STATE OF WISCONSIN

IN SUPREME COURT

No. 2014AP0400

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.

NON-PARTY BRIEF OF THE ATTORNEY GENERAL IN SUPPORT OF THE PETITIONERS

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INTRODUCTION

The People of Wisconsin adopted the Home Rule Amendment in 1924 to address a specific problem: the proliferation of state legislation addressing purely local issues because cities and towns lacked legal authority to make such rules for themselves. To alleviate this problem, the Amendment gave cities the authority they previously lacked. It left the Legislature with full authority to displace, through uniform legislation, any local laws that the newly empowered cities chose to adopt.

The Court of Appeals in this case turned the Amendment into something it was never intended to be: a limitation on the Legislature's authority to enact uniform laws that have different practical impacts on different cities. In the process, it undercut a common-sense, statewide reform of the type that States around the country have adopted: a ban on residency restrictions for public employees ("Residency Restriction Ban"). This Court should reverse the Court of Appeals and make clear that the Home Rule Amendment poses no obstacle to uniform, good-government reforms like the Legislature adopted here.

STATEMENT OF INTEREST

When a law's constitutionality is at stake, the Wisconsin Attorney General is "entitled to be heard." Wis. Stat. § 806.04(11); *see also State v. City of Oak Creek*, 2000 WI 9, ¶ 35, 232 Wis. 2d 612, 605 N.W.2d 526.

ARGUMENT

In Wisconsin, "legislative power . . . is lodged in the Legislature." *Van Gilder v. City of Madison*, 222 Wis. 58, 67, 267 N.W. 25, 28 (1936). Cities, on the other hand, "are creatures of the state legislature and have no inherent right of self-government beyond the powers expressly granted to them." *Madison Teachers Inc. v. Walker*, 2014 WI 99, ¶ 89, 358 Wis. 2d 1, 851 N.W.2d 337. The Home Rule Amendment honors that constitutional balance. In interpreting the Amendment, this Court has cautioned that "courts should be most reluctant to impose by implication . . . a limitation upon legislative power which the Constitution . . . sweepingly confides to the Legislature." *State v. Baxter*, 195 Wis. 437, 446, 219 N.W. 858, 861–62 (1928).

The Home Rule Amendment provides that "[c]ities and villages organized pursuant to state law may determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of statewide concern as with uniformity shall affect every city or every village." Wis. Const. art. XI, § 3(1). As this Court recently explained in *Madison Teachers*, a law enacted by the Legislature trumps local legislation if the State law is *either* primarily addressed to an issue of statewide concern *or* "uniform[]." 358 Wis. 2d 1, ¶¶ 91–95. This Court "first establish[es] the character of the legislative enactment at issue, and only then consider[s] whether the uniformity

requirement is satisfied if the state law concerns a matter of primarily local affairs." *Id*. ¶ 94.

Like *Madison Teachers*, this case involves a dispute as to the proper legal standard for analyzing the Amendment: namely, the scope of the uniformity requirement. Id. ¶ 90. To help address that legal dispute, the State provides historical support for this Court's holding in *Thompson v. Kenosha County* that the Legislature satisfies the Amendment's uniformity requirement with a law that is "on its face, uniformly applicable throughout the state." 64 Wis. 2d 673, 687, 221 N.W.2d 845 (1974). Petitioners and their *amici* provide additional compelling reasons why the Ban trumps Milwaukee's residency requirement, including a more fulsome discussion as to why the Ban is primarily addressed to an issue of statewide concern. Pet'rs Br. 14–21; Amicus Wis. Inst. for Law & Liberty's Br. in Support of Pet'rs Sec. 2.

I. The Residency Restriction Ban Is Addressed Primarily To Issues Of Statewide Concern

The Ban creates a statewide policy permitting anyone who works in a non-emergency capacity for a Wisconsin city to live anywhere they choose. Wis. Stat. § 66.0502(3)(a). From the point of view of Milwaukee, the Ban limits the restrictions the city can place on its employees. In such "mixed bag" cases—with both statewide and local concerns—the Court asks whether the issue "more greatly

concerns the people of the entire state or the people in the municipality." *Madison Teachers*, 358 Wis. 2d 1, ¶ 117.

Overwhelming considerations dictate that the Ban is primarily addressed to an issue of statewide concern. As a threshold matter, the Legislature found that "residency requirements are a matter of statewide concern." Wis. Stat. § 66.0502(1). This determination "is entitled to great weight because matters of public policy are primarily for the Legislature." *Van Gilder*, 222 Wis. at 74, 267 N.W. at 31. In addition, this Court has recently recognized that "[t]he terms of the public employer-employee relationship have long been the subject of statewide legislation in Wisconsin," and that is precisely what the Residency Restriction Ban addresses. *Madison Teachers*, 358 Wis. 2d 1, ¶ 115.

More generally, the Ban involves matters primarily of statewide concern because it is garden-variety good-government legislation, designed to alleviate substantial burdens on the free movement of all Wisconsin citizens. During the Ban's legislative drafting process, the Legislature learned that fifteen other States have found the need to prohibit local residency restrictions as a matter of sufficiently weighty statewide concern to justify legislation. *See* Wis. Legis. Fiscal Bureau, Local Government Employee Residency Requirements, P. No. 554, at 2 (2013).[1] Like

[1] *Available at* http://docs.legis.wisconsin.gov/misc/lfb/budget/2013_15_biennial_budget/102_budget_papers/554_residency_requirements_local_government_employee_residency_requirements.pdf.

Wisconsin, these States have concluded that residency restrictions inhibit the freedom of citizens to live and work where they choose. *Id.* at 3–4. Residency restrictions both unfairly harm the States' citizens and undermine the ability to recruit talented workers into public service. *Id.* The Legislature designed the Ban to give everyone in Wisconsin protections against a pernicious practice that other States are similarly addressing. The Home Rule Amendment does not displace that entirely reasonable legislative judgment. *See also* Pet'rs Br. 17–21.

II. The Residency Restriction Ban Satisfies The Uniformity Requirement

A. By its plain terms, the Amendment allows the Legislature to adopt any laws that "with uniformity . . . affect every city or every village." Wis. Const. art. 11 § 3(1). As early as *Van Gilder*, this Court expressed support for the view that this uniformity requirement simply mandates equal *legal* treatment of all Wisconsin cities. 222 Wis. at 67, 267 N.W. at 28. Any other understanding, this Court noted, appears untenable because almost any law impacts cities differently. *Id.* Forty years later, in *Thompson*, this Court made the point even clearer, holding that a statute that was "*on its face*, uniformly applicable throughout the state" meets the Amendment's uniformity standard. 64 Wis. 2d at 687 (emphasis added).

B. The Home Rule Amendment's history is entirely consistent with *Thompson*'s holding that any statute that

"on its face" treats all cities equally satisfies the uniformity requirement. At the time Wisconsin debated the Amendment, the problem of the day was the Legislature enacting city-specific legislation, addressing purely local issues, because cities lacked sufficient legal power to regulate their own affairs. The Amendment sought to cure this problem by giving cities general law-making authority so the Legislature would no longer have to pass such laws. It was not intended to displace the Legislature's authority to enact legally uniform laws for all of Wisconsin's cities.

In Wisconsin's early days, the Legislature spent a great deal of its time on private or "special" legislation. *State ex rel. Ekern v. City of Milwaukee*, 190 Wis. 633, 636, 209 N.W. 860, 861 (1926). City-specific legislation was especially pervasive since only the Legislature could modify city charters and cities were powerless absent explicit authorizations from the Legislature. *Id*.

Reformers made several attempts to fix the problems arising from the Legislature enacting city-specific laws. In 1871, the People adopted a constitutional amendment banning private legislation on nine topics, including amending town and village charters. Wis. Const. art. IV, § 31.[2] General laws on those topics were permitted only if they were "uniform in their operation throughout the state." Wis. Const. art. IV, § 32.

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[2] An 1892 amendment added "cities" to "towns and villages." *Van Gilder*, 222 Wis. 58, 69, 267 N.W. 25, 29.

But cities still lacked general law-making authority, and as they grew, so did their needs. So the Legislature continued to pass laws granting specific authority to deal with local issues, but they now targeted classes of cities rather than individual cities. This Court upheld that approach, holding that the Legislature could enact laws limited to cities above a certain population. *See Johnson v. City of Milwaukee*, 88 Wis. 383, 60 N.W. 270 (1894); *Adams v. City of Beloit*, 105 Wis. 363, 81 N.W. 869 (1900).

In 1911, the Legislature took a broader approach, passing a statute that allowed cities to modify their charters and "to exercise all powers in relation to . . . municipal affairs not conflicting with the fundamental or any general law." *State ex rel. Mueller v. Thompson*, 149 Wis. 488, 494, 137 N.W. 20, 23 (1912). Acting under this new law, Milwaukee proposed to amend its charter so it could produce and sell ice. But this Court invalidated the 1911 law as an unconstitutional delegation of legislative power. *Id.*, 149 Wis. at 498, 137 N.W. at 24. "[P]ower to make law," the Court reasoned, "was reserved exclusively to the Legislature, and any attempt to abdicate it . . . must, necessarily, be held void." *Id.*, 149 Wis. at 491–92, 137 N.W. at 22. In particular, the "power to grant corporate charters for cities . . . was a legislative function at common law, and made exclusively such by our Constitution." *Id.*, 149 Wis. at 493, 137 N.W. at 23.

Reformers sought to cure this problem through the Home Rule Amendment. Much of the discussion in the press during its enactment (1919–1924)[3] focused on the continued problem of the need for legislation addressing local issues. Milwaukee Mayor Daniel W. Hoan, who helped draft the Amendment, estimated that "legislation of only local interest takes up at least a month of the legislature's time each session." Oshkosh Daily Northwestern, Mar. 2, 1921, at 11.[4] Other articles reported similar estimates. "[O]ver 25 per cent of the measures before the Wisconsin legislature directly affect[] Milwaukee." The Capital Times, Jan. 27, 1921, at 1.[5] "[O]ne-third of state legislation . . . pertain[s] to municipalities and state legislators have not the training and experience to deal efficiently with mere local problems." Appleton Post-Crescent, Jun. 8, 1922, at 1.[6] "[E]very legislature must consider nearly two hundred bills which apply only to Milwaukee." Joseph P. Harris, The Capital Times, Jan. 19, 1924, at 9.[7] One article gave as an example "a bill . . . enacted to permit the installation of a telephone in a city office." *Id.*

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[3] In 1921, the Legislature repealed all special city charters (except Milwaukee's) and replaced them with a general city charter law. *See* ch. 242, Laws of 1921. This act, like the 1911 law, gave cities broad law-making authority via statute. Wis. Stat. § 62.11(5). Perhaps to avoid the fate of the 1911 law, this new law did not allow cities to amend their charters.

[4] App. 10.

[5] App. 7.

[6] App. 14.

[7] App. 20.

Reformers explained that the Amendment would free the Legislature from having to spend time debating and enacting such laws. Mayor Hoan, for example, argued: "At this time when everyone in the legislature is crying out about the long session, why should we continue a system which piles up hundreds of bills affecting cities to be considered by that body." Daniel W. Hoan, Letter to the Editor, The Capital Times, Apr. 22, 1919, at 4.[8] Mayor Hoan added that "home rule will . . . cut out more nonsense from the legislature than any other step that can be taken." Oshkosh Daily Northwestern, Mar. 2, 1921, at 11.[9] The secretary of the Wisconsin League of Municipalities, Ford H. MacGregor, emphasized the same concern: "The amendment will give municipalities . . . power to [amend] their own charters without having to go to the legislature . . . . This amendment would avoid the necessity of a great number of . . . bills." Manitowoc Herald-Times, Jul. 3, 1924, at 8.[10]

These public discussions made clear that the Amendment was not designed to limit the Legislature's authority when it wanted to act for the entire state. Mayor Hoan assured readers that the Amendment "preserves to the legislature the right to legislate on any matter concerning the state at large *or* which affect all cities or villages uniformly." Daniel W. Hoan, Letter to the Editor, The

[8] App. 5.
[9] App. 11.
[10] App. 22.

Capital Times, Apr. 22, 1919, at 4 (emphasis added).[11] Another paper similarly explained: "The state will not lose its power over cities, the mayor stated, for it can prohibit them from doing anything by making state wide application to all measures passed. Cities will be given a free hand in local affairs, without becoming free from state legislation, it is claimed." Oshkosh Daily Northwestern, Mar. 2, 1921, at 11.[12] Yet another paper quoted "one of the best charter experts in the country" as explaining that the Amendment "would in no way impare [sic] legislative control." Appleton Post-Crescent, Jun. 8, 1922, at 1.[13]

The People of Wisconsin adopted the Home Rule Amendment in 1924. Soon after, this Court clarified that the Amendment's "recognized purpose . . . is a grant of power to cities and villages," explaining that the Amendment "imposes no limitations upon the power of the Legislature." *Baxter*, 195 Wis. at 445, 448, 219 N.W. at 861, 862. Indeed, the Amendment's only impact on laws enacted by the Legislature is that "enactments of the Legislature which do not affect all cities uniformly are to be subordinate to legislation of cities within their constitutional field." *Id.*, 195 Wis. at 447, 219 N.W. at 862. Two sentences later, the Court repeated this idea in slightly different words: "If the state legislation affects only classes of cities"—that is, if it

[11] App. 5.
[12] App. 11.
[13] App. 12–13, 14.

treats some classes of cities differently than other classes of cities—"it is subordinate to the city legislation." *Id.*, 195 Wis. at 448, 219 N.W. at 862.

A few years later, this Court issued *Van Gilder*, including broad reasoning that the Amendment's uniformity requirement merely required that all cities received equal legal treatment. *See supra* Part II.A. This Court emphasized that it "was the intention of the people . . . to leave a large measure of control over municipal affairs with the Legislature." *Van Gilder*, 222 Wis. at 71, 267 N.W. at 30. Then, four decades later in *Thompson*, the Court adopted this reasoning as a holding, explaining that the Amendment's uniformity requirement was satisfied by a law that was "on its face, uniformly applicable throughout the state." 64 Wis. 2d at 687. This understanding was consistent with the Amendment's history, which revealed no intention to place any limitations on the Legislature's authority to enact legally uniform laws.

C. Under *Thompson*'s proper understanding of the uniformity requirement as demanding only equal legal treatment, the Residency Restriction Ban invalidates Milwaukee's residency restriction. The Ban provides that, with limited exception for certain emergency personnel, "no local governmental unit may require, as a condition of employment, that any employee . . . reside within any jurisdictional limit." Wis. Stat. § 66.0502(3)(a), (4)(b). This applies equally to every city in the state, from Milwaukee to

Manawa.[14] No Wisconsin city may impose a residency mandate on its non-emergency employees, period. Just as in *Thompson*, the Ban is "on its face, uniformly applicable throughout the state." 64 Wis. 2d at 687. That fact, standing alone, is "sufficient to satisfy the uniformity requirement." *Id.*

D. The Court of Appeals argued that if the uniformity requirement is understood to only mandate legal uniformity, this would "all but obliterate" the Home Rule Amendment. 364 Wis. 2d 626, ¶ 32. This interpretation—besides being entirely contrary to *Thompson*—misunderstands the Amendment's primary historical purpose of giving general law-making authority to cities. The Amendment allowed some cities to enact residency restrictions in the first place, without seeking any special legislation from the Legislature. The new local powers created by the Amendment, however, remained subject to the Legislature's override authority. Having concluded that widespread residency restrictions are contrary to the State's public interest, the Legislature cured that problem with entirely uniform legislation of the sort the Amendment expressly permits.

In addition, the Amendment does place one important limit on the Legislature. The 1871 constitutional amendments, which banned certain private legislation, allowed laws targeting classes of cities. *Supra* Part II.B. As this Court explained in *Van Gilder*, the Home Rule

[14] *See* Manawa, Wis., Code § 54-15.

Amendment added the principle that if the Legislature addresses primarily local affairs with a law that targets a class of cities, then the city can trump that law. 222 Wis. at 80, 267 N.W. at 34.

Nor does the Court of Appeals' out-of-context focus upon the word "affect" support its position. 364 Wis. 2d 626, ¶ 18. As the historical record makes clear, none of the various reforms of the time required anything *beyond* equal legal treatment (if anything, they required slightly less, since they still allowed reasonable classifications). The 1871 constitutional amendments allowed "general laws" that were "uniform *in their operation*." Wis. Const. art. IV, § 32 (emphasis added). The 1911 statute gave cities powers that did not conflict with laws "*operative generally* throughout the state." 1911 Wis. Sess. Laws 558 (Chapter 476), § 1 (emphasis added). Nothing in the Amendment's history suggests that its slightly varied wording—"with uniformity affect"—requires *more* than equal legal treatment, as the Court of Appeals held. Wis. Const. art. XI, § 3(1). Notably, Mayor Hoan, one of the Amendment's primary champions, used similar phrases interchangeably in describing the Amendment. *See* Oshkosh Daily Northwestern, Mar. 2, 1921, at 11 ("The state . . . can prohibit [cities] from doing anything by making state wide *application* to all measures passed." (emphasis added)).[15]

[15] Appendix 11.

CONCLUSION

The decision of the Court of Appeals should be reversed.

Dated this 22nd day of January, 2016.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 2,999 words.

Dated this 22nd day of January, 2016.

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