RECEIVED
06-15-2021
CLERK OF WISCONSIN
SUPREME COURT

WISCONSIN SUPREME COURT

APPEAL NO: 2020AP940

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, the Honorable John P. Zakowski, Circuit Court Judge, Presiding
Circuit Court Case No: 18-CV-640

# RESPONSE BRIEF OF PLAINTIFF-RESPONDENT BROWN COUNTY

Andrew T. Phillips, S.B.W. No. 1022232
Steven L. Nelson, S.B.W. No. 1009779
Douglas M. Raines, S.B.W. No. 1059539
Christopher E. Avallone, S.B.W. No. 1095465
von BRIESEN & ROPER, S.C.
411 East Wisconsin Ave., Ste. 1000
Milwaukee, WI 53202
PH: (414) 287-1570
FAX: (414) 276-6281
Email: aphillips@vonbriesen.com
Attorneys for Plaintiff-Respondent
Brown County

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

*Cases*

*Statutes*

*Other Authorities*

## STATEMENT OF THE ISSUES

1. **Whether the presumptively valid Brown County sales and use tax ordinance ("Ordinance") complies with Wis. Stat. §77.70's enabling language that a county may impose a sales and use tax "only for the purpose of directly reducing the property tax levy," when the revenues derived from the Ordinance's sales and use tax—consistent with the guidance of a long-standing Attorney General Opinion—are used to pay for capital projects that otherwise would be funded by a countywide property tax.**

**Circuit Court Decision**: Yes. The circuit court concluded the Ordinance complies with Wis. Stat. §77.70 because the sales and use tax revenues are being used to fund capital projects that Brown County otherwise would have funded by issuing debt. (R.103; App.101-32.)

**Court of Appeals Certification**: Although the court of appeals certified the appeal instead of ruling on the merits, the court of appeals noted it "tend[s] to agree" with the interpretation of Wis. Stat. §77.70 Brown County advances:

> By its plain language, WIS. STAT. § 77.70 speaks of a legislative purpose to achieve a direct reduction in the property tax levy in counties that choose to enact a sales and use tax. The statute does not specifically endorse a "dollar-for-dollar" methodology in budgeting for achieving this purpose, nor does the statute explicitly prohibit counties from using sales and use tax revenue to fund new projects. The

> attorney general's conclusion that § 77.70 restricts the expenditure of sales and use tax revenue to items that may otherwise be funded by property taxes is sensible.

(App.152.)

2. **Whether this Court should overturn the propositions of law dating back over 150 years in Wisconsin that opinions of the attorney general are to be accorded deference, and legislative acquiescence to an attorney general's statutory interpretation is indicative of the statute's meaning.**

**Circuit Court Decision**: The circuit court deemed the Attorney General Opinion to be persuasive and a correct interpretation of Wis. Stat. §77.70. (R.3:24-28; App.124-28.)

**Court of Appeals Certification**: The court of appeals stated it "tend[s] to agree" with the "sensible" Attorney General Opinion. (App.152.)

3. **Whether the Ordinance violates Wis. Stat. §77.70 as non-compliant with the levy limits prescribed by Wis. Stat. §66.0602, when §66.0602 does not require a levy to be offset by sales and use tax revenues, and when §66.0602 exempts debt service payments from the levy limit calculation.**

**Circuit Court Decision**: No. The circuit court concluded Wis. Stat. §66.0602 further illustrates the legislature did not intend Wis. Stat. §77.70 to require counties to offset the property tax levy dollar-for-

dollar with sales and use tax revenues. (R.103:21-22; App.121-22.)

**Court of Appeals Certification**: The court of appeals noted the amicus Wisconsin Counties Association's arguments with respect to the interplay between Wis. Stat. §77.70 and Wis. Stat. §66.0602—arguments that support Brown County's interpretation—"cannot be gainsaid[.]" (App.158-59.)

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Plaintiff-Respondent Brown County submits that oral argument is appropriate and presumes the Court will hear oral argument and will publish its opinion as a matter of course.

## INTRODUCTION

Brown County Taxpayers Association and Frank Bennett (collectively "BCTPA") are wrong when they contend the Ordinance is invalid because it does not comply with Wis. Stat. §77.70. Where, as here, a sales and use tax ordinance prevents an increase in the county's property tax levy over the life of the sales and use tax, the ordinance complies with §77.70.

BCTPA's interpretation of §77.70—*i.e.*, proceeds from a sales and use tax must be offset, dollar-for-dollar, from the property tax levy—imposes a limit on county authority the statute's plain meaning does not reflect:

- Had the legislature intended §77.70 to require a dollar-for-dollar offset, the legislature would have used the term "offset" or other explicit mandatory language in the statute.

- Had the legislature intended §77.70 to require a dollar-for-dollar offset, it would have put instructions in the statute—or in another statute enforcing §77.70—how counties are to apply and calculate such an offset.

But the legislature has not done so, even 23 years after the Wisconsin Attorney General ("AG") interpreted §77.70 ***not*** to mandate a dollar-for-dollar offset, and even after 64 other Wisconsin counties have enacted sales and use tax

ordinances that do ***not*** provide for such an offset. Thus, for decades, the legislature has not attempted to "correct" any misinterpretation of §77.70 by the AG, the Department of Revenue ("DOR"), or 64 Wisconsin counties. Instead, the legislature's implied acceptance of the AG's Opinion and the practice of 64 counties constitutes an implied rejection of BCTPA's interpretation of §77.70 and also shows the legislature ***has not even accounted for the possibility §77.70 could require an offset***. By definition, an interpretation of a statute—such as BCTPA's interpretation here—that the legislature has not contemplated is an interpretation that is contrary to the legislature's intent and one that diverges from the statute's plain meaning.

Judicial deference to an AG Opinion, as well as the proposition that legislative acquiescence to an AG's statutory interpretation is indicative of the statute's meaning, are long-rooted in Wisconsin law, dating back 150 years. *Harrington v. Smith*, 28 Wis. 43 (1871). BCTPA has not given the Court reason to overturn 150 years of precedent. However, regardless of whether the Court deems the 1998 AG Opinion presumptively correct, and irrespective of the Ordinance's presumed validity, *State ex rel. B'nal B'rith Found. v.*

*Walworth Cnty. Bd. of Adjustment*, 59 Wis. 2d 296, 307, 208 N.W.2d 113 (1973), the County is not asking the Court to rest on a presumption. The County's interpretation is consistent with §77.70's plain meaning and the legislature's intent.

Moreover, BCTPA's arguments regarding levy limits actually support Brown County's interpretation of §77.70. Neither Wis. Stat. §66.0602 nor any other Wisconsin statute requires a property levy to be offset by sales and use tax revenues, and BCTPA fails to apprehend §66.0602 exempts debt service payments from the levy limit calculation. Wis. Stat. §66.0602(3)(d)2.; (*see* R.44, ¶¶18-19, 41-42, Exhs. B, C).

The Ordinance's presumptive validity not only is reflected in its conformity with the plain meaning of §77.70, the AG Opinion, and the practice of dozens of Wisconsin counties, but also is reflected in Brown County's thorough and deliberate budget process. (R.103:29-30; App.129-30.) Had the County not funded its needed capital improvements through a sales and use tax, it would have funded them through issuing debt. (R.44, ¶7.) To pay off the debt, Brown County would have had to increase property taxes. In its budgeting process, the County calculated the savings local

taxpayers would realize through a sales and use tax instead of debt financing:

- If the County had issued debt for the projects, the property tax on a median-value home in Brown County would have ***increased*** $356.48 over the life of the Ordinance. (*Id.*, ¶¶29, 33.) Instead, the sales and use tax will result in the property tax on such a home ***decreasing*** $140.20. (*Id.*, ¶32.) Thus, the sales and use tax is ***saving*** taxpayers who own a median-value home ***$496.68*** over the life of the Ordinance. (*Id.*, ¶¶7, 27-34.)

- In aggregate terms, if Brown County had financed its capital projects through borrowing instead of through the sales and use tax, borrowing would have cost Brown County taxpayers $13,627,943.36 in interest payments over the six-year life of the Ordinance and $47,000,000 in interest payments over the twenty-year life of the loans. (*Id.*, ¶¶29-30.)

As the circuit court concluded, Brown County "put considerable thought and effort into determining how the sales and use tax revenue would reduce the property tax levy[.]" (R.103:29-30; App.129-30.) This Court should not frustrate the County's efforts.

## STATEMENT OF THE CASE

This is a declaratory judgment action in which the sole issue—the validity of the presumptively valid Ordinance—is one of statutory interpretation. Specifically, the crux of this case is the interpretation of the following words in §77.70:

"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. . . . [T]he county sales and use taxes may be imposed only for the purpose of directly reducing the property tax levy[.]"

On cross-motions for summary judgment, the circuit court correctly concluded the Ordinance is valid and complies with §77.70. (R.103; App.101-32.) Section 77.70 contains enabling language that permits counties to impose by ordinance a sales and use tax. If counties choose to enact such an ordinance, the ordinance complies with §77.70 if the sales and use tax revenues are used to pay for capital projects that otherwise could be funded by a countywide property tax, thereby preventing a property tax increase. This is the interpretation of §77.70 the AG applied and is the interpretation the circuit court adopted when it granted summary judgment to Brown County. (*Id.*; App.144-47.) In its certification, the court of appeals stated it "tend[s] to agree" with the AG's "well-reasoned" and "sensible" Opinion. (App.152.)

This Court should affirm.

## STATEMENT OF FACTS

### I. BROWN COUNTY ENACTS THE ORDINANCE, WHICH STATES THE SALES AND USE TAX REVENUES "SHALL BE UTILIZED ONLY TO REDUCE THE PROPERTY TAX LEVY."

Before Wis. Stat. §77.70 was modified in 1985, Wisconsin counties had the authority to impose a sales and use tax, but few did so because the counties themselves could not retain the net proceeds. (App.167.) Instead, all net proceeds from a sales and use tax were required to be distributed to towns, cities, and villages within the county. (*Id.*); *see also* Wis. Stat. §77.76(4) (1983-84 version).

In amending §77.70, the legislature permitted counties to retain the proceeds of a sales and use tax if a county imposed by ordinance a sales and use tax at a rate of 0.5% "only for the purpose of directly reducing the property tax levy":

> 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. . . . [T]he 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.

Wis. Stat. §77.70.

On May 17, 2017, Brown County enacted the Ordinance by a vote of 23 to 3. (R.71:6.) Brown County publicly vetted the Ordinance before enacting it, having held a public meeting on May 8, 2017 and engaging in nine public listening sessions thereafter. (R.67, 69.) The May 17, 2017 meeting where the County enacted the Ordinance was public, and eleven citizens spoke in favor of the Ordinance and two citizens spoke in opposition to it. (R.71:2.)

The Ordinance took effect for 72 months beginning January 1, 2018 and indicates the sales and use tax revenue "**[s]hall be utilized only** to reduce the property tax levy":

> **9.02 Purpose**. This Ordinance enacts a temporary 72 month, 0.5 percent Brown County sales and use tax, revenues for which: 1) **Shall not be utilized** to fund any operating expenses other than lease payments associated with the below mentioned specific capital projects; and 2) **Shall be utilized only** to reduce the property tax levy by funding the below listed specific capital projects, as well as funding said specific capital projects' associated costs as deemed appropriate by Brown County administration . . . .

(R.3:1; App.165 (bold in original).)

The Ordinance allocates $147,000,000 raised by the sales and use tax to nine capital projects the County Board legislatively determined were "necessary" and "need[ed]" for

the "long-term viability of the County." (*Id.*; R.71:2; R.68:4.) The County enacted the sales and use tax to reduce property taxes by funding needed capital projects that otherwise would have been funded through the issuance of additional debt. (R.3; App.165; R.44, ¶7.)

Through the Ordinance, Brown County has been able to pay down existing debt and fund the listed capital projects. (R.68.) As reflected in the Brown County Executive Committee meeting minutes of May 8, 2017, the sales and use tax has enabled Brown County to "stop bonding," and over its six-year life, the tax will decrease the County's debt approximately $69 million, from $134 million to $65 million. (R.68:2) The decrease in the total debt decreases the cost to pay for the debt, which, in turn, also results in a decrease in the tax levy required to pay the County's debt. (*Id.*) By replacing the property tax levy used to pay for bonding and new debt with the sales and use tax, the Ordinance "guarantee[s] tax relief" to Brown County residents. (*Id.*)

The County determined the tax savings to residents from the sales and use tax by calculating the effect on property taxes if the County had funded the Ordinance's capital projects through issuing debt, instead of funding those

projects through the sales and use tax. (R.44, ¶¶27-34.) Had Brown County borrowed the funds, county taxpayers would have shouldered the extra costs of $13,627,943.36 in interest payments over the life of the Ordinance and $47,000,000 in interest payments over the twenty-year life of the debt service. (*Id.*, ¶¶29-30.)

These totals mean the property tax on a median-value home in Brown County would have ***increased*** $356.48 between 2018 and 2023 without the sales and use tax; instead, because of the sales and use tax, the property tax on a median-value home will ***decrease*** $140.20 in that same time period. (*Id.*, ¶¶32-34.) Thus, the owner of a median-value home in Brown County ***will save $496.68 in property taxes over the life of the Ordinance*** because the County funded the projects through the sales and use tax instead of through debt financing. (*Id.*)

Additionally, Brown County imposed a mill rate[1] freeze, which provides that if the mill rate exceeds the 2018 mill rate in any year during the Ordinance's six-year effective

[1] The mill rate is a "figure representing the amount per $1,000.00 of the assessed value of property, which is used to calculate the amount of property tax." *Milewski v. Town of Dover*, 2017 WI 79, ¶47 n.18, 377 Wis. 2d 38, 899 N.W.2d 303 (internal quotation marks omitted).

period, then the sales and use tax will terminate on December 31 of that year. (R.3:1; App.165.) The mill rate has not increased since the County enacted the Ordinance.

The Ordinance also provides the sales and use tax will terminate before the 72-month effective period if Brown County issues "any general obligation debt" for anything other than refinancing. (*Id.*)

## II. AS PART OF ANNUAL BUDGETING, WISCONSIN COUNTIES SET PROPERTY TAX LEVIES IN ACCORDANCE WITH THE STATUTORY LEVY LIMIT.

Wisconsin counties are statutorily required to adopt an annual budget. Wis. Stats. §§59.60, 65.90(2). In January, Brown County begins its eight-month strategic planning process that results in a final budget the County adopts in October or November. (R.44, ¶12.) A county budget is required to delineate all anticipated revenue sources to support budgeted expenditures. Wis. Stat. §65.90(2).

Once a county accounts for revenue sources and determines operating expenses, it sets the property tax levy. How a county sets the property tax levy is governed by Wis. Stat. §66.0602, which was enacted in 2005, seven years after

the AG issued his 1998 Opinion interpreting Wis. Stat. §77.70. 2005 Wis. Act. 25 §1251c.

The property tax levy is calculated by adding the revenue necessary to fund county operations ("Operating Levy") to the revenue necessary to pay the county's debt service ("Debt Levy"). (R.103:9 n.2; App.109.) Section 66.0602 imposes a cap on the permissible annual percent increases to a county's Operating Levy. Wis. Stat. §66.0602(2). The cap—known as the "Levy Limit"—restricts the percent increase of the Operating Levy over the prior year to the percentage increase in the county's net new construction, as reported by DOR (subject to certain exclusions not material here). *Id.* The Operating Levy is subject to the Levy Limit, but the Debt Levy is not. Wis. Stat. §66.0602(3)(d)2.; (*see* R.44, ¶¶18-19, 41-42, Exhs. B, C). In other words, the statute exempts debt service payments from the Levy Limit calculation. *Id.*

Subsections 66.0602(2)-(2m) require a certain decrease—or, what the statute calls a "negative adjustment"—in a county's Levy Limit under certain circumstances, *e.g.*, if a county receives fee revenue from certain services, such as garbage collection, fire protection, or

snow plowing. Wis. Stat. §66.0602(2)-(2m)(b)1.-(b)2. However, §66.0602 does not require any decrease in a county's Levy Limit based upon receipt of sales and use tax revenues. *See* Wis. Stat. §66.0602.

Importantly, Wis. Stat. §66.0602(6) authorizes DOR to enforce Levy Limits. If a county exceeds its Levy Limit, DOR is required by law to offset, dollar-for-dollar, state aid otherwise owed to the county. Wis. Stat. §66.0602(6)(a).

DOR uses a Levy Limit Worksheet to ensure a county has complied with the statutory Levy Limits. (R.44, ¶¶17-19, 41-42, Exhs. B, C.) The Levy Limit Worksheet contains categories of revenues or expenditures that are to be added or subtracted from the allowable levy to perform the Levy Limit calculation. (*Id.*) The Levy Limit Worksheet excludes from the Levy Limit calculation sums a county is obligated to pay for debt service. (*Id.*) In other words, if a county borrows money for a capital project, the Levy Limit Worksheet excludes from the definition of revenues subject to the Levy Limit the county's principal and interest payments on the debt. (*Id.*) Like the statute, the Levy Limit Worksheet also does not provide for any deduction of proceeds from a county

sales and use tax from the allowable levy, or even address such proceeds. (*Id.*, ¶¶20, 41-42, Exhs. B, C.)

## III. IF THE SALES AND USE TAX IS REPEALED, BROWN COUNTY WILL LOSE THE SALES AND USE TAX PROCEEDS AND WILL BE FORCED TO BORROW TO FUND ITS NEEDED CAPITAL PROJECTS.

Brown County has studied both the economic benefits it will realize from the sales and use tax and the ill-effects it will suffer if the sales and use tax is repealed. The County accounted for estimated sales and use tax proceeds when formulating its annual budget for 2018 and 2019. (*Id.*, ¶16.) The County estimated it would receive $22,458,333 in sales and use tax revenue in 2018 and $24,500,000 in sales and use tax revenue in 2019.[2] (*Id.*)

If the Ordinance is repealed, Brown County will suffer several adverse effects:

- The County will lose the sales and use tax revenue and will have to decrease future budgets by the anticipated amount of sales and use tax revenue. (*Id.*, ¶37.)

- The County will be forced to borrow to fund its capital projects, which will result in an increase in property taxes to pay for the associated principal and interest expense. (*Id.*, ¶¶7, 27-30, 35.)

[2] Brown County received $22,643,051.49 in sales and use tax revenue in 2018. (R.62:5.)

- Any County budget in place will need to be amended to account for the change in revenue categories. (*Id.*, ¶26.)

- There is a "significant risk" the County's credit rating will decrease. (*Id.*, ¶38.)

## IV. IN MAY 1998, THE ATTORNEY GENERAL ISSUED AN OPINION CONCLUDING AN ORDINANCE THAT ALLOCATES SALES AND USE TAX PROCEEDS TO FUND PROJECTS THAT OTHERWISE COULD BE FUNDED BY A PROPERTY TAX LEVY COMPLIES WITH WIS. STAT. §77.70.

By 1998, Wis. Stat. §77.70 had been in force for 13 years, but no court or other legal authority had interpreted the meaning of the statutory phrase "only for the purpose of directly reducing the property tax levy." (App.168.) The AG received a request to advise "how funds received from a county sales and use tax imposed under [§77.70] may be budgeted by the county board." (App.167.)

In response, the AG issued an Opinion interpreting the statutory language "the sales and use tax may be imposed only for the purpose of directly reducing the property tax levy" to permit two means of compliance with §77.70: Funds raised by a sales and use tax could be either **(a)** "budgeted to reduce the amount of the overall countywide property tax levy"; or **(b)** budgeted "to defray the cost of any item which

can be funded by a countywide property tax." (*Id.*) The AG reasoned: "The same amount of countywide property tax reduction occurs whether the county board chooses to budget revenues from net proceeds of the sales and use tax as a reduction in the overall countywide property tax levy or as an offset against a portion of the costs of specific items which can be funded by the countywide property tax." (App.168.)

The AG explained that §77.70 permits counties to use the proceeds of a sales and use tax to defray either the cost of existing projects or the cost of new projects. (*Id.*) The AG reasoned that it would be "unreasonable" to construe §77.70 to, on the one hand, permit counties that had started projects to complete them using sales and use tax revenue, but to, on the other hand, prohibit counties that had not yet started similar projects from using sales and use tax revenue to fund such new projects at all. (App.167-68.)

The AG also provided guidance on what the word "directly" means within §77.70. To "directly" reduce the property tax levy, the AG concluded, sales and use tax revenue may be put towards budget items that could be funded from the countywide property tax levy to begin with: "[T]he budgeting of sales and use tax proceeds to defray the

cost of items which cannot be funded by a countywide property tax constitutes indirect rather than direct property tax relief." (App.169.)

The AG observed that Wisconsin counties "lack statutory authority to implement a direct system of tax credits to individual property owners through distribution of property tax bills, the contents of which are specified by [DOR]." (App.168 (brackets added).)

The 1998 AG Opinion stood without challenge, either via litigation or via proposed legislative amendment to §77.70, until BCTPA challenged the Ordinance. At the time this suit was filed, 66 of Wisconsin's 72 counties had enacted a sales and use tax pursuant to §77.70. (R.41:25-60; R.42:1-60; *see also* https://www.revenue.wi.gov/Pages/FAQS/pcs-taxrates.aspx#txrate3 (last visited June 9, 2021).)

## ARGUMENT

This case involves the interpretation of Wis. Stat. §77.70. Interpretation of a statute is a question of law this Court reviews *de novo*. *Capoun Revocable Trust v. Ansari*, 2000 WI App 83, ¶6, 234 Wis. 2d 335, 610 N.W.2d 129.

## I. THE ORDINANCE COMPLIES WITH THE PLAIN MEANING AND LEGISLATIVE INTENT OF WIS. STAT. §77.70.

The Ordinance is presumptively valid. *B'nal B'rith Found.*, 59 Wis. 2d at 307 (stating where a local government entity enacts an ordinance pursuant to statutory authority, "all ***presumptions are in favor of its validity***, and ***any person attacking it must make the fact of its invalidity clearly appear***") (emphasis added; internal quotation marks omitted).

The Ordinance complies with §77.70's enabling language that permits a county "desiring to impose county sales and use taxes" to do so by ordinance that "stat[es] its purpose" and is "imposed only for the purpose of directly reducing the property tax levy." Brown County enacted the sales and use tax to avoid using the property tax levy to pay for the capital projects identified in the Ordinance. (R.3; App.165; R.44, ¶7.) Accordingly, Brown County enacted the sales and use tax Ordinance "for the purpose of" funding projects that otherwise would have been funded by a countywide property tax. (*Id.*) Brown County's interpretation of §77.70 is supported by years of consistent application under the guidance of the AG Opinion and DOR, as well as the practice of dozens of other counties.

BCTPA contends the Ordinance is invalid because it contravenes §77.70, which BCTPA interprets to require counties to offset sales and use tax revenues with a dollar-for-dollar decrease in the property tax levy. (BCTPA Br., p. 10.) BCTPA is wrong. BCTPA's interpretation is contrary to the statute's text and the legislature's intent. Nowhere in §77.70 does any language mandating a dollar-for-dollar offset appear. Nor has the legislature enacted any means to effectuate the dollar-for-dollar offset BCTPA insists §77.70 requires. Therefore, it is clear the legislature has not contemplated the statute could even possibly mandate such an offset. As the circuit court concluded: BCTPA's interpretation "***reads mechanisms into the statute that simply are not present*** because the Wisconsin Legislature did not put them there. . . . If [§77.70] were to require a dollar-for-dollar reduction of a county's property tax levy, then the Wisconsin Legislature would have said so in the body of the statute, and it would have spelled out the process for Wisconsin counties to follow." (R.103:18, 19; App.118, 119 (emphasis added).) The circuit court was correct, and this Court should affirm.

### A. Under the Plain Meaning of Wis. Stat. §77.70, Wisconsin Counties May Enact a Sales and Use Tax to Fund Projects They Otherwise Could Fund Through the Property Tax Levy.

The Ordinance complies with the plain meaning of Wis. Stat. §77.70. An analysis of the text of §77.70 and a comparison of §77.70 with closely-related or surrounding statutes—such as Wis. Stats. §§77.705, 77.706—shows §77.70 permits Wisconsin counties to enact sales and use taxes that fund projects they otherwise could fund through the property tax levy.

#### 1. The Ordinance Complies with the Text of Wis. Stat. §77.70: Brown County Imposed a Sales and Use Tax "Only for the Purpose of Directly Reducing the Property Tax Levy."

The goal of statutory interpretation is to discern the legislature's intent. *Doe v. Am. Nat'l Red Cross*, 176 Wis. 2d 610, 616, 500 N.W.2d 264 (1993). Statutory interpretation begins with the language of the statute. *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶¶45-46, 271 Wis. 2d 633, 681 N.W.2d 110. "In construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute." *Id.*, ¶46. Courts presume the legislature chooses

"its terms carefully and precisely to express its meaning." *Ball v. District No. 4*, 117 Wis. 2d 529, 539, 345 N.W.2d 389 (Ct. App. 1984).

Section 77.70 permits a county "desiring to impose county sales and use taxes" to do so "by the adoption of an ordinance" that "stat[es] its purpose," "refer[s] to" Chapter 77, and "impose[s]" the sales and use tax at a rate of 0.5% "only for the purpose of directly reducing the property tax levy . . . ." Wis. Stat. §77.70.

There is no dispute the Ordinance complies with the first three elements of §77.70: **(1)** the County chose to adopt a sales and use tax and did so by Ordinance; **(2)** the Ordinance states its purpose and refers to Chapter 77; and **(3)** the Ordinance imposes a sales and use tax at a rate of 0.5%. (R.3:1; App.165.) BCTPA is wrong when it contends the Ordinance does not comply with the fourth element of §77.70 – *i.e.*, the sales and use tax is imposed "only for the purpose of reducing the property tax levy."

The Ordinance commits Brown County to using the revenue from the sales and use tax only to fund projects the County otherwise would have funded from the property tax levy. (R.103; App.101-32; R.44, ¶7.) The Ordinance and

Brown County's action in this regard are compliant with §77.70 for three inter-related reasons. *First*, §77.70 contains enabling language that gives counties latitude as to how to reduce the property tax levy. *Second*, the sales and use tax enables Brown County to decrease its debt service—and, consequently, its property tax levy—over the six-year life of the Ordinance. *Third*, while the Ordinance's mill rate freeze is not expressly required by the statute, the freeze helps ensure the County remains compliant with §77.70.

***Enabling language***. Section 77.70 contains enabling language that permits counties to enact a sales and use tax ordinance if they so "desir[e]." Wis. Stat. §77.70. If counties choose to enact such an ordinance, the ordinance must "impose[]" a sales and use tax at a rate of 0.5% and "stat[e] its purpose" of "directly reducing the property tax levy." *Id.*

While the statute ***allows*** counties to ***"impose"*** a sales and use tax "for the purpose of directly reducing the property tax levy," the statute does not ***require*** counties to ***"use"*** or ***"spend"*** sales and use tax proceeds only for that purpose. *Id.* In other words, the enabling language allows a sales and use tax to be imposed, but the statute does not prescribe or restrict how sales and use tax revenue must be ***spent***. *Id.* The statute

does not contain any terms such as "offset," "deduct," "subtract," or "retire" that might delineate how a county must spend sales and use tax proceeds. *See id.*; *contra* Wis. Stats. §§77.705-.706 (both providing that sales and use tax revenue "***shall*** be used ***exclusively*** to ***retire*** the district's debt") (emphasis added). Thus, §77.70 does not direct what projects sales and use tax proceeds must fund, does not require an offset, and does not address how a (non-existent) offset from the property tax levy would be applied.

***Decrease in the property tax levy.*** BCTPA engages in unsupported speculation about Brown County's ability to borrow funds, in an effort to cast doubt on whether the County ***could have*** funded its capital projects by issuing debt. (BCTPA Br., pp. 31-33.) BCTPA does so to attempt to circumvent the undisputed fact that the County, just as it had done in previous years, ***would have*** funded the projects identified in the Ordinance by issuing debt, had the County not enacted the Ordinance.[3] (R.44, ¶7.)

[3] BCTPA further attempts to undermine this uncontroverted fact by contending the County's affiant lacks personal knowledge and his statement the County would have funded the capital projects through borrowing had the County not enacted the sales and use tax lacks the requisite foundation. (BCTPA Br., p. 33.) BCTPA is incorrect. The affiant is the County's Finance Director who averred to his personal

Contrary to BCTPA's assertions, the County's ability to borrow is not theoretical. The County issued new debt totaling $12.24 million in 2015, $15.35 million in 2016, and $29.23 million in 2017. (*See* 2017 Comprehensive Annual Finance Report for Brown County, p. 108, *available at* https://www.browncountywi.gov/departments/administration/finance/2017-annual-comprehensive-financial-report/ (last visited June 9, 2021).) Such a trend demonstrates the County had the ability to borrow $147,000,000 over the six-year life of the Ordinance. (*Id.*; *see also* R.44, ¶7.)

BCTPA further argues the Court should discount the prospect of Brown County borrowing $147,000,000 because the County's borrowing such sum would "undermine" the constitutional debt cap. (BCTPA Br., p. 34.) BCTPA's premise is faulty. The debt cap is 5% of taxable property. Wis. Const. art. XI, §3(2). Equalized value of Brown County

---

knowledge, (R.44, ¶2), and provided foundation for his statement, (*see id.*, ¶¶3-16, 23-38).

BCTPA moved for summary judgment, reflecting its agreement there is no dispute of material fact. (R.39, 40.) BCTPA has not admitted any evidence to rebut Brown County's evidence that it would have funded its capital projects through debt. BCTPA's disagreement with the Finance Director's statement is predicated on BCTPA's own speculation. Speculation is no basis on which a presumptively valid ordinance can be rebutted, *cf. B'nal B'rith Found.*, 59 Wis. 2d at 307, or on which a genuine dispute of material fact can be created, *see* Wis. Stat. §802.08(2).

property in 2020 was $24.6 billion, which means the County's constitutional borrowing cap was ***$1.23 billion*** last year.

(https://www.revenue.wi.gov/Pages/SLF/EqualizedValue.aspx (last visited June 9, 2021).)

When the County issues debt without otherwise modifying other budget commitments, the property tax levy increases. (R.44, ¶¶7, 28-29, 33.) Thus, by funding projects that otherwise would have been funded by the property tax levy, the sales and use tax acts as a substitute for the Debt Levy.

The effect is this: When a county funds projects through a sales and use tax that otherwise would have been funded by the property tax levy, the property tax levy is reduced. (R.68:2.) As the May 8, 2017 Brown County Executive Committee meeting minutes reflect, the Ordinance will result in a decrease in the debt service and, consequently, a decrease in the total property tax levy. (*Id.*) The sales and use tax has enabled the County to "stop bonding," and over its six-year life, the tax will decrease the County's debt approximately $69 million, from $134 million to $65 million. (*Id.*)

BCTPA's repeated reference to an approximate $4,000,000 increase in the property tax levy from 2017 to 2018 is misleading. (BCTPA Br., pp. 3, 7, 11, 26-27.) BCTPA accounts for only the first year of the sales and use tax and, thus, BCTPA's one-year snapshot disregards the actual property tax ***savings over the 72-month life of the Ordinance*** due to the decreased debt service payments. (R.68:2; R.44, ¶¶27-34.) Because funding the Ordinance projects through debt financing would have cost Brown County property-taxpayers $13,627,943.36 in interest payments over the six-year life of the Ordinance and $47,000,000 in interest payments over the twenty-year life of the loans, the Debt Levy—and, consequently, the overall property tax levy—may well have increased more than $4,000,000 from 2017 to 2018 absent the sales and use tax. (R.44, ¶¶29-30.) Brown County delivered to its residents "guarantee[d] tax relief" by replacing the property tax levy used to service debt with the sales and use tax. (R.68:2.)

***Mill rate freeze.*** The Ordinance's mill rate freeze helps ensure compliance with §77.70 because the freeze prohibits any increase in the mill rate—*i.e.*, any proportional increase in property taxes—during the term of the Ordinance.

(R.3:1; App.165.) If the mill rate increases, the Ordinance automatically sunsets. (*Id.*)

As shown, the text of the Ordinance complies with §77.70's requirement that a sales and use tax may be "imposed only for the purpose of directly reducing the [County's] property tax levy[.]"

### 2. A Comparison of Wis. Stat. §77.70 with Wis. Stats. §§77.705, 77.706 Shows the Legislature Did Not Intend Wis. Stat. §77.70 to Require a Dollar-for-Dollar Offset.

As part of a plain meaning analysis, a statute "is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely related statutes[.]" *Kalal*, 271 Wis. 2d 633, ¶46. A comparison of Wis. Stat. §77.70 with other "surrounding or closely related" statutes in Chapter 77 shows the legislature did not intend §77.70 to require the offset BCTPA urges.

The 1995 Miller Park Tax (Wis. Stat. §77.705) and the 1999 Lambeau Field Tax (Wis. Stat. §77.706) explicitly mandate that sales and use tax proceeds be spent to pay the respective stadium districts' debts dollar-for-dollar, while

§77.70 does not contain an explicit mandate as to how a county may spend sales and use tax proceeds. *Compare* Wis. Stats. §§77.705-.706 *with* Wis. Stat. §77.70. Both stadium tax statutes provide that the respective stadium districts "may impose a sales tax and a use tax"; and that the revenue derived from a sales and use tax authorized by the statutes "***shall be used exclusively to retire the district's debt.***" Wis. Stats. §§77.705-.706 (emphasis added).

Thus, while §77.705, §77.706, and §77.70 all contain language authorizing the imposition of a sales and use tax, the stadium tax statutes contain a key limitation that is absent from §77.70: The stadium tax statutes contain language in a separate clause mandating that proceeds from sales and use taxes "***shall be used exclusively to retire***" each stadium district's debts. Wis. Stats. §§77.705-.706 (emphasis added). In other words, the legislature authorized the sales and use tax to pay for the stadiums, but then separately mandated the tax proceeds be spent to pay the respective districts' debts dollar-for-dollar, instead of being used for any other purpose. *Id.*; (*see also* R.103:20; App.120). In contrast, §77.70 authorizes a sales and use tax and provides that the "purpose" must be

for levy reduction, but §77.70 does not specifically mandate how counties spend their sales and use tax revenue.

Section 77.70's contrast with §§77.705-.706 shows the legislature did not intend for §77.70 to require counties to offset sales and use tax proceeds dollar-for-dollar from the property tax levy. *Ball*, 117 Wis. 2d at 539 (the legislature chooses "its terms carefully and precisely to express its meaning"); (R.103:20, 26). If the legislature had intended to enact in §77.70 a strict spending constraint, it would have done so. *Ball*, 117 Wis. 2d at 539.

In this Court, BCTPA now contends for the first time the stadium taxes "do not direct the expenditure of Stadium Tax revenue" but, instead, direct the expenditure of "leftover money." (BCTPA Br., p. 42.) BCTPA is incorrect. The above discussion shows the stadium tax statutes mandate the revenue be spent to retire the debt of the stadium districts. Wis. Stats. §§77.705-.706. In addition, Wis. Stats. §§229.685(1) and 229.825 contain express limitations on how the stadium tax revenues must be spent. The stadium tax statutes and §§229.685(1), 229.825 show the legislature knows how to direct expenditures when it intends to do so. As does the 2017 amendment to §77.70, which creates an

exception for Wis. Stat. §66.0621(3m). Contrary to BCTPA's assertion, (BCTPA Br., pp. 15-16), the 2017 amendment to §77.70 ***supports*** the County's interpretation because—just as §§77.705-.706—§66.0621(3m) directs how revenues are to be spent. The legislature did not include such direction in §77.70.

### B. The 1998 Attorney General Opinion Supports Brown County's Interpretation of Wis. Stat. §77.70.

The 1998 AG Opinion supports Brown County's interpretation of Wis. Stat. §77.70. Although the Court should reject BCTPA's invitation to abolish the age-old proposition that AG Opinions are presumptively correct, BCTPA's invitation is a non-sequitur. The presumption is not outcome-determinative here: The County's interpretation is consistent with the statute's plain meaning and the legislature's intent, and the Ordinance is ***presumed to be valid, regardless of whether the AG Opinion is presumed to be correct***. *B'nal B'rith Found.*, 59 Wis. 2d at 307.

#### 1. The 1998 AG Opinion is Consistent with the Text of Wis. Stat. §77.70.

AG Opinions hold persuasive value and are deemed "presumptively correct." *Schill v. Wis. Rapids Sch. Dist.*,

2010 WI 86, ¶126, 327 Wis. 2d 572, 786 N.W.2d 177 (lead opinion). BCTPA fails to show the 1998 AG Opinion—which interprets Wis. Stat. §77.70 to mean a county may enact a sales and use tax ordinance to finance capital projects that otherwise could be funded by a property tax levy—is wrong. (App.167.)

The AG Opinion is consistent with the plain meaning of the statute. Indeed, in its certification, the court of appeals expressed it "tend[s] to agree" with the AG's "well-reasoned" and "sensible" Opinion. (App.152.)

As the AG reasoned: "The same amount of countywide property tax reduction occurs whether the county board chooses to budget revenues from net proceeds of the sales and use tax as a reduction in the overall countywide property tax levy or as an offset against a portion of the costs of specific items which can be funded by the countywide property tax." (App.168.) In other words, "by subtracting the sales and use tax revenue from the total property tax, and then determining the net the property tax must be levied, a county has directly reduced its property tax levy." (R.103:25; App.125.)

Further, the AG's application of the word "directly" comports with Wisconsin law. "Direct" can mean "immediate; proximate; by the shortest course," or it can mean "characterized by [a] close logical, causal, or consequential relationship." *State v. Kizer*, No. 2020AP192-CR, 2021 WI App __, ¶¶8, 13, 15, 2021 WL 2212719 (Ct. App. June 2, 2021) (recommended for publication) (brackets in original). The AG concluded the property tax is "directly" reduced when sales and use tax revenue is put towards budget items that otherwise are permitted to be funded from a countywide property tax, as opposed to those budget items that statutorily cannot be funded from a countywide property tax. (App.169.) The word "directly" does not mandate an offset.

In the twenty-three years since the AG issued his Opinion interpreting §77.70, the legislature has amended §77.70 four times, but it has not changed any of the language at issue here. *See* 2009 Wis. Act 2, §521; 2009 Wis. Act 28, §1856d; 2017 Wis. Act 17, §25; 2017 Wis. Act 58, §34e. Such legislative acquiescence suggests the legislature agrees with the AG's interpretation. *Voice of Wis. Rapids, LLC v. Wis. Rapids Sch. Dist.*, 2015 WI App 53, ¶11, 364 Wis. 2d

429, 867 N.W.2d 825 (stating "legislative acquiescence" to an AG Opinion is "significant"). Indeed, an AG Opinion is "accorded even greater weight, and is regarded as presumptively correct, when the legislature later amends the statute but makes no change in response to the [AG Opinion]." *Schill*, 327 Wis. 2d 527, ¶126 (internal quotation marks omitted).

What's more, at the time of filing, 66 Wisconsin counties had relied on the 1998 AG Opinion in enacting new sales and use tax ordinances or in maintaining previously-enacted sales and use tax ordinances (after this case was filed, two more counties enacted sales and use tax ordinances). (R.41:25-60; R.42:1-60.) "One of the soundest reasons sustaining contemporaneous interpretations of long standing is the fact that" the public and other actors have relied on such interpretation. *Town of Vernon v. Waukesha Cnty.*, 99 Wis. 2d 472, 479-80, 299 N.W.2d 583 (Ct. App. 1980), *aff'd* 102 Wis. 2d 686, 307 N.W.2d 227 (1981) (internal quotation marks omitted). Wisconsin courts base this rule on "the theory that the legislature is acquainted with the contemporaneous interpretation of a statute, especially when made by . . . executive officers [such as the AG] charged with

the duty of administering or enforcing the law, and therefore impliedly adopts the interpretation upon re-enactment." *Id.* (internal quotation marks omitted).

The sales and use tax ordinances enacted in other counties do not support BCTPA's "dollar-for-dollar" offset interpretation of §77.70 but, rather, reflect the AG's interpretation. Of the 66 Wisconsin counties that have enacted a sales and use tax ordinance, only ***two*** counties have enacted an ordinance that explicitly offsets sales and use tax proceeds dollar-for-dollar from the property tax levy, which alone rebuts BCTPA's contention that §77.70 has mandated such an offset since 1985. (R.41:48, 54; BCTPA Br., p. 10.) Because §77.70 does not require such an offset, there would not be any need for a county enacting a sales and use tax to include one.

The legislature's acquiescence in the AG Opinion, as well as the practices of dozens of Wisconsin counties, support Brown County's interpretation of §77.70.

### 2. The Court Should Not Abolish the 150-Year-Old Common Law Rule that AG Opinions are Accorded Deference.

Because the AG Opinion undermines BCTPA's position, BCTPA wants this Court to abolish the common law rule that AG Opinions are presumptively correct. (BCTPA Br., pp. 23-25.)

Since its 1871 decision in *Harrington v. Smith*—which came only 23 years after statehood—this Court has reinforced the proposition that AG Opinions are accorded deference and has viewed governmental action in executing a statute as indicative of the statute's meaning:

> The statute in question was enacted and has been continuously interpreted, understood and acted upon by the executive department of the government, the officers appointed by law to carry it provisions into effect, for a period of over twenty-one years, and during twelve successive administrations of the state. Long and uninterrupted practice under a statute, especially by the officers whose duty it was to execute it, is good evidence of its construction . . . .
>
> . . .
>
> And in this case the important fact is not to be overlooked, that the highest law officer of the state—the attorney general—has always been one of the commissioners, whose duty it was to construe and carry the law into effect. Great weight is undoubtedly to be attached to a construction which has

> thus been given. . . . The concurrent opinion and advice of these attorneys general . . . ought . . . to be some evidence of what the law is; and some persons might be disposed, perhaps, to think, evidence equal to a decision of this court. The [S]upreme [C]ourt of the United States has on more than one occasion paid great respect to such evidence on questions of statutory construction.

*Harrington*, 28 Wis. at 68-69 (internal citations omitted; brackets added); *see also Schill*, 327 Wis. 2d 527, ¶126; *Town of Vernon*, 99 Wis. 2d at 479-80; *Wisconsin Valley Improvement Co. v. Public Serv. Comm'n.*, 9 Wis. 2d 606, 617, 101 N.W.2d 798 (1960) (stating AG Opinions are "entitled to considerable weight"); *Stevens v. Wittig*, 266 Wis. 331, 336, 63 N.W.2d 732 (1954) (stating the Court "may consider the acquiescence of the legislature" in the State's construction of a statute that had been on the books for eight years).

The Court should decline BCTPA's invitation to overrule 150 years of precedent. This Court "follows the doctrine of *stare decisis* scrupulously because of [the Court's] abiding respect for the rule of law" and because *stare decisis* not only "promotes evenhanded, predictable, and consistent development of legal principles," but also "contributes to the actual and perceived integrity of the judicial process."

*Progressive Northern Ins. Co. v. Romanshek*, 2005 WI 67, ¶¶41, 43, 281 Wis. 2d 300, 697 N.W.2d 417 (internal quotation marks omitted).

Overruling precedent is especially not warranted here because BCTPA does not even attempt to apply this Court's criteria for departing from *stare decisis*. *See Hinrichs v. Dow Chemical Co.*, 2020 WI 2, ¶¶68-69, 389 Wis. 2d 669, 937 N.W.2d 37 (recognizing the four criteria for overturning prior cases and concluding those criteria were not satisfied). In fact, this Court has stated it should consider overturning prior decisions "***only when***" the criteria are met. *Romanshek*, 281 Wis. 2d 300, ¶44 (emphasis added).

BCTPA has not provided the Court reason to overturn 150 years of case law holding AG Opinions are entitled to deference. BCTPA contends that by according AG Opinions presumptive validity, the Court abdicates its role, but that is incorrect. In deeming AG Opinions presumptively valid, the Court is not handing its authority "to say what the law is" to another branch of government. (BCTPA Br., p. 24.) The Court retains its prerogative to interpret the statute and assert what it means. But contrary to BCTPA's argument, the

canons of construction and long-standing interpretations should be given weight.

BCTPA states "[t]here 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," such as "the Legislature might not be able to reach agreement on a change[,]" or enacting an amendment may be "a low priority." (*Id.*, pp. 24-25.) This argument makes the County's point – a point that has been enshrined in Wisconsin law for over a century: If the legislature cannot muster a majority of votes to "correct" an "incorrect" AG Opinion, or if the legislature lacks the will to bring such an issue to a vote, then by definition the AG Opinion is not manifestly wrong. *See Schill*, 327 Wis. 2d 527, ¶126; *Harrington*, 28 Wis. at 68-69.

Finally, BCTPA speculates the legislature might not act because it might not be aware of the AG Opinion. (BCTPA Br., p. 25.) This is an odd conjecture, given both that BCTPA made the Government aware of this case by suing the Secretary of DOR, (*id.*, p. 8), and that the law presumes the legislature to be aware of AG Opinions, *Town of Vernon*, 99 Wis. 2d at 479-80.

Ultimately, regardless whether the Court considers the AG Opinion to be presumptively correct: **(a)** the law presumes the Ordinance to be valid, and it is BCTPA's burden to show it is invalid, *B'nal B'rith Found.*, 59 Wis. 2d at 307; **(b)** the County's interpretation of §77.70 is consistent with the plain meaning and the legislative intent; and **(c)** BCTPA retains the ability to argue the AG Opinion is manifestly wrong. The circuit court and the court of appeals have disagreed with BCTPA. (R.103; App.152.) For the reasons stated in this Brief, this Court should too.

### C. BCTPA's Interpretation is Contrary to the Statute's Plain Meaning: Wis. Stat. §77.70 Does Not Require Wisconsin Counties to Offset Sales and Use Tax Proceeds Dollar-for-Dollar From the Property Tax Levy.

BCTPA contends Wis. Stat. §77.70 requires Wisconsin counties to offset sales and use tax proceeds dollar-for-dollar from the property tax levy. (BCTPA Br., p. 10.) But neither the text of the statute nor the legislative history supports BCTPA's "dollar-for-dollar offset" interpretation.

#### 1. The Text of Wis. Stat. §77.70 Does Not Provide for a Dollar-for-Dollar Offset.

BCTPA's interpretation of Wis. Stat. §77.70 is inconsistent with the statute's text. Had the legislature

intended §77.70 to require counties to offset sales and use tax proceeds dollar-for-dollar from the property tax levy, as BCTPA contends, the legislature would have used the term "offset" or similar mandatory language and "would have spelled out the process for Wisconsin counties to follow" to apply such an offset. (R.103:18-19; App.118-19); *Ball*, 117 Wis. 2d at 539. But the legislature did not do so. Thus, BCTPA's interpretation of §77.70 "reads mechanisms into the statute that simply are not present because the Wisconsin Legislature did not put them there." (R. 103:18-19; App.118-19.) The statute is to be construed as written, not as BCTPA might want it to be written. *Columbus Park Hous. Corp. v. City of Kenosha*, 2003 WI 143, ¶¶34, 40, 267 Wis. 2d 59, 671 N.W.2d 633.

Additionally, inherent in BCTPA's "dollar-for-dollar offset" interpretation is the notion that §77.70 prohibits counties from funding through a sales and use tax new capital projects that have not already begun at the time the sales and use tax is enacted. (BCTPA Br., pp. 14-15, 18-20.) However, the 1998 AG Opinion rejected as unreasonable the notion that the statute bars funding new projects. (App. 167-68; R103:26; App. 126.) The AG concluded §77.70 ***does***

permit the funding of new projects through a sales and use tax. (*Id.*) BCTPA attacks the AG's reasoning by—remarkably—arguing it is ***not*** unreasonable to "forc[e] counties to first raise the property tax levy before lowering it with a sales tax[.]" (BCTPA, p. 21.) Even BCTPA acknowledges this is inefficient. (*Id.*)

Such needless inefficiency is anathema to the good government practices BCTPA purports to champion. BCTPA would rather have counties plan capital projects, borrow millions of dollars to pay for those projects, take on the costly interest expense associated with the debt, increase property tax levies to pay for the debt, absorb all of the professional costs and fees associated with debt issuance, and ***then*** impose a sales and use tax to decrease the debt burden. (*Id.*) Besides being inconsistent with the plain meaning of §77.70, BCTPA's approach is a double-whammy of bad policy: BCTPA's approach requires greater bureaucratic intervention and greater government debt carry, while it simultaneously imposes a greater tax burden on the taxpayers as they wait for their counties to enact a sales and use tax to provide relief from their already-increased property taxes. If adopted, BCTPA's interpretation of §77.70 would cost counties and

taxpayers millions more than the efficient, common-sense approach §77.70 permits and Brown County chose. (R.68:2; R.44, ¶¶29-30.)

BCTPA inexplicably asserts the AG's conclusion regarding new capital expenditures was "not his call to make." (BCTPA, p. 21.) BCTPA's assertion suggests the interpretation of §77.70 was the legislature's "call." Legislatures do not interpret statutes. And because, at the time, no court had interpreted §77.70, corporation counsel requested the AG's guidance. (App.167, 168.) Thus, the AG was the only authority that ***could*** make the call.

It is apparent the legislature does ***not*** interpret §77.70 to bar new capital projects. If the legislature believed the AG's interpretation of §77.70 was incorrect, it would have "corrected" him by amending the statute. The legislature has not done so, even though it has had 23 years to act on any perceived misinterpretation the AG might have applied to §77.70. *Voice of Wis. Rapids*, 364 Wis. 2d 429, ¶11 (stating "legislative acquiescence" to an AG Opinion is "significant").

The legislature has ***not even accounted for the possibility §77.70 could require a dollar-for-dollar offset***: It has not enacted any mechanism to effectuate such an offset.

(R.103:18-19, 22; App.118-19, 122; R.44, ¶¶17-20, Exhs. B, C); Wis. Stat. §66.0602. Indeed, counties lack the authority to issue tax credits that would be necessary if §77.70 required an offset. (App.168.) The legislature's implied acceptance of the AG's interpretation—as well as its acceptance of the dozens of other Wisconsin county sales and use tax ordinances that are consistent with the AG's interpretation—shows BCTPA's "dollar-for-dollar offset" interpretation of §77.70 is contrary to the statute's plain meaning and the legislature's intent, rendering BCTPA's interpretation unreasonable. *Cf. Bruno v. Milw. Cnty.*, 2003 WI 28, ¶¶ 19-22, 260 Wis. 2d 633, 660 N.W.2d 656.

### 2. The Legislative History of Wis. Stat. §77.70 Does Not Support BCTPA's Interpretation

BCTPA also is incorrect that Wis. Stat. §77.70's legislative history supports its interpretation. (BCTPA Br., pp. 16-18.)

Generally, courts consult legislative history only when a statute is ambiguous. *Kalal*, 271 Wis. 2d 633, ¶¶46, 50-51. Because the parties agree §77.70 is unambiguous, the Court need not—and should not—consult legislative history. *Id.*

Even if the Court were inclined to consult §77.70's legislative history, that history does not support BCTPA's "dollar-for-dollar offset" interpretation. Before the legislature amended §77.70 in 1985, the bill was amended from stating "for property tax relief" to stating "directly reducing the property tax levy." (R.59:180.) While that amendment may have made the statute more specific, that amendment does not indicate the legislature intended for counties to apply a dollar-for-dollar offset – property tax relief occurs with the cessation of annual property tax increases.

Senator Feingold's public statement as reported in a news article—which does not constitute legislative history—likewise does not support BCTPA's interpretation of §77.70. (BCTPA Br., p. 17 (quoting R.59:189).) As an initial matter, "[i]t is not appropriate . . . for a court to rely on the statements of a member of the legislature as to what the legislature intended when enacting a statute." *Labor and Farm Party v. Elections Bd.*, 117 Wis. 2d 351, 356, 344 N.W.2d 177 (1984) (per curiam). In fact, the news article BCTPA relies on is ***inadmissible hearsay*** that may not be considered on summary judgment. *Streff v. Town of Delafield*, 190 Wis. 2d 348, 359 n.4, 526 N.W.2d 822 (Ct. App. 1994).

However, even if the Court were to consider hearsay public statements from elected officials in 1985 concerning the newly-amended §77.70, those public statements support ***the County's*** interpretation of the statute. Senator Feingold's statement about "lowering property tax bills" does not suggest §77.70 mandates an offset. (BCTPA Br., p. 17 (quoting R.59:189).) Meanwhile, BCTPA ignores that Governor Earl viewed the new statute as a means for "***hold[ing] down property-tax increases . . . .***" (R.59:190 (emphasis added).) Governor Earl's statement is ***consistent*** with the AG's interpretation—an interpretation to which the legislature has acquiesced and on which Wisconsin counties have relied—that counties may enact sales and use tax ordinances "to defray the cost of any item which can be funded by a countywide property tax." (App.167.) That is what Brown County has done. (R.3; App.165-66.)

## II. THE LEVY LIMITS ESTABLISHED IN WIS. STAT. §66.0602 DO NOT REQUIRE WISCONSIN COUNTIES TO OFFSET SALES AND USE TAX PROCEEDS DOLLAR-FOR-DOLLAR FROM THE PROPERTY TAX LEVY.

BCTPA suggests the 1998 AG Opinion would turn out differently today because of the 2005 introduction of Levy Limits, as codified in Wis. Stat. §66.0602. (BCTPA Br., pp.

27-30.) BCTPA is wrong. Section 66.0602 does not require a levy to be offset by sales and use tax proceeds, and §66.0602 exempts debt service payments from the Levy Limit calculation. Wis. Stat. §66.0602(3)(d)2.; (*see* R.44, ¶¶18-19, 41-42, Exhs. B, C). Section 66.0602 actually supports ***the County's*** interpretation of §77.70.

The Wisconsin legislature enacted §66.0602 twenty years after its 1985 amendment to §77.70. Despite having been aware of §77.70 for decades, the legislature did not require in §66.0602 a decrease in the allowable levy when a county receives revenue from a sales and use tax. *Heritage Farms, Inc. v. Markel Ins. Co.*, 2009 WI 27, ¶40, 316 Wis. 2d 47, 762 N.W.2d 652 (courts presume the legislature is aware of existing law when it enacts a statute); *see* Wis. Stat. §66.0602. If, as BCTPA contends, §77.70 requires a county to offset its property tax levy dollar-for-dollar with sales and use tax proceeds, then the legislature would have accounted for that requirement in §66.0602(2m) and directed DOR to include such a dollar-for-dollar offset calculation in the Levy Limit Worksheet. *Ball*, 117 Wis. 2d at 539. However, neither §66.0602 nor any other statute requires a levy to be offset by sales and use tax revenues. *See* Wis. Stat. §66.0602.

The fact the legislature did not include an offset for sales and use tax revenues when it enacted §66.0602 further shows the legislature made a concerted choice in §77.70 ***not*** to require a one-dollar reduction in the property tax levy for every dollar of sales and use tax revenue. *Cf.* Wis. Stats. §§77.705-.706, 229.685, and 229.825.

In addition, DOR is the state entity charged with ensuring county compliance with the Levy Limit, and DOR's Levy Limit Worksheet does not contemplate the dollar-for-dollar offset BCTPA urges. DOR's Levy Limit Worksheet does not address county revenue derived from a sales and use tax. (*See* R.44, ¶¶41-42, Exhs. B, C.)

Before it was amended in 1985, §77.70 required DOR to "distribute the local sales tax collections from each enacting county to the cities, villages and towns in the county . . . ." Wis. Stat. §77.76(4) (1983-84 version). Had the legislature intended for county sales and use tax proceeds to offset the property tax levy when it amended §77.70 in 1985, it would have directed DOR to apply the offset, just as it had previously directed DOR to distribute sales and use tax proceeds to cities, villages and towns. But the legislature has never so directed.

Thus, the provisions of §66.0602, the important compliance work of DOR, and the prior version of §77.70 further illustrate BCTPA's interpretation contravenes the legislature's intent. Section 66.0602 and DOR's Levy Limit Worksheet show the legislature never contemplated §77.70 might impose the offset BCTPA conjures. BCTPA's interpretation nullifies the effect of §66.0602, which is a comprehensive substantive and implementation statute relating to local government Levy Limits. BCTPA's proffered wholesale nullification would produce "internal incoherence" among statutes and would yield "unfortunate consequence[s]," all of which are recognized absurd results this Court should avoid. *See Abraham v. Milw. Mut. Ins. Co.*, 115 Wis. 2d 678, 681-82, 341 N.W.2d 414 (Ct. App. 1983) (an interpretation of one statute that nullifies the effect of another statute is an absurd result); *Crown Castle USA, Inc. v. Orion Const. Group, LLC*, 2012 WI 29, ¶21, 339 Wis. 2d 252, 811 N.W.2d 332 (declining to adopt statutory interpretation that creates "internal incoherence" among statutes); *McQuestion v. Crawford*, 2009 WI App 35, ¶12, 316 Wis. 2d 494, 765 N.W.2d 822 (interpretation that would create "unfortunate consequence[s]" was unreasonable or

absurd); (BCTPA Br., pp. 20-21 (stating "we do not expect the legislature to contradict itself")).

Nevertheless, BCTPA contends the Levy Limit forbids the expenditure of sales and use tax proceeds on anything other than a dollar-for-dollar offset from the property tax levy, asserting the Levy Limit bars counties from increasing the property tax levy by however much they want to spend for new projects. (BCTPA Br., pp. 28-30.) BCTPA's argument fails because §66.0602 ***exempts debt service payments from the Levy Limit calculation***. Wis. Stat. §66.0602(3)(d)2.; (*see* R.44, ¶¶18-19, 41-42, Exhs. B, C). Brown County could have—and, without the sales and use tax, indisputably ***would have***—issued general obligation debt and passed the costs onto county property-taxpayers for many years to pay for the projects identified in the Ordinance. (R.44, ¶¶7, 29-30.) However, Brown County did not issue any debt to pay for those projects and, therefore, the County is reducing the property tax levy by foregoing debt service payments, which fall outside the Levy Limit calculation. (*Id.*, ¶19); Wis. Stat. §66.0602(3)(d)2.

Finally, contrary to BCTPA's speculation, the one-year experiences of Ashland County in 1988-89, of Langlade

County in 1988-89, and of Lafayette County in 2001-02 do not show those counties have implemented the dollar-for-dollar offset BCTPA contends §77.70 requires. (BCTPA Br., pp. 47-48.) BCTPA does not present any evidence of what the sales and use tax revenues and the property tax levies of those counties were in the succeeding years. Moreover, the years BCTPA highlights pre-date the 2005 enactment of Levy Limits. BCTPA's cherry-picked examples of what three counties experienced in a single year before Levy Limits were enacted do nothing to undermine the County's interpretation of §77.70, much less show BCTPA's interpretation of §77.70 is correct. *B'nal B'rith Found.*, 59 Wis. 2d at 307 (burden is on the party challenging an ordinance to show the ordinance is invalid).

## III. INTERPRETING WIS. STAT. §77.70 TO REQUIRE A DOLLAR-FOR-DOLLAR OFFSET WOULD LEAD TO UNREASONABLE OR ABSURD RESULTS AND OTHERWISE WOULD USURP THE LEGISLATIVE PROCESS.

Beyond there being no support for BCTPA's interpretation of §77.70 in the statute's text, in the legislative history, in the surrounding statutes, or in the practice of other counties, BCTPA's interpretation—if adopted—would lead to

unreasonable results and would impermissibly usurp the legislative process.

### A. BCTPA's Interpretation Would Lead to Unreasonable or Absurd Results.

Courts are to construe statutes in a manner that avoids unreasonable or absurd results. *Kalal*, 271 Wis. 2d 633, ¶46. As shown above, BCTPA's "dollar-for-dollar offset" interpretation of Wis. Stat. §77.70 leads to the unreasonable/absurd result of incorporating into the statute an offset that the legislature did not enact – or even contemplate when it enacted statutes governing county budgets. (R.103:18-19, 22, App.118-19, 122); *see* Wis. Stat. §66.0602; *Crown Castle*, 339 Wis. 2d 252, ¶21 (declining to adopt statutory interpretation that creates "internal incoherence" among statutes).

Because the legislature did not contemplate a mandatory dollar-for-dollar offset—and, therefore, did not enact any provisions for effectuating one—governmental actors will face uncertainty as to how to implement such an offset, if the Court were to accept BCTPA's interpretation. As the AG noted in 1998, counties lack the inherent authority to implement a direct tax credit to property owners, and must

follow DOR guidelines on tax billing. (App.168.) But DOR's guidelines do not contain any mechanism to credit property owners for property tax rebates or offsets based on sales and use tax revenues. Contrary to BCTPA's intimation, the PC-400 form does not serve such a function. (*Compare* BCTPA Br., p. 46 *with* R.91, ¶¶5, 11-13 *and* R.95, ¶¶4-5, 10-11, Exh. A.) There is no statutory mechanism for counties to offset sales and use tax revenues against individual property owner taxes, because the legislature did not intend for there to be a such an offset when it enacted §77.70.

Beyond requiring DOR and counties to invent the mechanism for an offset without any statutory guidance, BCTPA's interpretation leads to ***at least two other*** unreasonable/absurd results: **(1)** Brown County will lose its sales and use tax revenue and will incur enormous debt; and **(2)** Brown County's careful budgeting process will be upended.

*First*, if the sales and use tax Ordinance is ruled invalid, Brown County will be obligated to fund its capital projects through issuing debt. (R.44, ¶7.) Accordingly, if this Court reverses the circuit court's decision, Brown County and its taxpayers will face a number of adverse consequences,

such as the loss of the sales and use tax revenues and the likely decline in the County's credit rating. (R.44, ¶¶37-38); *McQuestion*, 316 Wis. 2d 494, ¶12 (deeming "unfortunate consequence[s]" unreasonable/ absurd).

In addition, if the proceeds of the sales and use tax were not available, the County would have to fund capital projects from borrowed money, which would result in property tax increases to pay for the associated interest. (R.44, ¶¶7, 27-30, 35.) Instead of issuing general obligation debt and passing the interest costs on to county property-taxpayers for many years, Brown County acted in a fiscally responsible fashion by choosing the "pay-in-cash" method of financing its capital projects. (*See id.*, ¶¶29-38.)

*Second*, if BCTPA's interpretation is adopted, Brown County's careful budgeting process will be upended. The County drafted, proposed, and enacted the Ordinance to fund nine capital projects through a sales and use tax and—as the circuit court found—in doing so, also "ensured that the property tax levy was reduced over the . . . life of the Ordinance." (R.103:29; App.129.) The County's careful planning also is reflected in the Ordinance's mill rate freeze and the sunset provisions. (R.3; App.165-66.) As the circuit

court found, Brown County's budget decisions were made by "intelligent and talented people" who conducted "ample research and put considerable thought and effort into determining how the sales and use tax revenue would reduce the property tax levy" and fund new projects. (R.103:29-30; App.129-30.) This Court should avoid the unreasonable result of upending the County's careful budgeting process – a result that would occur if BCTPA's interpretation of §77.70 were accepted. *McQuestion*, 316 Wis. 2d 494, ¶12.

Moreover, a judicially-mandated offset that is not legislatively recognized would create confusion and lead to disparate application of the offset, unless there is substantial judicial intervention to guide counties in their budgeting practices. If BCTPA's interpretation of §77.70 were accepted, the appellate courts or the circuit court would be tasked with determining how and when the dollar-for-dollar offset is to be implemented, thereby writing into §77.70 provisions that are not present.

For example, because §66.0602(2)(a) provides the base amount of a county's Levy Limit "shall be the actual levy for the immediately preceding year," the offset BCTPA suggests would operate to continually reduce a county's levy

authority year-by-year. However, BCTPA does not explain how the year-to-year calculation is to be performed, leaving it to the courts to figure out how to implement BCTPA's (erroneous) "offset" interpretation.

### B. BCTPA's Interpretation of the Statute Impermissibly Usurps the Legislative Process.

Finally, Brown County agrees with the circuit court that judicial acceptance of BCTPA's "dollar-for-dollar offset" interpretation of Wis. Stat. §77.70 would impermissibly usurp legislative prerogative. (R.103:22-24; App.122-24.) When the legislature expressed that a sales and use tax "may be imposed" by counties, and those counties could then use the revenue "only for the purpose of directly reducing the property tax levy," the circuit court aptly noted the legislature "left ample discretion to Wisconsin counties' elected officials as to how they would directly reduce their respective property tax levies." (R.103:22; App.122). Whether a county decides to enact a sales and use tax ordinance "is a matter for the voters to decide through their elected representatives." (*Id.*)

Through the actions of its elected officials, Brown County exercised the option to impose a sales and use tax. Before enacting the sales and use tax Ordinance, Brown

County conducted public meetings and held public listening sessions. (R.67:1; R.68:2-5; R.69; R.70:1; R.71:1-2, 6.) The County heard from local citizens, who spoke both for and against the proposed Ordinance, and ultimately the County enacted the Ordinance by a 23 to 3 vote. (R.71:1-2, 6.) In doing so, Brown County made the deliberate policy choice to decrease its debt $69,000,000 over the life of the Ordinance and save county property-taxpayers the $47,000,000 they otherwise would have had to pay in interest costs had the County funded its capital projects through debt rather than through the sales and use tax. (R.68:2; R.44, ¶¶7, 29-30.) Thus, the County Board—and, by extension, the voters who elected that Board—overwhelmingly chose to grant County residents "guaranteed tax relief" by replacing the property tax levy used to pay for bonding and new debt with the sales and use tax. (R.68:2.)

In what the circuit court deemed "an unacceptable usurpation of the legislative process," BCTPA's challenge to the Ordinance amounts to its post-hoc second-guessing of the County's concerted judgment as to how to fund capital improvements that County Board members deemed "necessary" and "need[ed]" for the "long-term viability of the

County." (R.103:24; App.124; R.71:2; R.68:4.) The ballot box—not the courtroom—is the appropriate place for BCTPA to register its disagreement with the legislative prescriptions of §77.70 and the informed budget choices of Brown County's elected representatives.

## CONCLUSION

The plain meaning of Wis. Stat. §77.70 permits counties to fund through a sales and use tax ordinance capital projects that otherwise could be funded though the property tax levy. When a county does so, it imposes the sales and use tax "for the purpose of directly reducing the property tax levy." Wis. Stat. §77.70. For decades, dozens of Wisconsin counties have interpreted §77.70 in that fashion when enacting sales and use tax ordinances. The legislature has not amended the statute to provide otherwise. There is no support in the text, surrounding statutes, or historical practice for BCTPA's "dollar-for-dollar offset" interpretation of §77.70. This Court should affirm.

Respectfully submitted and dated at Milwaukee, Wisconsin this 15th day of June, 2021.

von BRIESEN & ROPER, S.C.
Attorneys for Plaintiff-Respondent Brown County

By: _____
Andrew T. Phillips, S.B.W. No. 1022232
Steven L. Nelson, S.B.W. No. 1009779
Douglas M. Raines, S.B.W. No. 1059539
Christopher E. Avallone, S.B.W. No. 1095465

P.O. ADDRESS:
411 East Wisconsin Avenue
Suite 1000
Milwaukee, WI 53202
PH: (414) 287-1570
Fax: (414) 276-6281
Email: aphillips@vonbriesen.com

## CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in § 809.19(8)(b) and (c), Stats. for a brief produced with the following font:

> Proportional serif font: minimum printing resolution of 200 dots per inch, 13-point body text, 11-point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 10,930 words.

Respectfully submitted and dated at Milwaukee, Wisconsin this 15th day of June, 2021.

von BRIESEN & ROPER, S.C.
Attorneys for Plaintiff-Respondent Brown County

By: _____
Andrew T. Phillips, S.B.W. No. 1022232
Steven L. Nelson, S.B.W. No. 1009779
Douglas M. Raines, S.B.W. No. 1059539
Christopher E. Avallone, S.B.W. No. 1095465

P.O. ADDRESS:
411 East Wisconsin Avenue
Suite 1000
Milwaukee, WI 53202
PH: (414) 287-1570
Fax: (414) 276-6281
Email: aphillips@vonbriesen.com

## CERTIFICATE OF COMPLIANCE WITH 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. s. 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 15th day of June, 2021.

von BRIESEN & ROPER, S.C.
Attorneys for Plaintiff-Respondent
Brown County

By: _____
Andrew T. Phillips, S.B.W. No. 1022232
Steven L. Nelson, S.B.W. No. 1009779
Douglas M. Raines, S.B.W. No. 1059539
Christopher E. Avallone, S.B.W. No. 1095465

P.O. ADDRESS:
411 East Wisconsin Avenue
Suite 1000
Milwaukee, WI 53202
PH: (414) 287-1570
Fax: (414) 276-6281
Email: aphillips@vonbriesen.com

## CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2021, I personally caused copies of Plaintiff-Respondent Brown County's Brief to be mailed by first-class postage prepaid mail to:

Richard M. Esenberg, Esq.
Anthony F. LoCoco, Esq.
Wisconsin Institute for Law & Liberty
330 East Kilbourn Avenue, Suite 725
Milwaukee, WI 53202

Jennifer L. Vandermeuse, Esq.
Brian P. Keenan, Esq.
Wisconsin Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Dated this 15th day of June, 2021.

von BRIESEN & ROPER, S.C.
Attorneys for Plaintiff-Respondent Brown County

By: _____
Andrew T. Phillips S.B.W. No. 1022232
Steven L. Nelson S.B.W. No. 1009779
Douglas M. Raines S.B.W. No. 1059539
Christopher E. Avallone, S.B.W. No. 1095465

P.O. ADDRESS:
411 East Wisconsin Avenue
Suite 1000
Milwaukee, WI 53202
PH: (414) 287-1570
Fax: (414) 276-6281
Email: aphillips@vonbriesen.com

36425455_1