STATE OF WISCONSIN
SUPREME COURT
NO. 2015AP1523

Vincent Milewski and Morganne MacDonald,

Plaintiffs-Appellants-Petitioners,

v.

Town of Dover, Board of Review for the Town of Dover, and Gardiner Appraisal Service, LLC, As Assessor for the Town of Dover,

Defendants-Respondents-Respondents.

PETITION FOR REVIEW OF A DECISION OF THE COURT OF APPEALS DISTRICT II

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Vincent Milewski and Morganne MacDonald respectfully petition the Wisconsin Supreme Court for review of the May 4, 2016 decision of the Court of Appeals in this case, 2015AP1523, pursuant to Wis. Stat. §§808.10 and 809.62.

ISSUES PRESENTED FOR REVIEW

Issue 1: Whether government entry into a citizen's home under Wis. Stat. §70.47(7)(aa) and §74.37(4)(a) (which together require property owners to permit interior inspections of homes for tax assessment purposes or forfeit their right to challenge their assessment in any manner) constitutes a search for Fourth Amendment purposes.

Court of Appeals' Decision: This issue was raised in the parties' respective dispositive motions and decided by the Circuit Court and the Court of Appeals on summary judgment. The Court of Appeals held that government entry into a citizen's home under these statutes was not a Fourth Amendment search and thus citizens were entitled to no constitutional protection from such government activity.

Issue 2: Whether warrantless searches under Wis. Stat. §70.47(7)(aa) and §74.37(4)(a) are reasonable as a matter of law.

Court of Appeals' Decision: This issue was raised in the parties' respective dispositive motions and decided by the Circuit Court and the Court of Appeals on summary judgment. The Court of Appeals held that even if warrantless searches under Wis. Stat. §70.47(7)(aa) and §74.37(4)(a) were treated as Fourth Amendment searches, they are reasonable as a matter of law.

Issue 3: Whether Wis. Stat. §70.47(7)(aa) and §74.37(4)(a) violate the Due Process Clause by depriving a citizen of any right to appeal a tax assessment if the citizen denies consent to an assessor to conduct an interior inspection of the citizen's home.

Court of Appeals' Decision: This issue was raised in the parties' respective dispositive motions and decided by the Circuit Court and the Court of Appeals on summary judgment. Given its conclusion that no Fourth Amendments rights were implicated, the Court of Appeals found that there was no violation of the Due Process Clause.

BRIEF STATEMENT OF CRITERIA FOR REVIEW

The Plaintiffs-Appellants refused to allow a tax assessor inside their house to inspect it without a warrant. When their home was reassessed, its assessed value was increased by over 12%. The taxing authority similarly

increased the assessed value of three other houses in the same subdivision that the assessor had not been permitted to enter. *Every other property in the subdivision had its assessed value lowered by the taxing authority.* When the Plaintiffs-Appellants attempted to challenge this anomalous, outlying assessment, they were not permitted to do so either administratively or in court because they had refused to consent to an interior inspection of their home by the government.

The Plaintiffs-Appellants filed suit alleging that the government's conduct violated their Fourth Amendment and Due Process rights. The Circuit Court granted summary judgment to the Defendants-Respondents. The Court of Appeals rejected the Plaintiffs-Appellants' appeal, holding that entry into a citizen's home by the government for tax assessment purposes was not a search and citizens were not protected by the Fourth Amendment from such governmental intrusion. Because the government intrusion was deemed not to be a search, the Court of Appeals further held that the statutes that punish citizens for withholding their consent to entry into their home by eliminating their right to challenge their tax assessment do not violate their rights to due process.

Put simply, the Court of Appeals decision authorizes general warrantless searches for the purpose of imposing taxes. Because citizens who refuse may not challenge their assessment, the penalty for refusing to consent to this general and warrantless search is to be assessed almost any tax the government is willing to impose.

1. This case presents real and significant questions of state and federal constitutional law. Wis. Stat. §809.62(1r)(a). This Court should hold that an entry into a citizen's home for purposes of tax assessment is a "search" and penalizing those who refuse to consent to such a search is a violation of the Fourth Amendment of the United States Constitution and Art. I. sec. 11 of the Wisconsin Constitution. It should hold that the punishment for withholding consent - the elimination of any and all rights to appeal the assessment - is a denial of due process.

2. There are no published cases in Wisconsin that consider the impact of the Fourth Amendment and the Due Process Clause on the Wisconsin statutes governing property tax assessment. Because this is a case of first impression, a decision from this Court will clarify the law and have statewide impact. Wis. Stat. §809.62(1r)(c)2.

3. The questions presented here will recur whenever a homeowner refuses to consent to a tax assessor's demand to search a home. They are not factual in nature, but are questions of law of the type that are likely to recur unless resolved by the Supreme Court. Wis. Stat. §809.62(1r)(c)3.

4. The Court of Appeals' decision is in conflict with controlling opinions of the United States Supreme Court. Wis. Stat. §809.62(1r)(d). In *Camara v. Municipal Court of San Francisco*, 387 U.S. 523 (1967), the Supreme Court declared unconstitutional an ordinance that punished the refusal to consent to an administrative search of a home. Wisconsin statutes impose a similar sort of punishment. In *McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 36 (1990), the Supreme Court declared that states must provide some post-deprivation process for the recovery of taxes unlawfully levied. Wisconsin law has stripped the Plaintiffs-Appellant of **any** remedy for the recovery of taxes unlawfully levied.

STATEMENT OF FACTS AND OF THE CASE

The Plaintiffs-Appellants, Vincent Milewski and Morganne MacDonald, are husband and wife and own a home at 1232 Linden Lane

(the "Property"), which is located in the Lorimar Estates subdivision within the Town of Dover (the "Town"). (R. 41:2, 4; R. 43:2, 4; R. 42:2; R. 25:1.) Prior to 2013, the Property was assessed at $273,900, with an estimated fair market value of $277,761. (R. 35:3-4; R. 26:22.)

The Town performed a new assessment of all real property within the Town for the 2013 tax year. (R. 41:3; R. 42:3; R. 43:3; R. 35:3-4; R. 26:7-9.) On or about August 14, 2013, the Plaintiffs-Appellants received a notice stating "An assessor will stop to view your property on Tues, Aug 20 at 6:10 pm." (*Id.*, 15.) On August 20, 2013, when the assessor arrived at the Property, Ms. MacDonald offered to open the gate to their yard and told him he was welcome to view the Property from the exterior, but he would not be allowed inside the house. (R. 24:1.) The assessor left without accepting Ms. MacDonald's offer to enter into the yard and view the exterior of the property, and without questioning her about the interior of her home. (*Id.* at 2; R. 26:18; R. 26:38; R. 26:40-41.)

On October 4, 2013, the assessor sent the Plaintiffs-Appellants a certified letter indicating he had not "viewed the interior of your buildings" and asking the Plaintiffs-Appellants to schedule a time for viewing. (R.

26:16.) The Plaintiffs-Appellants did not schedule a time for viewing, but did write a letter to the Town objecting to interior inspections. (R. 25:8-9.)

The Assessor then re-valued the Property at $307,100, increasing 12.12% from the previous assessment of $273,900 and 10.56% from the previous estimated fair market value of $277,761. (R. 26:19-20, 22.)

The Plaintiffs-Appellants allege (and submitted evidence to the Circuit Court) that the increased valuation was done in retaliation for their refusal to permit an interior inspection and/or as a way of coercing the Plaintiffs-Appellants (and, by example, other citizens) to permit such an inspection. Of forty-three parcels in the Plaintiffs-Appellants' subdivision, only four (including the Property) had not been subjected to an internal inspection by the assessor. (R. 25: 3, 10-13; R. 26:23-24, 40.) Due to market conditions, the assessor decreased the "fair market" values of the thirty-nine parcels whose owners consented to an interior inspection by an average of 5.81%. (R. 25:3, 10 (App. 127).)

Home values were down, but not for the owners who refused to consent to a warrantless search of their homes. The market was somehow kind to these homeowners in a way that it was not for everyone else in the neighborhood. The assessor increased the "fair market" valuation of those

four parcels by an average of 10.01%. Two of the original inspection holdouts later permitted inspection and their assessments were then lowered, apparently to reflect some newly discovered information that their value was consistent with that of all the other houses in the subdivision. (R. 26:23-24, 40.) One parcel, located at 24219 Lotus, decreased from $257,700 to $200,400, or 22.24%. (*Compare* R. 25:10 (App. 127) *with* R. 38:3 (App. 128).) The other, located at 1248 Larkspur, decreased from $270,300 to $235,600, or 12.84%. (*Compare* R. 25:10 (App. 128) *with* R. 38:3 (App. 128).) **The result of the re-assessment project was thus a finding by the assessor that all of the houses in the Lorimar subdivision had decreased in value – except the two whose owners had not consented to an interior inspection.**

On or about November 14, 2013, the Plaintiffs-Appellants filed an Objection Form for Real Property Assessment with the Town. (R. 25:3, 14; R. 26:17.) On November 25, 2013, Mr. Milewski appeared at the Dover Board of Review ("BOR") hearing, attempting to object to his assessment. (R. 25:3.) The BOR denied him the right to appear and contest his assessment, concluding that, under Wis. Stat. §70.47(7)(aa), he had "refused a reasonable request by certified mail of the assessor to view [his]

property." (*Id.*, 4.) At the BOR hearing, Mr. Milewski argued that §70.47(7)(aa) did not bar him from challenging his assessment. (*Id*.) The BOR rejected his argument and refused to allow him to appear and contest his assessment. (*Id.*; R. 41:4-5; R. 42:4; R. 43:5; R. 26:17.)

The Plaintiffs-Appellants paid the taxes due on the Property for Tax Year 2013 in two installments, on December 31, 2013 and January 30, 2014. (R. 25:4; R. 26:34; R. 41:5; R: 43:5.) On January 30, 2014, the Plaintiffs-Appellants served on the Town Clerk a Notice of Claim and Claim under Wis. Stat. §74.37 against the Town, alleging that their assessment was excessive and the Town had violated their Fourth Amendment rights. (R. 25:4, 15; R. 41:5; R. 43:5.) The Town of Dover did not deny or allow the Claim within 90 days after the Claim was filed. (R. 41:5; R. 43:5.)[1]

The Plaintiffs-Appellants then filed this lawsuit. On May 6, 2015, the Circuit Court held a hearing on dispositive motions filed by the parties. After argument, the Court issued an oral ruling granting the Defendants' dispositive motions and denying the Plaintiffs' motion for partial summary judgment. (R. 47:30-49.) On June 11, 2015, the Circuit Court entered a

[1] The Plaintiffs-Appellants followed a similar procedure of paying the taxes and filing claims for the years subsequent to 2013 as well. (R. 41:5; R: 43:5.)

written order to that same effect. (R. 44.) On July 24, 2015, the Plaintiffs-Appellants filed a timely notice of appeal. (R. 46.) The Court of Appeals affirmed the decision of the Circuit Court on May 4, 2016.

ARGUMENT

I. ENTERING A HOME TO ASSESS IT IS A "SEARCH" AND NOT REASONABLE AS IMPLEMENTED IN WISCONSIN LAW

According to the Court of Appeals, it is acceptable for the government to demand entry into a home to conduct a tax assessment. If the homeowner refuses, the government may then levy and collect a tax of any amount and the homeowner can do nothing about it. There is no appeal to the Board of Review. There is no day in court.

The Court of Appeals saw no constitutional problem with this result. They say it simply reflects a perfectly reasonable system for collecting taxes and, as such, is beyond the scope of the Fourth Amendment. It is not. The British practice of general and warrantless searches of homes to collect taxes was one of the main evils the framers sought to prevent by the Fourth Amendment:

> To combat tax evasion, the British and the American colonial governments used general warrants and writs of assistance to look for untaxed goods in homes and other buildings. . . . These general warrants and writs of assistance **were very much opposed** by the Americans and they **were the impetus for the Fourth Amendment prohibition**

> **against general warrants and the requirement that searches be reasonable**.

Collins T. Fitzpatrick, *Protecting the Fourth Amendment So We Do Not Sacrifice Freedom for Society*, 2015 WIS. L. REV. 1, 4-5 (emphasis added).

John Adams – perhaps the principal author of the Fourth Amendment[2] – was fully aware of the history of the King using his power to search colonists' homes for revenue purposes. In February 1761, he personally attended a court argument on this issue in a case known as *Paxton's Case*. Massachusetts Historical Society, The Adams Papers: Digital Edition, https://www.masshist.org/publications/apde2/view?id=ADMS-05-02-02-0006-0002-0001#ptrLJA02d034n1) (citing Legal Papers of John Adams, Vol. 2 at 107). The King had given British custom authorities general and permanent "writs of assistance" to look for taxable goods that were challenged by famous colonial lawyer James Otis. When Adams recounted the case years later he noted that the argument by counsel opposing the King's power on this issue was "the first Act of Opposition to the arbitrary Claims of Great Britain. Then and there the child

[2] "No other actor, drafter or 'framer' had any comparable influence [to Adams] on the language and structure of the Fourth Amendment." Thomas H. Clancy, *The Framers' Intent: John Adams, His Era and the Fourth Amendment*, 86 IND. L. J. 979, 1052 (2011).

Independence was born." *Id.* The Court of Appeals literally authorizes what our Founders abhorred.

A. The Government's Entry into a Home for Tax Assessment Purposes is a Fourth Amendment "Search"

The Court of Appeals decided that Wisconsin Statutes §70.47(7)(aa) and §74.37(4)(a) did not violate the constitutional rights of the Plaintiffs-Appellants because a warrantless entry under the tax assessment statutes is not the kind of "search" that is governed by the Fourth Amendment.[3] (Ct. App. Dec. ¶15.)

The Court of Appeals' conclusion, however, runs contrary to the plain language of the Fourth Amendment, which expressly protects "[t]he right of the people to be secure in their . . . houses." "When 'the Government obtains information by physically intruding' on . . . houses, . . . 'a 'search' within the original meaning of the Fourth Amendment' has 'undoubtedly occurred.'" *Florida v. Jardines*, 133 S. Ct. 1409, 1412 (2013) (quoting *U.S. v. Jones*, 132 S. Ct. 945, 950-51, n. 3 (2012).

[3] Article I, Section 11 of the Wisconsin Constitution is identical to the Fourth Amendment, save one punctuation change, and Wisconsin courts ordinarily "construe[] the protections of these provisions coextensively." *State v. Artic*, 2010 WI 83, ¶28, 327 Wis. 2d 392, 786 N.W.2d 430. The Plaintiffs-Appellants' complaint asserted a claim under both.

After the American Revolution, with, as noted above, the experience of improper revenue searches "[v]ivid in the memory of the newly independent Americans," the Fourth Amendment was drafted, proposed and ultimately ratified by the States. *Payton v. New York*, 445 U.S. 573, 583 n. 21 (1980) (citing *Boyd v. United States*, 116 U.S. 616, 625(1886)). The United States Supreme Court has since made clear that "[f]reedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment." *Id.* at 587. "[T]he Fourth Amendment," the Court has held, "has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Id.* at 590. *See also State v. Sobczak*, 2013 WI 52 ¶27; *State v. Felix*, 2012 WI 36 ¶76 (Prosser, J., concurring).

Homeowners therefore have a constitutional right to refuse to consent to the government entering their home, and once refused, the government cannot enter without obtaining a warrant unless faced with an emergency situation. *See Donovan v. Dewey*, 452 U.S. 594, 598, n. 6 (1981) ("Absent consent or exigent circumstances, a private home may not be entered to conduct a search or effect an arrest without a warrant."). The government function of collecting taxes does not give license to invade the

sanctity of the home. Because preventing government searches of the home which were intended to assist government tax collection was one of the primary purposes of the Fourth Amendment, tax collection must conform to its strictures - not override them.

The Court of Appeals said a warrantless property inspection should be permitted because it will not lead to criminal prosecution, but the right to be free of searches of one's home is not limited to those accused of committing a crime. *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 530-31 (1967) (it would be "anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior"). Administrative searches, no less than searches for evidence of a crime, "are significant intrusions upon the interests protected by the Fourth Amendment." *Id.* at 534.

It would be an odd result to decide that the government may **not** enter into a home without a warrant to further the significant governmental

interest of arresting a felon,[4] but may do so to further the less significant governmental interest of conducting tax assessments.

The distinction under the Fourth Amendment between entering the home for tax assessment purposes and doing an external inspection was made clear in *Widgren v. Maple Grove Twp.*, 429 F.3d 575 (6th Cir. 2005). In that case, the Court held that an exterior inspection of a home for tax assessment purposes was not a Fourth Amendment search but clarified as follows:

> At the very core [of the Fourth Amendment] stands the right of a man to retreat *into* his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961), *quoted in Kyllo v. United States*, 533 U.S. 27, 31, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001) (emphasis added)… In short, "the Fourth Amendment has drawn a firm line at the entrance to the house" so that, "[a]bsent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton v. New York*, 445 U.S. 573, 590, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). This "distinction of constitutional magnitude" between a house's interior and exterior is firmly rooted in the text of the Fourth Amendment, "which guarantees the right of people 'to be secure *in* their ... houses' against unreasonable searches and seizures." *Kyllo*, 533 U.S. at 41, 43, 121 S.Ct. 2038 (Stevens, J., dissenting) (emphasis in original).

Id. at 583 (alterations in original).

Moreover, the fact that the tax assessor never went inside the Plaintiffs-Appellants' home does not eliminate their Fourth Amendment

[4] Such as in *Payton*, where the Court held that the Fourth Amendment prohibited warrantless and nonconsensual entry into a suspect's home to make a felony arrest. 445 U.S. at 576.

claim. A constitutional claim can be premised on punishment for exercise of a constitutional right. *See, e.g.*, *Dunn v. Blumstein*, 405 U.S. 330, 341 (1972) (quoting *Harman v. Forssenius*, 380 U.S. 528, 540 (1965) ("'It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution." "Constitutional rights would be of little value if they could be . . . indirectly denied.'"). Here, the Plaintiffs-Appellants were punished for refusing to consent to a search by being stripped of their constitutional right to appeal the assessment.

That warrants are required for enforcement of noncriminal statutes and regulations and that a penalty for refusing a search can violate the Fourth Amendment is established by the U.S. Supreme Court's decision in *Camara*. In that case, the U.S. Supreme Court declared that entry into a home for purposes of making a building inspection constituted a search under the Fourth Amendment. 387 U.S. at 534. Such an inspection, without a warrant, would violate the homeowner's constitutional rights. *Id.* The Court saw no pressing need for immediate inspection that would create exigent circumstances sufficient for a warrantless search, *Id.* at 533, and even devoted a substantial portion of its opinion to addressing what kind of a warrant would be appropriate. *Id.* at 534-39. Here, the governmental task

of tax assessment is of even less urgency than inspecting for dangerous conditions. *Camara*'s holding that property inspections without consent and without a warrant violate the Fourth Amendment should *a fortiori* apply here.

The Court of Appeals believed this case was closer to *Wyman v. James*, 400 U.S. 309 (1971). In *Wyman*, the Supreme Court held that the State of New York could require a parent receiving Aid to Families with Dependent Children ("AFDC") benefits to submit to a home interview as a condition to receiving government benefits. 410 U.S. at 326.

This "benefit" distinction was critical to the result in *Wyman*. The Court there noted that those who dispense charity have an "interest in and expect[] to know how . . . charitable funds are utilized and put to work" and that "[t]he public, when it is the provider, rightly expects the same." 400 U.S. at 319. The caseworker, it reasoned, was "not a sleuth but rather, we trust, is a friend to one in need," *Id.* at 323, who helped ensure that welfare funds intended to benefit children actually did so. *Id.* at 318. If a home interview was refused, there would be no penalty. Aid would simply cease or never begin. *Id*. at 317-18. *Wyman* is inapplicable here.

But the tax collector does not dispense government benefits. The Plaintiffs-Appellants have not applied to the Town to receive any benefits and the tax assessor is not a friend to one in need.[5] Citizens cannot forego paying taxes any more than the building owners in *Camara* could avoid compliance with the building code. If they refuse to consent, the government will not simply go away and leave them alone.

This is not even a case (like that posed in *Wyman*, 400 U.S. at 324) where a taxpayer must prove entitlement to a deduction – a benefit she has claimed and for which she has the burden of proof. *See Interstate Transit Lines v. Comm'r of Internal Revenue*, 319 U.S. 590, 593 (1943) ("[A]n income tax deduction is a matter of legislative grace and . . . the burden of clearly showing the right to the claimed deduction is on the taxpayer.").

A better analogy would be the claim by a taxing authority, say the Internal Revenue Service, that it may conduct general and warrantless searches of a taxpayers' home and effects to look for evidence of unreported income. It cannot do so.

Unlike the parent who applied for the AFDC benefits in *Wyman*, the Plaintiffs-Appellants have asked for nothing to which the Town could

[5] "The Pharisee stood and was praying this to himself: 'God, I thank You that I am not like other people: swindlers, unjust, adulterers, or even like this tax collector." Luke 18:11.

attach the string of requiring a home inspection. If mere residence in the municipality was a "benefit" to which the Town could attach such a string, then *Camara* and all of the other cases protecting homeowners from warrantless searches would have come out the other way. The municipality could conduct warrantless searches for purposes of building inspections, energy management, recycling compliance, crime solving or any other asserted municipal purpose as a condition to a citizen's benefit of living in the municipality. But that is not the law.

Further, *Wyman's* reasoning is inconsistent with current Fourth Amendment law. The U.S. Supreme Court's view of what constitutes a Fourth Amendment "search" has significantly changed since *Wyman* was decided in 1971. In *United States v. Jones*, ___ U.S. ___, 132 S. Ct. 945, 949, 181 L. Ed. 2d 911 (2012), the Supreme Court held that the Government's installation of a GPS device on a citizen's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a "search."

More importantly, in *Jones* the Supreme Court made it clear that it was explicitly changing the analysis applicable to Fourth Amendment jurisprudence to "assur[e] preservation of that degree of privacy against

government that existed when the Fourth Amendment was adopted." 132 S. Ct. at 947.

The Supreme Court characterized its decision as returning to a "trespass" analysis of what constitutes a search. In doing so, Justice Scalia's originalist approach in Fourth Amendment cases was adopted by the majority of the Supreme Court. Timothy C. MacDonnell, *Justice Scalia's Fourth Amendment: Text, Context, Clarity, and Occasional Faint-Hearted Originalism*, 3 VA. J. CRIM. L. 175, 248 (2015) ("Through the *Jones* decision, Justice Scalia has brought about a fundamental change in the Court's Fourth Amendment jurisprudence and moved the Court, at least in this area, toward his originalist approach.").

In *Florida v. Jardines*, ___ U.S. ___, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013), the Supreme Court again followed this originalist approach and concluded that allowing police dogs to sniff on a citizen's front porch was a "search." 133 S. Ct. at 1414 ("When "the Government obtains information by physically intruding" on persons, houses, papers, or effects, "a 'search' within the original meaning of the Fourth Amendment" has "undoubtedly occurred.") (emphasis added). *See also City of Los Angeles,*

Calif. v. Patel, 135 S. Ct. 2443, 192 L. Ed. 2d 435 (2015) (government's viewing of a hotel registry was a "search.").

In each of these cases, the Supreme Court found that conduct far less intrusive than the detailed inspection of the interior of a citizen's home constituted Fourth Amendment searches. The point of these cases is that the Supreme Court deliberately returned Fourth Amendment jurisprudence to its roots. The question to be asked is "whether the framers would have believed that a tax assessor inspecting the inside of a home without a warrant was a "search." Given that a primary purpose of the Fourth Amendment was to protect against warrantless searches for revenue purposes, the answer is absolutely "yes." This is especially so because "when it comes to the Fourth Amendment, the home is first among equals." *Jardines,* 133 S. Ct. at 1414. These recent decisions establish that *Wyman*'s conclusion to the contrary, even were it applicable, is outdated and should be limited to its facts.

B. Wisconsin's Assessment Searches Are Not Reasonable

The Court of Appeals also held that even if a compelled interior inspection by a tax assessor is a Fourth Amendment search, it does not violate the Constitution because such a search is reasonable. (Ct. App. Dec.

¶16-19). The United States Supreme Court has stated, however, that "searches . . . inside a home without a warrant are presumptively unreasonable." *Payton v. New York*, 445 U.S. at 586. The Court of Appeals failed to start from this presumption.

As noted earlier, one of the primary concerns of the framers was to prevent *general* searches – searches done without a warrant – of homes for taxable goods. They believed that the government's interest in raising revenue did not and should not justify warrantless home searches. Concluding that a statute that authorizes general searches of everyone's home is "reasonable" under the Fourth Amendment, turns the framers' intent on its head.

It does no good to say that the Plaintiff-Appellants could refuse when that refusal places them at the unfettered mercy of the tax collector. In this case, the assessor assumed the Plaintiff-Appellants "must have" made undisclosed improvements based on nothing more than their refusal to consent, and increased their assessment while those of comparable properties went down. The "right to refuse" does not amount to much if it can provide the basis for assuming that the government will find whatever it's looking for. *See Dunn v. Blumstein*, 405 U.S. 330, 341 (1972) (quoting

Harman v. Forssenius, 380 U.S. 528, 540 (1965)) ("'It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution.'"). So even if a system of warrantless tax inspection searches could be reasonable by itself, the statutory penalty for resistance cannot be the loss of the right to contest the tax imposed.[6]

The Court of Appeals spent only a single paragraph addressing whether the tax assessor's search was reasonable. (Ct. App. Dec. ¶19.) The Court of Appeals believed that the state's interest in uniformity of taxation outweighed the "relatively low" intrusion into the privacy of their home. As we have seen, entry into the home is never a "relatively low" intrusion. The Court of Appeals failed to begin from a presumption that the warrantless search was unreasonable, and therefore improperly minimized the strong privacy interest people have in their homes.

Nor, as we have seen, is there a "need it to tax" exception to the Fourth Amendment. Given, the Amendment's history, there never could be. Old King George could very well have argued – and probably believed – that general and warrantless searches were necessary to catch those

[6] An aggrieved property owner can only challenge the tax indirectly - by challenging the assessment. And by forfeiting the right to challenge the assessment, the property owner therefore forfeits his right to challenge the tax.

colonial tax evaders. The IRS might welcome the ability to investigate individuals with whom it disagrees by indiscriminately rooting about their property and records. But taxation must conform itself to the Constitution; not the other way round.

In any event, compliance with the Fourth Amendment is not particularly difficult in this context. In the absence of consent to an interior inspection, it would require that the government assess the value of a home using all of the other tools available in the absence of an interior inspection, including inspecting the exterior, interviewing the owners, inspecting building records to determine what improvements have been made to the home, applying what it knows about the home from previous assessments, and applying what it knows about comparable properties. Additionally and as one neighboring State requires, the government could place a pro-active responsibility on homeowners to report modifications to their property that might increase value. *See* Iowa Code §441.24(1).[7]

The government would then issue its assessment which would be binding absent an appeal. Certainly, the homeowners could challenge the

[7] *See also* http://www.johnson-county.com/dept_jc_assessor.aspx?id=2641, listing changes homeowners should report to local assessors (new buildings, additions to house or buildings, new furnace / central air, basement or attic finish, decks, patios, and garages).

assessment, but the law already puts the burden on the homeowner to show how the assessment is wrong. To be sure, the homeowners' failure to permit an inspection might make success in that challenge more difficult (this would depend on the evidence taken as a whole), but it would not preclude an appeal.

Furthermore, the government interest in uniform taxation is not at all served by denying owners the right to appeal. In fact, uniformity is **harmed** by a system that allows assessors to make arbitrary assessments they know cannot be challenged.

The State of New York has shown that a tax assessment system can be consistent with the Constitution. See, *Yee v. Town of Orangetown*, 76 A.D. 104 (N.Y. Sup. Ct. App. Div. 2nd Dept. 2010) (homeowner is entitled to challenge tax assessment in Small Claims court without consenting to internal inspection by tax assessor); *Schlesinger v. Ramapo*, 807 N.Y.S. 2d 865 (N.Y. Sup. Ct. 2006) (homeowner may proceed with tax certiorari proceeding without consenting to interior inspection by tax assessor).

Moreover, the government would remain free to seek a warrant. The Supreme Court has expressly approved of administrative warrants requiring a lower showing than the traditional standard for probable cause. *Camara*,

387 U.S. at 538. In New York, if a town needs to enter the homes of the handful of taxpayers who refuse entry (nothing in the record establishes that all Wisconsin municipalities do interior inspections), it can explain why to a magistrate. *See, e.g., Matter of Jacobowitz v. Bd. of Assessors for Town of Cornwall*, 121 A.D.3d 294, 301-02 (N.Y. App. Div. 2nd Dept. 2014) (entry into home for assessment is a Fourth Amendment search and requires a warrant issued on a showing of probable cause that the search is reasonable).[8]

The State has numerous reasonable options to conduct accurate assessments and impose uniform taxes. Demanding entry into private homes, without a warrant, and upon penalty of losing all ability to challenge the imposed tax, is not one of them. The procedures set forth in the Wisconsin statutes are not reasonable, and not constitutional.

II. Depriving Property Owners of the Opportunity to Challenge their Property Tax Assessment Deprives Them of Property Without Due Process of Law

The United States Constitution mandates that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. "All people are born equally free and

[8] New Hampshire also has an administrative inspection warrant process if homeowners refuse consent for tax assessment interior inspections. See, N.H. Rev. Stat. § 74:17

independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed." Wis. Const. art. I, §1. The Wisconsin Supreme Court interpreted this clause as a protection of due process and has held that "[w]hile the language used in the two constitutions is not identical . . . the two provide identical procedural due process protections." *County of Kenosha v. C & S Mgmt., Inc.*, 223 Wis. 2d 373, 393, 588 N.W.2d 236 (1999).

The Town's excessive taxation of the Plaintiffs-Appellants' Property has deprived them of their property. *See McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 36 (1990) ("[E]xaction of a tax constitutes a deprivation of property."). Due process requires that they have a "fair opportunity" to receive "adequate, effective, and meaningful" access to the courts to argue that the assessment of their Property was improper. Moreover, meaningful access to the courts is a fundamental due process right. *Lewis v. Casey*, 518 U.S. 343, 350-51 (1996).

It is therefore unconstitutional to deprive taxpayers of the opportunity to challenge their tax assessments. Section 70.47(7)(aa), combined with Section 74.37(4)(a) and the other statutes requiring

completion of the board of review process before a tax challenge may be brought to court, deprive the Plaintiffs-Appellants of that fair opportunity. Section 70.47(7)(aa), as applied by the Defendants-Respondents, subjects the Plaintiffs-Appellants to a deprivation – an increased assessment resulting in higher taxes – without *any* opportunity to challenge it.

The U.S. Supreme Court has made it clear that state governments must provide a post-deprivation remedy for the recovery of taxes unlawfully levied. *McKesson*, 496 U.S. at 51. Property owners cannot be forced to pay taxes with no method of challenging the legality of that tax:

> To satisfy the requirements of the Due Process Clause . . . [a] State must provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a 'clear and certain remedy,' for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one."

McKesson, 496 U.S. at 39 (citation and footnote omitted).

That the Plaintiffs-Appellants could have kept their due process rights if they had submitted to a warrantless search of their home does not remedy the problem. Such a choice between fundamental rights is impermissible. *See Dunn*, 405 U.S. at 341-42. As noted above, conditioning a benefit, or imposing a penalty, for the exercise of constitutional rights constitutes an "unconstitutional condition." *See* p. 16 *supra*.

The Fourth Amendment, according to the Court of Appeals, cannot have been violated because the Plaintiffs-Appellants were not "compelled" to consent to a search, they were only denied a post-deprivation remedy. The denial of that remedy does not run afoul of the Fourteenth Amendment, it said, because the loss of the remedy was brought about by failure to consent to a search. In its view, the Plaintiff-Appellants were required to choose between their privacy rights and their due process rights. They could not have both.

CONCLUSION

Sections 70.47(7)(aa) and 74.37(4)(a) together violate the Plaintiffs-Appellants' Fourth Amendment rights and their right to due process of law. This Court should take this case on review to make sure that Wisconsin law is in line with current Fourth Amendment jurisprudence and that our state's method of assessing and collecting property taxes does not infringe on the constitutional rights of its citizens. The Plaintiffs-Appellants respectfully request that this Court grant their Petition for Review.

Dated this 2nd day of June, 2016.

Respectfully submitted,
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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief and appendix conform to the rules contained in section 809.19(8)(b) and (c) for a brief and appendix produced with proportional serif font. The length of the portions of this brief referred to in section 809.19(8)(c)1. is 5,184 words, calculated using the Word Count function of Microsoft Word 2010.

Dated: June 2, 2016

/s/ RICHARD M. ESENBERG
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CERTIFICATION OF ELECTRONIC FILING

I hereby certify that I have submitted an electronic copy of this brief and appendix which comply with the requirements of sections 809.19(12) and 809.19(13). I further certify that this electronic brief and appendix are identical in content and format to the printed form of the brief and appendix filed as of this date. A copy of this certificate has been served with the paper copies of this brief and appendix filed with the court and served on all opposing parties.

Dated: June 2, 2016

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