STATE OF WISCONSIN
SUPREME COURT
NO. 2015AP1523

Vincent Milewski and Morganne MacDonald,

Plaintiffs-Appellants-Petitioners,

v.

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

Defendants-Respondents.

Appeal from the Circuit Court of Racine County
Honorable Phillip A. Koss Presiding
Case No. 14-CV-1482

REPLY BRIEF OF PLAINTIFFS-APPELLANTS-PETITIONERS VINCENT MILEWSKI AND MORGANNE MACDONALD

Richard M. Esenberg, WI Bar No. 1005622
Brian McGrath, WI Bar No. 1016840
Thomas C. Kamenick, WI Bar No. 1063682
WISCONSIN INSTITUTE FOR LAW & LIBERTY
1139 E. Knapp Street
Milwaukee, WI 53202
414-727-9455
FAX: 414-727-6385
Attorneys for Plaintiffs-Appellants-Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

Wisconsin Constitution

INTRODUCTION

In this case, the Plaintiffs-Appellants-Petitioners' (hereinafter "Plaintiffs") refused to consent to a search of their home by the tax assessor and they were punished. They were denied the right to challenge the resulting assessment, even though their assessment, on its face, appeared to be inappropriately high and retaliatory.

There are three primary legal issues in dispute herein: (1) is an interior search of a home by a tax assessor a "search" for purposes of the Fourth Amendment[1], (2) if so, is conducting such a search without a warrant reasonable, and (3) is denying a homeowner who refuses a search any remedy to challenge her assessment, a violation of the homeowner's right to due process.

However, prior to discussing the substantive legal issues, there is a dispute about whether this is a facial challenge or an as applied challenge to the statutes in question. The Plaintiffs expressly brought the action as an as applied challenge (See, e.g. Complaint ¶ 51; R. 2.)

The Plaintiffs did not bring this case as a facial challenge because there are plausible circumstances where the statutes might be constitutional.

[1] And Art. 1, §11 of the Wisconsin Constitution

For example, if the Plaintiffs had denied the assessor any view of the property and not just denied an interior search, or if the Plaintiffs had failed to comply with some requirement necessary for an appeal other than a refusal to consent to a search of their home, the statutes might be constitutional. But here the Plaintiffs consented to a view of their home, including from the fenced in back yard, and did everything required for an appeal except allow the assessor to conduct an interior search.

Because this is an as applied challenge, the Plaintiffs do not need to prove that the statutes are unconstitutional in all imaginable circumstances and there is no presumption of constitutionality. *State v. Wood,* 2010 WI 17, ¶13, 323 Wis. 2d 321, 780 N.W. 2d 63; *Soc'y Ins. V. Labor & Indus. Review Comm'n*, 2010 WI 68, ¶ 27, 326 Wis. 2d 444, 786 N.W.2d 385.

The Plaintiffs request that this Court hold that Wis. Stats. §§70.47(7)(aa) and 74.37(4)(a) may not constitutionally preclude a homeowner who allows a view of their home (except for an interior search) and who meets all requirement to challenge their assessment (except for an interior search) from challenging their assessment before the Board of Review and/or in court.

I. GOVERNMENT ENTRY INTO A HOME TO CONDUCT A TAX ASSESSMENT IS A "SEARCH"

Neither Respondent does much to support the argument that entry into a home by the government to conduct a tax assessment is not a "search" within the meaning of the Fourth Amendment. The saying is that if you see a bird and if it looks like a duck, swims like a duck, and quacks like a duck, then it probably is a duck. This simple abductive reasoning applies here. A government agent entering a person's home to look for things that the government wants the agent to look for certainly looks, sounds and feels like a search.

In fact, Respondent Gardiner Appraisal Services, LLC ("Gardiner") does not even attempt to argue that such conduct is not a "search." Gardiner argues only that such a search is reasonable. The Respondent Town of Dover (the "Town") does argue that an interior search of a home by the government is not a "search," but the Town offers only one case to support that position – *Wyman v. James*, 400 U.S. 309 (1971). (Town Br. at 7-10.)

In *Wyman*, the U.S. Supreme Court held that the State of New York could require a parent receiving AFDC benefits to submit to an in-home

interview as a condition of receiving government benefits. The fact that a government "benefit" – something that the recipient could refuse – was at issue was critical to the result in *Wyman*. 400 U.S. at 317-319. But the Plaintiffs have asked for no government benefit to which the Town could attach the string of requiring a home inspection. The Town does not even make an effort to show that the "benefit" distinction in *Wyman* applies here.

The limits of *Wyman* are illustrated in *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 530-31 (1967) and supported by cases like *Widgren v. Maple Grove Twp.*, 429 F.3d 575 (6th Cir. 2005), *Bennis v. Kleven*, No. 15-CV-479-JDP, 2016 WL 4197615, at *2 (W.D. Wis. Aug. 5, 2016), and *Covey v. Assessor of Ohio Cty.*, 777 F.3d 186 (4th Cir. 2015)[2]. In each of those cases, the court concluded that an exterior inspection of a home for tax assessment purposes was not a Fourth Amendment search, but that an interior search would be. If *Wyman* applied the way argued for by the Town, the reasoning in each of those cases is wrong, but the Town did not even try to make that argument.

The Town also failed to take issue with the modern Fourth Amendment cases cited by the Plaintiffs at pages 30-32 of their opening

[2] All three cases were cited in the Plaintiffs' Opening Brief at 24-25.

brief in which the Court has turned to an originalist – and, as we've seen – common sense understanding of the term "search" emphasizing that, if the government undertakes or demands to undertake what would otherwise be a trespass onto a person's property, there is a search. If warrantless entry by the tax assessor into a home is not a "search," then there would be no basis to conclude that warrantless entry into a home by the building inspector, zoning enforcer, utility service provider, or presumably any government official (except perhaps the police) would be of any constitutional concern. That is not the state of Fourth Amendment law in Wisconsin or in the nation as a whole.

II. WISCONSIN'S ASSESSMENT SEARCHES ARE NOT REASONABLE

A. Warrantless Home Searches are Presumptively Unreasonable.

The Respondents both argue that even if a warrantless interior inspection by a tax assessor is a Fourth Amendment search, it does not violate the Constitution because such a search is "reasonable." According to the Respondents, "reasonableness is the touchstone of the Fourth Amendment." (Town Br. at 11; Gardiner Br. at 17.) So it is. But the Respondents must take the bitter with the sweet. The U.S. Supreme Court has made clear that "**searches . . . inside a home without a warrant are**

presumptively unreasonable." *Payton v New York*, 445 U.S. 573 586 (1980) (emphasis added).

The Respondents chide the Plaintiffs for seeking to draw a bright line at the threshold of the home, but that line is firmly rooted in this Court's jurisprudence. It has observed that "[t]here can be no doubt that 'the Fourth Amendment has drawn a firm line at the entrance to the house," [citing *Payton*] "and it is our duty to zealously guard that line." *State v. Sobczak*, 2013 WI 52, ¶27, 347 Wis. 2d 724, 833 N.W. 2d 59. The line that the Respondents ridicule has already been drawn. The question here is whether they may cross it.

One would think that if warrantless searches of a home are presumptively unreasonable, and that if there is a line drawn at entry into the home that must be "zealously guarded," the Respondents are faced with a tall order. But neither Respondent cites or discusses *Payton* or the limited exigent circumstances which may overcome the presumption as described in *Coolidge v. New Hampshire*, 403 U.S. 443, 475 (1971) and *State v. Richter*, 2000 WI 58, ¶ 29, 235 Wis.2d 524, 612 N.W.2d 29, which generally involve such urgent matters as fleeing criminals and public

safety, and not more quotidian matters like tax assessments. *See,* Plaintiffs Opening Br. pp. 28-29.

The Town does not even acknowledge the existence of the presumption. Gardiner acknowledges it in an indirect way by citing *Brigham City v. Stuart* 547 U.S. 398, 403 (2006), rather than *Payton,* implying that the presumption is qualified by exceptions that might apply here. But the only exceptions that were noted in *Brigham City* were for firefighting and investigation, imminent destruction of evidence, and "hot pursuit." *Id.* Nothing in *Brigham City* even remotely suggests that a tax assessment is the kind of "exigency" that could rebut the presumption set forth in *Payton.*

In fact, despite all of their arguments that such searches are reasonable, neither Respondent cites anywhere in their brief to a case from any jurisdiction that says that a warrantless home search for tax purposes is reasonable. That is not surprising given the history of the Fourth Amendment. But the failure of both Respondents to come up with such a case is telling.

G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977) is the most relevant case in this context. It was cited by the Plaintiffs in their

opening brief but neither Respondent attempted to address it. In *G.M. Leasing* the U.S. Supreme Court held that the warrantless search of business premises for tax purposes was not permissible under the Fourth Amendment. *Id.* at 351-53.

The Respondents discount the history of the Fourth Amendment and say that the Plaintiffs exaggerate the similarity between the British general tax warrants that were the impetus of the Fourth Amendment and more modern tax collection activities of the government (which the Respondents characterize as "polite"[3]). But the *G.M. Leasing* Court was not so dismissive, finding that the search of the business was a violation of the Fourth Amendment *because* the intrusion on privacy undertaken in the collection of taxes was "one of the primary evils intended to be eliminated by the Fourth Amendment." *Id.* at 355. It reiterated that although the government has the right to pass laws necessary to collect its revenue, the means for doing so are restrained by the Fourth Amendment. *Id.* The Respondents may want to ignore the history of the Fourth Amendment but they are wearing legal blinders when they do so.

[3] Al Capone was noted to have said that you can get much farther with a kind word and a gun than you can with a kind word alone. When collecting taxes, the government is not armed solely with a kind word.

B. *Wisconsin's Uniformity Clause does not justify a Warrantless Home Search.*

The Respondents argue that warrantless searches of the home are justified by the Uniformity Clause in the Wisconsin Constitution[4] but that argument is faulty in several ways. First, and simplest, no court has ever held that the government interest in uniform taxation is an exigent circumstance sufficient to overcome the presumption of unreasonableness created by *Payton.* Nor would such a holding make sense. There is nothing time sensitive about a tax assessment that would preclude the government seeking a warrant to enter the home.

Second, Wisconsin's current system does not foster or achieve the purposes of the Uniformity Clause. The purpose of Wisconsin's Uniformity Clause "is to protect the citizen against unequal and consequently unjust taxation." *Gottlieb v. Milwaukee*, 33 Wis. 2d 408, 426, 147 N.W. 2d 633, 643 (1967). The statutes in question here achieved exactly the opposite result. The Plaintiffs ended up with an assessment that was completely inconsistent (and non-uniform) with that of forty-one out of forty-three homes in their subdivision.

[4] Wisconsin Constitution, Art. VIII, §1

Neither Respondent disputes that every one of the properties whose owners consented to warrantless entry into their homes had their assessments decreased, nor that the only two homeowners who refused an interior search had their assessments increased by 12.12% and 11.83%. (R. 38:3, App. 140.) Under the Respondents view, apparently the Uniformity Clause protects only homeowners who waive their Fourth Amendment rights and extended no protection to the Plaintiffs. But the Respondents cite no legal support for that view. The record is clear here that uniformity is harmed by a system that allows assessors to make arbitrary assessments they know cannot be challenged.

Third, the Respondents fail to deal with the system as a whole. They say that a citizen must forfeit her Fourth Amendment right so that she can be treated uniformly with a different citizen who waived her Fourth Amendment right, without considering or discussing the options that would avoid this inequitable conclusion.

For example, what harm would there be in allowing the Plaintiffs to appeal their assessment even after asserting their Fourth Amendment rights? If they could prove to the Board of Review or a court that their assessment was wrong, how would that cause a problem with the

Uniformity Clause? The answer is that it would not. In fact, such an option would help achieve uniformity.

As a second example, what harm would there be in requiring an administrative warrant before searching the home of a citizen that did not consent to entry by the tax assessor? All parties hereto acknowledge that such a system would be constitutional and such a system was described in some length by the Supreme Court in *Camara*, 387 U.S. at 534-39.

The Town says requiring a warrant would be a mere formality (Town Br. at 21), but here is the critical point - a system of administrative warrants would mean that the government must **ask for a warrant from an independent magistrate** and the homeowner could present her reasons for objecting. Having an independent review by a judicial officer provides the Fourth Amendment protection that the current system does not.

Both Respondents argue that the Plaintiffs give too much emphasis to the Plaintiffs' right to privacy in their home and not enough emphasis to the government's interest in searching the home. But the former is almost an impossibility and the latter is not accurate.

With respect to the Plaintiffs' right to privacy in their home this Court, itself, has said that "'overriding respect for the sanctity of the home

has been embedded in our traditions since the origins of the Republic.'" *State v. Ferguson*, 2009 WI 50, ¶17, 317 Wis. 2d 386, 767 N.W.2d 137 (quoting *Payton*, 445 U.S. at 586 (1980).) And that, "[i]n the home, our cases show, ***all*** details are intimate details, because the entire area is held safe from prying government eyes." (emphasis in original.) *State v. Sobczak*, 2013 WI 52, ¶27, 347 Wis. 2d 724, 833 N. W. 2d 59 (quoting *Kyllo v. United States*, 533 U.S. 27, 37 (2001).

Accordingly, it is much more accurate to say that the Respondents give insufficient emphasis to the right to privacy in the home when, for example, the Town says that the intrusion "is relatively minor." (Town Br. at 18.) That is just wrong as a matter of law.

Thus, the question to be asked is what governmental interest is so critical that it can overcome the presumption of unreasonableness as set forth in *Payton* and the only answer given by the Respondents (other than the Uniformity Clause) is that it makes the tax assessor's job easier and more efficient. (Gardiner Br. at 24-33.)

But it will always be easier to achieve government objectives – to enforce tax laws, or zoning laws, or health and safety rules – if the government can enter a home without a warrant. But allowing such

warrantless searches is completely inconsistent with the special protection provided to – and the bright line drawn at the threshold of – the home. The Respondents' argument to the contrary – that such a system is constitutional because it is better for the government - turns the framers' intent on its head.

Finally, the Respondents urge that because the existing system is long-standing and efficient, it must be constitutional. (Gardiner Br. at 24.) But taking confessions without informing a defendant of her rights was long-standing and efficient before it was declared unconstitutional. The issue is not how long the government has been doing it, the issue is whether the conduct violates the constitution.

III. DEPRIVING PROPERTY OWNERS OF THE OPPORTUNITY TO CHALLENGE THEIR PROPERTY TAX ASSESSMENT DEPRIVES THEM OF PROPERTY WITHOUT DUE PROCESS OF LAW

The Respondents contend that it was the Plaintiffs' own choice that denied them access to the courts and not anything else. (Town Br. at 24-28; Gardiner Br. 44-49.) This argument, of course, depends on the condition precedent that the Plaintiffs did not have a Fourth Amendment right to refuse to consent. For example, the Town argues that "there was no violation of due process here because [the Plaintiffs] did not have a Fourth

Amendment right to thwart the Town's efforts" to search their home under Wisconsin's tax assessment scheme. (Town Br. at 25.)

Neither Respondent disputes the legal proposition that a person cannot be made to choose between two constitutional rights. Thus, if this Court determines that a warrantless entry into the home by the tax assessor is a Fourth Amendment search, then there is no basis to deny the Plaintiffs' claim under the Fourteenth Amendment.

Moreover, even if this Court determines that the Plaintiffs had no Fourth Amendment right, they still have an independent claim under the Fourteenth Amendment. The Town's taxation of the Plaintiffs' home has deprived them of their property. *See McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 36 (1990) ("[E]xaction of a tax constitutes a deprivation of property.").

Further, *McKesson* leaves no room for the possibility that government can exact a tax without providing for at least some post-deprivation opportunity to seek a refund, and that the minimum a state must provide for the deprivation of property via taxation is the "opportunity to challenge the accuracy and legal validity of their tax obligation" and obtain a "clear and certain remedy" after the tax has been collected. *McKesson*,

496 U.S. at 39. Neither Respondent cites any cases that dispute this conclusion.

Here, the Plaintiffs have paid their property tax and have been denied any post-deprivation remedy. This the State cannot do.

CONCLUSION

Sections 70.47(7)(aa) and 74.37(4)(a) together violate the Plaintiffs' Fourth Amendment rights and their right to due process of law. This Court should reverse the Court of Appeals and hold that these statutes as applied to Plaintiffs infringe on the constitutional rights of its citizens.

Dated this 14th day of December, 2016.

Respectfully submitted,
WISCONSIN INSTITUTE FOR LAW & LIBERTY
Attorneys for Plaintiffs-Appellants-Petitioners

Richard M. Esenberg, WBN 1005622
(414) 727-6367; rick@will-law.org
Brian McGrath WBN 1016840
(414)727-7412; brian@will-law.org
Thomas C. Kamenick, WBN 1063682
(414) 727-6368; tom@will-law.org
1139 E. Knapp St.
Milwaukee, WI 53202
414-727-9455
FAX: 414-727-6385

FORM AND LENGTH CERTIFICATION

I hereby certify that this reply brief conforms to the rules contained in section 809.19(8)(b) and (c) for a brief produced with proportional serif font. The length of the portions of this brief referred to in section 809.19(8)(c)2. as well as its Introduction is 2,997 words, calculated using the Word Count function of Microsoft Word 2010.

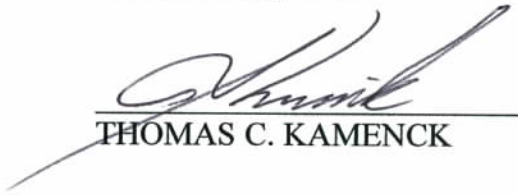
Dated: December 14, 2016

THOMAS C. KAMENICK

CERTIFICATION OF ELECTRONIC FILING

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

Dated: December 14, 2016



THOMAS C. KAMENCK