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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' REPLY BRIEF

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ARGUMENT

The County's brief features remarkably little textual analysis of §77.70. This is by design. The County has no real answers to the simple points that the absence of an increase is not the same as a "reduc[tion]" and that an approach requiring intervening steps is not "direct[]." §77.70. It is unable to explain away the Legislature's 2017 amendment, which adopts BCTA's view of what counts as direct reduction. It has no workable theory for why the Legislature rejected language requiring only property tax "relief" in favor of "direct[] reduc[tion]."

But even if the County did have more persuasive responses to each of these points, it cannot escape the fact that, even under its own theory of what §77.70 requires, its sales tax is still illegal. Because the County does not have room under its levy limit to pay for $147,000,000 in new spending, it is not avoiding a property tax increase that would otherwise have occurred; in fact, such an increase could not have occurred. The County is thus not even indirectly avoiding a hypothetical increase in its levy (much less directly reducing its levy).

The County asserts that it "indisputably ***would have***" borrowed in the absence of a sales tax and raised the levy to pay back the borrowing, an exception to levy limits. But putting that phrase in bold and italics does not make it so. As a matter of law there is no way to know whether, in the alternate universe in

which no sales tax exists, the thousands of Brown County voters or the dozens of members of the County's board would have voted to authorize such a massive amount of spending. If this Court agrees, this case is over—the County's tax is invalid—regardless of which party is correctly interpreting §77.70.

So the County instead wants to draw this Court's attention elsewhere: concerns about the administrability of the framework the Legislature adopted; the "careful" and "deliberate" manner in which the County adopted its (illegal) budget; a supposed need for "deference" to the AG, a political actor; the financial benefits of "paying in cash" as opposed to borrowing; the inefficiencies associated with restrictions on the use of sales tax revenue; and fears of adverse consequences to the County if it is found to have broken the law, among others. In other words, the County argues for what it wishes the law to be and not what it is. This Court should reject these arguments. The language of §77.70 is unambiguous, and the County's tax violates it.

I. BROWN COUNTY'S SALES TAX VIOLATES THE PLAIN LANGUAGE OF §77.70

The County repeatedly argues that the Legislature should have been more specific than it was and instead used terms such as "offset" or "subtract." County Br. 22. But it does not explain how the term "reduce" is any less clear or robust. Nor does it

explain how the absence of an increase can be characterized as a reduction.

The County similarly tries to add some ambiguity to the term "directly" by citing the newly-decided *State v. Kizer*, No. 2020AP192-CR, unpublished slip op. (Ct. App. June 2, 2021), for the proposition that "direct" means "characterized by [a] close logical, causal, or consequential relationship." *Kizer*, slip op. at ¶8 (quoting Merriam Webster Online). The County fails to note that the *Kizer* Court did not adopt this definition and was instead restating the argument of a party. In fact, *Kizer* never decides what "direct" means as applied to the facts of that case, instead providing only a non-exhaustive list of factors as "guidance" for the circuit court to consider.

Regardless, the definition argued for in *Kizer* and offered here by the County favors BCTA's reading: if any relationship between the enactment of the County's sales tax and the supposed lowering of its levy through the funding of capital projects can be said to exist, it most certainly is not "close."

And *Kizer* is helpful nonetheless in that it collects a number of Wisconsin cases supporting BCTA's position; in each case, the presence or not of an *intervening step* determines whether the relevant matter is "direct." *See id.* at ¶¶9-14 (citing *Tri City National Bank v. Federal Insurance Co.*, 2004 WI App 12, ¶18, 268 Wis. 2d 785, 674 N.W.2d 617 (bank's losses were not direct result

of employee misconduct; misconduct led to mortgage defaults which led to losses); *Gister v. American Family Mutual Insurance Co.*, 2012 WI 86, ¶34, 342 Wis. 2d 496, 818 N.W.2d 880 (hospital's liens against settlement between patients and insurer were not "direct charges" upon the patients; the charges were upon the settlements, into which the patients had entered); *Whirlpool Corp. v. Ziebert*, 197 Wis. 2d 144, 153, 539 N.W.2d 883 (1995) (benefit to party would be indirect if the money first passes through a second party); *State v. Parker*, 2001 WI App 111, ¶9, 244 Wis. 2d 145, 629 N.W.2d 77 (transfer to new prison was not a "direct" consequence of inmate's conviction; Department of Corrections had to exercise its discretion to order that transfer)).

All of these examples point in the same direction with respect to the facts of this case: any reduction in the County's property tax levy is indirect, not direct, because the funding of new spending items must first occur, with the hypothetical property taxes which *would* pay for these items *then* being "reduced."

The County likewise provides *no* response to the argument that its reading renders surplusage the 2017 amendment to §77.70. The Legislature made clear that funding certain bonds with sales tax revenue does not directly reduce the property tax levy—else there was no need to exempt the circumstance from §77.70's restriction. *See* §77.70 ("*Except as provided in s. 66.0621 (3m)*, the county sales and use taxes may be imposed only for the

purpose . . . .” (emphasis added)). Yet under the County’s theory this exemption should not have been needed since funding bonds with sales tax revenue avoids the need to fund them with property taxes.

Nor, moving to extrinsic sources, does the County have an explanation for why the Legislature tightened §77.70’s language from “property tax relief” to “directly reducing the property tax levy” (and in fact the County itself lapses into arguing that it is providing “tax relief” despite the fact that the statute calls for more, *see, e.g.*, County’s Br. 25 (quoting R.68:2)). Its only answer is to say that “property tax relief occurs with the cessation of annual property tax increases.” *Id.* 43. This is an odd argument to make given that it is undisputed that the County’s sales tax ordinance did not accomplish *even that much* in 2018, when its levy rose by about 5%, (R.9:14; 15:3.).[1]

[1] The County is wrong when it says that the 1985 newspaper article BCTA quotes is inadmissible hearsay; the article is a self-authenticating ancient document. *See* Wis. Stat. §908.03(16) (ancient documents exception to hearsay rule); §909.02(6) (newspapers and periodicals are self-authenticating). Similarly, the County’s objection that this Court may not consider Senator Feingold’s statement fails to distinguish between “documents that are part of the legislative history and public records,” which may be considered, and attempts by legislators to “*retrospectively*” testify as to what the *legislature* as a whole intended, which may not. *Cartwright v. Sharpe*, 40 Wis.2d 494, 508-09, 162 N.W.2d 5 (1968) (emphasis added). This Court is not barred from assessing the *contemporaneous* statement of the author of an amendment about the amendment *he has introduced* any more than it is barred from assessing legislative history generally. In any event, the County asked the

II. THE AG OPINION IS NOT ENTITLED TO A PRESUMPTION OF CORRECTNESS.

BCTA will not repeat its discussion, set forth in its initial brief, of why the AG's opinion is fundamentally flawed. The County nevertheless wants this Court to "defer[]" to the opinion as "presumptively correct." But the County cannot bring itself to actually defend such a presumption. It declines to address the constitutionally problematic operation of the presumption in the circumstances where it would actually apply, namely where the Court disagrees with the AG or else declines to interpret the statute. The County instead agrees that the Court "retains its prerogative to interpret the statute and assert what it means" and retreats to the position that the AG opinion "should be given weight," a meaningless phrase, conceding that it "is not asking the Court to rest on a presumption." County's Br. 3, 36-37.

Having utterly failed to rebut BCTA's showing that the presumption is "unsound in principle," *Johnson Controls, Inc. v. Emps. Ins. of Wausau*, 2003 WI 108, ¶99, 264 Wis. 2d 60, 665 N.W.2d 257, the County chides BCTA for not addressing other *stare decisis* factors. But in this case—where use of the presumption is not only erroneous but utterly incompatible with the constitutional separation of powers—this factor must be

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circuit court to strike BCTA's extrinsic sources; the circuit court did not do so. (R. 65:8.) If the County was aggrieved by this failure to rule it was free to file a cross-appeal. It did not.

controlling. The County's view is that the AG can declare a law enacted by one legislature to mean whatever he wishes and that if a later legislature cannot "muster a majority of votes to 'correct'" it, County's Br. 37, this Court is forced to presume the AG is correct. That cannot be the law.[2]

The AG opinion is wrong and should not be propped up by an unjustified presumption.[3]

III. BROWN COUNTY'S SALES TAX VIOLATES §77.70 EVEN UNDER ITS OWN INTERPRETATION OF THE STATUTE.

The County does not dispute that levy limits prevented it from actually raising its property tax levy to pay for $147,000,000 in new spending. Thus, even under its own interpretation of §77.70, its tax is illegal.

The County argues that it "indisputably ***would have***" borrowed" in the absence of a sales tax and funded this borrowing

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[2] This case does not present a situation where there has been legislative inaction following definitive *judicial* construction.

[3] Without developing the argument, the County cites a passage providing that "[l]ong and uninterrupted practice under a statute, especially by the officers whose duty it was to execute it, is good evidence of its construction." County's Br. 34 (quoting *Harrington v. Smith*, 28 Wis. 43, 68 (1871)). As explained below, practice under §77.70 has, on the contrary, been varied. And unlike in *Harrington*, where the AG was on the commission governed by the statute under review, here the relevant "officer[]" charged with executing §77.70 would be DOR, which has taken no position on the meaning of the statute.

with property taxes. County's Br. 48. BCTA did and does dispute this claim. It is false as a matter of law, fact, and logic. Borrowing requires authorization by the County Board or County voters, and whether these parties would have voted to authorize this borrowing is unknowable, despite the speculative and self-evidently false statement of the County's Finance Director that he has personal knowledge of the minds of each relevant voter. At most the County can say it *might have* borrowed if it cleared the requirements and received authorization. That's not good enough—§77.70 requires direct reduction, not the mere possibility of direct reduction. The County's approach reads any limitation out of the statute.[4]

IV. THE STADIUM TAXES DO NOT SUPPORT THE COUNTY'S INTERPRETATION.

The County argues that the Legislature that enacted the modern version of §77.70 in 1985 should have known how the Legislature in 1995 and 1999 would have enacted the Stadium Taxes and used the same language. As already noted there are

[4] The County's request that BCTA submit evidence of how the County Board or its voters would have voted in the alternate universe where no sales tax exists is nonsensical. That is exactly BCTA's point: no evidence that such a vote would or would not have taken place and/or would have been successful or unsuccessful is available. It is unknowable. The County also attempts to introduce new evidence of debt the County has issued in the past. County's Br. 23. Obviously, this does not support the argument that the County could or would have borrowed for a separate slate of projects.

many problems with this argument and BCTA will not repeat them all. A few additional points are necessary.

First, the County's argument that the language of the Stadium Taxes suggests that §77.70 does not restrict the expenditure of sales tax revenue is totally inconsistent with its central theory that the AG opinion is correct. Even the AG believed that the language in §77.70 is a "restriction on the use of county sales and use tax revenues." (R.59:169.)

Second, the County is wrong when it says that §§77.705-.706 direct the expenditure of sales tax revenue. *See id.* (variously discussing the disposition of moneys transferred from § 20.566 (1)(gd) (appropriating money to DOR for the "[a]dministration" of Stadium Tax), (1)(ge) (same), and moneys received under §341.14(6r)(b)13.b (provision in state license plate program). The approach used in these statutes is thus not probative—the provisions are not analogous.

Even if the County were right about the Stadium Taxes, it is still comparing two different types of taxes enacted at different times by different Legislatures for different purposes. A difference in language does not warrant rejecting the plain meaning of §77.70. *James v. Heinrich*, 2021 WI 58, ¶20 (2020) (indicating that two statutes could be easily compared because they were "drafted at the same time and by the same legislature"); *see Torres v. Lynch*, 136 S. Ct. 1619, 1634 (2016) (question was not whether Congress

more clearly expressed itself in other statutes but instead the fair reading of the statute before the Court).[5]

V. BCTA'S INTERPRETATION IS ADMINISTRABLE.

The County continually argues that there is no "mechanism" in the statute to support BCTA's interpretation. Although, as an initial matter, the Legislature is entitled to pass statutes that are difficult to administer and leave it to its agencies like DOR to provide procedural guidance (as Congress sometimes does with the IRS), no such problem arises with respect to §77.70. Compliance is largely a matter of subtraction during the budgeting process—sales tax revenue from the property tax levy—and the County itself quotes the statement of the AG explaining how it might be accomplished. County's Br. 14-15. Not surprisingly, the DOR's PC-400 form thus already accounts for the application of sales tax

[5] The County also briefly cites §§229.685(1) and .825 and §66.0621(3m) but does not develop any argument other than to say that they show Legislature "knows how to direct expenditures when it intends to do so." These statutes do not aid the County as it is once again comparing apples and oranges. In the former set of statutes the Legislature was creating new governmental entities from scratch, *see* §§229.66, .822, and was focused on creating new *funds* into which the entities could deposit revenue in the first place; this changed the entire emphasis of the text. In the latter the County was creating a new type of bond distinguished by the very source of revenue used to pay its principal and interest. These later-enacted statutes on different topics say little about §77.70, which is a more-broadly-worded statute creating a *tax*.

revenue to the property tax levy.[6] Indeed, the County itself acknowledges that some counties do subtract sales tax revenues from their property tax levies, County's Br. 33, contradicting its assertion that doing so is impossible or fraught with difficulties.[7]

What has been said shows why the County is wrong to argue that if BCTA were right the Legislature would have enacted into §66.0602—the statute that imposes limits on county property tax levies—a requirement that counties decrease the levy by the amount of sales tax proceeds. Brown County is eliding a county's property tax *levy* with the county's levy *limit*. The levy limit specifies the percentage by which a county is allowed to increase its levy in a particular year and depends on items like net new construction and other adjustments; it is not the same as the levy itself. *See* Wis. Stat. § 66.0602(1)-(2). Wis. Stat. §77.70, on the other hand, requires a reduction *in the levy itself*. There is thus no need for the Legislature to address §77.70 again in §66.0602. For

[6] The County's discussion of whether continues may "issue tax credits" is a red herring. Any "offset" is accomplished during the budgeting process, not on individual bills.

[7] However, the County's implication that only two counties comply with BCTA's interpretation of the statute is unfounded. The vast majority of sales tax ordinances either simply reference the statutory language or include more restrictive language supportive of BCTA's interpretation (BCTA provided numerous examples of the latter, BCTA's Br. 47); only a minority dedicate sales tax revenue to specific projects or permit spending on new projects in broad categories. (*See generally* R. 41:25-42:57, 59-60.)

the same reason, the contents of DOR's Levy Limit Worksheet are irrelevant (unlike DOR's PC-400 form).

VI. THE COUNTY'S "TAX RELIEF" IS ILLUSORY.

Though it spends most of its brief arguing that it need not directly reduce the property tax levy, the County dumps into its brief data to convince the Court that it is doing just that. BCTA addressed these accounting tricks in its opening brief, along with the County's misleading argument that its mill rate freeze makes a difference here. The dollars-and-cents tax "savings" and tax "relief" to which the County adverts are simply the numerical version of its assertion that it is reducing the levy by avoiding hypothetical borrowing. This "relief" is illusory, as it is not caused by operation of the county sales tax. And even were it not illusory, the Legislature considered and rejected a version of §77.70 that would have required only "relief." It mandated instead "direct[]" property tax "reduc[tion]." "Avoiding" borrowing that never occurred does not meet this standard.

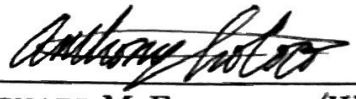
CONCLUSION

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

Dated: June 29, 2021.

Respectfully submitted,

WISCONSIN INSTITUTE FOR LAW & LIBERTY



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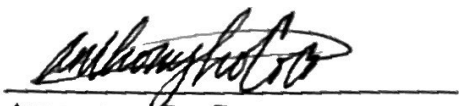
FORM AND LENGTH CERTIFICATION

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 2,999 words.

Dated: June 29, 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: June 29, 2021.

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