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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

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

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INTRODUCTION

This Court has recognized 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 v. New York*, 445 U.S. 573, 586 (1980)). Accordingly, it is "axiomatic that the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed. *Id.* (quoting *State v. Richter*, 2000 WI 58, ¶28, 235 Wis. 2d 524, 612 N.W.2d 29).

But Wisconsin law requires citizens to submit to warrantless searches of their homes as part of the property tax assessment process. If they refuse, they are punished. If they do not allow the assessor inside their home to inspect the interior, their punishment is that they may not challenge the resulting assessment. This is true no matter what the assessment turns out to be. The assessment could be patently wrong and abusively high, but the citizen who stood on her rights is, nevertheless, prohibited from challenging it.

The central point of the Plaintiffs-Appellants-Petitioners' (hereinafter "Plaintiffs") case is this – taxation by the State must conform

itself to the Constitutional rights of its citizens – not the other way around. A statutory scheme that permits warrantless searches of the homes of citizens for purposes of taxation does not pass constitutional muster just because it is long-standing or efficient or important to the State. It passes muster only if it satisfies the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution.[1] Wisconsin's system does not.

How can it be that the privacy and sanctity of the homes of Wisconsin citizens must give way to the State's system for collecting property taxes? According to the Defendant-Respondent Town of Dover, it is because the right of citizens to be secure in their homes is only "nominal" when compared to what Dover considers to be the substantial government interest in collecting taxes. (Dover Resp. to Pet. for Rev. 6-7.) The Court of Appeals agreed with Dover, concluding that in its view the level of intrusion caused by the tax assessor into a citizen's home is "relatively low." (Ct. App. Dec. ¶19, App. 134.)

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

But these conclusions completely ignore this Court's well-established jurisprudence on the Fourth Amendment and the rights of citizens to privacy in their homes. This Court has said, as clearly as it can be said, that "'the Fourth Amendment has drawn a firm line at the entrance to the house,' 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 (quoting *Payton*, 445 U.S. at 590). The government's warrantless entry into a citizen's home does not violate a merely "nominal" right, and the level of such an unwanted intrusion is never "relatively low." It is instead the "chief evil against which the wording of the Fourth Amendment is directed." *Ferguson*, 2009 WI 50, ¶17.

STATEMENT OF ISSUES

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

Court of Appeals' Decision: This issue was raised in the parties' respective dispositive motions and decided by the Circuit Court and the

Court of Appeals on summary judgment. The Court of Appeals held that unwanted government entry into a citizen's home under these statutes was not a Fourth Amendment search and thus citizens were entitled to no constitutional protection from such government intrusion.

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

Court of Appeals' Decision: This issue was raised in the parties' respective dispositive motions and decided by the Circuit Court and the Court of Appeals on summary judgment. The Court of Appeals held that even if warrantless searches by the tax assessor were treated as Fourth Amendment searches, they are reasonable as a matter of law.

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

Court of Appeals' Decision: This issue was raised in the parties' respective dispositive motions and decided by the Circuit Court and the Court of Appeals on summary judgment. The Court of Appeals found that there was no violation of the Due Process Clause.

STATEMENT ON ORAL ARGUMENT

Oral argument has already been scheduled for January 19, 2017. Plaintiffs believe this is appropriate. This case may set a new standard for searches of homes for property tax purposes and result in a new rule of law on whether and when the government can constitutionally foreclose a property owner from challenging their property tax assessments. Oral argument will be useful to fully develop the theories and legal authorities on each side.

STATEMENT OF FACTS AND OF THE CASE

Plaintiffs, Vincent Milewski and Morganne MacDonald, are husband and wife and own a home at 1232 Linden Lane (the "Property"), which is located in the Lorimar Estates subdivision within the Defendant-Respondent Town of Dover (the "Town"). (R. 41:2, 4; R. 43:2, 4; R. 42:2; R. 25:1.) Prior to 2013, the Property was assessed at $273,900, with an estimated fair market value of $277,761. (R. 35:3-4; R. 26:22.)

The Town performed a new assessment of all real property within the Town for the 2013 tax year. (R. 41:3; R. 42:3; R. 43:3; R. 35:3-4; R. 26:7-9.) The Town contracted with the Defendant-Respondent Gardiner Appraisal Services, LLC ("Gardiner) to conduct the new assessments. (R.

26:7-9.) On or about August 14, 2013, Plaintiffs received a notice stating "An assessor will stop to view your property on Tues, Aug 20 at 6:10 pm." (R. 26:15.) When the assessor arrived at the Property, Plaintiff MacDonald offered to open the gate to their yard and told him he was welcome to view the Property from the exterior, but he would not be allowed inside the house. (R. 24:1.) The assessor left without accepting Plaintiff MacDonald's offer to enter into the yard and view the exterior of the property, and without asking her any questions about the interior of her home. (R. 24:2; R. 26:18; R. 26:38; R. 26:40-41.)

On October 4, 2013, the assessor sent the Plaintiffs a certified letter indicating he had not "viewed the interior of your buildings" and asking the Plaintiffs to schedule a time for viewing. (R. 26:16.) The Plaintiffs did not schedule a time for viewing, but did write a letter to the Town objecting to an interior inspection. (R. 25:8-9.) The Assessor then re-valued the Property at $307,100, an increase of 12.12% from the previous assessment of $273,900. (R. 26:19-20, 22.)

There are forty-three parcels in the Plaintiffs' subdivision; only four properties, (including the Plaintiffs' Property) were originally not subject to an internal inspection by the assessor. (R. 25: 3, 10-13; R. 26:23-24, 40.)

The other thirty-nine owners all consented to an internal search. **Every one** of the properties whose owners consented to warrantless entry into their homes had their assessments **decreased**. The assessor decreased the assessments of these thirty-nine parcels by an average of 5.81% below the 2012 fair market values used by the Town (R. 25:3, 10, App. 139) and 4.49% below the 2012 assessments[2] (R. 38:3, App. 140).[3]

Only four homeowners did not permit warrantless entry into their homes. **Every one** of these homeowners saw their assessment **increased**. The assessor increased the assessments of these four parcels by an average of 8.73%. (App. 140.[4]) The Plaintiffs argued in the courts below that this was not a coincidence. (P. Ct. App Br. 39-41; R. 33:3-5.) In fact, it beggars belief to say otherwise.

Indeed, two of the original inspection holdouts later permitted an interior inspection. Their assessments were then reduced. (R. 26:23-24, 40; R. 38:3, App. 140.) The assessment for the parcel located at 24219

[2] The "2012 assessment" was done in 2004 but the assessed value was still in place in 2012.

[3] One can argue about whether it is more appropriate to compare the new 2013 assessments to the previous assessed value from 2004 or to compare the new 2013 assessments to the "full value" numbers for the property for 2012. The Plaintiffs did comparisons to both. *See* App. 139-140. Whichever comparison one chooses to look at, the result is the same; all the owners who consented to a search of their home had their assessments reduced; owners who did not consent had their assessments increased.

[4] All of the "averages" referred to herein were calculated by adding up the individual percentage increases or decreases and then dividing by the number of homes involved.

Lotus as of 2012 was $232,900. (R. 38:3, App. 140.) Prior to being permitted inside, the assessor's original 2013 decision was to increase the assessment to $257,700 (an increase of 10.6%). (*Id.*) After consent to search was given, the assessment fell to $200,400, a reduction rather than an increase from the 2012 level. (*Id.*) The other property, located at 1248 Larkspur, went from $242,100 up to $270,300 (prior to consenting to an interior inspection) and then down to $235,600 (after consenting to an interior inspection). (*Id.*)

The result of the re-assessment project was thus a finding by the assessor that all of the houses in the Lorimar subdivision had decreased in value – except the two whose owners had not consented to an interior inspection. The Plaintiffs intended to raise these and other facts before the BOR but were prevented from doing so. (R. 25:4.)

On or about November 14, 2013, the Plaintiffs filed an Objection Form for Real Property Assessment with the Town. (R. 25:3, 14; R. 26:17.) On November 25, 2013, Plaintiff Milewski appeared at the Defendant-Respondent Dover Board of Review ("BOR") hearing, attempting to object to the assessment. (R. 25:3.) The BOR denied him the right to appear and contest his assessment, concluding that, under Wis. Stat.

§ 70.47(7)(aa), he had "refused a reasonable request by certified mail of the assessor to view [his] property." (R. 25:4; R. 41:5; R. 43:5.) Thus, Plaintiffs were denied the opportunity to dispute a roughly 12% increase in their assessment which was wildly at odds with the assessments of the other homes in their subdivision.

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

The Plaintiffs then filed this lawsuit on July 23, 2014 as an as-applied constitutional challenge to the statutes in question.[6] The Court of

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

[6] Under Wis. Stat. § 806.04(11), the Attorney General was served with a copy of the Complaint. On August 14, 2014, the Attorney General notified the Circuit Court that his office would not be participating. On August 7, 2015 the Attorney General notified the Court of Appeals that his office did not intend to appear in the matter before the Court of Appeals. On October 19, 2016, the Attorney General was notified that this Court had accepted the Petition for Review.

Appeals stated the Plaintiffs' claim herein is actually a de facto facial challenge (Ct. App. Dec. ¶12, App. 131), but that is not correct. A facial claim challenges a law in all its applications, seeking a declaration that it cannot ever be enforced. *See State v. Wood*, 2010 WI 17, ¶13, 323 Wis. 2d 321, 780 N.W.2d 63. But Plaintiffs recognize that there may be circumstances where each statute might be constitutionally applied.

The first statute the Plaintiffs challenge, § 70.47(7)(aa), reads as follows:

> No person shall be allowed to appear before the board of review, to testify to the board by telephone or to contest the amount of any assessment of real or personal property if the person has refused a reasonable written request by certified mail of the assessor to view such property.

The Plaintiffs did not bring this case as a facial challenge to that statute because there are imaginable circumstances (hypothetical circumstances involving other situations not applicable here) where that statute might be constitutional. For example, § 70.47(7)(aa) does not, on its face, require an interior search. It refers only to a person who has refused a reasonable written request by an assessor "to view" their property. Thus, there could be hypothetical situations where the assessor does not ask to come inside the home and is still refused a view.

For example, suppose the Plaintiffs had denied the assessor any view of the property and not just denied an interior search. As shown *infra* at p. 24-26, the Constitution treats an exterior view of the house (not necessarily a "search" for Fourth Amendment purposes) differently than an interior inspection (always a "search" for Fourth Amendment purposes); it is therefore possible that the statute could be constitutional when applied to a homeowner who denies all access to the property. But that is not this case.

Here, Plaintiff MacDonald offered to open the gate to their yard and told the assessor he was welcome to view the Property from the exterior. (R. 24:1.) Plaintiff MacDonald did not refuse to answer questions about the property. Rather, the assessor rejected the offer to enter into the yard and view the exterior of the property, and did not question her about the interior of her home. (*Id.* at 2; R. 26:18, 38, 40-41.)

The second statute the Plaintiffs challenge, § 74.37(4)(a), reads as follows:

> No claim or action for an excessive assessment may be brought under this section unless the procedures for objecting to assessments under s. 70.47 . . . have been complied with.

The Plaintiffs do not challenge that statute as applied to property owners who failed to comply with Section 70.47 unless the "failure" was due to the

owners being prohibited from following BOR procedures because they exercised their right to refuse to consent to a government search of their home. Here, the Plaintiffs were faced with what appeared to be an improper and discriminatory assessment and they complied with all of the procedural and timing requirements for a challenge. Nevertheless, because of § 70.47(7)(aa) they were denied any remedy to challenge their assessment.

On May 6, 2015, the Circuit Court held a hearing on dispositive motions filed by the parties. After argument, the Court issued an oral ruling granting the Defendants-Respondents' dispositive motions and denying the Plaintiffs' motion for partial summary judgment. (R. 47:30-49.) On June 11, 2015, the Circuit Court entered a written order to that same effect. (R. 44.) On July 24, 2015, the Plaintiffs filed a timely notice of appeal. (R. 46.) The Court of Appeals affirmed the decision of the Circuit Court on May 4, 2016. (App. 126-138.)

On June 2, 2016, the Plaintiffs filed a Petition for Review with this Court raising three issues: (1) whether government entry into a citizen's home for tax assessment purposes constitutes a search for Fourth Amendment purposes, (2) whether warrantless searches by property tax

assessors under Wisconsin law are reasonable as a matter of law, and (3) whether the Wisconsin tax assessment statutes in question, taken together, violate the Due Process Clause by depriving a citizen of any right to appeal a tax assessment if the citizen denies consent to an assessor to conduct a search of the citizen's home. This Court granted the Petition for Review on October 11, 2016.

ARGUMENT

Chapter 70 of the Wisconsin Statutes requires the assessor for cities, villages and towns to conduct periodic assessments of all property located within the municipality. Under § 70.32(1), "[r]eal property shall be valued by the assessor in the manner specified in the Wisconsin property assessment manual provided under § 73.03(2a) from actual view or from the best information that the assessor can practicably obtain, at the full value which could ordinarily be obtained therefore at private sale."

The Wisconsin property assessment manual states that the "view" required under § 70.32 should include, among other things, a detailed viewing of the interior and exterior of all buildings and improvements. (R. 29:24). The Wisconsin Statutes do, however, provide some limits on the ability of assessors to enter onto private property.

An assessor may not enter onto real property more than once per year without the owner's consent, and a property owner may refuse entry altogether by giving prior notice to the assessor. § 70.05(4m). Although assessors are exempted from statutory liability for trespass, that exemption does not extend to entering *buildings*. § 943.13(4m). Nor does it extend to entering any part of the property if the owner has given notice refusing entry. *Id.* Thus, if an assessor enters a building without the express consent of an owner, or enters any portion of the property after having received notice not to enter, that assessor is guilty of trespass.

One would think that, given the constitutional and statutory right to refuse warrantless entry, homeowners who insist upon that right could not be penalized. But in Wisconsin, the exact opposite turns out to be true. Property owners have the right to formally object to their assessments before the local board of review (BOR proceedings are a faster, cheaper, and easier method of challenging an assessment compared to going to court). Wis. Stat. § 70.47(7). However, "[n]o person shall be allowed to appear before the board of review, to testify to the board by telephone or to contest the amount of any assessment of real or personal property if the

person has refused a reasonable written request by certified mail of the assessor to view such property." § 70.47(7)(aa).

Once the board of review process has been completed, a property owner has three options for continuing to challenge their assessment: (1) an appeal to the Department of Revenue, § 70.85 (whose decision can be reviewed under *certiorari* by a circuit court); (2) *certiorari* review of the board of review decision to a circuit court, § 70.47(13); or (3) a *de novo* claim for excessive assessment to a circuit court, § 74.37. *See Metropolitan Assocs. v. City of Milwaukee*, 2011 WI 20, ¶¶8-10 & n. 8, 332 Wis. 2d 857, 796 N.W.2d 717.

In this case, the Plaintiffs were denied a BOR hearing. Thus, there was no proceeding that could be subject to *certiorari* review. In fact, the applicable Wisconsin statutes require the homeowner to complete the BOR process as a condition to *certiorari* review. *See* § 70.85(2) and § 70.47(13). Thus, the only option potentially available to the Plaintiffs was a *de novo* claim for an excessive assessment under § 74.37, but that claim was also blocked by Wisconsin law. According to § 74.37(4)(a) "[n]o claim or action for an excessive assessment may be brought under this section unless the procedures for objecting to assessments under s. 70.47 . . . have been

complied with." That means that even a *de novo* claim for excessive assessment cannot be filed unless there was first a hearing before the BOR under § 70.47.

The result is that, under Wisconsin law, property owners who have exercised their Fourth Amendment right to decline to permit the assessor inside their homes to search their property cannot challenge their assessment before the board of review. And if they cannot do that, they are stripped of their right to a day in court. The relevant sections of the Wisconsin Statutes, taken together, permitted the Defendants-Respondents to penalize the Plaintiffs for exercising their rights under the United States and Wisconsin Constitutions and also deprived them of any right to challenge that penalty and seek a refund of excessive taxes.

These statutes are unconstitutional as applied to the Plaintiffs. They did everything required of them with respect to an assessment except permit the assessor to conduct a warrantless search of the inside of their home. Their assessment represented a substantial increase even though a general decline in the market resulted in a decreased assessment for virtually every other home in their subdivision. They also did everything required of them to challenge their assessment and did so on a timely basis.

Nevertheless, they were punished for exercising their Fourth Amendment right to be free from unreasonable searches and deprived of any right or remedy to challenge their assessment.

The Court of Appeals upheld the statutory provisions on three bases. First, the Court of Appeals said that when the tax assessor enters a citizen's home to conduct a tax assessment, that does not constitute a "search" for Fourth Amendment purposes. (Ct. App. Dec. ¶15, App. 132-133.) Second, the Court of Appeals said that even if it was a "search" under the Fourth Amendment, it was reasonable because the level of intrusion was "relatively low" and the governmental interest was significant. (Ct. App. Dec. ¶ 19, App. 134.) Finally, the Court of Appeals said the fact that the Plaintiffs were left with no remedy to challenge the assessment was not a due process violation because that result was caused by their own "choice" to refuse to consent to the interior inspection. (Ct. App. Dec. ¶ 21, App. 135.) This Court should reverse the Court of Appeals on each of these issues.

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

According to the Court of Appeals, it is acceptable for the government to demand warrantless entry into a home to conduct a tax

assessment and penalize those who refuse because doing so is not a "search" within the meaning of the Fourth Amendment. (Court App. Dec. ¶15, App. 132-33.) But the Court of Appeals devotes little time or space in its Decision to justify this conclusion.

It defies both common sense and our common language to say when the government enters someone's home to look around at whatever it might care to look at for its own purposes, that conduct is not a "search." According to Merriam-Webster's on-line dictionary, "search" means "to carefully look for someone or something: to try to find someone or something."[7] That is precisely what the assessor does. She carefully looks for evidence to support her assessment. She is conducting a "search" and no reasonable person would conclude otherwise.

Presumably, the Defendants-Respondents will concede that the assessor is searching the interior of the house under the common sense definition, but will argue that does not make it a "search" for purposes of the Fourth Amendment and Article I, sec. 11. But any such argument ignores both the history of the Fourth Amendment and the subsequent case law.

[7] http://www.merriam-webster.com/dictionary/search

A. The History of the Fourth Amendment Shows that Government Entry into a Citizen's Home for Tax Purposes Is a Search

The British practice of warrantless searches of homes to collect taxes was one of the main evils the framers sought to prevent by the Fourth Amendment:

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

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

John Adams –the principal author of the Fourth Amendment[8] – was fully aware of the history of the King using his unfettered power to search colonists' homes for revenue purposes. In February 1761, he personally attended a court argument on this issue in a case known as *Paxton's Case*. Massachusetts Historical Society, The Adams Papers: Digital Edition, https://www.masshist.org/publications/apde2/view?id=ADMS-05-02-02-

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

0006-0002-0001#ptrLJA02d034n1) (last visited November 8, 2016) (citing Legal Papers of John Adams, Vol. 2 at 107). The King had given British tax authorities general and permanent "writs of assistance" to look for taxable goods. The writs were challenged by famous colonial lawyer James Otis. When Adams recounted the case years later he noted that opposing the King's power in this case was "the first Act of Opposition to the arbitrary Claims of Great Britain. Then and there the child Independence was born." *Id.*

After the American Revolution, with the experience of abusive revenue searches "[v]ivid in the memory of the newly independent Americans," the Fourth Amendment was drafted, proposed, and ultimately ratified by the States. *Payton v. New York*, 445 U.S. 573, 583, n. 21 (1980) (quoting *Boyd v. United States*, 116 U.S. 616, 625 (1886)). Preventing home intrusion by the government for tax purposes was thus one of the major foundations for the Fourth Amendment.

It is this history that has led the courts to emphasize the sanctity of the interior of a citizen's home when it comes to the Fourth Amendment. As pointed out in *Florida v. Jardines*, "[w]hen 'the Government obtains information by physically intruding' on . . . houses, . . . 'a 'search' within

the original meaning of the Fourth Amendment' has 'undoubtedly occurred.'" 133 S. Ct. 1409, 1412, (2013) (quoting *U.S. v. Jones*, 132 S. Ct. 945, 950-51, n. 3 (2012)).

Moreover, the U.S. Supreme Court has said "[f]reedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment." *Payton*, 445 U.S. at 587. "[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Id.* at 590.

Similarly, this Court has said "[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. This Court has also quoted *Kyllo v. United States*, 533 U.S. 27, 37 (2001), saying that, "In the home, our cases show, ***all*** details are intimate details, because the entire area is held safe from prying government eyes." *Id.* (emphasis in original).

The Defendants-Respondents may say this history is not relevant because British soldiers operating under general warrants were much more

oppressive than modern-day property tax assessors. That may be true, but it misses the point entirely. The point is not that the tax assessor has all of the power of a British constable in colonial days, but rather that the Fourth Amendment was created to keep the government from searching (in the dictionary sense of the word) a citizen's home for tax purposes.

In Gardiner's Response to the Petition for Review, Gardiner says that "upon reading the opening section of [Plaintiffs-Appellants-Petitioners'] Argument, one would think that Wisconsin citizens are living in fear of jack-booted government officials forcing their way into homes at any time in order to collect taxes." According to Gardiner these arguments are "exaggerated." (Gardiner Resp. to Pet. for Rev. 22.)

But until quite recently few would have believed that Wisconsin law enforcement would engage in "pre-dawn, armed, paramilitary-style raids in which bright floodlights were used to illuminate the … homes" of innocent individuals. *State ex rel. Two Unnamed Petitioners v. Peterson*, 2015 WI 85, ¶¶28, 133. One may also have thought that Wisconsin prosecutors would not seize "wholly irrelevant information, such as retirement income statements, personal financial account information, personal letters, and family photos" while their targets were restrained under police supervision

and denied the ability to contact their attorneys. *Id.*, ¶ 29. But these things happened.

Moreover, the Fourth Amendment and Article I, sec. 11 do not simply prevent unreasonable searches coupled with some other arbitrary power. They do not prohibit only those unreasonable searches that are conducted in some unacceptably aggressive manner or that happen more than occasionally. Rather, they draw a firm line at the front door of our homes; that line may not be crossed by the government without a warrant or exigent circumstances, even if the government is polite when it does so.

There will always be some reason – often described with importunity – that the government "must" cut corners to serve its purposes, *e.g.*, to regulate campaign spending, enforce building codes, or impose taxes. Our framers were wise enough to see that an individual's foundational right to be secure in his home would have to be protected from the "urgencies" of the day. When it comes to protecting the home, a citizen's right to privacy in the home is never "nominal" (*see* Dover Resp. to Pet. for Rev. 6), nor is the level of intrusion ever "relatively low" (*see* Ct. App. Dec. ¶19, App. 134). The front door of a citizen's home is a bright line. When the government insists on crossing that line to "look around"

the inside of a citizen's home, it is always a "search" and always subject to the requirements of the Fourth Amendment. This is a case where this Court needs to "zealously guard that line." *Sobczak*, 2013 WI 52, ¶27.

B. Fourth Amendment Case Law Establishes that Government Entry into a Home for Tax Purposes Is a Search

Courts have drawn a distinction between an external view by an assessor (which is usually not a search) and an interior inspection of a home (which is always a search). For example, in *Widgren v. Maple Grove Twp.*, 429 F.3d 575 (6th Cir. 2005), the court held that an exterior inspection of a home for tax assessment purposes was not a Fourth Amendment search but clarified that an interior search would be:

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

> 533 U.S. at 41, 43, 121 S.Ct. 2038 (Stevens, J., dissenting) (emphasis in original).

Id. at 583 (alterations in original).

The distinction between an exterior view and an interior search by a tax assessor was also acknowledged in *Bennis v. Kleven*, No. 15-CV-479-JDP, 2016 WL 4197615, at *2 (W.D. Wis. Aug. 5, 2016) (relying on *Widgren* and concluding that a tax assessor did not violate the plaintiff's Fourth Amendment Rights only because the plaintiff did not submit evidence that the assessor went inside the plaintiff's cabin.)

Moreover, it is wrong as the Court of Appeals implies (Ct. App. Dec. ¶19, App. 134) to say there are **no** criminal law implications in a home search by a tax assessor. This is apparent from cases like *Covey v. Assessor of Ohio Cty.*, 777 F.3d 186 (4th Cir. 2015). In that case, a tax assessor not only did an exterior inspection of the home involved but also looked inside the home without a warrant. When he looked in the home he saw marijuana and reported it to the sheriff, who ultimately arrested the homeowner. The prosecutor argued that an inspection by a tax assessor was not a "search" for Fourth Amendment purposes, just as the Defendants-Respondents do here. The Fourth Circuit disagreed, noting the fundamental difference between an exterior inspection and looking into the interior. *Id.*

at 195. *See also State v. Vonhof*, 751 P.2d 1221 (Wash. App. 1988) (homeowner convicted after tax assessor observed presence of marijuana and reported the homeowner to the police.).

In support of its conclusion that a search by the tax assessor is not a "search" under the Fourth Amendment, the Court of Appeals relied solely upon *Wyman v. James*, 400 U.S. 309 (1971). In *Wyman*, the U.S. Supreme Court held that the State of New York could require a parent receiving Aid to Families with Dependent Children ("AFDC") benefits to submit to an in-home interview as a condition of receiving government benefits. *Id.* at 326.

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

Wyman is inapplicable here. The tax assessor does not dispense charity; nor have the Plaintiffs applied to the Town to receive any benefits. Unlike the parent who applied for the AFDC benefits in *Wyman*, the Plaintiffs have asked for nothing to which the Town could attach the string of requiring a home inspection. If mere residence in the municipality was a "benefit" to which the Town could attach such a string, then a municipality could conduct warrantless searches for purposes of building inspections, energy management, recycling compliance, or any other asserted municipal purpose as a condition to a citizen's benefit to living in the municipality. As noted earlier, this would undermine the original purpose of the Fourth Amendment. It is not the law.

First and foremost, the U.S. Supreme Court held in *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 530-31 (1967), that a municipality may not conduct warrantless searches for purposes of enforcing its building code. The Supreme Court held that administrative searches, no less than searches for evidence of a crime, "are significant intrusions upon the interests protected by the Fourth Amendment," *id.* at 534, and that it would be "anomalous to say that the individual and his

private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior," *id.* at 530.

Further, it would be an odd result to decide the government **may not** enter into a home without a warrant to further the significant governmental interest of arresting a felon, *see Payton*, 445 U.S. at 576 (Fourth Amendment prohibits warrantless and nonconsensual entry into a suspect's home to make a felony arrest), but **may** do so to further the less significant governmental interest of conducting tax assessments.

In fact, the various so-called "special needs" exceptions recognized to permit warrantless searches in Wisconsin have arisen in very different circumstances to those present here. *See State v. Rowan*, 2012 WI 60, 341 Wis. 2d 281, 814 N.W.2d 854 (upholding conditions of defendant's supervised release which authorized suspicion-less and warrantless searches of her person, vehicle, and residence); *State v. Guzman*, 166 Wis. 2d 577, 480 N.W.2d 446 (1992) (upholding warrantless and surprise drug screening of defendant during sentencing); *State v. Martin*, 2004 WI App 167, 276 Wis. 2d 310, 686 N.W.2d 456 (upholding statute which authorizes warrantless DNA samples from inmates); *State v. Guenterberg*, 202 Wis. 2d 648, 551 N.W.2d 63 (Ct. App. 1996) (upholding administrative code

section authorizing warrantless search of parolee's or probationer's living quarters or property); *Lundeen v. Wis. Dept. of Agriculture, Trade and Consumer Protection*, 189 Wis. 2d 255, 525 N.W.2d 758 (Ct. App. 1994) (upholding warrantless inspection of dairy farm for food safety purposes).

Nor are there any exigent circumstances here. In *State v. Richter*, 2000 WI 58, ¶78, 235 Wis. 2d 524, 612 N.W.2d 29, this Court noted four categories of exigent circumstances that authorize warrantless entry into a home: "1) hot pursuit of a suspect, 2) a threat to the safety of a suspect or others, 3) a risk that evidence will be destroyed, and 4) a likelihood that the suspect will flee." But none of those apply here.

In *Camara*, the U.S. Supreme Court specifically stated it saw no pressing need for a building inspection that would create exigent circumstances sufficient for a warrantless search, *id.* at 533, and even devoted a substantial portion of its opinion to addressing what kind of a warrant would be appropriate, *id.* at 534-39. Here, the governmental task of tax assessment is of even less urgency than inspecting for dangerous conditions. The proper assessment of a tax is not a health or safety issue, and the time it takes to obtain a warrant would not risk destruction of what the assessor would otherwise see. *Camara*'s holding that property

inspections without consent and without a warrant violate the Fourth Amendment should *a fortiori* apply here.

The Court of Appeals distinguished *Camara* on the very argument that the U.S. Supreme Court rejected. The Court of Appeals said *Camara* was inapposite because Camara's refusal to consent to a building inspection ultimately resulted in his arrest. (Ct. App. Dec. ¶14, App. 132.) But the *Camara* Court itself made clear the Fourth Amendment's right to privacy is not limited to attempts to enforce criminal law. 387 U.S. at 530. There is no case law establishing that the government may insist upon an unreasonable search of a person's home as long as the sanction it imposes for a refusal to consent is not criminal.

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

Amendment jurisprudence to "assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." 132 S. Ct. at 950.

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

In *Florida v. Jardines*, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013), the Supreme Court followed this originalist approach and concluded that allowing police dogs to sniff on a citizen's front porch was a "search." 133 S. Ct. at 1417-18 ("When 'the Government obtains information by physically intruding' on persons, houses, papers, or effects, 'a 'search' within the original meaning of the Fourth Amendment' has 'undoubtedly occurred.'") (quoting *Jones*, 132 S Ct. at 950-51, n. 3) (emphasis added).

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

This Court has noted and followed this change in Fourth Amendment law. In *State v. Subdiaz-Osorio*, 2014 WI 87, ¶48, 357 Wis. 2d 41, 849 N.W.2d 748, this Court, citing *Jones*, expressly noted that both the U.S. Supreme Court and this Court have returned to a common law trespass theory to analyze whether a search violated the Fourth Amendment. *See also State v. Dumstrey*, 2016 WI 3, ¶¶28-30, 366 Wis. 2d 64, 873 N.W.2d 502.

It is beyond dispute that entry into a home would be a trespass. Indeed, the Wisconsin statutes relating to tax assessors make this clear. Tax assessors have a statutory exemption from trespass, but that exemption does not extend to entering *buildings*. § 943.13(4m). Nor does it extend to entering any part of the property if the owner has given notice refusing entry. *Id.* Thus, if an assessor enters a building without the express consent of an owner, that assessor is guilty of trespass. Under current Fourth Amendment law, that makes it a Fourth Amendment search.

In these modern cases, the U.S. Supreme Court found that conduct far less intrusive than a detailed interior inspection of a citizen's home

constituted Fourth Amendment searches. More importantly, these cases show courts have deliberately returned Fourth Amendment jurisprudence to its roots. The question to be asked is whether the framers would have believed a tax assessor inspecting the inside of a home without a warrant was a "search." Given that a primary purpose of the Fourth Amendment was to protect against warrantless searches of homes for revenue purposes, the answer is absolutely "yes."

These recent decisions establish that *Wyman*'s conclusion to the contrary, even were it applicable, is outdated and should be limited to its facts. The government function of collecting taxes does not give license to invade the sanctity of the home. Because preventing government searches of the home to assist government tax collection was one of the primary purposes of the Fourth Amendment, tax collection must conform to its strictures - not override them.

The fact that the tax assessor never went inside the Plaintiffs' home does not eliminate their Fourth Amendment claim. A constitutional claim can be premised on punishment for the exercise of a constitutional right. *See, e.g.*, *Dunn v. Blumstein*, 405 U.S. 330, 341 (1972) (quoting *Harman v. Forssenius*, 380 U.S. 528, 540 (1965) ("'It has long been established that a

State may not impose a penalty upon those who exercise a right guaranteed by the Constitution. . . . Constitutional rights would be of little value if they could be . . . indirectly denied.'")). Here, the Plaintiffs were punished for refusing to consent to a search by being stripped of their constitutional right to appeal the assessment. That punishment is a Fourth Amendment violation.

Indeed, in *Camara* itself, the building inspector was denied entry. The imposition of a sanction on the refusal to consent nevertheless violated the Fourth Amendment. The Court of Appeals cannot be right that entry into a citizen's home by the government is not a search. If that were true, then there would be nothing wrong with the State or any municipality passing a law saying citizens must consent to entry by the tax assessor under penalty of a fine or even imprisonment. If unconsented entry by the tax assessor is not a "search," then there could be no constitutional concern caused by such a law.

Nor can it be true that a demand to enter for some purpose other than enforcement of the criminal law or that is enforced by something other than a criminal penalty is not a search. If that were so, Wisconsin homeowners would be subject to demands for entry for all manner of purposes enforced

by a panoply of burdens, sanctions and disabilities. If a proposition leads to absurd results, it is almost always wrong. An interior tax assessment inspection is a search.

II. WISCONSIN'S ASSESSMENT SEARCHES ARE NOT REASONABLE

The Court of Appeals also held that even if a compelled interior inspection by a tax assessor is a Fourth Amendment search, it does not violate the Constitution because such a search is reasonable. (Ct. App. Dec. ¶16-19, App. 133-134.) The United States Supreme Court has stated, however, that "searches . . . inside a home without a warrant are presumptively unreasonable." *Payton*, 445 U.S. at 586. The Court of Appeals failed to start from this presumption and failed to explain why this presumption does not apply here.

The Court of Appeals spent only a single paragraph addressing whether the tax assessor's search was reasonable. (Ct. App. Dec. ¶19, App. 134.) The Court of Appeals believed the state's interest in uniformity of taxation outweighed what it called the "relatively low" level of intrusion into the privacy of the home. As we have seen, however, entry into the home is never a "relatively low" level intrusion. One of the primary

concerns of the framers was to prevent searches of homes done without a warrant for tax purposes. *See supra*, Section I.A. They believed the government's interest in raising revenue did not and should not justify warrantless home searches.

The logic of the Court of Appeals' conclusion that punishing citizens for refusing interior inspections is necessary to accomplish uniformity of assessments (Ct. App. Dec. ¶19, App. 134) is faulty in at least three ways. First, by the logic adopted by the Court of Appeals, the interest in administrative efficiency and ease could justify requiring the forfeiture of Fourth Amendment rights in many contexts.

It will always be easier to achieve regulatory objectives – to enforce zoning laws and health and safety rules – if the government can enter a home without a warrant. But this conclusion is completely inconsistent with *Camara*, which rejected warrantless searches in these contexts. It is also completely inconsistent with the special protection provided to – and the bright line drawn at the threshold of – the home. We do not allow the government to conduct a warrantless search of the home to look for building code violations or to see if anything can be found that might

suggest the homeowner is underreporting his or her income. Such government purposes do not trump the Fourth Amendment.

Second, the Court of Appeals' logic is inconsistent with additional U.S. Supreme Court precedent regarding government searches for tax purposes. The Court of Appeals relied on *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), but the Court of Appeals misapplied that case. The Court of Appeals cited *New Jersey v. T.L.O* for the proposition that reasonableness requires balancing an "'individual's legitimate expectations of privacy and personal security' with the 'government's need for effective methods' to carry out its statutory commands." (Ct. App. Dec. ¶18, App. 133-34.) But what *New Jersey v. T.L.O.* actually says is the balance is between "the individual's legitimate expectations of privacy and personal security . . . [and] the government's need for effective methods *to deal with breaches of public order*. 469 U.S. at 337 (emphasis added). The difference in wording is significant.

In *New Jersey v. T.L.O.*, the Supreme Court dealt with the search of a student's purse by a school official who found drugs in the purse. In the section of the decision relied upon by the Court of Appeals, the Supreme Court compared the expectation of privacy of a student at school with the

School's need to maintain order for the safety of other students and staff. The Supreme Court found that in the unique setting of a school, "the substantial need of teachers and administrators for freedom to maintain order" would justify a warrantless search when "there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." *Id.* at 341-42.

There is no similar "breach of public order" here. This case involves the State's taxing power and presents a completely different balance. In *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977), the U.S. Supreme Court dealt directly with that issue. In that case, the government seized certain automobiles to satisfy a taxpayer's tax obligations and searched the business premises of a related business to look for additional assets. The Supreme Court held that the seizure of the automobiles from a public place was consistent with the Fourth Amendment but the search of the business premises was not. *Id.* at 351-53.

The government defended its conduct in *G.M. Leasing Corp* on essentially the same argument as the Court of Appeals used here. The government argued there is a broad exception to the Fourth Amendment

that allows warrantless administrative searches to further the enforcement of the tax laws, but the Supreme Court disagreed. *Id.* at 354. The Court said "[w]e recognize that the 'Power to lay and collect Taxes' is a specifically enunciated power of the Federal Government, Const., Art. I, s 8, cl. 1, and that the First Congress, which proposed the adoption of the Bill of Rights, also provided that certain taxes could be 'levied by distress and sale of goods of the person or persons refusing or neglecting to pay.'" But the Supreme Court held that this power did not include the power to conduct warrantless searches. *Id.* at 354-55.

Indeed, the Supreme Court held 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. The Supreme Court held that although the government has the right to pass laws necessary to collect its revenue, the means for doing are restrained by the Fourth Amendment. *Id.*

The application of the above cases to a State's power to collect taxes through administrative searches was analyzed in detail by the Iowa Supreme Court in *State v. Carter*, 733 N.W.2d 333 (Iowa 2007). In that

case, the Iowa Department of Revenue obtained an administrative search warrant to search the defendant's home to look for assets to collect the State's "drug tax."[9] In the course of that search marijuana was discovered. That led to a criminal search warrant, which led to an ultimate conviction. *Id*. at 334-35.

The issue in the case was whether the criminal search warrant, which yielded the evidence in question in the case, was valid; that, in turn, depended on whether the administrative search that preceded it was valid. *Id.* at 336–37. To answer that question, the Iowa Supreme Court looked at the constitutional requirements for a home search in an administrative context and, in particular, in the tax collection process. In doing so, the Iowa Supreme Court held that administrative searches, like searches for evidence of crime, are encompassed by the Fourth Amendment and while the "probable cause" standards may be different for such a search, nevertheless such searches require a valid warrant issued under "reasonable legislative or administrative standards" for conducting a search of a particular home. *Id*. at 337-38. Based in particular upon *G.M. Leasing Corp.*, the Iowa Supreme Court held that the Fourth Amendment drew a

[9] Iowa law imposes an excise tax on dealers of certain controlled substances.

clear line preventing warrantless searches of areas protected by the Fourth Amendment, such as homes. *Id*. at 339.

Even though the State has the power to tax, that power is constrained by the Fourth Amendment and does not permit warrantless searches even for administrative purposes. *See also Adams v. State*, 762 N.E.2d 737 (Ind. 2002) (which likewise invalidated a State's practice of administrative searches for the purpose of enforcing tax laws). The Court of Appeals' conclusion that a statute that authorizes general searches of everyone's home for property tax purposes is "reasonable" under the Fourth Amendment because such a system is better for the government, turns the framers' intent on its head.

The third fault in the Court of Appeals' logic that Wisconsin's current system is needed to obtain uniformity is illustrated in this case. The existing system achieved exactly the opposite result here. 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. Uniformity is **harmed** by a system that allows assessors to make arbitrary assessments they know cannot be challenged.

Even if a system of warrantless tax inspection searches could be reasonable by itself (which the Plaintiffs dispute), the statutory penalty for resistance cannot be the loss of the right to contest the tax imposed. This results in a separate constitutional violation.

The U.S. Supreme Court has made it clear that state governments must at least provide a post-deprivation remedy for the recovery of taxes unlawfully levied. *McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 51 (1990). Property owners cannot be forced to pay taxes with no method of challenging the legality of that tax:[10]

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

Id. at 39 (citation and footnote omitted).

It is not a "reasonable" system to say the Plaintiffs could have kept their due process rights if they had submitted to a warrantless search of their home. Citizens cannot be forced to give up their Fourth Amendment rights in order to secure rights guaranteed by the Fourteenth Amendment.

[10] An aggrieved property owner in Wisconsin can challenge an excessive tax only indirectly – by challenging the assessment. Wis. Stat. § 74.37. And by forfeiting the right to challenge the assessment, the property owner therefore forfeits his right to challenge the tax.

It does no good to say the Plaintiffs could refuse to consent when that refusal places them at the unfettered mercy of the tax assessor.

Moreover, it is not hard to imagine a different and better system. The State of New York has shown that a tax assessment system can co-exist with a homeowner's right to challenge a tax assessment even if the homeowner has refused an interior inspection. *See Yee v. Town of Orangetown*, 76 A.D. 104 (N.Y. Sup. Ct. App. Div. 2nd Dept. 2010) (homeowner is entitled to challenge tax assessment in small claims court without consenting to internal inspection by tax assessor); *Schlesinger v. Ramapo*, 807 N.Y.S. 2d 865 (N.Y. Sup. Ct. 2006) (homeowner may proceed with tax *certiorari* proceeding without consenting to interior inspection by tax assessor).

Also, the government is always free to seek a warrant, pursuant to which the search would be proper under the Fourth Amendment. Wisconsin has a statutory system for doing so. Wis. Stat. § 66.0119 specifically allows a municipality to seek a warrant for "property assessment" purposes. It is hard to accept an argument from the Defendants-Respondents that warrantless searches of homes are necessary and constitutionally appropriate when they chose not to use a statutory tool

available to them to achieve their asserted public purpose in a manner consistent with the Fourth Amendment and Article I, Section 11.

The U.S. Supreme Court has expressly approved of administrative warrants requiring a lower showing than the traditional standard for probable cause. *Camara*, 387 U.S. at 538. In New York, if a town needs to enter the homes of the handful of taxpayers who refuse entry, it can explain why and seek permission from a magistrate. *See, e.g., In re Jacobowitz v. Bd. of Assessors for Town of Cornwall*, 121 A.D.3d 294, 301-02 (N.Y. App. Div. 2nd Dept. 2014) (entry into home for assessment is a Fourth Amendment search and requires a warrant issued on a showing of probable cause that the search is reasonable). New Hampshire also has an administrative inspection warrant process if homeowners refuse consent for tax assessment interior inspections. *See* N.H. REV. STAT. § 74:17.

The State has reasonable and better options for creating a tax assessment system consistent with the Fourth and Fourteenth Amendments. Demanding entry into private homes, without a warrant, and upon penalty of losing all ability to challenge the imposed tax, is not one of them. The procedures set forth in the Wisconsin statutes are not reasonable, and not constitutional.

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

The United States Constitution mandates that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Wisconsin Constitution provides that "All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed." Wis. Const. art. I, § 1. This Court has interpreted this clause as a protection of due process and has held that "[w]hile the language used in the two constitutions is not identical . . . the two provide identical procedural due process protections." *County of Kenosha v. C & S Mgmt., Inc.*, 223 Wis. 2d 373, 393, 588 N.W.2d 236 (1999).

Meaningful access to the courts is a fundamental due process right. *Lewis v. Casey*, 518 U.S. 343, 350-51 (1996). In *Penterman v. Wisconsin Electric Power Co.*, this Court described the right of access to the courts as follows:

> It entitles the individual to a fair opportunity to present his or her claim. *Bell v. City of Milwaukee*, 746 F.2d 1205, 1261 ([7th Cir.] 1984) (citing *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d 62 (1965)). Such a right exists where the claim has a "reasonable basis in fact or law." *Bell*, 746 F.2d at 1261 (citing *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983)). Judicial access must be "adequate, effective, and meaningful." *Bounds v. Smith*, 430 U.S. 817, 822, 97 S. Ct. 1491, 1495, 52 L. Ed. 2d 72 (1977).

211 Wis. 2d 458, 474, 565 N.W.2d 521 (1997).

Here, the Town's taxation of the Plaintiffs' home has deprived them of their property. *See McKesson Corp.*, 496 U.S. at 36 (1990) ("[E]xaction of a tax constitutes a deprivation of property."). Due process requires, therefore, that they have a "fair opportunity" to present their claim of an improper assessment and receive "adequate, effective, and meaningful" access to the courts to argue that the assessment of their Property was improper.

Section 70.47(7)(aa), combined with Section 74.37(4)(a,) denied the Plaintiffs that fair opportunity. The Plaintiffs have suffered a deprivation – an increased assessment resulting in higher taxes – without *any* opportunity to challenge it. But according to the Court of Appeals, this was not a problem. Without discussing *McKesson*, *Lewis*, or *Penterman*, the Court of Appeals concluded it was the Plaintiffs' own choice that denied them

access to the courts and not anything else. (Ct. App. Dec. ¶21, App. 134.) Never mind that the Plaintiffs tried to challenge their assessment every step of the way, the Court of Appeals said that by refusing to consent to a government search of their home, they were choosing to forego their day in court.

In the view of the Court of Appeals, the Plaintiffs were required to choose between their privacy rights and their due process rights. They could not have both, and the Plaintiffs are merely suffering the consequences of their choice. But the government cannot force citizens to choose between two rights. *Dunn v. Blumstein*, 405 U.S. 330, 341-42 (1972) (government may not force individuals to choose between the "unconditional personal right" to travel and the right to vote); *Harman v. Forssenius*, 380 U.S. 528, 540 (1965) (individuals may not be punished by having to complete and file a burdensome certificate to exercise their right to vote without a poll tax).

In addition, *McKesson* leaves no room for the possibility that government can ever exact a tax without providing for at least post-deprivation opportunity to seek a refund. While the *adequacy* of a post-deprivation remedy can be questioned, *see, e.g.*, *Mathews v. Eldridge*, 424

U.S. 319 (1976) (establishing a three-part test to determine what procedures are required when there has been a deprivation of life, liberty, or property), *McKesson* establishes 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.

The Court of Appeals did not hold Wisconsin to this standard. Sections 70.47(7)(aa) and 74.37(4)(a) together violated the Plaintiffs' right to due process of law. In fact, they leave them with no meaningful process at all.

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 Wisconsin's method of assessing and collecting property taxes infringes on the constitutional rights of its citizens. The Plaintiffs respectfully request that this Court declare that Wis. Stat. § 70.47(7)(aa) and § 74.37(4)(a) taken together are unconstitutional as applied to them.

Dated this 10th day of November, 2016.

Respectfully submitted,
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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief and appendix conform to the rules contained in section 809.19(8)(b) and (c) for a brief and appendix produced with proportional serif font. The length of the portions of this brief referred to in section 809.19(8)(c)1. as well as its Introduction is 10,002 words, calculated using the Word Count function of Microsoft Word 2010.

Dated: November 10, 2016

Electronically signed by Thomas C. Kamenick

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THOMAS C. KAMENICK

CERTIFICATION OF ELECTRONIC FILING

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

Dated: November 10, 2016

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