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SUPREME COURT OF WISCONSIN

APPEAL NO: 2020AP940

BROWN COUNTY,

Plaintiff-Respondent,

vs.

BROWN COUNTY TAXPAYERS ASSOCIATION AND FRANK BENNETT,

Defendants-Third-Party Plaintiffs-Appellants.

vs.

PETER BARCA, SECRETARY, WISCONSIN DEPARTMENT OF REVENUE,

Third-Party Defendant-Respondent.

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

AMICUS BRIEF OF THE WISCONSIN COUNTIES ASSOCIATION

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INTRODUCTION AND ISSUES ADDRESSED

Defendants-Third-Party-Plaintiffs-Appellants, Brown County Taxpayers Association and Frank Bennett ("BCTPA") are not only asking this Court to overturn the Circuit Court's grant of summary judgment; BCTPA is asking this Court to overturn 23 years of settled interpretation of Wis. Stat. §77.70 and decades of uniform practice by the counties.

Since 1998, the counties have consistently abided by a formal opinion of the Attorney General ("AG") interpreting §77.70. In those 23 years, neither the Wisconsin Department of Revenue ("DOR") nor the Legislature has intervened to require a change. Now, BCTPA asks this Court to do just that.

This brief demonstrates that upending the settled interpretation of §77.70 would be catastrophic for the counties, taxpayers and the residents who rely on the services provided by the counties.

ARGUMENT

I. This Court Should Adhere To The Plain Meaning of Wis. Stat. §77.70 And The 1998 Attorney General's Opinion.

The AG issued a formal Opinion interpreting §77.70 in 1998. The AG rightly concluded that a county sales and use

tax "directly reduce[s] the property tax levy… [if the] "funds received from a county sales and use tax… [are] budgeted to reduce the amount of the countywide property tax levy *or to defray the cost of any budget item which can be funded by a property tax levy.*" A.App.167 (emphasis added).

The AG's interpretation comports with §77.70's plain meaning. Nothing in the language of §77.70 requires a county to set its budget and levy and then conduct a dollar-for-dollar reduction of its sales and use tax proceeds, as BCTPA contends.

The adoption of §66.0602 in 2005 demonstrates that the Legislature agrees with the AG's (and the counties') plain meaning interpretation of§77.70. Section 66.0602 limits the amount a county may increase its operating levy year-over-year and explains in great detail how the levy is to be calculated. Noticeably, §66.002 does not mention sales and use tax revenue. On the other hand, a county's debt levy is expressly exempted from the Levy Limit. Wis. Stat. §66.0602.

The Legislature has amended §66.0602 over 25 times without disturbing the AG's interpretation of §77.70. *See* 2005 Wis. Acts. 25, 484; 2007 Wis. Acts 20, 115, 129; 2009 Wis.

Act 28; 2011 Wis. Acts 32, 63, 75, 140, 145,258; 2013 Wis. Act 20; 2013 Wis. Act 165; 2013 Wis. Acts 222, 310; 2015 Wis. Acts 55, 191, 256; 2017 Wis. Acts 59, 207, 223, 243, 317, 365; 2019 Wis. Acts 45, 126, 133. The majority of these amendments directly addressed how the levy is to be calculated, how it should be capped or allowed to increase, and what expenditures should be excluded from the cap. If the Legislature thought the AG's Opinion was incorrect, these amendments provided numerous opportunities for a correction. Instead, the Legislature consistently left the status quo undisturbed.

Conversely, BCTPA posits that the Legislature's enactment of the Levy Limits worked an unwritten, unrecognized, and unwarranted amendment of the AG Opinion such that the Opinion should now read:

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

A.App.167. BCTPA's argument fails for a two simple reasons. First, if the Legislature meant for the adoption of the Levy Limits to repudiate the AG's Opinion and the status quo, it

would have said so. Second, BCTPA ignores the fact that the Levy Limits do not apply to a county's debt levy. Accordingly, sales and use taxes can still be used to defray the cost of any budget item that can be funded via the debt levy.

BCTPA argues that the debt levy is irrelevant because borrowing "require[s] clearing a variety of procedural hurdles…". (BCTPA Brief, p. 31; *See also* Reply, p. 9). According to BCTPA, these hurdles are so high that in combination with the limit on operating levy increases, the logic of the AG's Opinion fails. BCTPA's argument, however, ignores the actual data related to county borrowing. Between 2015 and 2019, seventy of the seventy-two counties cleared the supposed Sisyphean hurdles and borrowed money to pay for capital projects. (WCA-App.0072).

Indeed, from 2015 to 2019, these seventy counties borrowed over $2.3 billion. As of 2019, they were carrying a combined debt load of $620,992,921. *Id.* During this same period, the counties collectively raised over $1.9 billion *via* sales and use taxes.[1] Without the ability to use sales and use

[1] The Department of Revenue maintains and makes available to the public the total sales and use taxes collected by the counties at:

tax receipts to "defray the cost of any budget item which can be funded by a property tax levy," there is every reason to believe that billions more would be borrowed and that the taxpayers would be taxed to pay both the balance and the costs of servicing that additional debt.

As of today, sixty-six counties have organized their affairs (setting tax levies, approving capital projects, setting mill rates, issuing bonds, incurring debt, etc.) around the AG's Opinion. Indeed, since the year 2000 (just 2 years after the AG Opinion), fifteen counties have enacted sales and use tax ordinances. A review of the historic levies and the sales tax revenue demonstrates that not a single county actually effectuated a dollar-for-dollar reduction in their levy. *See* R.75-76; WCA-App.003-012.[2] Altering the longstanding

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https://www.revenue.wi.gov/Pages/Report/County-Sales-Tax.aspx

[2] It is true that the text of Grant County's ordinance required a "dollar-for-dollar" offset (R.41) and Washington County's ordinance required "a direct offset" (R.42); however a review of the actual data from these two Counties indicates that neither actually reduced their operating levy on a dollar-for-dollar basis. After adopting its sales and use tax in 1999, Washington County's levy continued to increase cycle-over-cycle at almost the exact same rate as it did in the years preceding the sales tax. (R.75-76; WCA-App.003-010). Grant County did see a reduction in its levy, but that reduction was not dollar-for-dollar. In 2002, Grant County realized $1.1 Million in sales tax revenue, but its levy reduction was less than $350,000. *Id.*

interpretation of §77.70 would upend the decades-old understanding of the law and introduce uncertainty to the critically important budget and levy setting function.

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

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

The sales tax has been a significant source of revenue allowing the counties to reduce their reliance on property taxes. In 2020, the counties generated $471,500,232 in revenue from sales and use taxes.[3] Thus, if the Court were to adopt BCTPA's interpretation of §77.70, over $400 million in annual tax revenue would be lost.

A few examples illustrate the crisis this would cause. In

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[3] Publicly available information from the Department of Revenue shows that the total sales and use taxes collected was $377,516,528 in 2017, $419,991,797 in 2018 and $445,315,805 in 2019. https://www.revenue.wi.gov/Pages/Report/County-Sales-Tax.aspx

2017, Milwaukee County's sales tax generated over $74,000,000 of revenue; an amount equal to 25% of its levy. *See* R.75-75; WCA-App.003-012. Dane County generated over $57,000,000; an amount equal to 30% of its levy. *Id.* But it is not just the larger counties that would be impacted. In 2017, Pepin County (population 7,469) generated $535,543 from its sales tax. That figure represents 12.8% of its 2017 levy. *Id.* A dollar-for-dollar reduction in the levies would force counties to choose between cutting essential services or foregoing necessary capital improvements.

Moreover, if sales and use tax revenue estimates are not met, the county would have a budget shortfall. Budget shortfalls are not simply accounting problems. Counties provide numerous State-mandated but not State-paid-for essential services to their residents such as human and social services, child welfare, law enforcement, health services and highway repair and maintenance, just to name a few. If any of these essential services cannot be fully funded due to sales and use tax collections falling below estimates, county residents who rely on these services would be placed in risk of real harm.

To make matters worse, because §66.0602 establishes

the prior year's levy as the baseline for a county's Levy Limit calculation, a dollar-for-dollar offset would not only reduce the current year's levy, it would automatically and artificially lower a county's maximum available levy for the following year. The following shows the affect reversal would have on Milwaukee County, by way of example.

Milwaukee County's 2017 levy was $291,921,998 and its sales and use tax receipts were $74,354,751; equal to 25% of the levy. *See* R.75-76; WCA-App.003-012. Under BCTPA's reading of §77.70, Milwaukee County would be required to deduct $74,354,751 from its 2017 levy. Thus, the 2017 levy would become $217,567,247. This would then become the baseline for setting Milwaukee County's 2018 levy. Under §66.0602, a levy may only increase from the baseline in an amount equal to the percentage increase in the county's "valuation factor,"[4] which is based on additional property value added to the county via new construction. Milwaukee County's 2018 increase in its valuation factor was

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

1.43%, considerably less than the 25% represented by its sales and use tax revenue. Thus, Milwaukee County's 2018 levy would end up being $220,678,459; the adjusted 2017 levy plus 1.43%.

Milwaukee County's levy has not been this low in 20 years (since 2002) and it is a certainty this would cause a real-world crisis as essential services would have to be slashed or eliminated.

And, assuming Milwaukee County's 2018 sales and use tax revenues increased over 2017's revenue (and they did, coming in at $77,538,845)[5] this problem would compound exponentially every year. Milwaukee County would now have to deduct from its 2018 levy to set the 2019 baseline either: (1) the $3,184,094 increase in sales and use tax revenue or (2) the full $77,583,845 of 2018 sales and use tax revenue realized. Because neither the Legislature nor DOR have ever considered a dollar-for-dollar reduction necessary, there is no guidance on which methodology is correct and there is no place on the

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

DOR's Levy Limit Worksheet to account for these numbers. Either scenario would be devastating.

It bears repeating that none of these calculations are currently found in §66.0602, explained in DOR's Levy Limit calculation guidance, or enshrined on the Levy Limit Worksheet. The real-world scenarios confronting the counties, and various permutations of those scenarios, underscore the very real problems with BCTPA's demand that the Court deviate from the long-settled interpretation of §77.70.

III. A Sales and Use Tax Ordinance Provides Tangible Tax Relief to County Residents.

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

taxpayers necessarily receive tax relief.

In 2017, dollars spent by non-residents ("Direct Visitor Spending") accounted for $12.7 billion dollars of spending across the 72 counties. *See* R.78; WCA-App.017-018. In turn, this spending generated $1.5 billion dollars in state and local taxes, a portion of which was county sales and use taxes. *Id.* In fact, by some estimates tourists or visitors spend 58.3% of their dollars on items (food and beverage, lodging, entertainment and general retail) that are subject to Wisconsin sales and use taxes. *See* R.80; WCA-App.020-068.

Florence County illustrates how a sales and use tax reduces the tax burden on county residents. In 2006, Florence County adopted a sales and use tax and, at that time, its Mill Rate was $7.02/$1,000. However, in 2007, the Mill Rate dropped to $6.27 and it dropped to $5.98 in 2008. Indeed, from 2007 to 2017 Florence County's Mill Rate averaged $6.40. *See* R.77-78; WCA-App.013-018. The change in the Mill Rate means an owner of a $200,000 home realized an average annual savings of $124 in property taxes in the decade after the sales and use tax was imposed. In the year prior to the sales and use tax, the homeowner's taxes were $1,404, but in succeeding

years that same homeowner's taxes on average were $1,280. The property-tax savings of $1,240 over the ten-year period means the sales and use tax essentially gave the Florence County property taxpayers a free tax year. That tax-free year is subsidized in part by Direct Visitor Spending, which totaled $5.7 million in Florence County in 2017. *See* R.78; WCA-App.017-018.

This trend is not uncommon. Green County saw a similar reduction in its Mill Rate after the adoption of a sales and use tax in 2003. Within 3 years, the Mill Rate had dropped by $0.98 and it remained below the 2003 level for seven years. *See* R.77-78; WCA-App.017-018. Trempealeau County also saw an immediate reduction in the Mill Rate following the adoption of a sales and use tax in 2010. The County's Mill Rate stayed below the 2010 rate for 6 years. *See* R.77-78; WCA-App.017-018.

These examples demonstrate that sales and use taxes provide tax relief to county property owners by broadening the tax base to include non-residents. Moreover, it is quite common for these new tax dollars to also result in a decreased Mill Rate. Any decrease in the Mill Rate yields immediate and

tangible savings.

BCTPA's interpretation would deprive the counties of the benefit of sales and use tax revenues and would force counties to increase borrowing. Thus, BCTPA's interpretation would provide none of the supposed taxpayer benefits BCTPA claims it is seeking to secure. Sales and use taxes benefit county residents by allowing them to enjoy a reduced property tax burden that is paid for in part by the in-county spending of out-of-county visitors. In contrast, borrowing falls solely on the resident property taxpayers and then compounds the burden as those taxpayers are responsible for both the borrowed principle and the interest payments. BCTPA's interpretation would be more costly to resident-taxpayers.[6]

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

As noted above, the interplay of BCTPA's reading of §77.70 with the mechanics of §66.0602's limitation on levy

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[6] BCTPA's papers studiously avoid any real discussion of the debt levy or the fact that the debt levy is exempted from the Levy Limit. The foregoing makes clear why.

increases will create an economic and human crisis in all sixty-six counties that have a sales and use tax. Moreover, a reversal of the circuit court's decision would mean that these counties are currently, and for years have been, in violation of the Levy Limits. Such violations carry substantial penalties: a corresponding reduction in the county's shared revenue payments from the State. Wis. Stat. §66.0602(6)(a).

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

Further, a ruling that BCTPA's interpretation is correct would raise the question of whether the counties have collected

hundreds of millions of dollars illegally and if so, what should be done about it. As the AG correctly noted, "Counties … lack statutory authority to implement a direct system of tax credits to individual property owners …". A.App.168. Likewise, they lack the statutory authority to issue refunds. For obvious reasons, BCTPA does not suggest a remedy.

CONCLUSION

For the foregoing reasons this Court should affirm.

Respectfully submitted this 12th day of July, 2021.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,778 words.

Dated this 12th day of July, 2021.

MICHAEL BEST & FRIEDRICH LLP

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ELECTRONIC FILING CERTIFICATION

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

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

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

Dated this 12th day of July, 2021.

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PROOF OF FILING CERTIFICATION

I hereby certify that I caused this Amicus Brief of the Wisconsin Counties Association to be hand-delivered to the Clerk of the Wisconsin Court of Appeals, on July12, 2021, for filing in accordance with Wis. Stat. § 809.80(3)(d). I further certify that on July 12, 2021, this Amicus Brief of the Wisconsin Counties Association was correctly addressed and hand-delivered to a third-party commercial carrier for delivery to all parties in this matter.

Dated this 12th day of July, 2021.

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CERTIFICATE OF SERVICE

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

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