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Zoning, Neighborhoods, and Development Committee
City of Milwaukee
(Delivered via email to clee@milwaukee.gov)

Re: Proposed Resolution 221501 Regarding Working Group to Monitor Berrada Properties Management, Inc.

Dear Members of the Committee:

My firm, which represents Berrada Properties Management, Inc. (BPM), recently learned of Alderman Robert Bauman's Proposed Resolution 221501. The resolution, if adopted, would create a "working group" to "[m]onitor residential rental properties owned or managed by" BPM—and BPM only. Ex. A at 1. It would also seek to "[d]evelop and implement strategies to remediate any substandard conditions observed" at BPM properties. *Id*. Because the Proposed Resolution is unwarranted and because its adoption would be unlawful in several respects, we respectfully request that the Committee vote it down. In the event that it is instead adopted, this letter attaches a litigation-hold notice informing the members of the Committee of their duty to preserve all potentially relevant evidence (texts, emails, letters, etc.) bearing on the possible claims described below. *See* Ex. B.

Regrettably, the proposal at issue appears to be yet another attempt by the sponsoring alderman to leverage the power of government to further personal ends—a practice that, in past cases, has resulted in high-profile litigation against the City. Just last month, Alderman Bauman complained to BPM about cosmetic changes that it had made to buildings in his neighborhood. Dissatisfied by those "perfectly legal" alterations (the alderman's words), he now seeks to commission a "monitor" devoted solely to BPM, responsible for "remediat[ing]" undefined "substandard conditions" as alleged by "aldermanic . . . complaints." Ex. A at 1. But targeting BPM in this way would violate the Bill of Attainder and Equal Protection Clauses of the United States and Wisconsin Constitutions, enforceable under 42 U.S.C. § 1983 and Wis. Stat. § 806.04, respectively. Also troubling, Alderman Bauman's public statements leading up to the proposal, calling Mr. Berrada a "menace" and "irresponsible," are defamatory—as were his statements in *Tri-Corp Housing, Inc. v. Bauman*, No. 07-cv-13965 (Mil. Cir. Ct. 2022) (appeal pending), according to the jury, which entered a $1.4 million verdict against the City.

BACKGROUND ON BERRADA PROPERTIES MANAGEMENT

BPM is Milwaukee's leading property management company. It has more than 9,000 units across the city, and it prides itself on providing quality living at affordable prices. Due to its success, BPM is the fourth largest taxpayer in the city.[1] BPM deploys a business model that serves the lower-income and working-class neighborhoods of our City without gentrifying them. BPM gainfully employs hundreds of individuals, many of whom are Milwaukee residents and nearly all of whom are members of minority groups.

BPM's model involves purchasing neglected and poorly managed properties, completely rehabilitating them, and then leasing them back to occupants. Ordinarily, when BPM acquires one of its near-blighted properties, it offers existing tenants the option to relocate for a time at BPM's expense, until the expedited renovation is complete. Tenants then move back into these improved units at equivalent or only modestly raised rents. Due to its extensive work to improve the quality of housing here and its strong reputation in the community, BPM now has a waiting list of more than 2,000 prospective tenants. *See, e.g.*, Ex. D at 2 (letter likening BPM's work to a "miracle transformation")

BPM is popular because it respects tenants. In 2020 and 2021, for example, BPM voluntarily implemented an eviction moratorium for months before and after the government's eviction moratoria were in place during the COVID-19 pandemic. This allowed its tenants to focus on their health, safety, and families without worrying about paying rent. BPM also returned to its tenants over $1 million in late fees that year. Additionally, BPM implemented a pre-eviction diversion program in 2020 in conjunction with community advocacy groups.

All of this work is critical to our City, since, sadly, we face a housing crisis. One major contributor to this crisis is the lack of private capital invested into "high-poverty neighborhoods and neighborhoods of color."[2] While public and nonprofit aid can help "set a strong foundation to spur private investment," private capital is key to resolving the housing crisis.[3] Fortunately, unlike many other businesses or individuals, BPM has injected hundreds of millions of dollars into our neighborhoods, rejuvenating them with fully updated, quality housing.

BPM's rehabilitation efforts are so comprehensive that BPM is the largest customer for Home Depot—nationwide.

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[1] City of Milwaukee, Wisconsin, *Assured Guaranty Municipal*, 19 (May 19, 2022), *available at* https://city.milwaukee.gov/ImageLibrary/Groups/cityComptroller/Bonds/General-Obligation/Milwaukee2022BondsandNotesOfficialStatementN3B4T5T6FINAL.pdf.

[2] Brett Theodos et al., *Neighborhood Investment Flows in the City of Milwaukee*, Urban Inst., 60 (Nov. 17, 2021), *available at* https://tinyurl.com/3cr283f4.

[3] Talis Shelbourne, *Five Key Takeaways from the Urban Institute's Report on How Money Flows Throughout Milwaukee*, Milwaukee Journal Sentinel (Nov. 17, 2021).

As further evidence of its commitment to the community, BPM also runs a bulk-item-pickup program costing it millions of dollars. BPM started this program years ago, after noticing numerous bulk items being discarded on its properties—most by non-tenants—who did not want to pay the city's bulk-collection fees themselves. Instead of complaining to the City, BPM has provided its own solution (on its own dime), with its crews collecting four, 30-yard dumpsters' worth of trash each day. The items are then condensed into smaller units, by BPM's own machinery, for disposal by waste management.

Of course, given its footprint in Milwaukee, BPM regularly cooperates and interfaces with government officials. For instance, BPM has teamed up with—and continues to team up with—the Department of Neighborhood Services for years with near weekly collaborations to ensure timely completion of all work orders. *See, e.g.*, Ex. G. In fact, there are "standing appointment[s]" between BPM and city government to "meet . . . every Thursday to ensure that all of the fire inspections in [BPM's] portfolio are completed by mid-year." *Id.* Given this collaboration, there are multiple inspectors from city government who are dedicated to BPM, which, in turn, employs multiple workers devoted almost solely to responding to department work orders generated by citizen calls. *See id*. The prompt attention to work orders is evidenced by the fact that a substantial volume of orders has never resulted in fines.

As another example, because BPM invests in some of Milwaukee's most challenging areas, BPM maintains a strong relationship with the police while it transforms blighted properties into attractive homes. *See, e.g.*, Ex. H (expressing appreciation from police to BPM for "assist[ing]" with apprehending a "target in custody and recover[ing] multiple firearms"); Ex. I (thanking BPM for being "very responsive and accommodating" to the community). Part of this work involves landscaping to permit more light around its buildings to increase safety.

BPM also had amicable relations with other members of the city government, including Alderman Bauman. He has even asked Mr. Berrada to provide housing in a BPM property to an individual that Alderman Bauman was trying to help.

More recently, Alderman Bauman has become hostile. This hostility seems to have arisen around the same time that BPM painted a building near Alderman Bauman's home in a manner that he found unsatisfactory and not in keeping with what he deems to be "historic preservation" standards.

ALDERMAN BAUMAN'S APPARENT PATTERN AND PRACTICE OF USING GOVERNMENT POWER FOR PRIVATE ENDS

Alderman Bauman is "a longtime historic preservation advocate."[4] "Since 1997, he has resided in an 1888 Victorian home in the Historic Concordia Neighborhood on Milwaukee's west side and is a member of the board of directors of Historic Concordia

[4] *Alderman Bauman's Biography*, City of Milwaukee (last accessed Jan. 25, 2023), *available at* https://city.milwaukee.gov/CommonCouncil/CouncilMembers/District4/AldermanBaumansBio.

Neighbors, Inc."[5] He is so enthusiastic about architecture and preservation that he won the 31st annual Spaces & Traces Historic Preservation Award in May 2012[6] and, more recently, served as master of ceremonies to The Cream of the Cream City Awards that recognizes "outstanding contributions in the field of historic preservation and heritage education" in Milwaukee.[7]

Yet, it seems that when other citizens' constitutional conduct might "interfere" with his personal interests, Alderman Bauman will sometimes use his public office to try to stop it. Here are a few known examples:

- In *Wisconsin Housing and Economic Development Authority v. Tri-Corp Housing, Inc.*, 2011 WL 1760449 (Ct. App. Wis. May 10, 2011), Alderman Bauman allegedly "interfered" with city contracts and a nonprofit organization that provided housing to cognitively impaired individuals, causing a housing facility to shutter. *Id.* ¶ 2. Notably, that housing facility was "approximately two blocks" from his 1888 Victorian home. *Id.* ¶ 5. According to the court, Alderman Bauman was determined to "[r]elocate [cognitively impaired] residents and [raze]" their housing. *Id.* ¶ 12.
- Likewise, in *Family Dollar Stores of Wisconsin LLC v. City of Milwaukee*, 2022 WL 6590183 (Ct. App. Wis. Oct. 11, 2022), the Wisconsin Court of Appeals concluded that Alderman Bauman's use of government power violated Family Dollar's constitutional due-process rights. There, he had "spearheaded" proceedings and made "biased" statements against a Family Dollar located near his home. *Id.* ¶¶ 34–35.[8] And although he had been expected to act as an "impartial" public servant in this dispute, he instead "prejudged this matter" based on his views of a "problematic establishment in his district," according to the court. *Id.* ¶ 35. Given his risk of bias, the court would not even accord Alderman Bauman "the presumption of honesty and integrity that would ordinarily be applied" to public officials. *Id.*
- Similarly, in *Six Star Holdings, LLC v. City of Milwaukee*, 932 F. Supp. 2d 941, 945–46, 953 (E.D. Wis. 2013), the federal court found that Alderman Bauman's instruction to the city clerk to "hold" Six Star's application for a theater license around his home violated the First Amendment. The city's liability—created by his official misconduct—was affirmed by the Seventh Circuit Court

[5] *Id.*

[6] Michael Horne, *Ald. Bauman's Century-Old Home*, Urban Milwaukee (Oct. 12, 2012), *available at* https://urbanmilwaukee.com/2012/10/12/house-confidential-ald-baumans-century-old-home/.

[7] *Milwaukee Alderman Bauman: "Cream of Cream City" to be recognized at Historic Preservation awards ceremony*, WisPolitics (May 19, 2017), *available at* https://tinyurl.com/mvh877cs.

[8] Alderman Bauman's home is located near Kilbourne Avenue and 29th Street. *See* James Groh, *Milwaukee Alderman Bob Bauman's home hit by a stray bullet*, TMJ4 (Nov. 8, 2022), *available at* https://www.tmj4.com/news/local-news/alderman-bob-baumans-home-hit-by-a-stray-bullet. The Family Dollar targeted by Alderman Bauman is located approximately two blocks northeast of his home. *See* Jeramey Jannene, *Family Dollar, Gimble Beat City in Court*, Urban Milwaukee (Jan. 4, 2023), *available at* https://tinyurl.com/4bdpw8hk.

of Appeals. *Six Star Holdings, LLC v. City of Milwaukee*, 821 F.3d 795, 799 (7th Cir. 2016).

This pattern of behavior has caused concern to others in government. Milwaukee City Attorney Tearman Spencer has condemned Bauman's "repeated behavior [of] continually bully[ing]" others and "exert[ing himself] past [his] authority."[9] Over the years, according to Attorney Spencer, "many, many projects and decisions made by Alderman Bauman" have cost "millions of dollars for taxpayers."[10] As one example, Alderman Bauman "cost taxpayers money when he pushed to purchase a gas station" that he had "sought for years to close" due to his view that it "hurt the neighborhood's developmental potential."[11] All of this and more led Attorney Spencer to question whether Milwaukee should continue to indemnify Alderman Bauman for repeated misconduct.[12]

ALDERMAN BAUMAN'S RECENT COMMENTS ABOUT BPM

The conduct giving rise to this letter began around December 2022. At that time, Alderman Bauman called Mr. Berrada a "menace to tenants and neighborhoods in the city of Milwaukee" because of an alleged rat infestation.[13] According to the news report, around a dozen rats were found at a six-unit BPM property located "just two blocks" from his 1888 Victorian home.[14] Alderman Bauman went on to complain about "overflowing trash containers" at the property, calling Mr. Berrada an "irresponsibl[e] . . . landlord."[15]

After these unprovoked statements were published, BPM contacted Alderman Bauman on December 8, 2022, to explain the situation and address his concerns. *See* Ex. C-1. BPM informed Alderman Bauman that it takes rat infestations seriously and responds as quickly as possible by immediately dispatching pest control. Additionally, BPM pays building maintenance and construction crews to address any structural or physical issues with its properties that might allow rodents to enter its buildings. Yet, because BPM respects its tenants' rights to privacy, it is unable to simply force its way into private residences to deal with rats around the clock. *Id.* BPM also emphasized that rat infestation is a citywide problem, as Alderman Bauman fully knows. BPM concluded by inviting Alderman Bauman to meet with Mr. Berrada and tour BPM properties and operational facilities. *Id.*

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[9] Jeramey Jannene, *Tearman Spencer Attacks Robert Bauman*, Urban Milwaukee (Feb. 21, 2022), *available at* https://tinyurl.com/mhh7htsr.

[10] *Id.*

[11] *Id.*

[12] Shaun Gallagher, *Alderman's lost lawsuit could cost the city $1.4 million*, TMJ4 (Feb. 21, 2022), *available at* https://tinyurl.com/yc2p3feh.

[13] Nick Bohr, *Progress at rat infested Milwaukee apartment*, 12WISN (Dec. 6, 2022), *available at* https://www.wisn.com/article/progress-at-rat-infested-milwaukee-apartment/42170464.

[14] *Id.*

[15] *Id.*

Alderman Bauman declined the invitation. *See* Ex. C. In a December 8, 2022, email, rather than address the issues that prompted BPM to write, Alderman Bauman shared his displeasure with BPM's aesthetic design choices. "I know from personal observation," he wrote, "that the [alterations] performed" by BPM "on many pre[-]war buildings did not improve their appearance but significantly diminished their architectural and historic quality." *Id.* "For example[,] painting perfectly sound pre-war brick buildings makes absolutely no sense" in his view "and literally ruined the exteriors since paint [is] virtually impossible to remove from brick." *Id*. "The paint job" to buildings around his home in particular, he wrote, "was not even professionally executed." *Id*. He "add[ed] to this list the addition of pergolas to pre-war buildings [that] detract from the architectural character of the buildings" around his neighborhood. *Id*. Nor does he care for the new windows installed by BPM because, notwithstanding their efficacy, original windows are "integral to the buildings' architecture." *Id*. He similarly expressed his displeasure with BPM's landscaping decisions. For his part, Alderman Bauman would prefer to "increase the tree canopy in neighborhoods." *Id*. Finally, although he declined to tour BPM's properties so he never saw their improvements from the inside, he believed that many "were not blighted (at least on the exterior)." *Id*. In all, while acknowledging that all these renovations "were perfectly legal," he did not think they "improve[d]" his "neighborhood." *Id*. He concluded instead that the lack of his aesthetic preferences has a "negative impact." *Id*.

Soon after raising his cosmetic critiques, on January 20, 2023, Alderman Bauman submitted the Proposed Resolution. It proposes that a "working group" "[m]onitor" BPM and implement "strategies" to remediate "substandard conditions observed" at BPM's properties. Ex. A at 1. One "substandard condition" under the proposal is "negative impacts," which although is undefined in the proposal, is the same type of "negative impact" that Alderman Bauman just complained about on December 8, 2022, concerning BPM's paint project and pergolas placement around his home. The "working group" is composed of representatives from the Department of Public Works, Department of City Development, City Attorney's Office, Police Department, and Housing Authority of the City of Milwaukee. *Id*. The Department of Neighborhood Services would chair this working group and act as a "clearing house for aldermanic and citizen complaints regarding these properties." *Id*.

For example, under the proposal, if Alderman Bauman did not agree with window replacements on a BPM property a few blocks from his house, he could issue an "aldermanic . . . complaint" to deploy this working group to "remediate" that "substandard condition." *Id.* The resolution goes on to cite past conduct in support, including unnamed "news reports" and unspecified "complaints." *Id*. The proposal further cites a "14-count" lawsuit filed in November 2021 by the Wisconsin Department of Justice against BPM, which is being actively litigated. That suit, which was partially dismissed, is currently pending in the Milwaukee County Circuit Court. And although numerous landlords and property management companies have been subject to "news reports," tenant "complaints," or lawsuits over the years, the proposal targets BPM only.

LEGAL ISSUES

The Zoning, Neighborhoods, and Development Committee should not adopt the Proposed Resolution. By irrationally targeting and punishing BPM with a government monitor, the Proposed Resolution would violate the Bill of Attainder and Equal Protection Clauses of the federal and state constitutions. Moreover, Alderman Bauman's damaging and false comments against Mr. Berrada, which are the obvious genesis of the proposal, are defamatory. In short, the Proposed Resolution and the surrounding conduct raise several legal issues.

Defamation. The elements of defamation are "(1) a false statement; (2) communicated by speech, conduct or in writing to a person other than the person defamed; and (3) the communication is unprivileged and tends to harm one's reputation so as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her." *Torgerson v. Journal/Sentinel, Inc.*, 320 Wis. 2d 524, 534 (Wis. 1997). Mr. Berrada can satisfy each.

In December 2022, Alderman Bauman made false statements about Mr. Berrada to the press, calling him "an increasing menace to tenants and neighborhoods in the city of Milwaukee."[16] He also stated that unspecified and alleged "complaints from neighbors about overflowing trash containers" is "a question of landlord irresponsibility."[17] These statements obviously "harm[ed]" Mr. Berrada's "reputation so as to lower him . . . in the estimation of the community [and] to deter third persons from associating or dealing with him," as they impugn his competence and character. *Torgerson*, 320 Wis. 2d. at 534. This is especially so with prospective tenants who would otherwise want to rent from BPM but are now reluctant to engage with an alleged "irresponsible . . . menace."

Alderman Bauman's critical statements against Mr. Berrada are more inappropriate even than his statements in *Tri-Corp Housing, Inc. v. Bauman*, No. 07-cv-13965 (Mil. Cir. Ct. 2022), where just last year, a Milwaukee jury found by a 10–2 vote that he had wrongfully defamed a company, leading to a $1.4 million verdict that, if upheld on appeal, will be shouldered by the taxpayers.[18] The jury specifically found these statements by Alderman Bauman defamatory:

- "West Samaria has repeatedly demonstrated that they are unwilling or unable to provide quality care to the mentally disabled residents who lived there."
- "West Samaria had a bad design, a bad location and a bad operator."[19]

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[16] Bohr *supra* n.13.

[17] *Id*.

[18] Alison Dirr & Bruce Vielmetti, *Milwaukee Ald. Robert Bauman's critical comments lead to $1.4 million jury verdict in defamation case*, MILWAUKEE J. SENTINEL, Feb. 21, 2022, *available at* https://tinyurl.com/5x87tpkk.

[19] *See* Br. for Tri-Corp, *Tri-Corp Hous., Inc. v. Robert Bauman*, No. 2022-AP-000993, at 14, 21, 26, 45, 52 (Wis. Ct. App. Dec. 23, 2022).

And although the trial judge reversed the jury's decision after concluding that Tri-Corp is a "public figure" that must satisfy a heightened "actual malice" standard,[20] here, the standard is mere "negligence" because Mr. Berrada is not a (limited) public figure. *Denny v. Mertz*, 106 Wis. 2d 636, 657–58, 318 N.W.2d 141, 151 (1982).[21]

Nor is there any defense to these statements. First, in calling Mr. Berrada an "increasing menace to tenants," Alderman Bauman purported to make a statement of fact. His false "factual" assertion is that Mr. Berrada is a danger or threat (*i.e.*, a "menace") to current or future tenants who must rely upon him for housing. Courts routinely find these sorts of expressions defamatory. In *Laughland v. Beckett*, 2015 WI App 70, ¶ 24, for example, the court found the following statements defamatory over protests from the defendant that they were mere opinions: "low life," "swindler," "manipulat[or]," "loser," and more. The court reasoned that all these statements were "variations of the underlying . . . factual assertion that [the plaintiff] engaged in fraudulent financial activity." *Id.* ¶ 28; *see also* Wis. JI – Civil 2500 ("'Mixed opinion' is a communication which blends an expression of opinion with a statement of fact" and is "actionable if it implies the assertion of undisclosed defamatory facts as the basis of the opinion."). There is no factual basis to conclude that Mr. Berrada is a danger to his tenants. To the contrary, the 2,000 people on BPM's waitlist are eager to rent from him. Second, it is no defense that Alderman Bauman framed Mr. Berrada's alleged "irresponsibility" as "a question," because "[o]ne may be [defamed] by implication and innuendo quite as easily as by direct affirmation." *Converters Equip. Corp. v. Condes Corp.*, 80 Wis. 2d 257, 263–64 (Wis. 1977) (finding statements defamatory despite prefatory phrasing that included "appear[ed] to be" or "apparently").

Liability for these defamatory statements is compensatory damages to be determined by a jury. As Attorney Spencer recently indicated, there is an open question about whether Milwaukee taxpayers should continue to indemnify Alderman Bauman for his repeated harmful conduct.[22]

Bill of Attainder. In addition, the proposal itself, if adopted, would constitute an unconstitutional bill of attainder, because it targets BPM with a certain kind of punishment but no trial.

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[20] *Tri-Corp Housing, Inc. v. Bauman*, No. 07-cv-13965, Dkt. 598 (Mil. Cir. Ct. May 16, 2022). This opinion is currently being appealed. *Tri-Corp Housing, Inc. v. Bauman*, No. 2022-AP-000993 (Wis. Ct. App. Dec. 23, 2022). On appeal, Tri-Corp argues not only that it is not a "public figure" for purposes of defamation law, *see* n. 19 at 49–55, but that even if it is, the jury found that Alderman Bauman acted with "actual malice" in defaming Tri-Corp Housing, *id.* at 7, 42–48.

[21] Mr. Berrada is not a public figure because he never "voluntarily thrust[ed]" or "injected" himself into any controversy. *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 166 (1979) (finding that petitioner accused of being a spy was not a "public figure" even though he generated significant media publicity). Rather, he "was dragged unwillingly into the controversy" by statements directed at him. *Id.* Further, a person "charged with alleged defamation cannot, by [his] own conduct, create [his] own defense by making the claimant a public figure." *Hutchinson v. Proxmire*, 443 U.S. 111, 112–13 (1979).

[22] Gallagher *supra* n.12.

Article I, Section 10 of the U.S. Constitution, like its counterpart under the Wisconsin Constitution, provides that states shall pass "No Bill of Attainder." U.S. Const. art. I, § 10; Wis. Const., art. I, § 12 (same). A bill of attainder is "a legislative act which inflicts punishment without a judicial trial." *Wis. Bingo Supply & Equip. Co. v. Wis. Bingo Control Bd.*, 88 Wis. 2d 293, 304, 276 N.W.2d 716, 721 (1979). In other words, "legislative acts, *no matter what their form*, that apply [] to named individuals . . . in such a way as to inflict punishment on them without judicial trial are bills of attainder prohibited by the Constitution." *United States v. Lovett*, 328 U.S. 303, 315 (1946) (emphasis added). Bills of attainder also may be characterized by whimsical, capricious, or irrational actions that unfairly target certain individuals but not others. *See, e.g.*, *Falls v. Town of Dyer, Ind.*, 875 F.2d 146, 149 (7th Cir. 1989) ("If [challenger] can prove that the law of [municipality] is that '[challenger] may not use portable signs, and everyone else may', then he has stated a claim of irrational state action, of a bill of attainder by another name.").

A law that singles out an individual by name, as here, easily satisfies the specificity requirement. *See Lovett*, 382 U.S. at 315–18 (concluding that legislative act amounted to bill of attainder when it named individuals). The Proposed Resolution specifically provides that only "Berrada Properties Management, Inc., and its affiliates" shall be subject to a "[m]onitor" that will "remediate any substandard conditions." Ex. A at 1. No one else. Indeed, the Proposed Resolution "was designed to apply to [a] particular individual[]" only. *Lovett*, 382 U.S. at 316. It also matters not that the Proposed Resolution singles out BPM, a corporation, because "corporations" possess "constitutional rights," including protection from bills of attainder. *Consolidated Edison Co. of New York, Inc. v. Pataki*, 292 F.3d 338, 349 (2d Cir. 2002) ("[C]orporations must be considered 'individuals' that may not be singled out for punishment under the Bill of Attainder Clause.") (citation omitted); *accord Club Misty, Inc. v. Laski*, 208 F.3d 615, 617 (7th Cir. 2000) (assuming "that corporations . . . are protected by the constitutional prohibition against" bills of attainder). Nor was there any judicial trial here as the resolution purports to pass through a "purely legislative process" by city government. *Pataki*, 292 F.3d at 346.

Another feature of bills of attainder is retrospective focus. That is, "defin[ing] past conduct as wrongdoing and then impos[ing] punishment on that past conduct." *Id.* at 349. "Such a bill attributes guilt to the party . . . singled out in the legislation." *Id.; accord De Veau v. Braisted*, 363 U.S. 144, 160 (1960) ("The distinguishing feature of a bill of attainder is the substitution of a legislative for a judicial determination of guilt."). On its face, the Proposed Resolution cites only retrospective conduct in support of its resolution to impose a government monitor. The proposal speaks of past "news reports," "received complaints from tenants," and a lawsuit filed two years ago in November 2021. Ex. A at 2.

There is also no doubt that the Proposed Resolution amounts to "punishment." The Supreme Court has articulated factors, none by itself dispositive, to help determine whether the legislative act amounts to punishment. *Pataki*, 292 F.3d at 351 (collecting cases). The first relevant factor here is "whether the [proposed enactment],

'viewed in terms of the type of severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes.'" *Id.*; *Flemming v. Nestor*, 363 U.S. 603, 615 (1960) (describing "inability to discern any alternative [nonpunitive] purpose which the [legislative act] could be thought to serve" as a basis for finding the statute punitive). "Under this functional test, the nonpunitive aims must be 'sufficiently clear and convincing' before a court will uphold a disputed statute against a bill of attainder challenge." *Foretich v. United States*, 351 F.3d 1198, 1220 (D.C. Cir. 2003). This factor—"the so-called 'functional test'"—has been described as "'the most important'" factor to consider. *Id.* at 1218

Here, the Proposed Resolution functionally seeks to "punish" BPM for unspecified past conduct related to "news reports," "complaints," and a two-year-old lawsuit that has not yet advanced beyond dispositive motion practice. The heavy burden the Proposed Resolution seeks to impose on BPM for this past conduct cannot be understated. By singling out BPM, the Proposed Resolution permanently associates it with guilt related to unspecified (and unproven) past conduct. The proposal then memorializes its wafer-thin "findings" with a determination that BPM uses "substandard conditions in [its] residential rental properties" that the "working group" must "address and remediate." Ex. A at 3. That, of course, is obviously false, as multiple inspectors from the City—who interact with BPM weekly—could attest. The Proposed Resolution goes on to cite a "14-count lawsuit" that, it claims, found "violations of state's landlord-tenant law." *Id*. at 2. Not so. Lawsuits contain only allegations. None has been proven. Regardless, the circuit court has already partially dismissed that lawsuit, and the remaining counts are pending and subject to strong constitutional challenges.[23] The proposal thus inflicts significant and costly injury not only to BPM's business in the form of compliance costs but also to its reputation. *See Foretich*, 351 F.3d at 1223–24 (concluding that reputational harm inflicted by legislative act constituted punishment).

Nor is there any legitimate "nonpunitive legislative purpose" to the proposal. *Pataki*, 292 F.3d at 351. The proposal does not even attempt to articulate one. Indeed, there is not even a rational basis for the Proposed Resolution as described below. BPM is already working with the City, to a greater extent than any other property-management company, to ensure that all issues are addressed as soon as they arise. To be sure, while city government has regulatory powers over general welfare, "simply [] positing any nonpunitive purpose" without regard to "the nature of the burden imposed" cannot defeat a bill-of-attainder challenge. *Foretich*, 351 F.3d at 1223 (rejecting government's arguments concerning health and safety of a child). And here, as explained, the burden is substantial.

At any rate, singling out BPM alone with a monitor for past conduct irrespective

[23] *See* Ex. J, Defendants' Br. in Support of Motion for Partial Judgment on the Pleadings, *State of Wisconsin v. Berrada Properties Management, Inc.*, No. 2021-CX-0011, Dkt. 181 (Mil. Cnty. Cir. Ct. Aug. 23, 2022); Ex. K, Defendants' Br. In Support of Motion to Suppress Evidence and for Protective Order, *State of Wisconsin v. Berrada Properties Management, Inc.*, No. 2021-CX-0011, Dkt. 207 (Mil. Cnty. Cir. Ct. Sept. 14, 2022) (same).

of similarly situated companies is inconsistent with powers over general welfare. This is true even if the (pretextual) justification is to prevent harm to tenants, since "eliminating harm to innocent third parties" based on isolated past conduct "is a purpose consistent with punishment" rather than traditional powers over the general welfare. *Pataki*, 292 F.3d at 352; *accord United States v. Brown*, 381 U.S. 437, 458 (1965) (observing that "[a] number of English bills of attainder were enacted for preventive purposes"). Thus, for example, eliminating alleged "negative impacts of [BPM] properties" based on past conduct as supposedly occurred in prior "news reports" or "complaints from tenants" is a quintessential example of punishment aimed at deterring conduct. But "deter[ing] . . . conduct" of one person "with an eye toward protecting public health" is not "a valid, non-punitive justification" for the Proposed Resolution. *Pataki*, 292 F.3d at 352–53 (concluding that eliminating "potential threats to public health and safety," as uttered by the government, was an insufficient nonpunitive justification). This is because "[g]eneral and specific deterrence are [] traditional justifications for punishment." *Id.*; *accord Selective Serv. Sys. v. Minn. Public Interest Research Grp.*, 468 U.S. 841, 851–52 (1984) ("Punishment is not limited solely to retribution for past events, but may involve deprivations inflicted to deter future misconduct."); 1 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law*, § 1.5(a)(1), (4) (1986) (similar).

Moreover, there are plainly "less burdensome alternatives by which" the Proposed Resolution "could have achieved [any] legitimate nonpunitive objectives." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 482 (1977) (observing that "it is often useful to inquire into the existence of less burden alternatives" to determine whether the act is punitive). For example, the Proposed Resolution could simply allow BPM to continue interfacing with the Department of Neighborhood Services as it has done on a nearly weekly basis for years without imposing a monitor. In this regard, there is no nonpunitive or rational reason why *five* government agencies must form a working group to "monitor" BPM. Tellingly, including the "police department" only proves the punitive purpose of the Proposed Resolution.

Above all, corporate monitors are a well-known tool of punishment to be imposed *after* the conclusion of criminal or civil judicial proceedings. *See, e.g.*, U.S. DOJ, *Corporate Monitors* (May 25, 2010), *available at* https://tinyurl.com/y5ckp4kn (outlining "use of corporate monitors"). As Attorney General Garland recently endorsed, monitors—as "officers of the court"—"act as neutral arbiters" who ensure compliance with a judicial order or settlement agreement after judicial process. U.S. DOJ, *Review of Use of Monitors* (Aug. 13, 2021), *available* at https://tinyurl.com/mvuaxrhk. Courts also approve using monitors to serve retributive and rehabilitative theories of punishment. As explained in *In re Stabile*, "court appointment of monitors in conjunction with deferred prosecution agreements is an increasingly common tool used by prosecutors in cases *involving corporate malfeasance*." 436 F. Supp. 2d 406, 407 (E.D.N.Y. 2006) (emphasis added). The monitor is tasked with "an investigative, quasi-prosecutorial, and quasijudicial role that is unique in our legal system." *Id.*; *accord United*

States v. Purdue Frederick Co., Inc., 495 F. Supp. 2d 569, 572 (W.D. Va. 2007) (endorsing the use of corporate monitor as "punishment" for OxyContin manufacturer); *SEC v. WorldCom, Inc.*, 273 F.Supp.2d 431, 436 (S.D.N.Y. 2003) (endorsing monitor in light of "the need for punishment and deterrence" in corporate malfeasance case). Here, on the other hand, there has been no corporate malfeasance to justify a monitor. Far from it, BPM is a valued member of the Milwaukee community with thousands of tenants hoping to reside in one of its affordable buildings. *See, e.g.*, Ex. D. Nor has there been any process afforded to BPM to justify a monitor. Instead, the Proposed Resolution purports to use a monitor as the cat's paw to "aldermanic . . . complaints." Ex. A at 3. This is not a legitimate nonpunitive purpose.

The second relevant factor is "whether the legislative record 'evinces a legislative intent to punish.'" *Pataki*, 292 F.3d at 350. It does. As Alderman Bauman conceded, "the city has little jurisdiction over . . . tenant complaints" concerning "landlord-tenant matters." Ex. C at 2. Yet the Proposed Resolution justifies its proposal by declaring that BPM has "received complaints from tenants." Ex. A at 2. This fatal contradiction exposes an alternative motive beyond general welfare concerns. That alternative motive is laid bare in his December 8, 2022, email in which he complains of the "perfectly legally" aesthetic look of BPM properties "in the Concordia neighborhood where [he has] lived for 27 years." Ex. C at 2. But protecting 1888 Victorian homes, or public officials who live in them, from the sight of contemporary renovations to low-income and working-class housing properties is not a legitimate nonpunitive purpose.

Equal Protection. Finally, the proposal violates the Equal Protection Clause to the federal and state constitutions.[24]

"There is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law" are applied equally to all. *Milwaukee Brewers Baseball Club v. Wis. Dep't. of Health and Social Services*, 130 Wis. 2d 79, 85, 387 N.W.2d 254 (Wis. 1986) (citation omitted). Accordingly, the "equal protection clause provides a remedy when 'a powerful public official pick[s] on a person out of sheer vindictiveness.'" *Olech v. Village of Willowbrook*, 160 F.3d 386, 387 (7th Cir. 1998). Businesses or individuals use this clause to "prove that 'action taken by the state, whether in the form of prosecution or otherwise, was a spiteful effort to "get" [them] for reasons wholly unrelated to any legitimate state objective.'" *Id.* Case law thus "recognize[s] successful equal protection claims brought by a 'class of one[]' where the plaintiff alleges that [it] has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). In *Falls v. Town of Dyer*, for example, the court concluded that "legislative . . . action" of "singl[ing] . . . out" business owners "for unique treatment" without a rational basis

[24] The Wisconsin Supreme Court applies the same interpretation to the state Equal Protection Clause, Wis. Const. art. I § 1, as that given to the federal provision, U.S. Const. amend. XIV § 1. *State v. Heft*, 185 Wis.2d 288, 293 n. 3, 517 N.W.2d 494 (1994).

violates the constitution. 875 F.2d at 147–49; *accord Swanson v. City of Chetek*, 719 F.3d 780, 784 (7th Cir. 2013) ("The classic class-of-one claim is illustrated when a public official, 'with no conceivable basis for his action other than spite or some other improper motive comes down hard on a hapless private citizen.'"); *Milwaukee Brewers*, 130 Wis. 2d at 85–106 (concluding under state law that a legislative body violated equal protection when it irrationally deprived the plaintiffs of legal rights while those similarly situated operated with full legal rights).

There is no rational basis for singling out BPM while other similarly situated companies remain free to operate without a monitor. To the contrary, there is ample reason to believe that BPM's ongoing, extensive work with the City trumps any government interest in "monitoring."

The Proposed Resolution cites "news reports documenting the volume of eviction actions" filed "in Milwaukee County Circuit Court." Ex. A at 2. Although the proposal fails to cite which news reports, in early January 2023, the Milwaukee Journal Sentinel published an article entitled *Which Milwaukee landlords are the most frequent evictors? Here's what the data says*.[25] The article names eviction actions from twenty-five property owners and landlords including BPM. If the article is the impetus for the proposal, then all of these property owners are similarly situated with BPM as they are "directly comparable to [BPM] in all material respects." *Reget v. City of La Crosse*, 595 F.3d 691, 695 (7th Cir. 2010) (defining "similarly situated" under a "class-of-one equal-protection claim" as those "directly comparable" to the plaintiff). Despite this similarity, the Proposed Resolution inexplicably targets BPM only, rendering more favorable treatment to other property owners. A similarly situated business that receives "more favorable treatment" by the government is a classic example of "show[ing] there was no proper motivation for the disparate treatment," *Swanson*, 719 F.3d at 784, or no rational basis for the law.[26]

Relatedly, if the Proposed Resolution were adopted, there is no question that BPM would be subject to a unique degree of government intrusion. Notwithstanding that others are similarly situated, BPM alone would face burdens of having to answer to *five* separate public agencies including, for example, by arranging meetings, coordinating visits, answering inspectors, obtaining permits, responding to inquests, paying fines, going to court, purchasing materials, and more all to "remediate substandard conditions" that any of those agencies or any alderman might observe in their personal view. Courts have concluded that such unique burdens give rise to colorable equal protection claims especially where, as here, there is animus directed against the challenger. In *Swanson*, for instance, the public official did not like his neighbors' "remodel[ing]." 719 F.3d at 781. So, he used his office to burden them. He specifically used "his influence" to interfere with permits and to tell government inspectors to

[25] Daphne Chen, *Which Milwaukee landlords are the most frequent evictors? Here's what the data says*, Milwaukee Journal Sentinel (Jan. 11, 2023), *available at* https://tinyurl.com/4jpcsvs8.

[26] Imposing an inspection program to monitor perfectly legal evictions would not even remedy affordable housing issues in Milwaukee at any rate.

treat them unfavorably. *Id*. at 782. All these actions "appear[ed] illegitimate on their face" and, because they drastically deviated from the norm, the court concluded that one plaintiff could sustain his equal protection challenge as a class of one. *Id*. at 785.

The substance of the Proposed Resolution, along with its chronology, further evince irrational motives wholly unrelated to any legitimate state objective. The proposal seeks to reduce "negative impacts" of BPM properties on "neighborhoods" by "remediat[ing] any substandard conditions" observed at BPM. Ex. A at 2. The proposal does not define "negative impacts," but Alderman Bauman did on December 8, 2022. At that time, he complained about the "negative impact of" BPM "renovations" that "people who live [in his neighborhood of] Concordia" can "observe" in an "environment they call home." Ex. C at 2. Adding "pergolas" to the landscape or "painting . . . pre-war brick buildings" a different color are the examples of "negative impact[s]" that Alderman Bauman offered weeks before issuing his proposal. *Id*. But precluding property owners from making "perfectly legal" renovations is not a rational state objective. *Id*.; *accord Swanson*, 719 F.3d at 781. To the contrary, using government power to enforce the personal aesthetic preferences of government officials is the epitome of "reasons wholly unrelated to any legitimate state objective." *Olech*, 160 F.3d at 387.

In short, protecting Victorian sensibilities in a government official's neighborhood over the affordable housing needs of low-income and working-class families in Milwaukee, while allowing others similarly situated to remain unburdened, is neither rational nor legitimate. It is unconstitutional.

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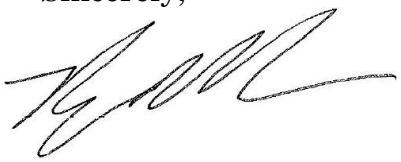
BPM and Mr. Berrada look forward to continuing their work with the City and its citizens. The BPM portfolio will continue to grow, and, as a result, the quality and quantity of affordable housing in Milwaukee will only improve. The Proposed Resolution should not be adopted.

Sincerely,



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Enclosures