SUPREME COURT
STATE OF WISCONSIN

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

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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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),

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 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.)*

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."*

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

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]

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).

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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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:

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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.

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