

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**With Section 809.19(12)**

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Section 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all parties.

Dated: January 25, 2016 */s/ Richard M. Esenberg*

Richard M. Esenberg

STATE OF WISCONSIN

IN SUPREME COURT

No. 2014AP0400

JAMES A. BLACK, GLEN J. PODLESNIK
and STEVEN J. VAN ERDEN,

Plaintiffs-Respondents-Petitioners,

MILWAUKEE PROFESSIONAL FIRE
FIGHTERS ASSOCIATION LOCAL 215,

Intervenor-Plaintiff-Respondent-Petitioner,

MILWAUKEE POLICE ASSOCIATION and
MICHAEL V. CRIVELLO,

Plaintiffs-Respondents-Cross-Appellants-Petitioners

v.

CITY OF MILWAUKEE,

Defendant-Appellant-Cross-Respondent.

# NON-PARTY BRIEF OF THE ATTORNEY GENERAL IN SUPPORT OF THE PETITIONERS

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## INTRODUCTION

The People of Wisconsin adopted the Home Rule Amendment in 1924 to address a specific problem: the proliferation of state legislation addressing purely local issues because cities and towns lacked legal authority to make such rules for themselves. To alleviate this problem, the Amendment gave cities the authority they previously lacked. It left the Legislature with full authority to displace, through uniform legislation, any local laws that the newly empowered cities chose to adopt.

The Court of Appeals in this case turned the Amendment into something it was never intended to be: a limitation on the Legislature's authority to enact uniform laws that have different practical impacts on different cities. In the process, it undercut a common-sense, statewide reform of the type that States around the country have adopted: a ban on residency restrictions for public employees ("Residency Restriction Ban"). This Court should reverse the Court of Appeals and make clear that the Home Rule Amendment poses no obstacle to uniform, good-government reforms like the Legislature adopted here.

## STATEMENT OF INTEREST

When a law's constitutionality is at stake, the Wisconsin Attorney General is "entitled to be heard." Wis. Stat. § 806.04(11); *see also State v. City of Oak Creek*, 2000 WI 9, ¶ 35, 232 Wis. 2d 612, 605 N.W.2d 526.

## ARGUMENT

In Wisconsin, "legislative power . . . is lodged in the Legislature." *Van Gilder v. City of Madison*, 222 Wis. 58, 67, 267 N.W. 25, 28 (1936). Cities, on the other hand, "are creatures of the state legislature and have no inherent right of self-government beyond the powers expressly granted to them." *Madison Teachers Inc. v. Walker*, 2014 WI 99, ¶ 89, 358 Wis. 2d 1, 851 N.W.2d 337. The Home Rule Amendment honors that constitutional balance. In interpreting the Amendment, this Court has cautioned that "courts should be most reluctant to impose by implication . . . a limitation upon legislative power which the Constitution . . . sweepingly confides to the Legislature." *State v. Baxter*, 195 Wis. 437, 446, 219 N.W. 858, 861–62 (1928).

The Home Rule Amendment provides that "[c]ities and villages organized pursuant to state law may determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of statewide concern as with uniformity shall affect every city or every village." Wis. Const. art. XI, § 3(1). As this Court recently explained in *Madison Teachers*, a law enacted by the Legislature trumps local legislation if the State law is *either* primarily addressed to an issue of statewide concern *or* "uniform[]." 358 Wis. 2d 1, ¶¶ 91–95. This Court "first establish[es] the character of the legislative enactment at issue, and only then consider[s] whether the uniformity

requirement is satisfied if the state law concerns a matter of primarily local affairs." *Id*. ¶ 94.

Like *Madison Teachers*, this case involves a dispute as to the proper legal standard for analyzing the Amendment: namely, the scope of the uniformity requirement. Id. ¶ 90. To help address that legal dispute, the State provides historical support for this Court's holding in *Thompson v. Kenosha County* that the Legislature satisfies the Amendment's uniformity requirement with a law that is "on its face, uniformly applicable throughout the state." 64 Wis. 2d 673, 687, 221 N.W.2d 845 (1974). Petitioners and their *amici* provide additional compelling reasons why the Ban trumps Milwaukee's residency requirement, including a more fulsome discussion as to why the Ban is primarily addressed to an issue of statewide concern. Pet'rs Br. 14–21; Amicus Wis. Inst. for Law & Liberty's Br. in Support of Pet'rs Sec. 2.

## I. The Residency Restriction Ban Is Addressed Primarily To Issues Of Statewide Concern

The Ban creates a statewide policy permitting anyone who works in a non-emergency capacity for a Wisconsin city to live anywhere they choose. Wis. Stat. § 66.0502(3)(a). From the point of view of Milwaukee, the Ban limits the restrictions the city can place on its employees. In such "mixed bag" cases—with both statewide and local concerns—the Court asks whether the issue "more greatly

concerns the people of the entire state or the people in the municipality." *Madison Teachers*, 358 Wis. 2d 1, ¶ 117.

Overwhelming considerations dictate that the Ban is primarily addressed to an issue of statewide concern. As a threshold matter, the Legislature found that "residency requirements are a matter of statewide concern." Wis. Stat. § 66.0502(1). This determination "is entitled to great weight because matters of public policy are primarily for the Legislature." *Van Gilder*, 222 Wis. at 74, 267 N.W. at 31. In addition, this Court has recently recognized that "[t]he terms of the public employer-employee relationship have long been the subject of statewide legislation in Wisconsin," and that is precisely what the Residency Restriction Ban addresses. *Madison Teachers*, 358 Wis. 2d 1, ¶ 115.

More generally, the Ban involves matters primarily of statewide concern because it is garden-variety good-government legislation, designed to alleviate substantial burdens on the free movement of all Wisconsin citizens. During the Ban's legislative drafting process, the Legislature learned that fifteen other States have found the need to prohibit local residency restrictions as a matter of sufficiently weighty statewide concern to justify legislation. *See* Wis. Legis. Fiscal Bureau, Local Government Employee Residency Requirements, P. No. 554, at 2 (2013).[1] Like

[1] *Available at* http://docs.legis.wisconsin.gov/misc/lfb/budget/2013_15_biennial_budget/102_budget_papers/554_residency_requirements_local_government_employee_residency_requirements.pdf.

Wisconsin, these States have concluded that residency restrictions inhibit the freedom of citizens to live and work where they choose. *Id.* at 3–4. Residency restrictions both unfairly harm the States' citizens and undermine the ability to recruit talented workers into public service. *Id.* The Legislature designed the Ban to give everyone in Wisconsin protections against a pernicious practice that other States are similarly addressing. The Home Rule Amendment does not displace that entirely reasonable legislative judgment. *See also* Pet'rs Br. 17–21.

## II. The Residency Restriction Ban Satisfies The Uniformity Requirement

A. By its plain terms, the Amendment allows the Legislature to adopt any laws that "with uniformity . . . affect every city or every village." Wis. Const. art. 11 § 3(1). As early as *Van Gilder*, this Court expressed support for the view that this uniformity requirement simply mandates equal *legal* treatment of all Wisconsin cities. 222 Wis. at 67, 267 N.W. at 28. Any other understanding, this Court noted, appears untenable because almost any law impacts cities differently. *Id.* Forty years later, in *Thompson*, this Court made the point even clearer, holding that a statute that was "*on its face*, uniformly applicable throughout the state" meets the Amendment's uniformity standard. 64 Wis. 2d at 687 (emphasis added).

B. The Home Rule Amendment's history is entirely consistent with *Thompson*'s holding that any statute that

"on its face" treats all cities equally satisfies the uniformity requirement. At the time Wisconsin debated the Amendment, the problem of the day was the Legislature enacting city-specific legislation, addressing purely local issues, because cities lacked sufficient legal power to regulate their own affairs. The Amendment sought to cure this problem by giving cities general law-making authority so the Legislature would no longer have to pass such laws. It was not intended to displace the Legislature's authority to enact legally uniform laws for all of Wisconsin's cities.

In Wisconsin's early days, the Legislature spent a great deal of its time on private or "special" legislation. *State ex rel. Ekern v. City of Milwaukee*, 190 Wis. 633, 636, 209 N.W. 860, 861 (1926). City-specific legislation was especially pervasive since only the Legislature could modify city charters and cities were powerless absent explicit authorizations from the Legislature. *Id*.

Reformers made several attempts to fix the problems arising from the Legislature enacting city-specific laws. In 1871, the People adopted a constitutional amendment banning private legislation on nine topics, including amending town and village charters. Wis. Const. art. IV, § 31.[2] General laws on those topics were permitted only if they were "uniform in their operation throughout the state." Wis. Const. art. IV, § 32.

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[2] An 1892 amendment added "cities" to "towns and villages." *Van Gilder*, 222 Wis. 58, 69, 267 N.W. 25, 29.

But cities still lacked general law-making authority, and as they grew, so did their needs. So the Legislature continued to pass laws granting specific authority to deal with local issues, but they now targeted classes of cities rather than individual cities. This Court upheld that approach, holding that the Legislature could enact laws limited to cities above a certain population. *See Johnson v. City of Milwaukee*, 88 Wis. 383, 60 N.W. 270 (1894); *Adams v. City of Beloit*, 105 Wis. 363, 81 N.W. 869 (1900).

In 1911, the Legislature took a broader approach, passing a statute that allowed cities to modify their charters and "to exercise all powers in relation to . . . municipal affairs not conflicting with the fundamental or any general law." *State ex rel. Mueller v. Thompson*, 149 Wis. 488, 494, 137 N.W. 20, 23 (1912). Acting under this new law, Milwaukee proposed to amend its charter so it could produce and sell ice. But this Court invalidated the 1911 law as an unconstitutional delegation of legislative power. *Id.*, 149 Wis. at 498, 137 N.W. at 24. "[P]ower to make law," the Court reasoned, "was reserved exclusively to the Legislature, and any attempt to abdicate it . . . must, necessarily, be held void." *Id.*, 149 Wis. at 491–92, 137 N.W. at 22. In particular, the "power to grant corporate charters for cities . . . was a legislative function at common law, and made exclusively such by our Constitution." *Id.*, 149 Wis. at 493, 137 N.W. at 23.

Reformers sought to cure this problem through the Home Rule Amendment. Much of the discussion in the press during its enactment (1919–1924)[3] focused on the continued problem of the need for legislation addressing local issues. Milwaukee Mayor Daniel W. Hoan, who helped draft the Amendment, estimated that "legislation of only local interest takes up at least a month of the legislature's time each session." Oshkosh Daily Northwestern, Mar. 2, 1921, at 11.[4] Other articles reported similar estimates. "[O]ver 25 per cent of the measures before the Wisconsin legislature directly affect[] Milwaukee." The Capital Times, Jan. 27, 1921, at 1.[5] "[O]ne-third of state legislation . . . pertain[s] to municipalities and state legislators have not the training and experience to deal efficiently with mere local problems." Appleton Post-Crescent, Jun. 8, 1922, at 1.[6] "[E]very legislature must consider nearly two hundred bills which apply only to Milwaukee." Joseph P. Harris, The Capital Times, Jan. 19, 1924, at 9.[7] One article gave as an example "a bill . . . enacted to permit the installation of a telephone in a city office." *Id.*

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[3] In 1921, the Legislature repealed all special city charters (except Milwaukee's) and replaced them with a general city charter law. *See* ch. 242, Laws of 1921. This act, like the 1911 law, gave cities broad law-making authority via statute. Wis. Stat. § 62.11(5). Perhaps to avoid the fate of the 1911 law, this new law did not allow cities to amend their charters.

[4] App. 10.

[5] App. 7.

[6] App. 14.

[7] App. 20.

Reformers explained that the Amendment would free the Legislature from having to spend time debating and enacting such laws. Mayor Hoan, for example, argued: "At this time when everyone in the legislature is crying out about the long session, why should we continue a system which piles up hundreds of bills affecting cities to be considered by that body." Daniel W. Hoan, Letter to the Editor, The Capital Times, Apr. 22, 1919, at 4.[8] Mayor Hoan added that "home rule will . . . cut out more nonsense from the legislature than any other step that can be taken." Oshkosh Daily Northwestern, Mar. 2, 1921, at 11.[9] The secretary of the Wisconsin League of Municipalities, Ford H. MacGregor, emphasized the same concern: "The amendment will give municipalities . . . power to [amend] their own charters without having to go to the legislature . . . . This amendment would avoid the necessity of a great number of . . . bills." Manitowoc Herald-Times, Jul. 3, 1924, at 8.[10]

These public discussions made clear that the Amendment was not designed to limit the Legislature's authority when it wanted to act for the entire state. Mayor Hoan assured readers that the Amendment "preserves to the legislature the right to legislate on any matter concerning the state at large *or* which affect all cities or villages uniformly." Daniel W. Hoan, Letter to the Editor, The

[8] App. 5.
[9] App. 11.
[10] App. 22.

Capital Times, Apr. 22, 1919, at 4 (emphasis added).[11] Another paper similarly explained: "The state will not lose its power over cities, the mayor stated, for it can prohibit them from doing anything by making state wide application to all measures passed. Cities will be given a free hand in local affairs, without becoming free from state legislation, it is claimed." Oshkosh Daily Northwestern, Mar. 2, 1921, at 11.[12] Yet another paper quoted "one of the best charter experts in the country" as explaining that the Amendment "would in no way impare [sic] legislative control." Appleton Post-Crescent, Jun. 8, 1922, at 1.[13]

The People of Wisconsin adopted the Home Rule Amendment in 1924. Soon after, this Court clarified that the Amendment's "recognized purpose . . . is a grant of power to cities and villages," explaining that the Amendment "imposes no limitations upon the power of the Legislature." *Baxter*, 195 Wis. at 445, 448, 219 N.W. at 861, 862. Indeed, the Amendment's only impact on laws enacted by the Legislature is that "enactments of the Legislature which do not affect all cities uniformly are to be subordinate to legislation of cities within their constitutional field." *Id.*, 195 Wis. at 447, 219 N.W. at 862. Two sentences later, the Court repeated this idea in slightly different words: "If the state legislation affects only classes of cities"—that is, if it

[11] App. 5.
[12] App. 11.
[13] App. 12–13, 14.

treats some classes of cities differently than other classes of cities—"it is subordinate to the city legislation." *Id.*, 195 Wis. at 448, 219 N.W. at 862.

A few years later, this Court issued *Van Gilder*, including broad reasoning that the Amendment's uniformity requirement merely required that all cities received equal legal treatment. *See supra* Part II.A. This Court emphasized that it "was the intention of the people . . . to leave a large measure of control over municipal affairs with the Legislature." *Van Gilder*, 222 Wis. at 71, 267 N.W. at 30. Then, four decades later in *Thompson*, the Court adopted this reasoning as a holding, explaining that the Amendment's uniformity requirement was satisfied by a law that was "on its face, uniformly applicable throughout the state." 64 Wis. 2d at 687. This understanding was consistent with the Amendment's history, which revealed no intention to place any limitations on the Legislature's authority to enact legally uniform laws.

C. Under *Thompson*'s proper understanding of the uniformity requirement as demanding only equal legal treatment, the Residency Restriction Ban invalidates Milwaukee's residency restriction. The Ban provides that, with limited exception for certain emergency personnel, "no local governmental unit may require, as a condition of employment, that any employee . . . reside within any jurisdictional limit." Wis. Stat. § 66.0502(3)(a), (4)(b). This applies equally to every city in the state, from Milwaukee to

Manawa.[14] No Wisconsin city may impose a residency mandate on its non-emergency employees, period. Just as in *Thompson*, the Ban is "on its face, uniformly applicable throughout the state." 64 Wis. 2d at 687. That fact, standing alone, is "sufficient to satisfy the uniformity requirement." *Id.*

D. The Court of Appeals argued that if the uniformity requirement is understood to only mandate legal uniformity, this would "all but obliterate" the Home Rule Amendment. 364 Wis. 2d 626, ¶ 32. This interpretation—besides being entirely contrary to *Thompson*—misunderstands the Amendment's primary historical purpose of giving general law-making authority to cities. The Amendment allowed some cities to enact residency restrictions in the first place, without seeking any special legislation from the Legislature. The new local powers created by the Amendment, however, remained subject to the Legislature's override authority. Having concluded that widespread residency restrictions are contrary to the State's public interest, the Legislature cured that problem with entirely uniform legislation of the sort the Amendment expressly permits.

In addition, the Amendment does place one important limit on the Legislature. The 1871 constitutional amendments, which banned certain private legislation, allowed laws targeting classes of cities. *Supra* Part II.B. As this Court explained in *Van Gilder*, the Home Rule

[14] *See* Manawa, Wis., Code § 54-15.

Amendment added the principle that if the Legislature addresses primarily local affairs with a law that targets a class of cities, then the city can trump that law. 222 Wis. at 80, 267 N.W. at 34.

Nor does the Court of Appeals' out-of-context focus upon the word "affect" support its position. 364 Wis. 2d 626, ¶ 18. As the historical record makes clear, none of the various reforms of the time required anything *beyond* equal legal treatment (if anything, they required slightly less, since they still allowed reasonable classifications). The 1871 constitutional amendments allowed "general laws" that were "uniform *in their operation*." Wis. Const. art. IV, § 32 (emphasis added). The 1911 statute gave cities powers that did not conflict with laws "*operative generally* throughout the state." 1911 Wis. Sess. Laws 558 (Chapter 476), § 1 (emphasis added). Nothing in the Amendment's history suggests that its slightly varied wording—"with uniformity affect"—requires *more* than equal legal treatment, as the Court of Appeals held. Wis. Const. art. XI, § 3(1). Notably, Mayor Hoan, one of the Amendment's primary champions, used similar phrases interchangeably in describing the Amendment. *See* Oshkosh Daily Northwestern, Mar. 2, 1921, at 11 ("The state . . . can prohibit [cities] from doing anything by making state wide *application* to all measures passed." (emphasis added)).[15]

[15] Appendix 11.

## CONCLUSION

The decision of the Court of Appeals should be reversed.

Dated this 22nd day of January, 2016.

Respectfully submitted,

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## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 2,999 words.

Dated this 22nd day of January, 2016.

_____

LUKE N. BERG
Deputy Solicitor General

**CERTIFICATE OF COMPLIANCE**
**WITH WIS. STAT. § (RULE) 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 22nd day of January, 2016.

_____
LUKE N. BERG
Deputy Solicitor General

SUPREME COURT
STATE OF WISCONSIN
Appeal No. 2014AP000400

JAMES A. BLACK, GLEN J. PODLESNIK and STEVEN J. VAN ERDEN,

Plaintiffs-Respondents-Petitioners,

MILWAUKEE PROFESSIONAL FIRE FIGHTERS ASSOCIATION LOCAL 215,

Intervenor-Plaintiff-Respondent-Petitioner,

MILWAUKEE POLICE ASSOCIATION and MICHAEL V. CRIVELLO,

Plaintiffs-Respondents-Cross-Appellants-Petitioners,

v.

CITY OF MILWAUKEE,

Defendant-Appellant-Cross-Respondent.

# LEAGUE OF WISCONSIN MUNICIPALITIES' AMICUS CURIAE BRIEF

From the District I Court of Appeals Decision Dated and Filed July 21, 2015, Reversing in Part and Affirming in Part the Trial Court's Judgment

Court of Appeals Case No. 2014-AP-400
Trial Court Case No. 2013-CV-5977

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## INTRODUCTION

The League of Wisconsin Municipalities (League) is a non-profit, voluntary association of 587 Wisconsin cities and villages cooperating to improve and aid the performance of local government. Established in 1898, the League and its officers were actively involved in drafting and securing passage of the constitutional home rule amendment. We agree with the City of Milwaukee's brief and write separately to refute the Attorney General's contention that the constitutional home rule amendment was intended as nothing more than a measure to relieve the legislature of the burden of enacting local laws and "left the Legislature with full authority to displace through uniform legislation, any local laws that the newly empowered cities chose to adopt." (Att'y Gen'l's brief at p. 1).

We contend that the plain language of the amendment and extrinsic evidence showing the intent of the drafters demonstrates that the amendment was deliberately and carefully drafted not only to empower cities and villages to determine their local affairs and government, but to also limit legislative incursions into matters of local affairs and government. The League has a strong interest in seeing the amendment interpreted in accordance with its plain and unambiguous language and intent of the drafters. The people of Wisconsin amended the Constitution and vested authority to *determine local affairs* and government in cities and villages. We believe this case illustrates the constitutional home rule amendment's importance in protecting municipalities

that have exercised constitutional home rule power from legislative incursions into local affairs. It also demonstrates the need for the courts, as guardians of the Constitution, to interpret the amendment according to its plain language and as it was purposefully drafted in order to give voice to the voters who amended the constitution and assure the continued vitality of this important source of municipal authority.

## ARGUMENT

Wisconsin municipalities have two distinct sources of home rule authority: (1) Statutory, and (2) constitutional. Statutory home rule authority, found in Wis. Stat. §§61.34 (villages) and 62.11(5) (cities), grants municipalities broad powers "[e]xcept as elsewhere in the statutes specifically provided ....." Municipalities typically rely on statutory home rule authority when enacting laws because it is a broad grant of power and the procedures for its use are uncomplicated. The downside to using statutory home rule authority to pass laws is that such laws must yield to any state statutes that are determined to conflict with the local law. Statutory home rule power is not at issue in this case.

This case involves constitutional home rule power. Municipalities exercise constitutional home rule by charter ordinance. Wis. Stat. § 66.0101(1). The constitutional home rule amendment was adopted after this Court held that the legislature's 1911 statutory grant of municipal home rule power was an unconstitutional delegation of power. *State ex rel. Mueller v. Thompson*, 149

Wis. 488, 137 N.W. 20 (1912). The express language of the amendment empowers cities and villages to "*determine* their *local* affairs and government" subject *only* to the Constitution and "to such enactments of the legislature of *statewide* concern as with uniformity shall affect every city or every village." Wis. Const. Art XI, Sec. 3(1) (emphasis added). This language is clear and unambiguous.

The amendment was passed by two successive legislatures (1921 and 1923) and ratified by 61.19% of the population voting in the 1924 general election.[1] The "deliberate" procedure set forth in Wis. Const. Art. XII for amending the constitution "render[s] as certain as practicable that the electors desired [the change], evidenced by an expression of judgment after ample time and facility for investigation and maturity of thought on the subject ....." *Id.* at 490, 137 N.W. at 22. It is "clearly judicial duty to liberally construe... such an expression of the will of the people ...." *State ex rel. Ekern v. City of Milwaukee*, 190 Wis. 633, 637, 209 N.W. 860, 861 (1926). *State ex rel. Michalek v. LeGrand*, 7 Wis.2d 520, 526, 253 N.W.2d 505, 506-507 (1977).

The constitutional amendment accomplishes two things. First, it directly grants legislative power to municipalities by expressly giving cities and villages the power to determine their "local affairs and government" so that "such powers are now held by express grant in and by the Constitution,

[1]1925 Wisconsin Blue Book available at http://digital.library.wisc.edu/1711.dl/WI.WIBlueBk1925. Also 2011-2012 Wisconsin Blue Book at p. 218, summarizing history of constitutional amendments.

whereas formerly any such power was held solely through and by the Legislature, which might give, amend, or take away." Second, the constitutional home rule amendment limits the legislature in its enactments in the field of local affairs of cities and villages. *Michalek, supra,* 7 Wis.2d 520, 526, 253 N.W.2d 505, 506-507 (1977) citing *State ex rel. Ekern v. Milwaukee*, 190 Wis. 633, 637, 209 N.W. 860 (1926).

The plain language of the home rule amendment requires this Court to first determine whether Milwaukee's 1938 charter ordinance requiring municipal employees to reside in the City, is a matter of the City's local affairs and government. The phrase "local affairs and government," "in a document such as a constitution, in broad and general terms, should have a liberal construction looking toward virility rather than impotency." *State ex rel. Ekern v. City of Milwaukee*, 190 Wis. 633, 639, 209 N.W. 860, 861 (1926). Beginning the inquiry by asking whether sec. 66.0502 is a matter of statewide concern or whether it uniformly affects every city or village puts the cart before the horse. If the Court determines that Milwaukee's ordinance governs a matter of local affairs, then constitutional home rule empowers the City to determine it. Only then should the Court consider whether sec. 66.0502 is a legislative enactment of statewide concern and, if so, whether it uniformly affects all cities and villages. If the Court determines that sec. 66.0502 is **not** a legislative enactment of statewide concern within the meaning of the home rule amendment or that it does not uniformly affect every city or every village, that

determination does not invalidate sec. 66.0502. It does, however, mean that the City of Milwaukee's charter ordinance is not superseded by sec. 66.0502.

**THE CONSTITUTIONAL HOME RULE AMENDMENT WAS PURPOSEFULLY DRAFTED NOT ONLY TO EMPOWER CITIES AND VILLAGES TO DETERMINE THEIR "LOCAL AFFAIRS AND GOVERNMENT" BUT TO PROTECT CITIES AND VILLAGES FROM LEGISLATIVE INCURSIONS INTO MATTERS OF LOCAL AFFAIRS AND GOVERNMENT.**

The plain language of the constitutional home rule amendment undermines the Attorney General's contention that the amendment was intended as nothing more than a measure to relieve the legislature of the burden of enacting local laws and "left the Legislature with full authority to displace through uniform legislation, any local laws that the newly empowered cities chose to adopt" is clearly incorrect (Att'y Gen'l's brief at p. 1).

The League, the City, and *amicus* Wisconsin Institute for Law and Liberty agree that current jurisprudence ignores the plain language of the Wisconsin Constitution (City's brief at 25-29, WILL brief at 7, n.9). This is very troubling because the constitutional home rule amendment was drafted purposefully and clearly to empower cities and villages to determine their local affairs and government, and to limit the legislature's interference with that power. In order to interpret the constitutional home rule amendment in a meaningful way that honors and respects the Constitution, we respectfully submit that this Court must first look to the plain and unambiguous language of

the amendment. *State ex rel Kalal v. Circuit Court of Dane County*, 2004 WI 58, par. 45, 271 Wis.2d 633, 681 N.W.2d 846.

We offer extrinsic evidence to refute the Attorney General's contention that the amendment was merely intended to relieve the legislature of the burden of enacting local laws. Although the amendment was certainly intended to relieve the legislature of the burden of enacting local laws, that was not its sole purpose; the drafters clearly intended not only to remove from the legislature the power to determine local affairs and government and vest that power in cities and villages, but to limit the legislature's ability to interfere with cities and villages determining local affairs and government. The Attorney General's brief cites numerous articles quoting Milwaukee Mayor Daniel W. Hoan who was instrumental in drafting the amendment. We agree that Mayor Hoan is a reliable source of authority regarding what was intended in drafting the constitutional home rule amendment. Mayor Hoan is the "writer" of the portion of the League of Wisconsin Municipalities' *amicus* brief in *State ex rel. Sleeman v. Baxter*, No. 252 (1928), referenced in the City of Milwaukee's brief at p. 28. That brief provides much insight into how and why the amendment was drafted as it was.

In the League's *amicus* brief in *Baxter*, Hoan explains that his drafting of the constitutional home rule amendment was informed by his experience in representing Thompson, the mandamused clerk who prevailed in *State ex rel. Mueller v. Thompson*, 149 Wis. 488, 137 N.W. 20 (1912). In *Thompson*, the

City of Milwaukee relied on a grant of statutory home rule authority in amending its charter to add the power to build and operate a municipal ice plant. The city clerk, represented by Hoan, refused to call the election at which the amendment was to be acted on, claiming the act was unconstitutional. The court agreed. Hoan explains that he "carefully studied and understood" the court's opinion in *Thompson* and drafted the home rule amendment to overcome the difficulties pointed out in the decision.

The drafters deliberately chose to directly grant power to municipalities rather than enlarge the legislature's authority to delegate functions to cities. Hoan explains in the LWM *Baxter* amicus brief why he chose to amend the first paragraph of Section 3 of article XI of the Constitution, as opposed to other sections, and further explained that in drafting the amendment, it became obvious to him that "this legislative power of determining form of government, affairs and functions, thus vested in the state legislature, must, to be transferred, be accomplished not only by certain definite words, but by striking words from the constitution so as to eliminate even a possibility of debate as to the intention of the amendment...." LWM Baxter amicus brief at p. 6.

The Wisconsin amendment was also drafted so as to eliminate the difficulties encountered by constitutional home rule amendments in other jurisdictions noted by Judge Timlin in his concurring opinion in *State ex rel. Mueller.* LWM *Baxter* amicus brief at p. 2 The second half of the LWM Baxter amicus brief, authored by the then-League President, Charles

Hammersley and League of Wisconsin Municipalities Counsel, Frank R. Bentley. compares the language used in Wisconsin's constitutional home rule amendment with the limiting language found in other constitutional home rule amendments: Missouri, California, Washington, Michigan, Arizona, Ohio, Virginia, Nebraska, Texas, Florida, Arkansas, Maryland, New York. The brief notes that in some of the states (e.g., New York) the power is expressly limited to a certain class of governmental functions which may be determined by the local units while in all of the constitutional provisions in other states is found this language: "May frame a charter for its own government consistent with and subject to the constitution and laws of the state ...." See LWM amicus Baxter brief at p. 43. They conclude as follows:

> By this comparison, it is strikingly apparent that the Wisconsin amendment far exceeds, in its scope and power for municipal self-government, that in any other states which have adopted such constitutional provision. The rights and powers given to cities and village here, must be determined by a broader rule of construction than those under such a provision or provisions as are set forth in other states.

Hoan amended the constitution as follows, deleting the struck-through language and adding the remainder.

> Cities and villages organized pursuant to state law ~~It shall be the duty of the legislature, and they~~ are hereby empowered, to determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of state-wide concern as shall with uniformity affect every city or every village. The method of determination shall be prescribed by the legislature. ~~to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent abuses in assessments and taxation, and in contracting debts by such municipal corporations.~~

Amicus brief at p. 9 showing the form of Senate Jt. Res. No. 18, introduced January 24, 1923. Hoan says he struck out definite words in Section 3 of Article 11 and added new words thereto so that "not a single member of the legislature, city attorney, member of the Wisconsin League of Municipalities, any citizen or the courts could have any misunderstanding as to what was intended." (Hoan brief at p. 8). He borrowed the word "determine" from the *Thompson* decision and stated, "By employing the word 'determinee' [sic] a new element was injected into Home Rule amendments, such as had never been contained in any other Home Rule amendment. Here was set forth in clear language the power to determine local government and affairs, not by the legislature or the court, but expressly vested in cities and villages." LWM amicus Baxter brief at 13.

Hoan states as follows: "[T]his exact form of the Joint Resolution … was introduced into the legislature, argued by all of the committees, adopted by two sessions without alteration of whatsoever nature." Moreover, he presented and explained the amendment to a conference of municipal attorneys who unanimously accepted the wording and interpretation, "drafted in[sic] specifically explained its meaning to two consecutive conventions of the League of Wisconsin Municipalities at which were present over 300 delegates of city officials and the League thereafter sponsored the amendment before the legislature; drafted the amendment in the form it appears (as a joint resolution in the legislature); appeared at every hearing before committees of the

legislature on the resolution; explained and propounded its meaning at these meetings as one of the representatives of the League of Wisconsin Municipalities and asserts that no other interpretation of this amendment was there offered except as outlined in this brief. LWM Baxter amicus brief at pp. 2 and 8.

A newspaper article quoting Professor Ford H. MacGregor, secretary of the League of Wisconsin Municipalities, also clearly indicates an understanding that the Wisconsin home rule amendment was broader than constitutional home rule amendments in other states and was intended to limit the state legislature in its enactment of local affairs and government. In the article, MacGregor explained that constitutional home rule was not new, noting that it had been tried out in Missouri, Michigan, Ohio, Minnesota, California, Washington, Oregon, Oklahoma, Colorado, Arizona and a number of other states. The newspaper article provides as follows: "While this home rule amendment gives cities and village greater powers of local self government, it in no way ties the hands of the state legislature in matters of *state-wide concern*," declares Mr. MacGregor. "*It does prevent the legislature from interfering in purely local affairs but it does not prevent the state from passing any law in which the state as a whole is interested* (emphasis added)."[2]

[2] Wisconsin Historical Society, Wisconsin Local History & Biography Articles, The Wisconsin State Journal, Madison, WI July 20, 1924; viewed online at

## CONCLUSION

The constitution expressly grants cities and villages the power to determine their local affairs and government and expressly says this power is subject ONLY to the constitution and legislative enactments **of statewide concern** as uniformly affect every city and village. The inclusion of "statewide concern" in the home rule amendment as a limiting principle on the legislature is purposeful. If "statewide concern" wasn't meant as a limiting principle, the home rule amendment would have simply said that municipalities are empowered to determine their local affairs and government subject only to the constitution and legislative enactments that uniformly affect every city and village. Emphatically, that is NOT what it says.

Although the legislature's determination of what is a "local affair" or what is a matter of "statewide concern" within the constitutional home rule amendment is entitled weight, it is not controlling and this court has recognized that the simple fact that the legislature has taken up the matter of municipal employee residency does not make it a matter of statewide concern. The words "'state-wide concern' could not have been used with that precise meaning because the Legislature itself would under such construction have the power of whittling away the provisions of the home-rule amendment." *Van Gilder*, 222 Wis. 58, 267 N.W. 25, 28 (1936).

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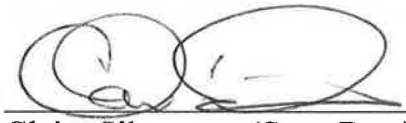
http://www.wisconsinhistory.org on February 4, 2016 and reproduced in Appendix to League brief

The Legislature's assertion of statewide interest in sec. 66.0502 is unsupported and is simply a recitation of "magic words" intended to support a legal conclusion that frees it of the constitutional constraint on its powers. The recitation indicates the legislature wishes the court to view it as a matter of statewide concern, but doesn't speak to the heart of the matter. The courts are not a rubber stamp for the legislature.

This court should declare that Milwaukee's charter ordinance requiring employees reside in the City is a matter of the City's local affairs and that sec. 66.0502 is not, within the purview of constitutional home rule, a matter of statewide concern as with uniformity affects every city and village and that, therefore, the City of Milwaukee's charter ordinance is not superseded by the legislature's enactment of Wis. Stat. sec. 66.0502.

Respectfully submitted this 8th day of February, 2016.

League of Wisconsin Municipalities

By: 

Claire Silverman (State Bar #1018898)

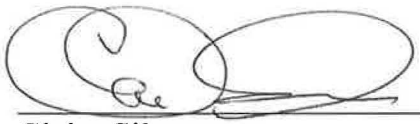
## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 2848 words.

I further certify that I have submitted an electronic copy of this brief which complies with the requirements of sec. 809.19(12) and that the electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the Court and mailed this day to all parties.

Dated: February 8, 2016.



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