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SUPREME COURT

No. 2020AP940

In the Supreme Court of Wisconsin

BROWN COUNTY,
PLAINTIFF-RESPONDENT,
v.
BROWN COUNTY TAXPAYERS ASSOCIATION AND FRANK BENNETT,
DEFENDANTS-THIRD-PARTY
PLAINTIFFS-APPELLANTS,
v.
PETER BARCA, SECRETARY, WISCONSIN DEPARTMENT OF REVENUE,
THIRD-PARTY DEFENDANT-RESPONDENT.

On Certification from District III of the Wisconsin Court of Appeals following Appeal from the Circuit Court for Brown County, Case No. 18-CV-640, The Honorable John P. Zakowski Presiding

DEFENDANTS-THIRD-PARTY PLAINTIFFS-APPELLANTS' BRIEF AND APPENDIX

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STATEMENT OF THE ISSUES PRESENTED

1. Does Brown County's sales and use tax violate Wis. Stat. §77.70, which mandates that such taxes "may be imposed *only* for the purpose of *directly reducing* the property tax levy" (emphases added), given that the tax commits over one hundred million dollars of sales tax revenue to new spending projects?

Circuit Court Decision: The Circuit Court answered "no" based on its conclusion that the County had avoided a hypothetical increase in its property tax levy to pay for the new spending and had thereby "directly reduc[ed]" the levy. (R.103:28.)

2. Are courts required to treat a 1998 attorney general opinion agreeing that counties may use sales tax revenue to fund new spending projects as "presumptively correct" because the Legislature has amended §77.70 since 1998 but not addressed the issue raised in that opinion?

Circuit Court Decision: The Circuit Court answered "yes."

3. Assuming that preventing a hypothetical increase in the property tax levy qualifies as "directly reducing the property tax levy," does Brown County's sales tax nevertheless violate §77.70 because state-imposed levy limits barred the County from actually paying for all of its new spending with property tax increases?

Circuit Court Decision: The Circuit Court answered "no."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case involves issues of first impression and of substantial and continuing public interest. Consistent with its usual practice, this Court should hear oral argument in this case and publish its decision.

INTRODUCTION

This Court is asked to determine whether Plaintiff-Respondent Brown County's sales and use tax complies with Wis. Stat. §77.70, which requires that "county sales and use taxes may be imposed only for the purpose of directly reducing the property tax levy." The County's sales tax does not comply with §77.70, for two reasons.

First, rather than applying its sales tax revenue to "directly reduc[e]" the property tax levy owed by its taxpayers, Brown County is instead using the money to bankroll $147,000,000 in *new* spending projects. The County's argument is that without the sales tax it *would have* paid for the projects with increased property taxes, and that by instead enacting a sales tax it has thereby "directly reduc[ed]" the levy. But the avoidance of a hypothetical increase in a levy is not the same as a reduction, much less a *direct* reduction. Indeed, the year after Brown County enacted its sales tax, its property tax levy actually *increased* by about 5% from $86,661,972 to $90,676,735.

Second, even if this Court were to agree with Brown County (or assume without deciding) that avoiding a hypothetical increase in the levy satisfies §77.70, Brown County's sales tax is still illegal. The County could not have raised its property tax levy by $147,000,000 *even hypothetically* because statutory limits cap the amount by which a county can increase its levy each year. For

example, the County proposed spending about $18,000,000 dollars of sales tax revenue on capital projects in 2018 but was statutorily barred from raising its property tax by more than about $1,000,000 that year. Thus the sales tax clearly did not prevent spending that would otherwise have occurred and no levy "reduction" resulted.

The County maintains that it could have *borrowed* $147,000,000 and then raised property taxes to pay back the bonds—a type of levy increase not subject to levy limits—but a court cannot simply assume that the County could and would have complied with all legal prerequisites for borrowing such a massive sum of money, such as obtaining permission from a public referendum or passing a resolution authorizing the borrowing by at least a three-fourths majority. Indeed, assuming the existence of the political will and/or public support for this spending spree would read "only for the purpose of directly reducing the property tax levy" right out of the statute. A county will virtually *always* be able to say that it "could have" borrowed but instead chose to tax. It renders the restriction in §77.70 a nullity—why have it at all?

Because the County does not have adequate responses to the unambiguous text of §77.70, much of its approach in this litigation has consisted in warnings of catastrophe if its tax is invalidated. This Court should see these "arguments" for what they are: atextual attempts to convince the judiciary to rule on grounds other than what the law requires. Although the County's

fears are illusory or overblown, it would be for the political branches to address whether changes to the sales tax statute are warranted following decision in this case. The only question before this Court is what the language of §77.70 requires.

This case arose because Brown County wants to have it both ways: it wants access to the significant pot of taxpayer money §77.70 authorizes it to collect and it also wants to spend that money however it wants. But that's not the county tax-and-spend power the Legislature approved. While Brown County need not adopt a sales tax at all, if it does so, state law mandates that the tax "may be imposed only for the purpose of directly reducing the property tax levy." The County has ignored that statutory requirement.

STATEMENT OF THE CASE

I. Factual Background

On May 17, 2017, the Brown County Board of Supervisors enacted an ordinance creating a 0.5% sales and use tax (the "Ordinance"), scheduled to go into effect on January 1, 2018. (R.1:5; 3.) According to the Ordinance, the $147,000,000 that the County's sales tax is expected to raise over its six-year duration is dedicated to be spent on the following new projects:

1. Expo Hall Project – $15,000,000
2. Infrastructure, Roads and Facilities Projects – $60,000,000
3. Jail and Mental Health Projects – $20,000,000

4. Library Project – $20,000,000
5. Maintenance at Resch Expo Center Project – $10,000,000
6. Medical Examiner and Public Safety Projects – $10,000,000
7. Museum Project – $1,000,000
8. Parks and Fairgrounds Project – $6,000,000
9. Stem Research Center Project – $5,000,000

(R.3:1.)

In 2017, the Brown County Executive issued a 2018 budget proposal that was consistent with the newly-passed ordinance. (R.9:13, 34-39; *see* R.15:3.) On November 1, 2017, the Brown County Board of Supervisors made minor amendments to the budget proposal (not relevant here) and adopted it as amended as Brown County's 2018 budget. (*See* R.9:14; 15:3; 59:95-167.) On November 7, 2017, the Brown County Executive signed the 2018 budget with no vetoes. (R.9:14; 15:3.) The budget created a special fund "to account for the collection and use of .05% [sic] County sales tax imposed for capital improvements." (R.58:90.) The budget estimated that the County's sales tax would raise $22,458,333 in 2018 and called for spending $17,895,065 of that revenue. (R.59:39.) That money was budgeted to be spent on the following new projects:

1. Highway Projects – $9,264,687
2. Facility Building Upgrades – $250,000
3. Jail Projects: Sheriff Jail Pods – $1,071,258
4. Library Branch Expansion/Relocation – $1,000,000
5. Medical Examiner Facility – $528,120

6. Museum Permanent Exhibit – $500,000
7. Parks Improvements – $500,000
8. Brown County Research and Business Park: STEM Innovation Center – $4,200,000
9. Public Safety Communications Upgrades: 9-1-1 & TS SDC UPS Replacement – $581,000

(R.60:178-80.)

In 2017, Brown County's property tax levy was $86,661,972. (R.9:14; 15:3.) In 2018, after the enactment of its sales tax, Brown County's property tax levy was raised to $90,676,735, an increase of $4,014,763 or about 5%. (*Id.*) Moreover, as explained in detail below, Brown County did not have room in its statutory levy limit to increase its property tax levy to pay for all of the $17,895,065 of new spending proposed for 2018. (*See also id.*)

II. Procedural Background

On January 2, 2018, Defendants-Third-Party Plaintiffs-Appellants Brown County Taxpayers Association and Brown County taxpayer Frank Bennett (collectively, "BCTA") sued Brown County in Brown County Circuit Court seeking a declaration that the Ordinance violated Wis. Stat. §77.70. (R.115:2.) The Circuit Court, the Honorable William M. Atkinson presiding, dismissed that case without prejudice on March 1, 2018 explaining that BCTA needed to file a notice of claim under Wis. Stat. §893.80. (*Id.*)

BCTA thereupon promptly served Brown County with a notice of claim dated March 1, 2018. (R.4.) Brown County

disallowed the claim on or about May 22, 2018, but instead of waiting for BCTA to sue it again, Brown County filed the present lawsuit against BCTA in Brown County Circuit Court on May 23, 2018 seeking a declaration as to the validity of the Ordinance. (R.1; 5.) BCTA counterclaimed and filed a third-party complaint against Third-Party Defendant-Respondent Peter Barca, Secretary of the Wisconsin Department of Revenue ("DOR"), whom BCTA viewed as a necessary or permissive party. (R.9; *id.* at 11-12.) Following briefing on cross-motions for summary judgment by Brown County and BCTA, (*see* R.38-80, 87-97), the Circuit Court, the Honorable John P. Zakowski presiding, held oral argument on August 29, 2019. (R.127.)

On March 24, 2020, the Circuit Court issued its decision and order granting Brown County's motion for summary judgment, denying BCTA's motion for summary judgment, and upholding the validity of Brown County's ordinance. (R.103.) The Court concluded that the County had avoided a hypothetical increase in its property tax levy to pay for the new spending and that was sufficient. (R.103:28.)[1]

[1] On March 31, 2020, BCTA filed a motion for reconsideration or clarification of the Circuit Court's decision and order objecting to certain incorrect factual statements in the Circuit Court's decision regarding BCTA's pre-lawsuit discussions with the County. (R.107.) The Circuit Court denied the motion but agreed that the challenged observations were both incorrect and irrelevant to the legal question before it. (R.115:4.)

Judgment was entered on May 18, 2020 (R.120), and BCTA filed its notice of appeal on May 20, 2020 (R.122). The Court of Appeals certified this appeal to this Court on March 3, 2021; this Court accepted the certification on April 22, 2021.

STANDARD OF REVIEW

Whether a circuit court correctly granted summary judgment is a question of law reviewed de novo, as are issues of statutory interpretation. *See, e.g.*, *Noffke ex rel. Swenson v. Bakke*, 2009 WI 10, ¶9, 315 Wis.2d 350, 760 N.W.2d 156.

ARGUMENT

The undisputed facts show that Brown County is using the proceeds from its sales tax to pay for $147,000,000 in new spending instead of complying with the statutory mandate that "county sales and use taxes may be imposed only for the purpose of directly reducing the property tax levy." Wis. Stat. §77.70. Merely avoiding a hypothetical increase in the levy does not meet the unambiguous terms of the statute. And even if it did, levy limits prevented Brown County from increasing its levy by the amount needed to fund its enormous spending projects with property taxes. The County's sales tax is thus unlawful.

I. BROWN COUNTY'S SALES TAX VIOLATES THE PLAIN LANGUAGE OF WIS. STAT. §77.70 BECAUSE PREVENTING A HYPOTHETICAL INCREASE IN THE COUNTY'S PROPERTY TAX LEVY IS NOT THE SAME AS "DIRECTLY REDUCING" THE LEVY.

It is well-settled Wisconsin law that "[a] county is a creature of the legislature and as such, it has only those powers that the legislature by statute provided." *Jackson County v. State Department of Natural Resources*, 2006 WI 96, ¶16, 293 Wis. 2d 497, 717 N.W.2d 713 (citing Wis. Const. art. IV, §22). The Legislature has granted to counties, via Wis. Stat. §77.70, the power to impose sales and use taxes subject to certain conditions.

The relevant portion of §77.70 reads as follows:

> Any county desiring to impose county sales and use taxes under this subchapter may do so by the adoption of an ordinance, stating its purpose and referring to this subchapter. The rate of the tax imposed under this section is 0.5 percent of the sales price or purchase price. Except as provided in s. 66.0621 (3m),[2] *the county sales and use taxes may be imposed only for the purpose of directly reducing the property tax levy* and only in their entirety as provided in this subchapter.

(Emphasis added.)

The italicized language above is self-explanatory and difficult to explain in any simpler terms. Counties may impose sales and use taxes, but must use the proceeds to directly reduce their property tax levies—no other purpose is authorized. To

[2] That exception was enacted in September 2017 and is not at issue here.

determine whether a county sales and use tax is lawful, then, the question is simply this: did the County's property tax levy decrease by the amount of sales and use tax raised?

The answer to that question in this case is undisputedly "no." Instead, the County used the revenue to fund a dramatic increase in spending and *still raised* its property tax levy by about $4,000,000. These actions run contrary to the plain language of Wis. Stat. §77.70, which is supported by the legislative history of the statute.

A. Under a plain language analysis, §77.70 requires counties to actually decrease their property tax levies by the amount of sales tax revenue collected

The methodology used to interpret statutes in Wisconsin is well established. "[S]tatutory interpretation 'begins with the language of the statute.'" *State ex rel. Kalal v. Cir. Ct. for Dane County*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (quoting *Seider v. O'Connell*, 2000 WI 76, ¶43, 236 Wis. 2d 211, 612 N.W.2d 659). "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id.*, ¶45. Because none of the words of Wis. Stat. §77.70 at issue are technical or specially-defined, resort must be had to their common, ordinary, and accepted meanings. Dictionaries are an accepted source for this type of meaning. *See*

id., ¶¶41, 53-54. "[I]f the meaning of the statute is plain, [a court] ordinarily stops the inquiry." *Sands v. Whitnall Sch. Dist.*, 2008 WI 89, ¶15, 312 Wis. 2d 1, 754 N.W.2d 439.

The pertinent language—"the county sales and use taxes may be [1] *imposed* only for the [2] *purpose* of [3] *directly* [4] *reducing* the property tax levy" (emphases added)—is not difficult to understand.

"Impose" means "to establish or apply as compulsory : LEVY." Webster's New Collegiate Dictionary 571 (1981) (illustrating with the example "[impose] a tax").[3]

"Purpose" means "something set up as an object or end to be attained." *Id.* at 930.

"Direct"[4] means "from point to point without deviation," "by the shortest way," "from the source without interruption or diversion," and "without an intervening agency or step." *Id.* at 320.

"Reduce" means "to diminish in size, amount, extent, or number." *Id.* at 962 (illustrating with the example "[reduce] taxes").

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[3] As discussed below, the relevant version of Wis. Stat. § 77.70 was enacted in the 1980s, so BCTA has cited a dictionary from that decade. *See Landis v. Physicians Ins. Co. of Wisconsin*, 2001 WI 86, ¶36, 245 Wis. 2d 1, 628 N.W.2d 893.

[4] "Directly" means "in a direct manner." *Directly*, Webster's New Collegiate Dictionary 320 (1981).

Thus, when the Legislature commands in §77.70 that a county sales and use tax "may be imposed only for the purpose of directly reducing the property tax levy" it is obviously mandating two things: (i) a county may levy the tax only to attain the object of diminishing the property tax levy in amount; and (ii) this diminishment must occur "by the shortest way" and "without any intervening steps," meaning immediately following collection of the sales tax revenue. Step one: impose the sales tax. Step two: decrease the property tax levy by the amount of the proceeds.

Not only is directly reducing the levy *a* purpose for imposing a sales tax, the statute establishes that it is the "only" permissible purpose. "Only" means "as a single fact or instance and nothing more or different," synonymous with "solely" and "exclusively." *Id.* at 795. Therefore, revenue from the sales tax can be used solely and exclusively to lower the property tax levy and for nothing more or different, such as increased spending.

As the above discussion demonstrates, Wis. Stat. §77.70 is concisely written and easily understandable. The words "impose," "purpose," and "reduce" are in common use, and the legislature's use of "directly" and "only" as brisk modifiers eliminate any doubt as to the statute's scope and application.

Unfortunately, despite this clear language, the County's position is that it may treat sales tax revenue as essentially unrestricted money, using it to fund any new spending projects

otherwise fundable with property taxes. Its theory is that it is avoiding an increase in the property tax levy that would be needed to pay for the projects with property taxes and thus is "reducing" the levy.

There are two significant textual problems with this argument: funding new spending with sales taxes does not "reduc[e]" the property tax levy and certainly does not do so "directly."

First, it does not "reduce" the levy because the levy has not *actually* diminished in amount —instead, it has not *increased*, and these are not equivalent. For example, if a fire marshal tells a bar owner that she must "reduce" the number of people in her bar, she has not obeyed if she simply prevents additional people from entering. Or if two parents give their daughter $10,000 on the condition that she use it to "reduce" her burdensome credit card debt, and she instead decides to use the money to finance a vacation to Europe she says she would otherwise have charged to the credit card, we do not say that she reduced her credit card debt thereby. Just so here: Brown County has not "reduced" the property taxes it requires its citizens to pay by imposing a *second* tax and then using it to pay for a wish list of new capital projects. It has simply avoided additional increases.

Second, even if the absence of an increase might be characterized as a "reduction," it is not "direct[]" because it did not

occur via the shortest way, namely application of the sales tax revenue to the property tax levy. Instead, Brown County was required to engage in the intervening step of funding new spending items with the revenue, which, in turn, supposedly lowered the property tax levy. This is, at best, *indirect* reduction of the property tax levy. But the Legislature specifically chose to insert the word "directly" before "reducing," and that adverb must be given meaning. *Kalal*, 271 Wis. 2d 633, ¶46 (courts should avoid rendering statutory language surplusage). The word "directly" has clear application in this scenario, where the County claims it has *in effect* reduced the levy, but only if additional, intervening steps are taken into account. A contrary interpretation reads the limitation on the use of sales tax revenue out of the statute, as almost anything fits into the category of "items fundable with property taxes." The Legislature might as well have simply authorized a tax with no restrictions on how it is used.

BCTA's reading of §77.70 is further supported by a 2017 amendment to the statute, in which the Legislature made clear that the restriction on sales and use taxes applies "[e]xcept as provided in s. 66.0621(3m)." That provision authorizes a county containing an electronics and information technology manufacturing zone to "issue bonds" for certain purposes "whose principal and interest are paid only through sales and use tax revenues." If the County's reading were correct, such an exception

in §77.70 would not have been necessary as, in the County's view, issuing such bonds to fund a particular item would allow the County to avoid having to fund the item with property taxes. Clearly, avoiding hypothetical levy increases does not satisfy §77.70.

The unambiguous text of §77.70 thus does not permit the County's position, and the Court can end its analysis there. However, "the court may also consult extrinsic sources 'to confirm or verify a plain-meaning interpretation,'" *Sands*, 312 Wis. 2d 1, ¶15 (quoting *Kalal*, 271 Wis. 2d 633, ¶51), and in this case legislative history is highly probative of §77.70's meaning and further confirms that the obvious meaning of the statute is the correct one.

Prior to 1985, counties could impose sales and use taxes, but the proceeds from such taxes had to be distributed to the cities, villages, and towns within the county. *See* Wis. Stat. §§77.70 (1983), 77.76(4) (1983). However, no county had enacted a sales tax, (R.41:9), "presumably because none of the proceeds of the tax could be used by county government and because counties could not control how the net proceeds of such taxes would be used by other local units of government within the county." (R.59:168-69.)

In 1985, the Legislature changed §77.76 to allow counties to use the proceeds from county sales taxes themselves. *See* 1985 Wis. Act 29, §1500x. Property tax relief was a major topic of debate

during that year's state budget process; for example, proposals were made to raise the state sales tax and earmark the money as direct credits on property tax bills. (*See* R.59:183-85.) Later in the year, the Legislature took up a mostly technical bill to improve the administration of the county sales tax. (*See* R.59:175.) During the process, Senator Russ Feingold offered a successful amendment to add language requiring the sales tax to be used only "for the purpose of property tax relief." (*Id.* at 176-79.) Senator Feingold explained his reasoning:

> The sales tax involves some fundamental inequities which make it basically an unattractive tax . . . . Insofar as counties may be using it anyway, however, we should ensure that the revenue it raises goes directly toward lowering property tax bills. The property tax is still the biggest tax problem facing this state. If we can help alleviate some of its burden with a county sales tax, I have less trouble allowing counties the option of levying such a tax.

(*Id.* at 189.)

Critically, in the Assembly, the vaguer phrase "property tax relief" was replaced with the even stricter "directly reducing the property tax levy." (*Id.* at 180-81.) That language was passed by the Legislature and signed by the Governor. 1985 Wis. Act 41.

Thus, the history of the enactment of Wis. Stat. §77.70—a focus on driving down property tax bills accompanied by a revealing tightening of the relevant language from mere tax "relief" to "direct[] tax "reduc[tion]"—confirms the meaning of the

statute: counties may adopt sales and use taxes, but may only do so to directly reduce the property tax levy. The amendment of §77.70 was a legislative effort to protect the ordinary taxpayer from the burden of both property and sales taxes by using the latter—which draws from a different base—to pay down the former. And if the Legislature had meant to require just property tax "relief"—which is what the County's position amounts to—it would not have discarded the version of the statute containing that very language. The County should not be permitted to defeat this manifest purpose by departing from §77.70's plain text.

B. The 1998 Attorney General opinion concluding that counties may use sales tax revenue to fund new spending projects contradicts the plain language of §77.70

The reason this case has not resolved more simply is a significantly flawed 1998 formal opinion by then-Attorney General Jim Doyle (the "AG"), wherein the AG discussed permissible uses of sales tax revenue and approved the view of §77.70 the County now adopts. (R.59:168-71.)

The opinion is not lengthy. After observing that sales tax revenue could permissibly be applied either to the total property tax levy or individual budget items and still result in direct property tax reduction, the AG considered "the possibility that the statute could be construed to require that the net proceeds of the sales and use tax be used only to defray the cost of *existing* projects,

as opposed to *new* items." (R. 59:169 (emphases added).) Unfortunately, the AG concluded that such a construction would be "unreasonable" and agreed that preventing the property tax levy from rising due to new spending had the same legal effect as reducing it. (*Id.*) In his view, counties could use sales tax revenue to offset "any individual budgetary item which can be funded by the countywide property tax." (*Id.* at 170.)

The AG's interpretation of the law is incorrect. This conclusion suffers from all of the defects discussed in the previous section. It ignores the word "reduce," because the avoidance of an increase is not a reduction. It ignores the word "directly," because any alleged reduction occurs only by operation of funding new spending, an intervening step, which in turn supposedly offsets hypothetical increased costs. It renders the Legislature's restriction on the use of sales tax revenue illusory—it will almost always be possible to say that maybe or somehow property taxes could have been raised to pay for new projects actually funded by the sales tax.

Despite these devastating textual problems, the AG gave only one reason for his conclusion. Citing the principle that in construing statutes "unreasonable or absurd results" should be avoided, the AG believed that it would be "unreasonable" if counties which had already started projects (and thus had factored the costs into their levy) could use sales tax revenue to pay for

them while a similarly-situated county which had not yet started the same project could not, despite the absence of any "county-by-county limiting language in the statute." (*Id.* at 169-70 (citing *Estate of Evans*, 28 Wis. 2d 97, 101, 135 N.W.2d 832 (1965)). This reasoning does not withstand scrutiny.

As an initial matter, the AG misunderstands the purpose of the "unreasonable results" rule. That canon is an aid to determining the *Legislature*'s meaning in enacting a statute. *See, e.g.*, *HSBC Realty Credit Corp. v. City of Glendale*, 2007 WI 94, ¶¶19-20, 303 Wis. 2d 1, 735 N.W.2d 77 (referring to the principle as a "canon[] of statutory construction"). It is not a blank check for executive branch actors to engage in a freewheeling analysis of whether they personally think that the Legislature's policy choices make sense. *See, e.g.*, *State v. Grunke*, 2008 WI 82, ¶31, 311 Wis. 2d 439, 752 N.W.2d 769 ("An absurd result follows when an interpretation would render the relevant statute contextually inconsistent or would be contrary to the clearly stated purpose of the statute.") (Footnotes omitted.); *Anderson v. Aul*, 2015 WI 19, ¶113, 361 Wis. 2d 63, 862 N.W.2d 304 (Ziegler, J., concurring on behalf of the Court) (it was inappropriate for the lead opinion to consider, among other things, harm that might occur to the plaintiffs as a result of the court's holding). *Grunke* cites textual or contextual inconsistency as the hallmarks of absurd or unreasonable results; we do not expect the legislature to contradict

itself. But the AG identifies no such problem. Instead, his conclusion rests on his own supposition that it is somehow unfair, and thus "unreasonable," to allow counties to pay for already-funded projects with sales taxes but not new projects. That was not his call to make.

And in any event, it is not an unreasonable limitation; it is integral to the taxing authority the Legislature chose to grant counties. While forcing counties to first raise the property tax levy before lowering it with a sales tax may seem inefficient, legislative limitations on local government authority are not usually designed with efficiency in mind—they are designed to protect the public. Requiring the county board to have both the financial ability and the political will to actually vote to raise the levy first requires discipline from elected officials and prevents them from obscuring from the public what is really going on. If legislators have been unable (due, for example, to applicable levy limits) or unwilling to raise property taxes, §77.70's limitation ensures that a county does not use sales taxes as a "short cut" around these obstacles to simply augment county revenue. Reasonable people might disagree on the wisdom of implementing such procedural safeguards and prizing values like transparency and accountability above efficiency, but the choice is not unreasonable as a matter of statutory construction.

Even on its own terms, the AG's argument fails. Section 77.70 does not in fact treat different types of counties differently. *All* counties must obtain non-sales-tax funding for a project before funding it with sales tax revenue. The first type of county in the AG's hypothetical—the county using a sales tax to pay for a preexisting project already funded by the property tax levy—has already done so. The second type—the one that wishes to use the sales tax to pay for a new project—must do so in the future.

The AG recognized that his interpretation threatened to read the word "directly" out of the statute (in fact, for reasons stated, it does). (R.59:170.) But he concluded that the word still "has meaning in those instances where budgetary items cannot be funded through a countywide property tax." (*Id.*) He gave only two examples of such items: public library service and county health departments; in these instances, the tax is not "countywide" because certain districts in the county already receiving analogous services are or may be exempt. (*See id.*) Using sales tax to defray such items not fundable by a countywide property tax, in the AG's view, constituted "indirect rather than direct property tax relief [sic][5]." (*Id.*)

This "saving construction" suffers from several flaws. First, the items the AG cites are fundable with property tax dollars and thus no different from other new spending items for purposes of

[5] Tellingly, the AG forgets that the statute requires more than just "relief."

his erroneous theory, even if some taxpayers are exempt. Second, it is difficult to imagine a more convoluted and unlikely way for the Legislature to have accomplished what the AG sees as the Legislature's true goal—preventing a few isolated items from being funded by sales taxes—than by adopting the sweeping language that §77.70 contains. Most importantly, however, the AG's construction does not address the central problem that paying for new spending fundable with property taxes *still involves* "intermediate step[s]" and thus does not "directly" reduce the levy. (*Id.*) In other words, even assuming that paying for public library service could be viewed as "indirectly" reducing the property tax levy, that is simply an *additional* layer of indirectness as compared to paying for capital projects with sales taxes, which also at best only indirectly reduces the property tax levy. The AG opinion never addresses this textual problem head-on.

C. The 1998 Attorney General opinion is not entitled to a presumption of correctness

Because what little reasoning the 1998 AG opinion contains is defective, this Court should disregard the opinion. *See, e.g.*, *State v. Beaver Dam Area Dev. Corp.*, 2008 WI 90, ¶37, 312 Wis. 2d 84, 752 N.W.2d 295 (explaining that AG opinions are "not binding as precedent"). But the County argues that this Court is *required* to treat it not only as persuasive (which would be bad enough) but also as *presumptively correct* because the Legislature

has amended §77.70 since 1998 but has not made changes responding to the AG's opinion. This proposition occasionally appears in this Court's cases, *see, e.g.*, *Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86, ¶126, 327 Wis. 2d 572, 786 N.W.2d 177 (lead opinion); *State v. Hemp*, 2014 WI 129, ¶32 n.10, 359 Wis. 2d 320, 856 N.W.2d 811, but this Court should stop using it for two central reasons.

Most obviously, it requires this Court to depart from its "duty . . . to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). For the presumption to do any work, this Court must either have disagreed with an AG opinion's view on a legal question or have declined to resolve the question at all, simply deferring to the AG's position. (If the Court already agreed with the AG, the presumption would be irrelevant.) In either case, the Court will have transferred its role to a coordinate branch. But as was recently observed, each branch must jealously guard its own prerogatives because they are conferred not for the benefit of the men and women who hold them but for the benefit of the people. *See Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶¶44-48, 382 Wis. 2d 496, 914 N.W.2d 21 (plurality opinion).

Secondly, the principle does not match reality. There could be countless reasons besides agreement with the AG that the Legislature might act on a statute yet not modify it in response to

an AG opinion. For example, the Legislature might not be able to reach agreement on a change; the Legislature might not be aware of or have considered the AG opinion; or a lack of controversy over the interpretation might make amendment a low priority. The Court's presumption would require the Legislature, each time it amends any statute, to pore over a centuries' worth of potentially relevant AG opinions and draft and vote on amendments addressing each one or otherwise risk "approving" it. This is not a reasonable expectation and does not comport with our constitutional separation of powers.

No one disputes that an AG opinion is of course entitled to consideration in this Court. But a binding presumption of correctness goes too far.

Regardless, assuming the validity of the proposition that AG opinions can ever be entitled to a presumption of correctness, that presumption is of course not irrebuttable in a court of law. For the reasons set forth in the prior section, the AG's reasoning is seriously deficient and contrary to the unambiguous terms of §77.70. Consequently, any presumption of correctness is rebutted and this Court need not and should not follow the opinion.

D. Brown County's sales tax violates the plain language of §77.70

In the end, the question facing this Court is simple: Did Brown County use its sales tax revenue to directly lower its

property tax levy, or did the County use it for something else? The language of the County's ordinance itself answers that question: the money is being used to pay for a slew of new projects, not to directly reduce the property tax levy, the only purpose authorized by Wis. Stat. §77.70.

This is well-illustrated by the County's financial data from the periods preceding and following the enactment of the sales tax.

The property tax levy which existed prior to the sales tax was the 2017 levy in the amount of $86,661,972. (R.9:14; 15:3.) The County's 2018 budget estimated that the County's sales tax would raise $22,458,333 that year and called for spending $17,895,065 of that revenue. (R.59:39.) If that latter number was shown as a subtraction from the pre-existing levy of $86,661,972, and the resulting levy for 2018 was then $68,766,907, the full amount of the sales tax would have been used to directly reduce the levy as required by §77.70. But that was not what Brown County did.

Instead, in 2018, Brown County proposed raising its spending by at least approximately $22,000,000[6] which would have raised its levy by about the same amount (to about $108,000,000). Brown County then reduced that "new" levy by

[6] That is, about $18 million in capital expenses to be funded by the sales tax (R.59:39), plus approximately $4 million in additional expenses (represented in the County's proposed financial summary (R.58:98)).

$17,895,065 (the year's sales tax revenue) resulting in its 2018 property tax levy of $90,676,735. Brown County contends that this was a reduction of the levy (because it decreased the hypothetical increase), when, in fact, it was an increase of $4,014,763 or about 5% from the levy that pre-dated the sales and use tax. (R.9:14; R.15:3.) Moreover, as explained below, Brown County did not even have room under its statutory levy limit to increase its property tax levy to pay for the $17,895,065 of new spending proposed for 2018 and thus effectively evaded it. In sum, Brown County's sales and use tax did not even result in property tax *relief* for Brown County taxpayers, to say nothing of direct reduction of the property tax levy.

The terms of §77.70 do not allow this—obviously, the County did not impose its sales tax "only for the purpose of directly reducing the property tax levy," but instead did so to fund new spending. The sales tax is unlawful.

II. BROWN COUNTY'S SALES TAX VIOLATES WIS. STAT. §77.70 EVEN UNDER ITS OWN INTERPRETATION OF THE STATUTE BECAUSE THE COUNTY DID NOT HAVE ROOM UNDER ITS LEVY LIMIT TO PAY FOR ITS NEW PROJECTS WITH PROPERTY TAXES.

Even if this Court disagrees with BCTA and concludes that the AG's (and the County's) position is correct, it should *still* strike down the County's sales tax. The AG concluded that a sales tax can be used to pay for new spending, but only if that new spending

could have been funded with a property tax. Because levy limits—enacted after the 1998 opinion was published—prevent counties from exceeding certain property tax levels, projects that would cause the levy to unlawfully exceed that limit if paid for with property taxes cannot be paid for with a sales tax. Brown County's projects exceed what the County could have paid for by raising its levy to its levy limit, so the sales tax is unlawful, even under the AG's opinion.

A. Levy limits restrict the amount of new spending to which a county may devote sales tax revenue under the 1998 Attorney General opinion

As noted, although the 1998 AG opinion approved of using sales tax revenue to pay for new projects, even the AG agreed that "[s]ales and use tax revenues *may not be budgeted* as a revenue item used to offset the cost of any specific budget item *which cannot be funded through a countywide property tax*," characterizing this as "indirect . . . property tax relief." (R.59:170 (emphases added).)

The Attorney General's opinion (and the amendment of §77.70) occurred *before the enactment of levy limits* in 2006. *See* 2005 Wis. Act 25, §1251c. Levy limits now prohibit how much counties may raise their property taxes, sharply limiting what a county can spend on new projects with a property tax increase or, by the AG's logic, with a sales tax.

Under Wis. Stat. §66.0602(2), "political subdivision[s]" (including counties, §66.0602(1)(c)) may not increase their levies "in any year by a percentage that exceeds the political subdivision's valuation factor." A "valuation factor" "means a percentage equal to the greater of either the percentage change in the political subdivision's January 1 equalized value due to new construction less improvements removed between the previous year and the current or zero percent." §66.0602(1)(d). Effectively, a county's levy is fixed at its current level, and can only be raised if the county experiences a net positive growth in property values due to new construction. A county cannot exceed this levy limit, unless it gets approval by referendum of the voters or other exceptions apply. §66.0602(4).

The Attorney General's opinion assumes that counties can raise property taxes at will, and thus did not, and could not, take into account the effect of levy limits on §77.70. Because of levy limits, it is no longer true that a county can raise the property tax levy however much it wants to pay for new expenditures. Instead, it can only raise its levy by an amount proportional to the net growth in new construction in the county. If the cost of proposed projects exceeds the allowable levy increase, the county could not raise its levy to pay for those projects. Because a county could not raise its property tax levy to pay for those projects, implementing

a sales and use tax to pay for those projects *would not avoid a property tax increase that would otherwise occur*.

B. Brown County could not have paid for its new projects with property tax increases

Even under the AG's interpretation, the County's sales tax still violates §77.70, because Brown County *could not* have raised its property tax levy to pay for all of the new spending being funded by the tax.

Brown County proposes to fund $147,000,000 in new projects over six years with its sales tax, including almost $18,000,000 in new spending in 2018 alone. (R.3:1; 59:39.) Yet in 2017, Brown County's property tax levy was $86,661,972 (R.9:14; 15:3) and in 2018, Brown County's levy limit was $87,584,261,[7] a difference of only about one million dollars. (R.46:1.) This means the County could not have raised its levy to pay for the $18,000,000 in new projects. Brown County is therefore not using its sales tax "only for the purpose of directly reducing the property tax levy." It is actually using the sales tax to evade its levy limits, increasing its overall tax revenue by over 20% in 2018.

Even the Circuit Court, which ruled against BCTA, recognized the force of this logic:

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[7] Or $91,115,007. Brown County initially stated that the latter number was correct (R.9:18; 15:5) but then stated the former was the actual number (R.38:22 n.15). BCTA does not know why they are different or which is correct. Nothing here turns on the difference.

> The Court, throughout the process of rendering a decision on this case, has found this Taxpayer argument the most compelling. How can the County claim "only" to be "directly reducing" its property tax levy with sales and use tax revenue, when it is increasing spending beyond what it could without the sales and use tax revenue? Phrased another way, if the County is generating $145,000,000.00-plus in sales and use tax revenue over 72 months, then why are property taxes not being reduced by $145,000,000.00-plus over those 72 months?

(R.103:28.) This is a good question but one the Circuit Court inexplicably decided to avoid answering. Nor does the Circuit Court answer the specific question for 2018—how can the County increase spending by $18,000,000 in one year, when it only has room for $1,000,000 under its levy limit, and still contend that it is somehow reducing the property tax levy? This Court should fix these errors. Even if the Court finds the AG's interpretation persuasive, it should still conclude that the County's sales tax violates Wis. Stat. §77.70.

C. This Court should not simply assume that the County could and would have obtained approval to borrow $147,000,000

Brown County argued below that the property tax levy limit *also* does not matter because the County could have borrowed to pay for the $147,000,000 in new projects, and counties can raise their levies to pay for debt service without regard to the levy limit. In other words, Brown County is saying that it *could* have

borrowed to pay for all this new spending; that it *could* have raised its property taxes to pay back those bonds; that paying for the same spending with sales tax revenue avoids these steps; and that, therefore, the County has somehow "directly reduc[ed] the property tax levy."

The central problem with this argument is that Brown County did *not* borrow for the new spending and cannot establish that it both (1) could and (2) would have. It is true that under Wis. Stat. §66.0602(3)(d)2., counties can exceed their levy limits to pay for new debt service subject to state constitutional limits on total indebtedness. But state law imposes a variety of extraordinary procedural requirements on borrowing. *See generally* Wis. Stat. §67.045 ("Debt issuance conditions."); §67.05 ("Bond issues; procedure."); §67.06 ("Form and contents of bonds."); §67.08 ("Execution and negotiation."); §67.09 ("Registration of municipal obligations."). Whether, in an alternate universe, they could have been satisfied is something that no one can know. Most importantly, to be able to borrow $147,000,000 the County would likely have had to get permission from a public referendum or pass a resolution authorizing the borrowing by at least a three-fourths majority. §67.045(1)(a), (f). Whether the County would have had the political will or popular support to do so is similarly unknowable. Would the people of Brown County have voted to

authorize this huge amount of borrowing, for example? Who can say?

Since the County cannot establish that it could and would have met all prerequisites for borrowing, then it cannot be said that its sales tax was used to avoid a certain increase in the property tax levy in order to pay back that borrowing. The County's sales tax is illegal.

Recognizing this, the County has attempted to argue that it is "undisputed" that it would have borrowed to fund all of its projects in the absence of a sales tax. It bases its claim that it knows—with infallibility—the state of affairs in the alternate universe in which no sales tax ordinance is passed on the following single sentence uttered by its Finance Director in an affidavit: "I am familiar with Brown County's May 17, 2017 Ordinance enacting a Sales and Use Tax for the purpose of funding capital projects which it is my understanding and belief would otherwise have been funded through the issuance of additional debt obligations." (R.44:2.)

BCTA has disputed this statement since the beginning of this case, pointing out in the Circuit Court that the statement was "purely speculative, not based on personal knowledge, wholly unfounded, and entitled to no weight." (R.64:17.) As a matter of law, it was and is insufficient to support summary judgment for the County. Wis. Stat. §906.02; *Hopper v. City of Madison*, 79 Wis.

2d 120, 130, 256 N.W.2d 139 (1977) ("Affidavits in support of a motion for summary judgment must contain evidentiary facts, of which the affiant has personal knowledge."). The Director cannot have personal knowledge of matters that would have occurred in the future and his "belief" is inadmissible as mere speculation. *Kraemer Bros. v. U.S. Fire Ins. Co.,* 89 Wis. 2d 555, 571, 278 N.W.2d 857 (1979) ("An affidavit made on information and belief does not satisfy the statutory requirement that the affidavit be made on personal knowledge and set forth evidentiary facts as would be admissible in evidence." (citing Wis. Stat. §802.08(3)); *Grunwald v. Halron*, 33 Wis. 2d 433, 441, 147 N.W.2d 543 (1967) ("mere speculation" is not admissible). Put simply, the question of future borrowing contingent on individual votes is not a provable fact.

Simply assuming that the County would have borrowed $147,000,000 is not merely wholly unwarranted as a factual matter. It would render meaningless the many careful procedures the Legislature imposed on borrowing and which the County neatly avoided here. It would undermine the constitutional cap on debt established by Article XI, §3(2) of the Wisconsin Constitution and allow Brown County to use its borrowing capacity to justify a sales tax, and to raise revenue without having that revenue charged against the debt limit. And, crucially, it would read the "only for the purpose of directly reducing the property tax levy"

limitation out of §77.70. A county need only utter the incantation that it "otherwise would have borrowed"—without any need to prove that fact—and it can spend sales tax revenue on virtually whatever it wants, no matter how high its levy might be climbing.

This argument makes a mockery of the decision the Legislature made in 1985 when it amended §77.70. Using sales tax revenue to avoid a *hypothetical* property tax hike that might have occurred *had* Brown County attempted to borrow money and *had* it been able to successfully meet all the prerequisites for doing so is hardly a direct property tax reduction. It is, instead, a Rube Goldberg interpretation of the law. First, assume that the County would have borrowed to pay for these projects had it not passed a sales tax. Second, assume that the County could and would have met the prerequisites to borrow for the projects. Third, assume that paying for debt service on *borrowing* is just as good as paying for the projects *directly*. Finally, assume that avoiding an increase actually counts as a reduction. This circuitous and uncertain route is not "reducing" anything, much less "directly reducing the property tax levy."

Because levy limits prevented Brown County from paying for its capital projects with its sales tax, and because, as a matter of law, it cannot be established that the County would have borrowed to do so, the County's tax fails even the AG's test.

III. BROWN COUNTY'S ALTERNATE ARGUMENTS THAT WIS. STAT. §77.70 IMPOSES NO RESTRICTION, THAT THE COUNTY IS COMPLYING WITH BCTA'S INTERPRETATION OF THE STATUTE, AND THAT INVALIDATION OF ITS TAX IS A BAD POLICY DECISION ALL FAIL.

Because Brown County's actions are totally inconsistent with both the language of Wis. Stat. §77.70 and its legislative history, and because the County's tax is illegal even under the AG's incorrect view of the law, the County has taken a "kitchen sink" approach in this case, offering a variety of alternate arguments. Each fails.

A. This Court should not read the restriction in §77.70 to have no meaning

The County offers a number of arguments that all essentially boil down to a view that §77.70's restriction is not really a restriction at all but instead some kind of exhortatory language that does not dictate how sales tax revenue need be spent. At the outset, it should be noted that each of these arguments is inconsistent with the County's separate argument that the AG's 1998 opinion is correct: even the AG frankly acknowledged that the language in §77.70 is a "restriction on the use of county sales and use tax revenues." (R.59:169.)

Even viewed on their own merits, however, these arguments are incorrect.

1. Whether §77.70 is an "enabling statute" is beside the point as the restriction on the imposition of a county sales tax is mandatory

Brown County has argued that §77.70 is, in the County's lexicon, an "enabling statute"—one that grants authority and discretion as to whether to use that authority—as opposed to a so-called "prescriptive" statute—one that mandates that Brown County do something. But this distinction does not exist in any Wisconsin case law; nor has any case law been identified suggesting that "enabling statutes" cannot contain conditions, modifiers or prescriptions. A person or an entity can be authorized to do something by a statute but also required to do it in a certain way and within certain limitations. In fact, in *Liberty Grove Town Bd. v. Door County Bd. of Supervisors*, the central case the County has cited for this supposed distinction, the Court of Appeals confirmed that "a county's statutory authority is *limited to that provided in the enabling statute*." 2005 WI App 166, ¶16, 284 Wis. 2d 814, 702 N.W.2d 33 (emphasis added); *see also Nw. Properties v. Outagamie Cty.*, 223 Wis. 2d 483, 487-88, 589 N.W.2d 683 (Ct. App. 1998) ("When an ordinance fails to comply with the empowering statute, it is invalid."). That is, *every* enabling statute is, in some sense, a prescriptive statute. This is so because "counties are creatures of the Legislature and their powers must be exercised within the scope of authority ceded to them by the state." *Dane Cty., Through Dane Cty. Dep't of Soc. Servs. v.*

Wisconsin Dep't of Health & Soc. Servs., 79 Wis. 2d 323, 329, 255 N.W.2d 539 (1977).

Section 77.70 is both an enabling and a prescriptive statute. It *enables* the imposition of a sales and use tax without requiring that a county adopt it, but it also *prescribes* the purpose for which it may be imposed, if it is imposed.

2. Section 77.70 should not be read hyperliterally

At times the County has tried to bolster its contention that §77.70 somehow contains no real restriction on the use of sales tax revenue by playing on the words "impose[]" and "purpose" in the statute. In the County's view, §77.70 only mandates the County possess the right subjective "purpose" when it "acts to impose the tax" (*i.e.* votes to adopt the ordinance). (R.38:15.) Brown County seems to imply (it never makes itself clear on this point) that the statute is satisfied if county lawmakers simply hold the proper intention in their hearts when they enact the ordinance into law. If they subjectively desire or intend property tax reduction, that is enough, regardless of whether the property tax levy is actually directly reduced. But this imaginative parsing of the individual words of a phrase at the expense of its whole meaning violates two basic principles of statutory construction.

First, words "are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816) (per Story, J.)

(discussing the federal Constitution), *quoted in* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 356 (2012). That is, words should be given a "fair" meaning, not a "hyperliteral" one. Scalia & Garner, *supra*, at 356 (emphasis removed).

For example, the late Justice Antonin Scalia's treatise on statutory interpretation discusses a classic case analyzed by the famed jurists William Blackstone and Samuel von Pufendorf in which a law prohibited persons from "laying hands" on a priest. Scalia & Garner, *supra*, at 356. Blackstone, Pufendorf, and Scalia all agree that the statute prohibits kicking a priest (though no hands are involved), even though a hyperliteral reading would permit that conduct. *Id.* at 356-57. Similarly, in *Wisconsin Carry, Inc. v. City of Madison*, 2017 WI 19, ¶¶3, 46, 373 Wis. 2d 543, 892 N.W.2d 233, a city could not circumvent a law forbidding cities from passing "ordinances" or "resolutions" regulating firearms by passing "rules" doing so. The point is that while courts should not add words to or subtract words from a statute, words should not be given an unnaturally restrictive meaning.

In this case, the verb "impose" is a synonym for "levy," as in to "levy a tax." *See* Webster's, *supra*, at 571. When the Legislature specifies the purpose of the "impos[ition]" of a sales and use tax, it is speaking about the imposition of a tax generally, meaning the entire process of enacting a tax, collecting tax proceeds, and

spending those proceeds, not the specific, limited act of mechanically enacting a tax into law by ordinance. This is the natural interpretation of the words used in §77.70 and how any layman would understand the statute. Brown County's contrary reading is unnatural and amounts to little more than wordplay.

Brown County's interpretation also violates a second canon of construction, namely the rule that "[s]tatutory interpretations that render provisions meaningless should be avoided." *Belding v. Demoulin*, 2014 WI 8, ¶17, 352 Wis. 2d 359, 843 N.W.2d 373. What is achieved by forcing a County to *enact* a sales and use tax for the purpose of directly reducing the property tax levy if it may then turn around and spend the proceeds however it wants? Nothing.

Brown County's arguments in this vein similarly appear to build on one sense of the word "purpose," which is "intention," Webster's, *supra*, at 930, as if the Legislature meant only to control the thoughts of County officials and not their actions. But that meaning is inapplicable in the lawmaking context, where purpose is relevant only insofar as it is "ascertainable from the text and structure of the statute itself." *Kalal*, 271 Wis. 2d 633, ¶¶48, 52. Counties enact a law for a particular purpose, such as directly reducing the property tax levy, by adopting an ordinance that accomplishes that effect. An alternate reading renders that condition on sales and use taxes meaningless and superfluous.

3. The restrictions in other statutes do not affect the interpretation of §77.70

The County argues that because nearby statutes, namely Wis. Stat. §§77.705 (the Miller Park Stadium Tax) and 77.706 (the Lambeau Field Tax) (collectively, the "Stadium Taxes") direct that certain appropriated moneys associated with the stadium taxes shall be "used" in a certain way, the absence of the same word in the county sales tax statute means that the Legislature did not place any restrictions on the use of county sales tax funds. This is error for several reasons.

First, the canon Brown County cites—namely, that courts should assign meaning to the failure to include in a statute a provision that appears in a similar statute, *see, e.g.*, *Heritage Farms, Inc. v. Markel Ins. Co.*, 2009 WI 27, ¶22, 316 Wis. 2d 47, 762 N.W.2d 652—does not apply where there are reasons for the difference, *see, e.g.*, *Scarborough v. United States*, 431 U.S. 563, 570-71 (1977) (canon inapplicable because the first statute was "enacted hastily with little discussion and no hearings" while the second was "a carefully constructed package of gun control legislation"); *Heritage Farms*, 316 Wis. 2d 47, ¶23 (canon inapplicable because first statute was "drafted from the perspective of who may bring an action," whereas second was "drafted from the perspective of who is the tortfeasor"). And here there are good reasons for the difference.

The County misunderstands the operation of Wis. Stat. §§77.705-.706. They do not direct the expenditure of Stadium Tax revenue but instead of other moneys, namely leftover money appropriated to DOR for it to administer these taxes and money received from a state license plate program. These moneys are transferred to appropriation accounts under §§20.835(4)(gb) and (ge).

In contrast, the leftover money appropriated to DOR to administer *county* sales taxes, *see* Wis. Stat. §20.566(g), "lapses to the general fund," while the county sales tax appropriation account does not receive money from the license plate program. There is thus simply no need to contain in §77.70 language analogous to that in §§77.705-.706. Simply stated, the County's argument is an apples-to-oranges comparison.

The second problem with the County's supposed distinction is that it is not actually consistently maintained in the statutes. For instance, the *actual* appropriation account for Stadium Tax revenue appropriates the money in part "for the purpose of financing a local professional baseball park district" or "football stadium district." §§20.835(4)(gb), (ge). This is analogous to the language in §77.70, and adopting the County's reading would mean that such language is similarly meaningless.

Third, §77.70 is *more* broadly worded than §77.705-.706, not less. A general ban on any racial discrimination in university

admissions, for example, is more broadly worded than a ban on awarding scholarships based on race—but the greater includes the lesser. In the same way, a broad requirement that the sales tax be imposed only for the purpose of directly reducing the property tax levy is still a limitation on spending or use of revenues.

Finally, the County never sets forth a coherent explanation of what the language in §77.70 means if it is not a restriction on the use of funds (again, even the AG agreed that it constitutes such a restriction (R.59:169)). The County is not asking the Court to choose between alternate readings but instead just wants the Court to reject the only reasonable reading being offered (and the most obvious one).

B. Brown County is not complying with BCTA's interpretation of the statute

At various times Brown County suggests—likely as a failsafe should this Court agree with BCTA's interpretation—that its math shows that the County's sales tax is directly reducing its property tax levy anyway. These conclusory statements, which revealingly are never actually accompanied by a clear, step-by-step explanation of how the reduction is being accomplished, are based on a hope that the Court's eyes will glaze if asked to scrutinize the County's calculations. But the statements do not withstand scrutiny.

Brown County first implies that it is using *some* of its sales and use tax revenue to pay down existing debt. (R.65:16.) Even were that true, it would not satisfy the statute, because the County would not be using the sales and use tax "only" to directly reduce the levy. Some of the tax revenue would still be used for other purposes, namely capital projects.

But *it is not true* that Brown County is using sales and use tax proceeds to pay existing debt. This is easily provable. The Sales Tax Ordinance states that "revenues . . . *[s]hall not be utilized* to fund any operating expenses other than lease payments associated with the below mentioned specific capital projects." (R.3:1.) Nor does Brown County's 2018 budget show sales and use tax revenue being spent on debt service; rather, it shows it being spent on $17,895,065 of projects from the ordinance (R.50:82), with a remaining balance of $4,574,118 unspent in a special fund, (R.51:26). Brown County's own minutes show not that the revenue is paying for debt service, but rather that paying for new capital projects with the revenue would avoid borrowing for those projects, keeping the total debt down as well as allowing the existing debt to be paid off faster. (R.68:2.) Thus any reduction in the property tax levy that occurs is not a direct result of the sales tax; the same reduction would obtain if the County chose not to fund the capital projects it lists at all. BCTA has already addressed how deciding that such actions meet §77.70 require assuming that the County

would have chosen to borrow and would have met the prerequisites for doing so, assuming that paying for debt service on *borrowing* is just as good as paying for the projects *directly*, and assuming that avoiding an increase counts as a reduction.

Brown County similarly argues that enacting into its ordinance a mill rate freeze somehow indicates compliance with §77.70. (*See* R.3:1.) It does not. Assuming the mill rate were somehow interchangeable with the property tax levy, a freeze is obviously not the same as a reduction, much less a direct reduction. And it is not interchangeable: the mill rate is a function of a county's property tax levy and the equalized value of taxable property. *See Milewski v. Town of Dover*, 2017 WI 79, ¶47 & n.18, 377 Wis. 2d 38, 899 N.W.2d 303 (lead opinion). So what Brown County is saying is that it has promised to limit its levy increases to a level that does not raise the mill rate. This is simply a variation of its earlier arguments. Slowing the increase of the property tax levy is not the same as a direct reduction of the property tax levy; a mill rate freeze, or even a decrease, does not necessarily mean the levy decreased. And even to the extent the mill rate is frozen or decreasing due to a *decrease* in the property tax levy, that decrease is, again, not due to sales tax revenues but instead from payments on debt service, which could occur with or without the County's sales tax.

C. This Court should reject Brown County's atextual policy arguments

Brown County's final collection of arguments offered throughout this litigation add up to a warning that bad things will happen if this Court rules in favor of BCTA. The County couches some of these arguments in the "absurd or unreasonable results" canon, but as explained that canon is not used for open-ended analyses into whether the Legislature's policy decisions are good ideas or not.

For example, Brown County suggests that BCTA's interpretation will not be administrable due in part to a lack of DOR guidance. Lack of administrability is a concern for the Legislature, not this Court, but in any event the County's fear is totally unfounded. The AG itself explained how counties can apply its revenue to decrease the property tax levy. (R.59:169.) In a particular budget the County can either apply last year's sales tax revenue to next year's levy or it can apply an estimate of next year's sales tax revenue to next year's levy (the same kind of estimates municipalities make in any number of budgetary areas). Indeed, DOR, while not taking a side in the legal dispute, has noted that all counties are *already* required to submit a PC-400 form, which contains a line item titled "County sales tax credit" and which reduces the county property tax levy on the form (*see* R.91). To the extent further guidance is needed, the Legislature or DOR will develop it.

This helps explain why sales tax ordinances in force in counties throughout the state already contain language explicitly reiterating that the relevant county may not spend sales tax revenue on new or expanded county services and/or must apply the funds directly to the tax levy. (*See, e.g.*, R.41:48 (ordinance states "100% of the revenue from the county sales and use tax shall be applied to property tax relief by reducing dollar-for-dollar the amount [o]f the property tax as established annually by the county board."); 47 (ordinance states tax revenue "may not be used for any new or expanded county services") *see also* R.41:45, 54, 59, 60; R.42:2, 13, 19, 26, 27, 47.)

In fact, although the many variables affecting the county budgeting process make proving that a dollar-for-dollar reduction has occurred in a particular year difficult, BCTA provided strong evidence below that such reductions have occurred in multiple counties. For example, Ashland County imposed its sales and use tax in 1988. Wisconsin Department of Revenue, *Sales Tax Rate Chart*, https://www.revenue.wi.gov/Pages/FAQS/pcs-taxrates.aspx. It collected $258,496.05 in sales tax revenue that year. Wisconsin Department of Revenue, *County Sales Tax Distributions*, https://www.revenue.wi.gov/Pages/RA/CountySalesTaxDistributions.aspx (use top and drop-down menus). And it reduced its property tax levy by a little more at the

same time—$259,106. (R.75:1.)[8] Langlade County also enacted its sales and use tax in 1988, collecting $279,308.29 in sales tax revenue that year and reducing its property tax levy by $282,938 the next year. Lafayette County imposed a sales and use tax in 2001, collecting $247,123.80 in revenue and reducing its levy by $292,050. These facts suggest that Brown County's speculative administrability fears are misplaced.

Separately, Brown County notes that a ruling in BCTA's favor would lead to all sorts of bad outcomes for it. It advances this argument despite the fact that "it is not the role of the court to weigh the 'consequences of alternative interpretations.'" *Anderson*, 361 Wis. 2d 63, ¶114 (Ziegler, J., concurring on behalf of the Court). A significant number of the negative effects cited by the County stem solely from the County's decision to break the law by spending its sales and use tax revenue to fund new spending projects rather than to directly reduce its property tax levy. Adopting the County's argument would mean incentivizing unlawful behavior: so long as a governmental entity can make it sufficiently difficult to extricate itself from its own illegal conduct by the time a court is able to review that conduct, the entity will be permitted to continue its activity. The County's concerns can

[8] Citations for the following two examples are to the same sources and follow the same pattern; for the sake of readability they have been omitted.

be addressed, if necessary, in the remedy phase of this litigation.[9] But whether the County's credit rating might be affected by a ruling that it improperly spent tax proceeds, for example, has nothing to do with the meaning of the statute at issue or the legality of the County's actions.

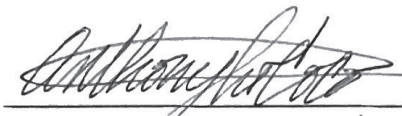
CONCLUSION

For the foregoing reasons, BCTA respectfully requests that this Court reverse the decision of the Circuit Court and remand for further proceedings.

Dated: May 24, 2021.

Respectfully submitted,

WISCONSIN INSTITUTE FOR LAW & LIBERTY



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[9] Before the Circuit Court, DOR requested additional briefing on the question of remedy if Brown County's sales tax is found to be illegal (given that the County is already illegally collecting the tax). Neither BCTA nor the County have objected to this request and remedy has never been extensively briefed. Consequently, the question properly before this Court is the legality of the County's tax; the question of remedy should be addressed in the first instance on remand.

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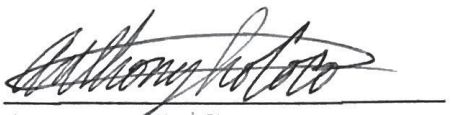
FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 10,978 words.

Dated: May 24, 2021.



ANTHONY LOCOCO

CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 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 certification has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: May 24, 2021.

ANTHONY LOCOCO

APPENDIX

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APPENDIX CERTIFICATION

Pursuant to Wis. Stat. § 809.19(2)(b), I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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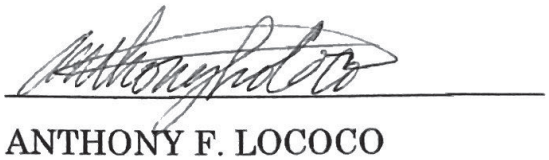

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