SUPREME COURT
STATE OF WISCONSIN

Appeal No. 2014-AP-400

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

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

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January 25, 2016

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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Police Residency Requirements, Professionalism, Economic Conditions and Equal Employment Goals*, 2-4, 23, 29 (1996) (unpublished Ph.D. dissertation, Urban Studies Program, Univ.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,

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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

Kenneth Chesebro

Certificate of Compliance
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

Richard M. Esenberg /RMS

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