STATE OF WISCONSIN
IN THE SUPREME COURT

JAMES A. BLACK, GLEN J. PODLESNIK AND
STEVEN J. VAN ERDEN,

Plaintiffs-Respondents-Petitioners,

MILWAUKEE PROFESSIONAL FIRE FIGHTERS
ASSOCIATION LOCAL 215,

Intervenor-Plaintiff-Respondent-Petitioner,

MILWAUKEE POLICE ASSOCIATION AND
MICHAEL V. CRIVELLO,

Plaintiffs-Respondents-Cross-Appellants,
Petitioners,

v.

CITY OF MILWAUKEE,

Defendant-Appellant-Cross-Respondent.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-CROSS-RESPONDENT, CITY OF MILWAUKEE

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

GRANT F. LANGLEY, City Attorney
State Bar No. 1013700
MIRIAM R. HORWITZ
Deputy City Attorney
State Bar No. 1016150
200 East Wells Street, Suite 800
Milwaukee, WI 53202
Telephone: 414-286-2601

Of Counsel:
ANNE KEARNEY
State Bar No. 1031085

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Cases

Wisconsin Statutes

Wisconsin Constitution

United States Code

Milwaukee City Ordinances

Other

ISSUES PRESENTED FOR REVIEW

1. Whether the home rule amendment, Wis. Const. art. XI § 3(1), provides the City of Milwaukee with authority to control its "local affairs and government" as reflected in the City's longstanding Charter Ordinance § 5-02, requiring residency for its employees, since Wis. Stat. § 66.0502 is not a legislative enactment of "statewide concern as with uniformity [affects] every city or every village."

The circuit court answered "no." The Court of Appeals answered "yes."

2. Whether the Milwaukee Police Association and Michael V. Crivello can seek damages under 42 U.S.C. § 1983 by claiming a federal constitutionally protected liberty interest arising from Wis. Stat. § 66.0502 to "b[e] free from residency" requirements, where there is no fundamental right or substantive due process violation present.

The circuit court answered "no," on the ground that, while there was a protected liberty interest, there was no deprivation to be redressed. The Court of Appeals answered "no."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are warranted in this case given the significance of the state constitutional provision involved and the federal constitutional redress sought by the Milwaukee Police Association and Michael Crivello as a matter of substantive due process.

NATURE OF THE CASE

The Wisconsin Supreme Court is asked to determine (a) the meaning of Article XI, Section 3(1) of the Wisconsin Constitution, the home rule amendment, as applied to a matter of local affairs of the City of Milwaukee embodied in Milwaukee Charter Ordinance §5-02; and (b) for Wis. Stat. § 66.0502, whether a local employee residency requirement can trigger a federal constitutional violation as a matter of substantive due process permitting damages under 42 U.S.C. § 1983. The City submits that the Court of Appeals was correct in its decision in both respects: the home rule amendment invests the City of Milwaukee with the authority to continue with its longstanding residency Charter Ordinance, and Wis. Stat. § 66.0502 does not create a protectable liberty interest giving rise to a federal constitutional violation necessitating redress under Section 1983.

The control by cities and villages over "local affairs and government" dates from 1924, after two successive Wisconsin legislatures passed and the people of the State of Wisconsin ratified Article XI, Section 3(1) of the Wisconsin Constitution: i.e., the home rule amendment. The amendment's purpose was to give local control to cities and villages through a "direct grant of legislative power to municipalities." *State ex rel. Ekern v. Milwaukee*, 190 Wis. 633, 637-38, 209 N.W. 860, 861 (1926). This "local affairs" authority under the amendment is limited only by "this constitution and . . . such enactments of the legislature of statewide concern as with uniformity shall affect every city or every village." Wis. Const., art. XI, § 3(1). For the reasons explained below, the home rule

amendment authorizes the City to proceed with Charter Ordinance § 5-02. Residency of city employees is a matter of the City's "local affairs." Further, the statute at issue, Wis. Stat. § 66.0502 does not address a "statewide concern" and does not with "uniformity . . . affect every city or every village" because it does not operate equally upon the City of Milwaukee.

This Court also should conclude that Wis. Stat. § 66.0502 does not provide grounds for the claim by the Milwaukee Police Association ("the MPA") and Michael Crivello of a federally cognizable and enforceable liberty right to be free from residency requirements. A continuing residency requirement such as Milwaukee's Charter Ordinance § 5-02 is fully consistent with federal constitutional law. Moreover, as the Wisconsin Court of Appeals properly determined, as a matter of federal law, a state statute cannot create a protectable liberty interest where no fundamental right exists, and no basis for claiming a violation of federal substantive due process law is presented under the circumstances of this case.

STATEMENT OF THE CASE

The residency of city employees has been the subject of the "local affairs" of the City of Milwaukee since 1938. Consistently with the "method of such determination . . . prescribed by the legislature," as set forth in Article XI, Section 3(1) and enacted as Wis. Stat. § 66.0101, the City passed charter ordinances as a matter of constitutional home rule. Charter Ordinance § 5-02, which requires Milwaukee employees as a continuing matter to reside within the

City's boundaries, is an ordinance enacted as a matter of constitutional home rule. (R. 30, Exh. A; App. 151-156.)[1]

The City employs more than 7,000 people and spends approximately $366.8 million on employee salaries annually. (R. 30, Exh. B. ¶ 5.) Given the longstanding nature of the Charter Ordinance, each employee accepted employment from the City of Milwaukee with the knowledge that he or she was subject to the residency requirement. (R. 30, Exh. A; App. 151-156.)

"About 50% of the City's employees are fire and police employees; 50% of its employees serve the City in other capacities." (R. 30, Exh. B. ¶ 5.) For some time, the unions of police and fire employees have sought to eliminate the City of Milwaukee's residency requirements.[2]

City employees residing in the City of Milwaukee are a "stabilizing force" in their neighborhoods, as Mayor Tom Barrett has explained. (R. 30, Exh. B. ¶ 14.) "The annual average income of City employees is approximately $16,000 higher than the annual average income of employed City residents." (R. 30, Exh. B. ¶ 13b.) City of Milwaukee employees buy real estate: "City employees have an

---

[1] (R. __) refers to the appeal record; (App. ___) refers to petitioners' joint appendix; (City App. ___) refers to the City's appendix.

[2] *See generally* "Walker Wrong on Residency Issue," *Milwaukee Business Journal*, March 8, 2013 (stating residency is a "local issue," its inclusion in the budget is "unusual," and it involves the Milwaukee police and fire unions), www.bizjournals.com/milwaukee/print-edition/2013/03/08/walker-wrong-on-residency-issue.html; Opinion, "Our View: Budget Is the Wrong Place to Change Residency Rules," *Milwaukee Journal Sentinel*, February 23, 2013 (stating that changing residency rule is a "major policy change" and noting that "there is good reason to believe it was done primarily at the request of police and firefighter unions in Milwaukee"), www.jsonline.com/news/opinion/budget-is-the-wrong-place-to-change-residency-rules-lv8sc1g-192614961.html.

81% home ownership rate, whereas all City residents have a 42% home ownership rate." (R. 30, Exh. B. ¶13c.)[3]

The Legislative Fiscal Bureau, in Paper #554, titled "Local Government Employee Residency Requirements" and prepared on May 9, 2013 for the Joint Committee on Finance, weighed in on this point as well: the "higher salary levels carry through to the value of homes owned by [City of Milwaukee] employees, which . . . are 20% higher than the average home value in the city." (R. 30, Exh. D, 5; City App. 5.) Mayor Barrett stated more specifically in his affidavit that "City employees' houses have an average assessed value of $116,241, whereas the average assessed value of houses owned by all City residents is $88,402." (R. 30, Exh. B. ¶ 13d.)

The City of Milwaukee may lose 60 percent of its employees as residents over an eleven-year period if the City's residency rule is eliminated. (R. 30, Exh. B ¶ 16.) The Legislative Fiscal Bureau Paper #554 compares an out-migration of City of Milwaukee employees to the exodus of city workers in other Midwestern cities such as Detroit, where 53 percent of the police force moved outside the City, and Minneapolis, where 70 percent of its employees reside outside the city. (R. 30, Exh. D, 6; City App. 6.)

---

[3] These statistics come from a report written by SB Friedman Development Advisors, which was commissioned by the City's budget office to ascertain the effect of the residency requirement. (R. 30, Exh. B. ¶¶ 11-12.) Plaintiffs moved to strike the report and portions of the affidavit of Mayor Barrett; their motion was denied by the circuit court. (R. 33-34, 44; App. 150.)

Not only will this out-migration affect real estate ownership and tax rolls, but "the projected out-migration of City employees will result in a substantial reduction in the gross sales of goods and services of retailers and service providers located in the City." (R. 30, Exh. B. ¶ 13f.) "The Friedman report projects a total loss of 3,940 employee households to the suburbs over an eleven-year period resulting in a reduction in the tax base of $622 million and reduced consumer expenditure within the City of $57 million." (R. 30, Exh. B ¶ 20.) As Mayor Barrett explained, such "a decline in real estate taxes will inevitably result in a decline in the ability of the City to fund municipal services and maintain the quality of life for City residents." (R. 30, Exh. B ¶ 10.)

Nonetheless, in 2013, in taking up the governor's proposed budget, the Wisconsin Legislature considered a provision to eliminate local government residency requirements. *See* Executive Budget (Shared Revenue and Tax Relief), http://doa.wi.gov/Documents/DEBF/Budget/Biennial%20Budget/2013-15%20Executive%20Budget/835-2013-15ExecutiveBudget.pdf. The Legislative Fiscal Bureau in Paper #554 emphasizes that the legislation operates to the detriment of the City of Milwaukee. (R. 30, Exh. D, 4-8; City App. 4-8.) Yet the legislature passed the provision (Section 1270) as part of 2013 Act 20; it became Wis. Stat. § 66.0502. The Milwaukee Common Council followed with Resolution 130376, expressing its legal view that Charter Ordinance § 5-02 was passed consistently with Article XI, Section 3(1) of the Wisconsin Constitution. (R. 30, Exh. C, App. 157-159.)

The Milwaukee Police Association, Michael V. Crivello, James A. Black, Glen J. Podlesnik, and Steven J. Van Erden filed suit in Milwaukee County Circuit Court on July 10, 2013, seeking a "declaration as to the rights and obligations of the parties under § 66.0502, Stats," a writ of mandamus, and an injunction to stop the City of Milwaukee from enforcing its longstanding residency requirement. (R. 1, 4-9.) Plaintiffs further sought compensatory and punitive damages as well as attorneys' fees, arguing that any residency requirement was a "deprivation of liberty" and thus a violation of their substantive due process rights "to be free from residency requirements." (R. 1, 4, 12-15.) The Milwaukee Professional Fire Fighters Association Local 215 intervened with the same demands. (R. 19.)

The City of Milwaukee answered, asserted affirmative defenses, and requested a declaration "that the enactment and continued enforcement of Milwaukee Charter Ordinance § 5.02, the City's residency ordinance, is a matter of local affairs and government, and, accordingly, a lawful exercise of the City's constitutional home rule authority granted to the City by Article XI, § 3, Wis. Const." (R. 11, 17.) The City denied that a claim under 42 U.S.C. § 1983 could be premised on Wis. Stat. § 66.0502. (R. 11, 14-16.) In a stipulation entered two days after plaintiffs filed suit (and ten days after enactment of Wis. Stat. § 66.0502), the parties agreed that the City would not act to enforce the Charter Ordinance's residency requirement. (R. 9.) The stipulation later was extended to encompass the period while the case was pending in the circuit court and court of

appeals and has been extended throughout the pendency of the case in this Court. (R. 22.)

The parties filed cross motions for summary judgment. (R. 23-30, 36-42.) In its decision dated January 27, 2014, the circuit court held that the requirements for declaratory action had been satisfied. (R. 44, 10, App. 139.) It granted plaintiffs' summary judgment motion in part, ruling that "Wis. Stat. § 66.0502 relates to a matter primarily of statewide concern and applies uniformly to all local government units in this state." (R. 44, 21, App. 150.) The circuit court further declared that "Wis. Stat. § 66.0502 creates a constitutional liberty interest in being free from residency requirements as a condition of municipal employment." *Id.* But the circuit court dismissed plaintiffs' claim for relief under 42 U.S.C. § 1983 as it found that no deprivation had occurred. *Id.* The circuit court dismissed plaintiffs' petition for a writ of mandamus. *Id.*

The City appealed. (R. 45.) Only the MPA and Michael Crivello cross-appealed, seeking to reverse the circuit court's dismissal of the 42 U.S.C. § 1983 claim and the denial of a trial as to damages. (R. 46.) The other plaintiffs did not challenge the circuit court's ruling that dismissed their claim under 42 U.S.C. § 1983. *Id.*

The Wisconsin Court of Appeals reversed the circuit court's grant of summary judgment and its declarations as to Wis. Stat. § 66.0502, the home rule amendment, and Milwaukee's Charter Ordinance § 5-02, as well as the determination that Wis. Stat. § 66.0502 gives rise to a "protectable liberty

interest." (App. 105.) The Court of Appeals affirmed the circuit court's determination that "the City of Milwaukee did not violate any of the constitutional rights of the Police Association" and thus decided that the Milwaukee Police Association and Michael V. Crivello could not recover under 42 U.S.C. § 1983. *Id.*

Specifically, the court held that the City of Milwaukee has authority under the home rule amendment to act consistently with the City's residency ordinance. As the Wisconsin Court of Appeals determined, "because Wis. Stat. § 66.0502 does *not* involve a matter of statewide concern and does *not* affect all local governmental units uniformly, it does not trump the Milwaukee ordinance." (App. 105.) As for the claim of a "protectable liberty interest," the Court of Appeals rejected the claim that a federally protected right to be free from residency requirements was created by Wis. Stat. § 66.0502, where a continuing residency requirement like that in City Charter Ordinance § 5-02 has been upheld as constitutional. (App. 118-119.) The Court of Appeals reversed the circuit court on the existence of a federally protected liberty interest and affirmed the court's conclusion that there had been no deprivation of a substantive due process right. (App. 105.)

On November 4, 2015, this Court granted the petition for review of James A Black, Glen J. Podlesnik, Steven J. Van Erden, Milwaukee Professional Firefighters Association Local 215, MPA, and Michael V. Crivello ("police and fire petitioners"). However, the portion of the appeal before this Court pertaining

to the claim under 42 U.S.C. § 1983 is advanced only by the MPA and Michael Crivello, who cross-appealed the adverse judgment on that claim to the Court of Appeals. (Petition for Review and Appendix at 22.)

ARGUMENT

I. The Home Rule Amendment Authorizes the City of Milwaukee to Control the Residency of City Employees As a Matter of "Local Affairs And Government" Where There Is No "Enactmen[t] of Statewide Concern As With Uniformity Shall Affect Every City or Every Village."

The City of Milwaukee enacted Milwaukee Charter Ordinance § 5-02 as a matter of "local affairs and government" under the constitutional home rule amendment. This case does not ask the Court to wade in political waters, determining whether a residency rule is "best," sound, or unsound public policy. *Compare In re Fond du Lac Metropolitan Sewerage Dist.*, 42 Wis. 2d 323, 332, 166 N.W.2d 225, 229 (1969). Rather, this case focuses on the interpretation of a state constitutional provision, viz., the home rule amendment, which the Court reviews *de novo*. *See Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶ 16, 295 Wis. 2d 1, 25, 719 N.W.2d 408, 420.

A. Constitutional Home Rule Authorizes the City to Proceed With Its Residency Charter Ordinance.

The City of Milwaukee seeks declaratory relief permitting enforcement of its residency Charter Ordinance § 5-02 as a matter of constitutional home rule. A declaratory judgment is appropriate here where the parties (and the lower courts) have agreed that there is a "justiciable controversy" in which the parties have

adverse legal interests and the controversy is "ripe for judicial determination." *Loy v. Bunderson*, 107 Wis. 2d 400, 410, 320 N.W.2d 175, 182 (1982). Summary judgment on this declaratory claim (as well as on the 42 U.S.C. § 1983 claim below) is reviewed *de novo* by this Court. *See Olson v. Town of Cottage Grove,* 2008 WI 51, ¶¶ 39, 309 Wis. 2d 365, 385, 749 N.W.2d 211, 221.

The home rule amendment provides as follows:

> 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. The method of such determination shall be prescribed by the legislature.

Wis. Const., art. XI, § 3(1).

In interpreting a constitutional amendment, the Court "is to give effect to the intent of the framers and of the people who adopted it." *State v. Cole*, 2003 WI 112, ¶ 10, 264 Wis. 2d 520, 530, 665 N.W.2d 328, 332 (citations omitted). Here, that intent comes from the 1921 and 1923 legislatures as well as the ratification by the people of the State of Wisconsin in 1924. *See generally State ex rel. Ekern v. City of Milwaukee,* 190 Wis. 633, 637, 209 N.W. 860, 861 (1926).

The purpose of the home rule amendment is to protect cities and villages against actions of the state legislature which override the political and economic interests of local governments in local affairs.[4] It "makes a direct grant of

[4] The investiture of authority in local government can be seen in the terms of Article XI, Section 3(1), in which "[c]ities and villages" now may determine their "local affairs and

legislative power to municipalities" and "limits the legislature in the exercise of its general grant of legislative power." *State ex rel. Ekern*, 190 Wis. at 637-638, 209 N.W. at 861. Indeed, "[t]he recognized purpose of this amendment was to confer upon cities and villages a measure of self-government not theretofore possessed." *State ex rel. Sleeman v. Baxter,* 195 Wis. 437, 445, 219 N.W.2d 858, 861 (1928). With this *constitutional* authority, a local government can weigh public policy concerns and render determinations that are more closely tailored to the values and norms of local citizens.

This is precisely what the City of Milwaukee has sought to do with its residency Charter Ordinance. As the home rule amendment authorizes and as will be discussed below, the City's Charter Ordinance § 5-02 is the result of a determination of "local affairs and government" that does not fall within the constitutional exceptions to home rule. *See* Wis. Const., art. XI, § 3(1) (home rule is "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").

And it is the centrality of the constitutional home rule amendment to this case that renders incorrect the last-raised contention of police and fire petitioners (*see* Issue Presented for Review 4, and argument, Petitioners Joint Brief and

---

government" subject to the stated limitations, whereas, before the adoption of the home rule amendment, legislative action was required to manage even the most direct of city affairs. Previously, Article XI, Section 3(1) provided: "It shall be the duty of the legislature, and they are hereby empowered, to provide for the organization of cities and incorporated villages, and to restrict the power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent abuses in assessments and taxation, and in contracting debts by such

Appendix ("petitioners' brief") at 48-49), that the City should have to meet a higher standard and show the unconstitutionality of Wis. Stat. § 66.0502. Police and fire petitioners, as filers of this suit, rely on Wis. Stat. § 66.0502. *See* petitioners' brief at 3. But the constitutional *authority provided* by Article XI, Section 3(1) for the Charter Ordinance's residency requirement and the consequent invalidity of § 66.0502 against that ordinance are what this case turns upon.

This Court has stated that, when faced with the application of a constitutional provision and a statute,

> the constitution or a constitutional amendment is of the highest dignity and prevails over legislative acts and court rule to the contrary. Ordinary acts of the legislature, whether adopted before or after the date of the constitution, cannot be given effect if to do so would contravene a substantive provision in the constitution.

Schmeling v. Phelps, 212 Wis. 2d 898, 908-909, 569 NW.2d 784, 788 (Ct. App. 1997), *quoted with approval in Cole*, 2003 WI 112, ¶ 14, 264 Wis. 2d at 533-534, 665 N.W.2d at 334 (emphasis omitted).

Because the City of Milwaukee duly enacted a Charter Ordinance under the home rule amendment and its implementing legislation, Wis. Stat. § 66.0101, "the question is whether the state legislature, by enacting [Wis. Stat. § 66.0502], has impermissibly infringed on the City of Milwaukee's home rule authority."

---

municipal corporations." *State ex rel. Sleeman v. Baxter*, 195 Wis. 437, 444, 219 N.W. 858, 861 (1928).

Madison Teachers, Inc. v. Walker, 2014 WI 99, ¶ 89, n. 27, 358 Wis. 2d 1, 63, 851 N.W.2d 337, 367.

B. Constitutional Home Rule Requires a Different Analysis from Statutory Home Rule.

The City of Milwaukee used its home rule authority to enact City Charter Ordinance § 5-02 as provided in Wis. Stat. § 66.0101. That this ordinance arises under constitutional home rule separates it from ordinances (including other residency ordinances) that have been adopted under statutory home rule. For instance, in *Adams v. State Livestock Facilities Siting Review Board*, 2012 WI 85, 342 Wis. 2d 444, 820 N.W.2d 404, the zoning ordinance and revised zoning ordinance passed by the Town of Magnolia were not charter ordinances*, see id.* ¶¶ 9-10. 342 Wis. 2d at 453-454, 820 N.W.2d at 407-408 ("Magnolia, Wis., Ordinance").

Because charter ordinances were not involved, this Court reviewed the Magnolia ordinance under the test announced in *Anchor Sav. & Loan Ass'n v. Equal Opportunities Comm'n*, 120 Wis. 2d 391, 355 N.W.2d 234 (1984), a statutory home rule case. *See Adams*, 2012 WI 85, ¶¶ 32-33, 342 Wis. 2d at 464-465, 820 N.W.2d at 414-415. In *Anchor*, the court reviewed the City of Madison's general ordinances (again, not a charter ordinance that would give rise to a constitutional home rule analysis) and identified the statutory home rule "question before this court [as] whether sec. 62.11(5) provides the city of Madison with the power to enact and enforce the ordinance" or whether state legislation is

preemptive because the legislature has withdrawn power from the municipality or conflicting actions exist. *Id.* at 395-396, 355 N.W. 2d at 237-238.

As *Anchor* instructs, it is with *statutory* home rule that this Court "should assess whether express statutory language has withdrawn, revoked, or restricted the city's power" and consider whether "the challenged ordinance is logically inconsistent with state legislation . . . [or] infringes the spirit of a state law or general policy of the state." *Id.* at 396, 355 N.W.2d at 237. *See also U.S. Oil, Inc. v. City of Fond du Lac*, 199 Wis. 2d 333, 339, 544 N.W.2d 589, 591 (Ct. App. 1996) (ordinance analyzed for preemption under Wis. Stat. § 62.11(5)); *West Allis v. County of Milwaukee*, 39 Wis. 2d 356, 368, 159 N.W.2d 36, 42 (1968) (municipalities did not "exercise their home-rule powers by charter ordinance"). Therefore, in this case where the City's residency rule is embodied in a charter ordinance adopted under constitutional as opposed to statutory home rule, the *Anchor* test constructed for statutory home rule ordinances does not apply.

C. Milwaukee Charter Ordinance § 5-02 Involves A Matter of Local Affairs.

The applicability of the home rule amendment, as explained in *Madison Teachers, Inc.*, 2014 WI 99, 358 Wis. 2d 1, 851 N.W.2d 337, involves a two-part test, which was applied by the Court of Appeals in this case. (App. 112-113.) Specifically, the inquiry first requires a determination whether a matter of "local affairs" or statewide affairs is primary. It is only as a secondary matter that the

court may consider "uniformity." *See Madison Teachers, Inc.*, 2014 WI 99, ¶ 94, 358 Wis. 2d at 64, 851 N.W.2d at 368.

Here, the City of Milwaukee's residency Charter Ordinance controls a matter of "local affairs." As this Court recognized in *Madison Teachers, Inc.*, 2014 WI 99, ¶¶ 124-128, 358 Wis. 2d at 80-82, 851 N.W.2d at 376-377, an inquiry into whether the matter is of "local affairs" does not turn wholly on whether the statute in question has denoted the legislation as one of local or statewide interest. The legislature can state, as with Wis. Stat. § 66.0502(1), that something is of "statewide concern" (and petitioners' brief so indicates at 14), but the legislature's statement, while receiving "great weight," is not dispositive. *See Van Gilder v. Madison*, 222 Wis. 58, 73-75, 267 N.W. 25, 31 (1936). Otherwise, this Court would have decided differently in *Madison Teachers*, *Inc.,* since Wis. Stat. § 62.623 deals with an employee retirement system, which is a matter of direct concern to local government. The Court instead decided that the pension was "primarily a matter of statewide interest." *See Madison Teachers, Inc.,* 2014 WI 99, ¶ 123, 358 Wis. 2d at 83, 851 N.W.2d at 377. As this Court has explained, the applicability of constitutional home rule, including the issue of "statewide" or "local" concern, is a matter to be decided by the courts not the legislature. *Id.*, ¶ 128, 358 Wis. 2d at 83, 851 N.W. 2d at 377.

The court's inquiry as to "local" or "statewide" concerns considers the essentials of the governmental interests involved: are the matters "(1) Those that are exclusively of state-wide concern; (2) those that may be fairly classified as

entirely of local character; [or] (3) those which it is not possible to fit . . . exclusively into one or the other of these two categories." *State ex rel. Michalek v. Le Grand*, 77 Wis. 2d 520, 527-28, 253 N.W. 2d 505, 507 (1977) (quotations omitted). Should the third category apply, the court is charged with determining which concerns are paramount: state or local. *Id.*

The City's residency matters in this case are properly classified as local in character. They are "intimately connected with the exercise by the city of its corporate functions." *Van Gilder*, 222 Wis. at 81, 267 N.W. at 34 (quoting *Adler v. Deegan*, 251 N.Y. 467, 489, 167 N.E. 705, 713 (1929)); *see also State ex rel. Michalek,* 77 Wis. 2d at 527 n. 7, 253 N.W. 2d at 507. The residency rule serves the City's legitimate fiscal interests, such as paying employee salaries to residents, the common investment of city's employees as residents in their community, and the importance of efficiently provided services. Simply stated, matters related to residency "affect the municipalit[y] directly and intimately." *State ex rel. Ekern*, 190 Wis. at 640, 209 N.W. at 862.

Police and fire petitioners do not seem to dispute the City's interest in residency as a matter of "local affairs." In their issue presented to this Court, they concede the point: "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 an Issue Primarily of*

Local Concern, As Opposed to the Uniform 'Affect' Specifically Contained in the Amendment Itself?"[5] (Petition for Review and Appendix at 1) (italics added).

The local character of the City's residency interests is also the conclusion of the Court of Appeals, which reached its finding after a detailed consideration of the factual record. (R. 124.)

1. The City's Fiscal Management is a Matter of "Local Affairs."

One of the primary "local affairs" directly involving residency is the fiscal management of the City. This management includes maintaining a tax base from which to draw revenues. For instance, in *City of Beloit v. Kallas*, 76 Wis. 2d 61, 66-67, 250 N.W.2d 342, 345 (1977), this Court acknowledged "interests [that] are matters of purely local concern relating to the tax base." *See also Nankin v. Village of Shorewood*, 2001 WI 92 ¶ 16, 245 Wis. 2d 86, 100, 630 N.W.2d 141, 147 (municipalities are "primary units of property tax administration in Wisconsin").

Equally necessary to a local government's continuing viability is its ability to budget and to control the "purse strings" or payments. City residents have a strong interest in determining how their tax dollars are spent. *See Beardsley v. City of Darlington*, 14 Wis. 2d 369, 373, 111 N.W.2d 184, 186-187 (1961) (city

[5] Since Wis. Stat. § 809.62(2) requires that all issues for review by this Court be raised in the "statement of issues" to this Court and the matter of "local affairs" is conceded rather than disputed in police and fire petitioners' issues presented, police and fire petitioners have not properly contested before this Court whether the Charter Ordinance's residency requirement is a local affair.

spends taxpayer money). Mayor Barrett explained in his affidavit that "[a]mong [his] duties is to prepare an annual executive budget that accounts for all City revenues and expenditures, and ensures that those revenues and expenditures are balanced." (R. 30, Exh. B ¶ 3.) In *Madison Teachers, Inc.*, 2014 WI 99, ¶ 114, 358 Wis. 2d at 75, 851 N.W.2d at 373, it was found that "the regulation of local budgetary policy and spending have long been considered matters of purely local concern." This Court explained in *Van Gilder*, 222 Wis. at 82, 268 N.W. at 35 that, "[t]here are some affairs intimately connected with the exercise of the city of its corporate functions . . . . Most important of all perhaps is the control of the locality over payments from the local purse." (quoting *Adler*, 251 N.Y. at 489, 167 N.E. at 713); *see also State ex rel. Michalek*, 77 Wis. 2d at 527 & n.7, 253 N.W.2d at 507.

Proper local government fiscal management requires that a City have control over matters, such as residency of its employees, that have a strong impact on its finances. This explains why—since 1938—the City has taken steps to do so. The City and its residents have substantial concerns about maintaining a large, healthy, stable tax base from which revenues can be drawn. City workers have a high percentage of home ownership and stabilize the tax base in Milwaukee neighborhoods, as Mayor Barrett explained in his affidavit. (R. 30, Exh. B ¶¶ 13-15.)

Without a residency rule, many current City employees and many new City hires will not live in the City. Resident departures could approach 60 percent of

City employees. (R. 30, Exh. B ¶¶ 13a, 16-20.) With an exodus of employees, a glut of housing, and a reduction in tax rolls, the Common Council has stated its concern that "[o]ver time the reduction in property values would likely decrease Milwaukee property tax receipts, diminishing the ability of the City to provide services and continue to pay family supporting wages . . . to City employees." (R. 30, Exh. C, 2; App. 59.)

There is, then, a direct connection between the tax base and City expenditures. Specifically, as the Mayor has explained, the City has a substantial interest in employing, and paying salaries from its revenues to, residents. (R. 30, Exh. B, ¶ 22a.) The City employs over 7,000 individuals and spends $366.8 million annually for its employee salaries. (R. 30, Exh. B ¶ 5.)

The City's fiscal management is entirely a matter of its local affairs. However, to the extent that it appears "mixed," the legal test calls for balancing the City's "local affairs" against any identified "statewide concern" (with an understanding that there may be some overlap) to determine which interest is primary: local government or state. *State ex rel. Michalek*, 77 Wis. 2d at 527-528, 253 N.W.2d at 507; *Madison Teachers, Inc.*, 2014 WI 99, ¶ 111, 358 Wis. 2d at 73, 851 N.W.2d at 372. In this case it has been argued that state legislators are more suited to make a residency determination. But a local government unit is better suited to make determinations that "directly and intimately" affect its fiscal viability, such as how its monies will be budgeted to pay for its employees—thus making this a matter of "local concern" even where these matters may affect

people of the state "remotely and indirectly." *State ex rel. Ekern*, 190 Wis. at 640, 209 N.W. at 862.

The Legislative Fiscal Bureau Paper #554 gives policy considerations for and against residency requirements. (R. 30, Exh. D, 4, 7-10.) Importantly, those considerations are directed to individual concerns of public employees, which is scarcely a "statewide concern" as defined in *State ex rel. Ekern*, 190 Wis. at 640, 209 N.W. at 862, involving legislation with a direct effect on "the people and state at large."

2. The City's Interest That Its Employees Share a Common Community Investment as City Residents Is a Matter of "Local Affairs."

Likewise, the City is better suited to determining local values and the investment to be made in its employees and the nature of the local community within which they will pursue their employment. The City's requirement that employees live in the City and thus have a personal stake in its progress is central to building the "identity" of the City and proceeding onward. While not as visible as, for instance, physical buildings, which are regulated by the City as a matter of local affairs, the composition of the City's resident population also reflects the City's "identity" and is therefore a local affair. *See State ex rel. Ekern*, 190 Wis. at 640, 209 N.W. at 862 (concluding zoning ordinance is a "local affair" since it is "such an affair or subject matter as grows out of and is presented by and because of [its] being such city or village as distinguished from a rural or pastoral community"); *see also Adler*, 251 N.Y. at 485, 167 N.E. at 711 ("A zoning

resolution in many of its features is distinctly a city affair, a concern of the locality, affecting as it does, the density of the population, the growth of city life and the course of city values"), *cited approvingly in Van Gilder*, 222 Wis. at 81, 267 N.W. at 34.

The City's residency requirement ensures that the more than 7,000 City employees know the specific needs and concerns of City residents. (R. 30, Exh. B ¶ 22b). As this Court noted in *Davis v. Grover*, 166 Wis. 2d 501, 528, 480 N.W.2d 460, 469 (1992), "cities of the first class [the City of Milwaukee] by virtue of their large population and concentration of poverty are substantially distinct from other cities." The residency requirement helps strengthen residents' confidence and trust in City employees. *See generally* Mayor Barrett affidavit (R. 30, Exh. B, ¶ 22). The community connection with and its trust in City employees are particularly important for law enforcement officers, given our country's current societal climate, a need discussed at length by the Court of Appeals in its decision. (App. 122-124.) As Police Chief Edward Flynn of the City of Milwaukee stated in his affidavit, "officers' residency in the community that they police creates a visceral and instinctive connection among the officers and community residents that cannot be created by other means." (R. 30, Exh E, ¶¶ 4.)

As stated succinctly by the Common Council in noting its policy concerns in Resolution File No. 130376: "Having police, fire department, health, water utilities, neighborhood services, and City development personnel, among other employees, live in the City provides them with better knowledge of the challenges

facing the City, increased understanding of neighborhoods and enhanced relationships with residents." (R. 30, Exh. C, 2, App. 158).

3. The Efficient Delivery of City Services Is a Matter of "Local Affairs."

The City's residency requirement seeks to ensure that City employees are readily and reliably available to succeed in their employment with the City. The Common Council explained why in Resolution File No. 130376: "Factors unique to the City, including both population and geography, contribute to the need to ensure that sufficient staff are able to respond in a timely way to weather and other emergency conditions, homeland security events, and other events requiring prompt service from road and maintenance crews, police, and fire personnel." (R. 30, Exh. C, 2, App. 158.) That may be particularly the case for law enforcement personnel. The residence of police officers in the community means that they are available to the community they serve and protect.[6] For instance, Milwaukee Police Department Rule 4-025.00 provides that "[members of the police force] are always subject to orders from proper authority and to call from civilians. The fact that they may be technically 'off duty' shall not be held as relieving them from the

[6] Wis. Stat. § 66.0502(4)(b) permits a no-more-than15-miles-out requirement for residency of law enforcement, fire, or emergency personnel, but, for the City of Milwaukee, the expansive geographical area (96 square miles), the number of miles travelled, and traffic translate into travel times that would not adequately serve the needs of City residents in remotely the same way as a residency rule. *See* Mayor Barrett Affidavit (R. 30, Exh. B. ¶ 22e).

responsibility of taking required police action in any matter coming to their attention at any time."

4. Local Concerns Predominate in Milwaukee Charter Ordinance § 5-02.

Local concerns are at the core of Milwaukee's residency requirement. Police and fire petitioners try to fit residency requirements into a broad category of "condition[s] of employment" that the state should regulate. *See* petitioners' brief at 17. But residency is not a discriminatory employment practice like those sought to be avoided in the provisions cited by petitioners. *See id.* at 17-18 (citing Wis. Stat. § 103.15(3) (HIV testing); § 111.37(2)(c) (honesty testing); § 111.372(1)(b) (genetic testing)).

To the extent that petitioners are looking at conditions of employment generally, such as wages, the Court's "jurisprudence is consistent with that of other states that have determined that compensating city employees is primarily a matter of local concern." *Madison Teachers, Inc.*, 2014 WI 99, ¶ 225 & n. 16, 358 Wis. 2d at 122, 851 N.W.2d at 397 (dissenting opinion) (collecting cases from non-Wisconsin jurisdictions finding that salaries or wages to city employees are of local concern). Nor can the statute be grounded in state administration of police and fire employees. The employment of *all* local government workers, not just police and firefighters, is affected by Wis. Stat. § 66.0502. For instance, with the City of Milwaukee, only 50 percent of employees are police or fire officers; the

remaining 50 percent of employees "serve the City in other capacities." (R. 30, Exh. B ¶ 5.)

As for health and safety and public welfare (for which petitioners can identify no issues, *see* petitioners' brief at 18-19), the Court of Appeals expressly and correctly stated that it could not conclude from the record that "Wis. Stat. § 66.0502 was drafted with the public's health, safety, or welfare in mind." (App. 117.) On balance, then, the City's residency requirement is a matter of "local affairs and government."

D. There Is No "Enactment of the Legislature of Statewide Concern As with Uniformity Shall Affect Every City and Every Village" That Limits Milwaukee Ordinance § 5-02.

By its plain terms, in order to restrict a local government's conducting of matters of its "local affairs," the home rule amendment requires an "enactment of the legislature of statewide concern as with uniformity shall affect every city and every village." Wis. Const. art. XI, § 3(1).

Nonetheless, in *Madison Teachers, Inc.*, 2014 WI 99, ¶ 101, 358 Wis. 2d at 68, 851 N.W.2d at 370, this Court read the amendment in a way that is inconsistent with this plain language. The City makes the point respectfully, but there is no doubt concerning it. For the Court there required not "a statewide concern" and "uniformity" but only a state law "with uniformity [that] affect[s] every city or every village." *Id.*, ¶ 109, 358 Wis. 2d at 73, 851 N.W.2d at 372. Yet the terms of the latter half of the amendment expressly couple the need for a "statewide concern" and "with uniformity" and thus dictate a reading of the

amendment that requires a legislative enactment to (1) address a matter of "statewide concern" *and* (2) "with uniformity shall affect every city and every village," in order to overcome a significant local interest.

The point is important and incontestable. As the Court of Appeals stated, "We note that the test articulated in *Madison Teachers* is somewhat at odds with the plain language of the home rule amendment, which does not contemplate a two-step inquiry that 'ends' simply by the existence of a statute concerning primarily a statewide interest." (App. 113.) Two Wisconsin Legislative Council memoranda reach conclusions also relying on an interpretation of the amendment that a matter of "local affairs" does not involve an analysis of uniformity. *See* Wisconsin Legislative Council Memoranda dated April 4, 2013, 6 (City App. 19.) ("If a court were to find that residency requirements are solely a matter of local concern, the court's inquiry would end there, because a charter ordinance imposing a residency requirement on public employees would be within the municipality's constitutional home rule authority.") and Wisconsin Legislative Council Memoranda dated April 15, 2013, 7 (City App. 26.) ("If a court adopts the *Van Gilder* analysis, and finds that residency requirements are a local affair, a state law prohibiting residency requirements only in first-class cities would likely be found unconstitutional."). *Compare Cole*, 2003 WI 112, ¶ 36 & n. 12, 264 Wis. 2d at 547, 665 N.W.2d at 341 ("the legal expertise of these agencies entitles their analysis to some consideration by this court").

Further, that is also the understanding of a commentator: "This must mean that the local exercise [of authority] is valid . . . unless the legislation is both of statewide concern and uniform." Comment, *Conflicts Between State Statute and Local Ordinance*, 1975 Wis. L. Rev. 840, 846.

While the Court in *Madison Teachers,* 2014 WI 99, ¶¶ 102-109, 358 Wis. 2d at 68-73, 851 N.W.2d at 370-371, reviewed home rule amendment precedent, those cases do not solidly support its reading. For instance, in *Thompson v. Kenosha County*, the Court does consider "uniformity" with "local affairs" at one point, *see* 64 Wis. 2d at 686, 221 N.W. 2d at 853, but the Court earlier stressed "two limitations on the legislature's power . . . statewide concern and . . .uniformly affect all cities and villages." 64 Wis. 2d at 683, 221 N.W.2d at 851. In *Van Gilder,* as well, the Court explains the "power to enact an organic law dealing with local affairs and government is subject to such acts of the legislature relating thereto as are of statewide concern and affect with uniformity all cities" 222 Wis. at 73, 267 N.W. at 31, but later states that a "charter ordinance of a city is not subject to an act of the legislature dealing with local affairs unless the act affects with uniformity every city" 222 Wis. at 84, 267 N.W. at 35-36.

In addition to reviewing the plain terms of a constitutional provision for its meaning, this Court looks to the "constitutional debates and the practices in existence at the time of the writing of the constitution," as well as the "earliest interpretation of the provision by the legislature as manifested in the first law passed following adoption." *Thompson v. Craney*, 199 Wis. 2d 674, 680, 546

N.W.2d 123, 127 (1996). Historical review provides an understanding that "uniformity" is paired with statewide concerns, not local affairs.[7] History concerning the meaning of the home rule amendment comes from the "writer" of the Brief of Wisconsin League of Municipalities, as Amicus Curiae, in *State ex rel. Sleeman v.* Baxter, No. 252 (1928), who reportedly "drafted the amendment in the form it appears (as a joint resolution in the legislature)." *Id.* at 2. That writer explains concerning the clause of Article XI, Section 3(1) containing "uniformity": "It does not say—subject to state laws, subject to state laws of state-wide concern, or subject to laws uniformly affecting cities, but it does say—subject *only* to such state laws as are therein defined, and these laws must meet two tests: First—do they involve a subject of state-wide concern and, second—do they with uniformity affect every city or village?" *Id.* at 14 (emphasis in original) (available at the Legislative Reference Bureau, Madison, Wisconsin).

A reading of the home rule amendment that would not give effect to an ordinance on a matter of "local concern" simply because there was a uniform

---

[7] The need for both "statewide concern" and "uniformity" also is evident from the context of surrounding constitutional amendments and relevant statutes. At the time that home rule was adopted, the Wisconsin Constitution *already* required that laws operate uniformly in order to supersede a municipal Charter Ordinance. For instance, Wisconsin Constitution Article IV prohibits state legislation from superseding a municipal charter unless the state law operates "uniform[ly]." Specifically, Article IV, Section 31(9) prohibits the legislature from "enacting any special or private laws" to amend a city charter. And Article IV, Section 32 provides the state legislature with authority to amend municipal charters if the law is a "general law" that is "uniform in their operation throughout the state." Nowhere in these amendments is mention made of "statewide concern." The change comes with Article XI, Section 3(1), where statewide concern is added to the language requiring uniformity. Had the drafters of the home rule amendment intended the legislation to rely on mere uniformity to overcome a local government charter ordinance, they could have utilized the prior amendments, with no need for enactment of the home rule amendment.

action by the legislature would strip all force and meaning from the home rule amendment. If, even where a city's actions were found to involve matters of local affairs, those actions could be undone by a legislative act so long as it were "uniform," the home rule amendment would be nugatory. The circumstance would be as it is here: the legislature has enacted Wis. Stat. § 66.0502, which police and fire petitioners claim to have facial uniformity; therefore (the argument goes), a longstanding Charter Ordinance should no longer be given force.

But we know that the home rule amendment is to be liberally construed to give it vitality. *See State ex rel. Ekern*, 190 Wis. at 639, 209 N.W. at 862; *State ex rel. Michalek*, 77 Wis. 2d at 526, 253 N.W.2d at 506. The City respectfully submits, then, that this Court should consider the plain words of the Constitution to afford them their "obvious and ordinary meaning," *State ex rel. Zimmerman v. Dammann*, 201 Wis. 84, 89, 228 N.W. 593, 595 (1930), and, as stated in the amendment, permit limitation of a City's act of "local affairs and government" only where there is a legislative enactment (a) of "statewide concern" (b) with "uniformity."

At a minimum, if notwithstanding the constitutional text this Court maintains the analytical framework of *Madison Teachers, Inc.,* the Court should give a meaningful interpretation to "uniformity." The "duty of the court to discover and give effect to the legislature in [interpreting a statute] . . . is equally applicable to the constitution." *State ex rel. Zimmerman*, 201 Wis. at 88-89, 228 N.W. at 595. And the legal imperative is for constitutional provisions to be read

so as "to save and not destroy." *State v. Dairyland Power Cooperative,* 52 Wis. 2d 45, 51, 187 N.W.2d 878, 881 (1971).

Here, then, a reading must be given to "uniformity" more substantial than a requirement of facial uniformity, which is the interpretation urged by police and fire petitioners. *See* petitioners' brief at 21, 27. The Court of Appeals called petitioners' reading "an extremely low hurdle for competing state legislation to clear." (App. 124.) Their statement that the statute applies to all cities in the state cannot be sufficient. The Court in *Madison Teachers, Inc.* essentially found that it did not matter if there is or is not a statewide interest, so long as there is uniformity. To reconcile this with the plain language of the home rule amendment, "uniformity" must be understood as actually affecting all municipalities in equal measure uniformly.

It is logical for the Court to follow the interpretive approach used in other areas involving "uniformity," such as in the area of school finance in the context of Wisconsin Constitution Article X, Section 3. The Court explained in *Kukor v. Grover,* 148 Wis. 2d 469, 436 N.W.2d 568 (1989), that it looked beyond plain meaning to historical analysis as well as to the earliest legal interpretations of Article X, Section 3. *Id.* at 485, 436 N.W.2d at 574. In applying that analysis, the Court reviewed more than the term "uniformity." It considered how school districts operated—in particular, the "character of the instruction given," *id.* at 486, 436 N.W.2d at 575 (quoting *State ex rel. Zilisch v. Auer*, 197 Wis. 284, 289-90, 221 N.W. 860, 862 (1928)), and, after looking at an historical understanding of

the amendment's purpose, concluded that the "uniformity" requirement in the context of student instruction should be defined as an "equitable" financial division. *Id*. at 490, 436 N.W.2d at 576.

Here, too, with the home rule amendment, a proper understanding of "uniformity" can be appropriately informed by historical perspective. The Court of Appeals appropriately determined, based on the purpose and terms of the home rule amendment, that "the uniformity requirement does not simply mean that a legislative enactment 'applying' to all municipalities passes the test." (App. 114.) An understanding of "uniformity" in the home rule amendment should be understood as requiring equality. And, in fact, in *Thompson*, this Court began with the terms of "uniformity," but it examined the statute more in depth to determine whether it resulted in equality: "Where a statute confers equal legal powers, that would seem sufficient to satisfy the uniformity requirements." 64 Wis. 2d at 687, 221 N.W.2d at 853.

The pairing of "uniformity" and "equality" is consistent with "uniformity" in other areas as well: "[T]here can be no uniform rule which is not at the same time an equal rule, operating alike upon all the taxable property throughout the territorial limits of the state, municipality, or local subdivision of the government." *Knowlton v. Board of Supervisors*, 9 Wis. 410, 421 (1859). *See also Niagara of Wisconsin Paper Co. v. Wisconsin Dep't of Natural Resources,* 84 Wis. 2d 32, 44-45, 48-49, 268 N.W.2d 153, 158-159 (1978) ("circuit courts agreed that sec.

147.021, Stats. stands for a policy of uniformity . . that Wisconsin industries would have an equal footing").

Police and fire petitioners challenge this "equality" language because, they say, it requires an "effect" analysis. *See* petitioners' brief at 23-25. This is not so. The Court is not asked, as in *Van Gilder*, 222 Wis. at 67, 267 N.W.2d at 28, about a law's "application to the city of X with two thousand five hundred population and [whether it would] affect it in the same way it affects the city of Milwaukee, a metropolitan community having a population of six hundred thousand." Rather, the Court is asked to decide whether the landscape upon which Wis. Stat. § 66.0502 was built was "equal." In *Adams v. Beloit*, 105 Wis. 363, 374, 81 N.W. 869, 872 (1900), for example, the court, when considering "uniformity" in context of city classification, asked whether "the law is operative alike."

An examination of the circumstances shows that, from the beginning, "operat[ing] alike" was missing from Wis. Stat. § 66.0502 for the City of Milwaukee. The governor's proposed Executive Budget of 2013 suggested eliminating residency: "The Governor recommends prohibiting local governmental units from requiring that any employee or prospective employee reside within the jurisdictional boundaries of the unit except as provided under state law." The provision further read, "The Governor also recommends that local governmental units be prohibited from bargaining over residency requirements." http://doa.wi.gov/Documents/DEBF/Budget/Biennial%20Budget/2013-

15%20Executive%20Budget/835-2013-15ExecutiveBudget.pdf. This recommendation was consistent with the request of City of Milwaukee police and fire unions, which sought to avoid residency requirements but did not want to bargain over them. (*See supra* note 2.) The elimination of residency was a City of Milwaukee issue.

The Court of Appeals concluded that "the facts in the record, exemplified by the Legislative Fiscal Bureau paper, make clear that the goal of Wis. Stat. § 66.0502 was to target the City of Milwaukee." (App. 116.) And the Legislative Fiscal Bureau, Paper #554, demonstrates that the residency requirement law would *not* operate equally against the City of Milwaukee.[8] Paper #554 focuses on the circumstances of the City of Milwaukee. (R. 30, Exh. D, 4-7, City App. 4-7.) As the Court of Appeals noted, "the Legislative Fiscal Bureau paper makes very clear that the City of Milwaukee would be very severely impacted by legislation prohibiting residency requirements. On the other hand, the impact of a prohibition on residency requirements on the numerous other local governmental bodies in this state is not discussed in any meaningful way." (App. 124-125.) The facts of this case (as contained in the affidavits submitted to the circuit court) show that the City of Milwaukee, in the words of the Court of Appeals, "will be deeply and

[8] "It is the statutory duty of the Legislative Fiscal Bureau to assist the legislature in its deliberations, and to study and recommend alternatives to legislation regarding all state budgetary matters." *Juneau County v. Courthouse Employees, Local 1312*, 221 Wis. 2d 630, 643-644, 585 N.W.2d 587, 592 (1998).

broadly affected" by the statute in a way that is not equal and thus not uniform. (App. 125.)

For all of these reasons, in the words of Article XI, Section 3(1) of the Wisconsin Constitution, the City's Charter Ordinance § 5-02 on residency advances matters of "local affairs and government" and does not fall within the exception of a "statewide concern" with "uniformity." Accordingly, the City should receive its declaration permitting the continued enforcement of its residency requirement.

II. No Federal Liberty Interest Giving Rise to a Substantive Due Process Violation Arises from Wis. Stat. § 66.0502 Pertaining to Residency.

The MPA and Michael Crivello maintain a 42 U.S.C. § 1983 claim, but there exists neither the necessary underlying substantive right nor a violation. Most fundamentally: There is no fundamental constitutional right upon which to base a substantive due process claim, nor do state statutes create substantive rights in this context. Further, the circuit court properly determined that there was no violation of a right in this case where there has been no harm done to plaintiffs. There "must [be] alleg[ations of] an actual deprivation of rights resulting from the defendant['s] acts," *Reichenberger v. Pritchard,* 660 F.2d 280, 285 (7th Cir. 1981), as is not the case here.

A. No Protectable Liberty Interest As a Matter of Substantive Due Process Arises from Wis. Stat. § 66.0502.

Under 42 U.S.C. § 1983, redress lies for violations of "rights, privileges, or immunities secured by the Constitution and [federal] laws" occurring under the color of state or local law. Section 1983 "is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred." *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979). There is no federal right to vindicate here where the City's residency requirement complies with federal constitutional law.

The City maintains a continuing residency requirement (*i.e.*, a rule requiring continuing residency as a condition for continuing eligibility for benefits such as employment). A continuing residency requirement, such as that of the City of Milwaukee, has withstood challenges based on an asserted constitutional "right to travel" and on equal protection, among others. *See McCarthy v. Philadelphia Civil Service Comm'n*, 424 U.S. 645, 646-647 (1976); *Detroit Police Officers Ass'n v. City of Detroit*, 405 U.S. 950 (1972). Courts have found the reasons expressed above by the City of Milwaukee to be rational reasons for residency. *See Kiel v. City of Kenosha,* 236 F.3d 814, 816 (7th Cir. 2000) (rational reasons include tax base, interest in community events, and service provision).

More generally, this—*i.e.*, the fact that residency requirements like Milwaukee Charter Ordinance § 5-02 "have been consistently found to be constitutional"—is the reason for the Court of Appeals' conclusion that "the trial

court erred in declaring Wis. Stat. § 66.0502 creates a protectable liberty interest." (App. 118-119.)

As the Court of Appeals properly determined, there is no fundamental constitutional right at issue. The MPA and Michael Crivello have asserted throughout this suit a violation of substantive due process, not procedural due process. *See* petitioners' brief at 31-32. However, substantive due process only protects against violations of "certain fundamental rights and liberty interests" that are "deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997) (citation omitted); *see also Hanes v. Dane County*, 608 F.3d 335, 338 (7th Cir. 2010). This case involves no such fundamental liberty interests (*e.g.*, those involving bodily integrity, the right to marry, marital privacy, the right to have children or the like). *See id.*

The MPA and Michael Crivello must therefore make the impossible contention that a substantive due process violation has occurred here because of "arbitrary" action that is a "shock to the conscience." Petitioners' brief at 32. But the circumstances of this case nowhere involve conduct that approaches the "most egregious conduct" that is constitutionally arbitrary and shocking to the conscience. *Compare County of Sacramento v. Lewis*, 523 U.S. 833, 846-847 (1998).

The bases asserted by the MPA and Michael Crivello for this "shock the conscience" behavior are statements by Mayor Tom Barrett indicating his continued support for the City's residency rule and a resolution passed by the

Common Council, Resolution File No. 130376, which was a general policy directive also championing the City's residency rule. *See* petitioners' brief at 41-43 & 29-31. Neither of these actions was "arbitrary, or conscience, shocking, in a constitutional sense." *Collins v. City of Harker Heights*, 503 U.S. 115, 128 (1992). To the contrary, Mayor Barrett's statements were consistent with the City's longstanding position that its Charter Ordinance § 5-02, which had been properly adopted as a matter of constitutional home rule (Wis. Const. Art. XI, § 3(1)) pursuant to Wis. Stat. § 66.0101, allowed the City to proceed addressing a matter of local affairs. The Common Council members, too, acted consistently with their legal view that the constitutionality of the Home Rule Amendment permits the City's ordinance notwithstanding the 2013 statute, Wis. Stat. § 66.0502.

The Mayor's position and that of the Common Council were adopted by a unanimous Court of Appeals, which determined that "Wis. Stat. 66.0502, does not involve a matter of statewide concern, nor does it affect every city or village uniformly; therefore, it does not, pursuant to the home rule amendment, Wis. Const. art. XI, § 3(1), trump the City of Milwaukee's residency requirement." (App. 125.) Put simply, the Court of Appeals concluded "the City ordinance is still good law; and we conclude that § 66.0502 does not apply to the City of Milwaukee. " (App. 125.)

Even if this Court now rules otherwise on the home rule matter, the Mayor was within his rights to act consistently with the law embodied in Charter

Ordinance 5-02 and thus with his legal obligations that that he "shall take care that the laws of the state and the ordinances of the city are duly observed and enforced." Milwaukee Charter Ordinance § 3-01. The officials of the Common Council similarly "discharge[d] their respective duties" as required by Milwaukee Charter Ordinance § 3-01. Resolution 130376 does not have the force of a charter ordinance and, therefore, does not enact or maintain the residency requirement. Their passage of the resolution was a statement of the common council's rational and legitimate concerns and its view of the legal rights of the City. (R. 30, Exh. C, App. 157-159.) In short, there is nothing that shocks the conscience about the actions of the mayor's and Common Council's actions.[9]

The MPA and Michael Crivello next seek to ground a substantive due process right in Wis. Stat. § 66.0502. *See* petitioners' brief at 33. Established federal law prohibits their argument: a state statute cannot act as the basis for a *substantive* due process right. As the Seventh Circuit flatly stated in *Kraushaar v. Flanigan*, 45 F.3d 1040 (7th Cir. 1995), "[t]he Supreme Court has never held that such state-created interests constitute a fundamental liberty interest protected under a *substantive* due process theory. Rather, the Court has analyzed state-created liberties under a *procedural* due process theory." *Id.* at 1047 (emphasis in original); *see also Russ v. Young*, 895 F.2d 1149, 1153 (7th Cir. 1989) (liberty interest from state statute receives only procedural due process protection).

[9] For these same reasons, police and fire petitioners are wrong when they argue, in their brief at 29-31, that the City somehow acted improperly in stating its position in Resolution No. 130376

This is for good reason, as the formation of a substantive due process right is far different from affirming a procedural due process right. As with cases such as *Roe v. Wade*, 410 U.S. 113, 152-153 (1973), the Court would be engaged in a rare process, for in essence it would be writing a new protectable interest into the federal constitution. As the United States Supreme Court stressed in *Glucksberg,* 521 U.S. at 720, "we 'ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this unchartered area are scarce and open-ended." (quoting *Collins*, 503 U.S. at 125.)

Indeed, the dangers of creating a substantive due process right are illustrated in the very attempts of the MPA and Michael Crivello to patch together a federally protected liberty interest. Their efforts at pages 33-35 of petitioners' brief borrow from imprisonment cases the parameters of "substantive limitations on official discretion," *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983), "language of an unmistakably mandatory character," *Hewitt v. Helms*, 459 U.S. 460, 471-472 (1983), and "specific directives to the decision maker that if the regulation's substantive predicates are present, a particular outcome will follow," *Russ,* 895 F.2d at 1153. However, these parameters are sufficiently vague (particularly when considered out of context) that very few statutes could *not* be asserted to fit these parameters.

---

and in this litigation that constitutional home rule supports Milwaukee's residency requirement.

Finally, to the extent that the MPA and Michael Crivello argue that a protected liberty interest arises from "restraint" imposed by a residency requirement, that effort also fails. *See* petitioners' brief at 36. They argue that there is a "similarly derived" duty in the residency statute and in *Helms,* 459 U.S. at 470. But *Helms* relies on a recognized fundamental right not present in the circumstances of this case and Wis. Stat. § 66.0502: a prior restraint on liberty that comes from imprisonment. *See DeShaney v. Winnebago County Dep't of Social Serv.*, 489 U.S. 189, 200 (1989). This difference between residency requirements and incarceration is dispositive.

B. Because There Was No Deprivation of a Protected Liberty Interest, There Is No Claim Under 42 U.S.C. § 1983.

In addition to there being no fundamental right, there has been no actual *deprivation* of plaintiffs' rights that would support a claim of violation. In *Carey v. Piphus*, 435 U.S. 247 (1978), the United States Supreme Court explained that damages under Section 1983 are available where there are actions in violation of "constitutional rights and [that] have caused *compensable injury*." *Id.* at 255 (citations omitted, emphasis in original). Specifically, actual harm must have been done to a claimed interest or right. *See Henderson v. Sheahan*, 196 F.3d 839, 848 (7th Cir. 1999); *see also Bonner v. Coughlin*, 545 F.2d 565, 567 (7th Cir. 1976) (42 U.S.C. § 1983 deprivation did not exist where no loss was effected by a state actor). The circuit court correctly determined that no such deprivation has occurred in this case.

The MPA and Michael V. Crivello do not (and cannot) claim loss of employment or disciplinary actions arising from enforcement of the City's residency requirement. As the circuit court correctly determined, "[t]here 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." (R. 44, 20, App. 149.) The MPA and Michael Crivello have not argued differently. *See* petitioners' brief at 36-38.

At best, they claim that there is a concern about their employment because of the existence of the residency requirement along with Wis. Stat. § 66.0502. However, as the Seventh Circuit made clear in *Reichenberger*, "[t]he mere possibility of remote or speculative future injury or invasion of rights will not suffice," 660 F.2d at 285, as a basis for arguing a Section 1983 violation. *See also Carey*, 435 U.S. at 262 (Section 1983 recovery is for "actua[l]" not "presumed" injury). At present, a stipulation is in place that extends a prior restraining order among the parties, providing that the City "shall not enforce [its] 'residency rule'" and that, during this time, the City will not "investigate or take disciplinary action against members . . . with respect to violations of the City's 'residency rule' and/or Charter Ordinance Section 5.02." (R. 9, 22; *see* petitioners' brief at 11.)

Michael Crivello also asks this Court to look back to the ten-day period between the effective date of Wis. Stat. § 66.0502 and the stipulated injunction (July 2, 2013 to July 12, 2013), when he claims "fear" and "concer[n]" accompanying "serious consideration to moving [his and his wife's] residence

outside the jurisdictional limits of the City of Milwaukee" and "actively searching for a new residence outside the City of Milwaukee." *See* petitioners' brief at 9-10, 47. Contrary to petitioners' brief at 47, the City does challenge the existence of such a claim as it was remote and speculative: there was *no* legal determination of a liberty interest arising from Wis. Stat. § 66.0502.

Further, as the Court stated in *Reichenberger*, 660 F.2d at 284-285, there must be an *actual deprivation of the claimed right* for there to be any basis for a remedy under Section 1983. Michael Crivello's complaints about a lack of *choice* or "tension" do not suffice. *See* petitioners' brief at 47. The circuit court properly did not reach damages, *see* petitioners' brief at 46-47, given that the MPA and Michael Crivello could not show recovery under 42 U.S.C. § 1983 for "the *deprivation* of any rights, privileges, or immunities secured by the Constitution and laws." (Emphasis added.)

The MPA and Michael Crivello lack a protectable liberty interest underlying a substantive due process right violation, and in any event there has been no deprivation of any right. The Court of Appeals properly dismissed the claim under 42 U.S.C. § 1983.

CONCLUSION

The judgment of the Court of Appeals should be affirmed. The City was entitled to a declaration that "the enactment and continued enforcement of Milwaukee Charter Ordinance § 5-02, the City's residency ordinance, is a matter of local affairs and government, and accordingly, a lawful exercise of the City's

constitutional home rule authority granted to the City by Article XI, § (3) Wis. Const." And, whatever the result on that main issue, the dismissal of the 42 U.S.C. § 1983 claim of the Milwaukee Police Association and Michael Crivello should be affirmed.

Respectfully submitted,

GRANT F. LANGLEY
City Attorney

_____

GRANT F. LANGLEY
City Attorney
State Bar No. 1013700
MIRIAM R. HORWITZ
Deputy City Attorney
State Bar No. 1016150
Attorneys for City of Milwaukee

P.O. ADDRESS:

800 City Hall
200 East Wells Street
Milwaukee, WI 53202
Telephone: 414-285-2601
Fax: 414-286-8550
Email: glangl@milwaukee.gov
mhorwi@milwaukee.gov

Of Counsel:

ANNE BEARLEMAN KEARNEY
State Bar No. 1031085

1081-2013-1887.002:224206

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c), for a brief and appendix produced with a 13 pt. proportional serif font. The length of this brief is 10,952 words.

Dated at Milwaukee, Wisconsin this 11th day of January, 2016.

GRANT F. LANGLEY
City Attorney
State Bar No. 1013700
MIRIAM R. HORWITZ
Deputy City Attorney
State Bar No. 1016150
Attorneys for City of Milwaukee

ELECTRONIC BRIEF CERTIFICATION

I hereby certify that:

I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

The electronic brief is identical in text, content, and format to the printed form of the brief filed today.

Dated and signed at Milwaukee, Wisconsin this 11th day of January, 2016.

GRANT F. LANGLEY
City Attorney
State Bar No. 1013700
MIRIAM R. HORWITZ
Deputy City Attorney
State Bar No. 1016150
Attorneys for City of Milwaukee

CERTIFICATION OF MAILING

Laura M. Bergner herein certifies that she is employed by the City of Milwaukee as an Administrative Specialist, Sr., assigned to duty in the office of the City Attorney, which is located at 841 North Broadway, Suite 716, Milwaukee, Wisconsin 53202; that on the 11th day of January, 2016 she filed an original and ten copies of the Brief and Appendix of Defendant-Appellant-Cross-Respondent, City of Milwaukee, in the above-entitled case, via courier service, and addressed to:

Ms. Diane M. Fremgen
Clerk of the Wisconsin Supreme Court
P.O. Box 1688
110 East Main Street, Suite 205
Madison, Wisconsin 53701-1688

and three copies of the Brief via U.S. Mail to opposing counsel as follows:

Attorney Jonathan Cermele
Cermele & Matthews, S.C.
6310 W. Bluemound Rd. #200
Milwaukee, WI 53213

Attorney John F. Fuchs
Fuchs & Boyle, S.C.
1233 N. Mayfair Rd., #210
Milwaukee, WI 53226

_____
LAURA M. BERGNER

APPENDIX TABLE OF CONTENTS