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WISCONSIN COURT OF APPEALS
DISTRICT III

APPEAL NO: 2020AP940

BROWN COUNTY,

Plaintiff-Respondent,

vs.

BROWN COUNTY TAXPAYERS ASSOCIATION
AND FRANK BENNETT,

Defendants-Third-Party Plaintiffs-
Appellants.

vs.

PETER BARCA, SECRETARY,
WISCONSIN DEPARTMENT OF REVENUE,

Third-Party Defendant-
Respondent.

Appeal from Circuit Court for Brown County Case No. 18-CV-640
The Honorable John P. Zakowski, Presiding

# AMICUS BRIEF OF THE WISCONSIN COUNTIES ASSOCIATION

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## INTRODUCTION AND ISSUES ADDRESSED

Defendants-Third-Party-Plaintiffs-Appellants, Brown County Taxpayers Association and Frank Bennett ("BCTPA") are not only asking this Court to overturn the Circuit Court's grant of summary judgment to Brown County; BCTPA is asking this Court to overturn 22 years of settled interpretation of Wis. Stat. § 77.70 and uniform practice.

Since 1998, the Counties have been consistently abiding with a formal opinion of the Attorney General interpreting Wis. Stat. § 77.70, and in those 22 years neither the Wisconsin Department of Revenue nor the Legislature has ever intervened to require a change in the Counties' practices. But now, BCTPA asks this Court to do just that.

This brief will explain how any decision from this Court that upends the settled interpretation of Wis. Stat §77.70 would be catastrophic for the Counties and their resident taxpayers.

## ARGUMENT

### I. This Court Should Adhere To The Plain Language of Wis. Stat. § 77.70 And The Attorney General's Opinion Which Has Guided Counties' Actions For The last Twenty-Two Years.

As noted in the Parties' briefs, the Attorney General issued a formal Opinion interpreting Wis. Stat. § 77.70 in 1998.

The Attorney General interpreted the plain language of the statute and correctly concluded that a county sales and use tax "directly reduce[s] the property tax levy …" if the "funds received from a county sales and use tax … [are] budgeted to reduce the amount of the countywide property tax levy *or to defray the cost of any budget item which can be funded by a property tax levy.*" A.App. 146 (1998 Wis. Att'y Gen. 2 (emphasis added)).

This reading of Wis. Stat. § 77.70 comports with its plain meaning. Contrary to BCTPA's arguments, nothing in the actual language of the statute requires a county to set its budget and levy and then conduct a dollar-for-dollar reduction of the property tax levy based upon sales and use tax proceeds, presumably with estimates of the next year's collections or the actual receipts from the prior year.

The provisions of Wis. Stat. § 66.0602 support the Attorney General's (and the Counties') plain meaning interpretation. Section 66.0602 imposes a Levy Limit, which limits the amount a county may increase its operating levy year-over-year. However, a county's debt levy is – and since the statute's inception in 2006 has been – exempt from the Levy Limit. Wis. Stat. § 66.0602.

Section 66.0602 has been amended over 25 times since its enactment. *See* 2005 Wis. Acts. 25 & 484; 2007 Wis. Acts 20, 115 & 129; 2009 Wis. Act 28; 2011 Wis. Acts 32, 63, 75, 140, 145 & 258; 2013 Wis. Act 20; 2013 Wis. Act 165; 2013 Wis. Acts 222 & 310; 2015 Wis. Acts 55, 191 & 256; 2017 Wis. Acts 59, 207, 223, 243, 317 & 365; 2019 Wis. Acts 45, 126, 133. For the majority of these amendments, the Legislature has considered how the levy is to be calculated, whether it should be capped or allowed to increase by a specific amount, and what expenditures should be excluded from the cap. If the Legislature thought the Attorney General's Opinion was incorrect, it would have "corrected" that Opinion in one of these amendments. Certainly, if the Legislature intended to amend or limit the Attorney General's Opinion it would have said so. The Legislature had over 25 chances to do so. It never did.

BCTPA claims that the enactment of levy limits in 2006 alters the Attorney General Opinion, essentially confining the Counties to a single method of directly reducing the property tax levy, *i.e.*, a dollar-for-dollar reduction based upon sales tax proceeds. (BCTPA Brief at 38-39). According to BCTPA the enactment of the levy limits worked an unwritten,

unrecognized and unwarranted amendment of the Attorney General Opinion such that the Opinion should now read:

> "I, therefore, conclude funds received from a county sales and use tax under section 77.70 may be budgeted to reduce the amount of the countywide property tax levy ~~or to defray the cost of any budget item which can be funded by a property tax levy~~."

A.App. 146. BCTPA's argument fails for a very simple reason. If the Legislature meant for the adoption of the Levy Limits to repudiate the Attorney General's Opinion and fundamentally change the legal status quo, again, it would have said so. Indeed, by 2006, all but 11 of the 72 Counties had adopted a sales and use tax.

As of today, sixty-eight county governments across this State have organized their affairs (*e.g.* setting tax levies, approving capital projects, setting mill rates for real property taxation, issuing bonds, incurring debt, etc.) around the well-reasoned opinion of the Attorney General. Indeed, since the year 2000 (just 2 years after the Attorney General issued his opinion), fifteen counties have enacted sales and use tax ordinances. Not a single county had a corresponding dollar-for-dollar reduction in their levy to account for the sales tax revenue. *See* R.75-76; WCA-APP.003-012. Altering the longstanding interpretation of Wis. Stat. § 77.70 would upend

the decades-long understanding of the law and introduce uncertainty to a critically important county function – budget setting.

## II. A Change In The Law Would Be Catastrophic To The Counties Ability To Provide Essential Services While Maintaining the Infrastructure Necessary To Support Economic Activity.

As noted above, every county that has enacted a sales and use tax since 2000 has implemented it in conformity with the Attorney General's Opinion – by budgeting funds received from a county sales and use tax to reduce the amount of the countywide property tax levy or to defray the cost of any budget item which can be funded by a property tax levy.

The sales and use tax has been a significant source of revenue allowing the counties to reduce their reliance on the property tax levy. In 2017, the counties generated $377,516,528 in revenue from sales and use taxes.[1] *See* R.75-76; WCA-APP.003-012. Thus, if the Court were to reverse, approximately $400 million in county tax revenue would suddenly be in jeopardy as uncollectable.

[1] Publicly available information from the Department of Revenue shows that the total sales and use taxes collected in 2018 was $419,991,797 and was $445,315,805 in 2019. https://www.revenue.wi.gov/Pages/Report/County-Sales-Tax.aspx

A few examples illustrate that it would be devastating for any county to forego its sales and use tax revenue. In 2017, Milwaukee County generated over $74,000,000 of revenue from its sales and use tax - an amount equal to 25% of its levy. *See* R.75-75; WCA-APP.003-012. Dane County generated over $57,000,000 – an amount equal to 30% of its levy. *Id.* It is not just the larger counties that would be significantly impacted. In 2017, Pepin County (with a population of just 7,469 people) generated $535,543 from its sales and use tax. That figure represents 12.8% of its levy for the same year. *Id.* Thus, a dollar-for-dollar reduction in the levies would force counties to choose between cutting essential services or foregoing necessary capital improvement projects.

BCTPA claims Wis. Stat. § 77.70 requires a county to reduce its levy dollar-for-dollar based on the county's estimated sales and use tax revenues and then hope that the budget would be met by the end of that fiscal year. This is not only impractical; it is unworkable.

If the estimated sales and use tax revenues are not met, the county would have a budget shortfall. Budget shortfalls are not simply accounting problems. Counties provide numerous essential services to their residents such as human and social

services, child welfare, law enforcement, health services and highway repair and maintenance, just to name a few. If any of these essential services cannot be fully funded due to sales and use tax collections falling below estimates, county residents who rely on these services would be placed at risk of real harm. This Court should not adopt an unprecedented reading of Wis. Stat. § 77.70 that would force the Counties to choose between these essential services.

To make matters worse, because Wis. Stat. § 66.0602 establishes the prior year's levy as the baseline for a county's levy limit calculation, a dollar-for-dollar offset would not only reduce the current year's levy, it would automatically and artificially lower a county's maximum available levy for the following year. The following, using Milwaukee County as an example, shows the affect reversal would have on a county.

Milwaukee County's 2017 levy was $291,921,998 and its sales and use tax receipts were $74,354,751, equal to 25% of the levy. *See* R.75-76; WCA-APP.003-012. Under BCTPA's reading of Wis. Stat. § 77.70, Milwaukee County would be required to deduct $74,354,751 from its 2017 levy. Thus, the 2017 levy would become $217,567,247. This would become the baseline for setting Milwaukee County's 2018

levy. Under Wis. Stat. § 66.0602, a levy may only increase from the prior year's baseline in an amount equal to the percentage increase in the county's "valuation factor," which is based on additional property value added to the county by new construction. Milwaukee County's 2018 increase in its valuation factor was 1.43%,[2] considerably less than the 25% represented by the sales and use tax revenue. Thus, Milwaukee County's 2018 levy would end up being $220,678,459, representing the amount of the adjusted 2017 levy plus 1.43%. Milwaukee County's levy has not been this low since 2002 and it is a certainty that this would cause a real-world crisis as essential services would have to be slashed or eliminated completely.

And, assuming Milwaukee County's 2018 sales and use tax revenues increased over 2017's revenue (and it did, coming in at $77,538,845[3]) this problem would only compound exponentially every year. In setting its 2019 levy, Milwaukee County would now have to deduct either: (1) the $3,184,094

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[2] Valuation factors are publicly available from the Department of Revenue at: https://www.revenue.wi.gov/Pages/EQU/nnc.aspx Click on the 2018 link at the bottom of the page.

[3] Sales and use tax receipts are publicly available from the Department of Revenue at: https://www.revenue.wi.gov/Pages/Report/County-Sales-Tax.aspx Click on the link for 2018.

increase in sales and use tax revenue realized in 2018 or (2) the full $77,583,845 of 2018 sales and use tax revenue. Because, neither the Legislature nor the Department of Revenue have ever considered a dollar-for-dollar reduction necessary, there is no guidance on which methodology is correct and there is no place on the Levy Limit Worksheet to plug in either of these numbers. Either scenario would be devastating as it would cause the levy to decrease exponentially year-over-year.

It bears repeating that none of these calculations, which would be required if the Court adopted BCTPA's interpretation, are currently found in Wis. Stat. § 66.0602, explained in the Department of Revenue's levy limit calculation guidance, or enshrined on the Levy Limit Worksheet. Contrary to BCTPA's characterization of a "simple" process, the real-world scenarios confronting the Counties, and the various permutations of those scenarios, underscore the very real problems with BCTPA's demand that the Court deviate from the settled interpretation of Wis. Stat. § 77.70 and the uniform practice of the Counties and the Department of Revenue.

## III. A Sales And Use Tax Ordinance Under Wis. Stat. § 77.70 Provides Tangible Tax Relief To County Residents.

BCTPA misunderstands how sales and use taxes actually generate revenue. BCTPA's consistent theme is that the sales and use taxes are just another way for counties to tax their residents. This is an incomplete and incorrect view of sales and use taxes. Because sales and use taxes apply to goods and services, and not real estate, they generate revenue from non-residents who shop, eat, vacation, or enjoy various entertainment venues in a county. In other words, sales and use taxes spread the tax burden to all of the people that use the infrastructure that the tax supports. As the tax base is broadened to include non-residents, county property taxpayers receive tax relief.

In 2017, dollars spent by non-residents ("Direct Visitor Spending" in the terminology of the tourism industry) accounted for $12.7 billion dollars of spending in the 72 counties.[4] *See* R.78; WCA-APP.017-018. In turn, this spending generated $1.5 billion dollars in state and local taxes,

[4] That number rose to $13.3 billion in 2019. This information is made publicly available by the Department of Tourism at: http://industry.travelwisconsin.com/research/economic-impact

a portion of which was county sales and use taxes. *Id.* In fact, by some estimates tourists or visitors spend 58.3% of their dollars on items (food and beverage, lodging, entertainment and general retail) that are subject to Wisconsin sales and use taxes. *See* R.80; WCA-APP.020-068.

Florence County illustrates how a sales and use tax reduces the tax burden on county residents. In 2006, Florence County adopted a sales and use tax and, at that time, its Mill Rate was $7.02/$1,000. However, the next year, the Mill Rate immediately dropped to $6.27; it dropped to $5.98 the year after that. Indeed, from 2007 to 2017 Florence County's Mill Rate averaged $6.40. *See* R.77-78; WCA-APP.013-018. Assuming a $200,000 home, the change in the Mill Rate means in the year prior to the sales and use tax, the homeowner's taxes were $1,404. After the introduction of the sales and use tax, that same homeowner's taxes on average were $1,280. That is an annual savings of $124 and a savings of $1,240 over the ten-year period. The sales and use tax essentially gave the Florence County taxpayers a free tax year. That tax free year was subsidized in part by Direct Visitor Spending, which totaled $5.7 million in Florence County in 2017. *See* R.78; WCA-APP.017-018.

This trend is not uncommon. Green County saw a similar reduction in its Mill Rate after the adoption of a sales and use tax in 2003. Within 3 years, the Mill Rate had dropped by $0.98 and it remained below the 2003 level for seven years. See R.77-78; WCA-APP.013-018. Trempealeau County also saw an immediate reduction in the Mill Rate following the adoption of a sales and use tax in 2010. The County's Mill Rate stayed below the 2010 rate for 6 years. See R.77-78; WCA-APP.013-018.

All of these examples serve as evidence that sales and use taxes are imposed for the purpose of providing tax relief to county property owners by broadening the tax base to include non-residents. Moreover, it is quite common for these new tax dollars to have a direct downward impact on the Mill Rate. The decrease in the Mill Rate yields immediate and tangible tax savings to county residents.

As shown above, if BCTPA's interpretation were adopted, the Counties would be deprived of sales and use tax revenues and, instead, would be forced to borrow to fund their projects. Thus, BCTPA's interpretation would provide none of the supposed taxpayer benefits BCTPA claims it is seeking to secure. Sales and use taxes benefit county residents by

allowing them to enjoy a reduced property tax levy that is paid for in part by the in-county spending of out-of-county visitors. In contrast, borrowing falls solely on the resident property taxpayers and then compounds the burden as those taxpayers are responsible for both the borrowed principle and the interest payments. Because of the costs associated with borrowing, BCTPA's interpretation would actually be more costly to resident-taxpayers.

## IV. A Ruling Declaring Brown County's Ordinance Invalid Will Require This Court To Usurp The Legislative Function And Amend Wis. Stat § 66.0602 To Prevent A Financial Crisis.

BCTPA contends Brown County's Ordinance is invalid because it does not reduce the property tax levy by a dollar for every dollar of sales and use tax revenue. As noted above, the interplay of BCTPA's reading of Wis. Stat. § 77.70 and the mechanics of Wis. Stat. § 66.0602's limitation on levy increases will create an economic and human crisis in all 68 counties that have a sales and use tax. Moreover, a reversal of the circuit court's decision would mean that these 68 counties are currently, and for years have been, in violation of the levy limits. Such violations carry penalties – a corresponding reduction in the County's shared revenue payments from the

State. Wis. Stat. §66.0602(6)(a).

To be clear, using the 2017 Milwaukee County numbers as an example, Milwaukee County would not only have its baseline for 2018 reduced by $74,000,000, it would lose another $74,000,000 in state aid in 2018. In reality BCTPA's interpretation would require the Court, in order to prevent a real calamity, to assume legislative power and rewrite Wis. Stat. § 66.0602 to: (1) eliminate the statutory penalties associated with exceeding the Levy Limit; and (2) wholly reconfigure the statutory baseline for setting next year's levies. The Court should avoid such a result because there is absolutely no legislative or administrative guidance on how to calculate BCTPA's supposed offset.

Further, a ruling that BCTPA's interpretation is correct would raise the question of whether the Counties have collected hundreds of millions of dollars illegally. If this Court were to reverse, the question of remedy would be vexing. As the Attorney General correctly noted, "Counties … lack statutory authority to implement a direct system of tax credits to individual property owners …". A.App 145. Likewise, they lack the statutory authority to issue refunds. BCTPA offers no suggestion of an appropriate remedy if the Court were to

reverse, and the current statutory powers of the Counties forecloses the possibility of a refund or a credit.

## CONCLUSION

For all the foregoing reasons this Court should affirm the decision of the Circuit Court.

Respectfully submitted this 16th day of October, 2020.

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## FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,873 words.

Dated this 16th day of October, 2020.

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## ELECTRONIC FILING CERTIFICATION

I hereby certify that I have submitted an electronic copy of this Amicus Brief of the Wisconsin Counties Association, and separate appendix, which complies with the requirements of Wis. Stat. §809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 16th day of October, 2020.

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## PROOF OF FILING CERTIFICATION

I hereby certify that I caused this Amicus Brief of the Wisconsin Counties Association to be hand-delivered to the Clerk of the Wisconsin Court of Appeals, on October 16, 2020, for filing in accordance with Wis. Stat. § 809.80(3)(b). I further certify that on October 16, 2020, this Amicus Brief of the Wisconsin Counties Association was correctly addressed and hand-delivered to the United States Postal Service for delivery to all parties in this matter.

Dated this 16th day of October, 2020.

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## CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that he has caused three (3) true and correct copies of the foregoing Amicus Brief of the Wisconsin Counties Association to be served upon counsel of record by U.S. first class mail as follows:

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