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 BRIEF AND APPENDIX

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

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

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ISSUES PRESENTED FOR REVIEW

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

   Answered by the Trial Court: "No."

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

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

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

Answered by the Trial Court: "Yes."

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

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

Answered by the Trial Court: "No."

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

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

Stats., and the Home Rule Amendment.

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

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

Answered by the Trial Court: Not Answered.

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

STATEMENT OF THE CASE

Nature of the Case:

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

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

Statement of Facts:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Procedural Status:

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Unfortunately, the Court of Appeals addressed only one

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

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

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

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

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

policy, and asserts home rule authority to do so.

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

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

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

The due process clause of the Fourteenth Amendment is

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. THAT DEPRIVATION VIOLATED SUBSTANTIVE DUE PROCESS.

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

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

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

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

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

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

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

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

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

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

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

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

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

i. The Mayor's Actions.

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

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

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

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

ii. The Common Council's Actions.

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

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

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

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

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

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

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

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

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

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

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

failed to state a claim.

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

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CERTIFICATION AS TO FORM AND LENGTH

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

/s/_____
Jonathan Cermele
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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 December 3rd, 2015, I placed in the United States Mail three copies of this brief to:

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

Dated this 3rd day of December, 2015.

/s/_____
Crystal Lewzader

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

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

ELECTRONIC BRIEF CERTIFICATION

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

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

/s/_____
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INDEX TO APPENDIX

ELECTRONIC APPENDIX CERTIFICATION

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

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

/s/_____
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PETITIONERS' APPENDIX CERTIFICATION

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

1. A table of contents;

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

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

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

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

/s/_____
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