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SUPREME COURT
STATE OF WISCONSIN

GREEN BAY PROFESSIONAL POLICE ASSOCIATION and ANDREW WEISS,
Plaintiffs-Appellants-Petitioners,

v.

CITY OF GREEN BAY,
Defendant-Respondent.

AMICUS CURIAE BRIEF OF THE MILWAUKEE POLICE ASSOCIATION IN SUPPORT OF PETITION FOR REVIEW

FROM THE DISTRICT III COURT OF APPEALS
DECISION DATED AND FILED SEPTEMBER 21, 2021,
AFFIRMING THE TRIAL COURT'S JUDGMENT

COURT OF APPEALS CASE NO. 2021-AP-102
TRIAL COURT CASE NO. 2019-CV-1248

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1. INTEREST OF AMICUS CURIAE

The Milwaukee Police Association ("MPA") is a labor organization representing more than one thousand three-hundred (1,300) police officers employed by the City of Milwaukee. All MPA members are subject to discipline under §62.50, Stats., but nonetheless maintain the due process protections afforded governmental employees who possess a protected property interest, under the United States Constitution and caselaw addressing the same.

The MPA therefore has a direct and continuing interest in ensuring that the relevant disciplinary appeal procedures be adhered to and applied in a fair and impartial manner, as well as retaining the due process rights and protections afforded them under the United States Constitution, as well as the laws of the State of Wisconsin.

II. INTRODUCTION AND ARGUMENT SUMMARY

The Green Bay Professional Police Association ("GBPPA") and Andrew Weiss ("Weiss") have filed a Petition for Review with this Court. That Petition should be granted, as:

- The decision below creates a "real and significant" question of Federal Constitutional

law relating to the rights afforded governmental employees under *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). *§809.62(1r)(a), Stats.*

- The decision below is in conflict with controlling opinions of the United States Supreme Court *(Loudermill, et al.) §809.62(1r)d, Stats.*

- It is necessary for this Court to clarify the law as it relates to the due process protections afforded Wisconsin law enforcement officers on an issue that is novel and has statewide impact. *§809.62(1r)(c)2, Stats.*

- The legal issue presented is likely to recur unless resolved by this Court. *§809.62(1r)(c)3, Stats.*

In particular, the actions of the City of Green Bay Chief of Police ("Chief") – in issuing discipline for policy violations never identified during the *Loudermill* process – is in direct conflict with the "notice" and "opportunity to be heard" requirements of *Loudermill* and its progeny. That error was compounded when the Court of Appeals wrongly conflated the "notice" required under Wisconsin's Law Enforcement Officer's Bill of Rights (Wisconsin Statutes Chapter 164) with that required by *Loudermill*. In so doing, the decision below not only allows the government to discipline its law enforcement employees without having to provide them (any/actual) notice

as to the basis for discipline. It further allows the employer to do away with the need to hear what that officer may have to say in his/her own defense, as long as the policy alleged to have been violated has been identified to the officer prior to his/her being interrogated as required under §164.02, Stats.

III. ARGUMENT

1. THE NOTICE REQUIREMENTS ARTICULATED IN *CLEVELAND BOARD OF EDUCATION V. LOUDERMILL* HAVE BEEN SEVERELY AND IMPROPERLY CURTAILED BY THE DECISION BELOW

A. By Wrongly Conflating the Notice Requirement of Chapter 164, Stats., with That of *Loudermill*, the Decision below Not Only Negates the Obligation to Provide "Notice" to Law Enforcement Officers Prior to Depriving Them Their Right to Property, but Prevents Those Officers from Making What *Loudermill* Termed "A Plausible Argument That Might Prevent the Discipline" Prior to its Imposition

The Court of Appeals confused the notice required to be provided under §164.02, Stats., prior to questioning a law enforcement officer, with the "notice and an opportunity to be heard" required under the Constitution and articulated in *Loudermill*. By finding that "all possible violations that were being investigated were made known to Weiss during the

investigation," *Appendix*, at 112, the Court of Appeals (wrongly) reasoned that Weiss had "effectively" been placed on notice (prior to being interrogated) of the policies eventually used to support his discipline–even though they had never been identified during the *Loudermill* process.

Notice under §164.02, Stats., is not the same as *Loudermill*, as it simply advises an officer of the scope of the interrogation prior to the officer being interrogated. It therefore serves two purposes: (1) apprise the officer who is subject to the investigation of the conduct at issue, and; (2) limit the interrogation to what was identified.

Wisconsin Statutes Chapter 164 (Wisconsin's Law Enforcement Officers' Bill of Rights) provides, in pertinent part:

> (1) *If a law enforcement officer is under investigation and is subjected to interrogation* for any reason which could lead to disciplinary action, demotion, dismissal or criminal charges, *the interrogation shall comply with the following requirements:*
>
> (a) *The law enforcement officer under investigation shall be informed of the nature of the investigation prior to any*

> *interrogation. §164.02, Stats.*
> (Emphasis added).

Critically, the "notice" required under *Loudermill* is completely different, both in its scope and purpose. The scope of notice under *Loudermill* pertains exclusively to disciplinary "charges" - something that can only arise *after* an investigation has been concluded - and requires that the employer provide the officer with evidence uncovered as a result of the investigation that led to the charge(s). The purpose is straightforward; provide the employee with the ability to respond to the "charges" identified, so as to provide his/her side of the story so as to counter the disciplinary allegations. As *Loudermill* stated, a "tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Loudermill*, 470 U.S. at 546. (Emphasis added).

As Petitioners correctly recognize, the "pre-interrogation notice as to the nature of the investigation" under Chapter 164, Stats., is a far cry from the due process requirements to provide notice and an opportunity to be heard prior to the government actually depriving an employee of a property right." *Petition for*

Review, p.19. The one (§164, Stats.) advises an officer as to the scope of the questioning during the investigation, whereas the other (*Loudermill)* advises the employee of what was uncovered during the investigation and provides him/her with the ability to respond thereto and potentially avoid the imposition of discipline altogether.

Obviously, a "pre-interrogation notice" has absolutely nothing to do with the Supreme Court's 1997 clarification that the government "include oral or written notice of the *charges*, an explanation of the employers evidence, and an opportunity for the employee to tell his side of the story." *Gilbert v. Homar,* 520 U.S. 924, 929 (1997) (Emphasis added). Simply put, a "pre-interrogation notice" cannot possibly identify "charges" that have arisen as a result of a completed investigation.

Yet, the Court of Appeals nevertheless reasoned below that notice provided under Chapter 164 counted as the "notice" required under *Loudermill*; thereby allowing the government to impose discipline on matters that were never identified during the *Loudermill* process. That turns traditional notions of due process on its head and certainly cannot be allowed to stand.

B. Not Only Does the Decision below Prove Wildly Impractical, it Leads to Absurd Results

The Court of Appeals' decision below is recklessly impractical. If discipline can include "charges" that were *never* identified by the employer during the *Loudermill process*, the affected employee is left to literally guess as to what should and should not be addressed in order to forestall the imposition of discipline; that is mainfestly at odds with due process. As stated in *Loudermill*:

> The essential requirements of due process, and all that respondents seek or the Court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement . . . *The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. Loudermill*, 470 U.S. at 546. (Emphasis added; internal citations omitted.)

It is unreasonable (and entirely unfair) to believe that an employee would, on their own accord, "respond" that are not

presented to them–even if such things were mentioned early on as part of an initial investigation, but were never disclosed as a violation after the investigation had been completed. Think about it. After all, a reasonable employee would assume that, while a wide variety of areas may have been investigated, the *results* of the investigation had necessarily narrowed the areas of potential misconduct such that only those *results* would need to be addressed going forward.

Conflating the notice required under §164.02, Stats., with what is required under *Loudermill* leads to additional absurd results. Viewing the two (2) types of notice as interchangeable (as the Court of Appeals did), allows the employer to claim compliance with *Loudermill* by simply advising its law enforcement employees prior to their §164, Stats., interrogation that the investigation would include a review of the officer's conduct with respect to all governmental policies.

The government could then avoid advising the officer as to any specific "charges" whatsoever; leaving the officer with the burden of trying to guess as to what was truly of concern to his/her employer. While such a procedure is now justified by the

decision below, it is clearly at odds with *Loudermill's* notice requirements, as the employee would have no opportunity to present his/her side of the story and explain why discipline should not issue. These fundamental concepts were lost on the Court of Appeals, and without this Court's assistance, will be lost forever moving forward. That, in turn, would allow the employer to take action without any "initial check against mistaken decisions" with respect to the imposition of discipline; a direct violation of *Loudermill's* stated purpose.

2. REVIEW IS NECESSARY TO MAINTAIN THE DUE PROCESS PROTECTIONS HISTORICALLY PROVIDED TO LAW ENFORCEMENT OFFICERS IN WISCONSIN

A. A Decision by This Court Will Clarify the Law with Respect to the Procedural Due Process Required Prior to Depriving Wisconsin Law Enforcement Officers of Their Property Rights

The City of Green Bay Police Department ("GBPD") has created a procedure by which it provides employees such as Weiss with due process. Prior to questioning an officer, the GBPD adheres to §164.02, Stats., by providing notice of the "nature of the investigation." Then, prior to the imposition of discipline, the GBPD provides the officer with written notice of

the proposed policy violations; a procedure commonly referred to as a *Loudermill* notice. *P-App.,* at 134-35. The accused officer may then respond to what has been identified as the reason(s) for potential discipline via a face-to-face meeting with the Chief (i.e., a *Loudermill* hearing).

While those particular procedures may vary somewhat from one department to another, every Wisconsin law enforcement department provides some form of notice to an officer after an investigation has been completed (identifying the basis for potential discipline), as well as a reasonable opportunity for the officer to respond thereto, be it in person or in writing. That process adheres to *Loudermill's* mandate that a "tenured public employee is entitled to oral or written notice of the *charges* against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.") *Loudermill,* 470 U.S. at 545-46. (Emphasis added).

Due process breaks down where, as occurred here, an officer is eventually disciplined for policy violations never identified in either the *Loudermill* notice or discussed in the *Loudermill* hearing. If the resulting discipline includes a loss of

property (as was the case here), then *Loudermill* is violated and an unconstitutional deprivation occurs. The reason is simple. If an officer was never provided "an explanation of the employer's evidence" against him, he/she is necessarily prevented from being heard. It could not be more clear and unambiguous.

CONCLUSION

The issue in this case (providing notice and an opportunity to be heard) is central to traditional notions of fair play and due process. Continued adherence with *Loudermill* is also essential to law enforcement officers throughout Wisconsin. Unfortunately, the decision below has turned *Loudermill* on its head, and created a process that would gut *Loudermill* beyond recognition. As the decision below has been ordered published, *Appendix*, at 102 it will effect each and every law enforcement officer in Wisconsin. Review is therefore necessary, lest Wisconsin law enforcement personnel be relegated to a watered down version of due process–a proposition directly at odds with current law. See e.g., *Driebel v. City of Milwaukee*, 298 F.3d 622, 637 (7th Cir. 2002) quoting *Garrity v. New Jersey*, 385 U.S. 493, 500, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967) *(Law*

enforcement officers are "not relegated to a watered-down version of constitutional rights.").

For those reasons, the MPA respectfully requests that this Court grant its Motion to submit this Amicus Brief, and accept review of the decision of the District III Court of Appeals in this case.

Dated at Milwaukee, this 28th day of October, 2021.

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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 an Amicus Brief produced with a proportional serif font. The length of this Amicus Brief is 2,078 words.

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CERTIFICATE OF MAILING

I, Lynnae Henderson, of Cermele & Matthews, S.C., 6310 West Bluemound Road, Suite 200, Milwaukee, Wisconsin, 53213, being sworn and upon oath do state that on October 29, 2021, per §809.19(8)(a)2, Stats., I placed in the United States Mail a three (3) copies of this brief to:

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Dated this 28th day of October, 2021.

Lynnae Henderson

Subscribed and sworn to before me
this 28th day of October, 2021.

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.

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