No. 2019AP1987

In the Supreme Court of Wisconsin

LOWE'S HOME CENTERS, LLC,
PLAINTIFF-APPELLANT-PETITIONER,

v.

CITY OF DELAVAN,
DEFENDANT-RESPONDENT.

On Appeal From The Walworth County Circuit Court,
The Honorable Daniel S. Johnson, Presiding
Case Nos. 2016CV589, 2017CV432

NONPARTY BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLANT-PETITIONER

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INTRODUCTION

This case involves an effort by certain localities and their tax assessors to supplant the Legislature's authority "to determine the appropriate methodology for valuing property for taxation purposes." *Walgreen Co. v. City of Madison*, 2008 WI 80, ¶ 19, 311 Wis. 2d 158, 752 N.W.2d 687. Through Wis. Stat. § 70.32(1), the Legislature provided that when (1) no recent arm's-length sale of the property at issue is available, the assessor *must* look to (2) "recent arm's-length sales of reasonably comparable property." Only in absence of these two categories of sales can the assessor turn to a broader category of considerations, including "all factors that, according to professionally acceptable appraisal practices, affect the value of the property to be assessed." *Id.* § 70.32(1).

Deviating from the law and well-established practice, Respondent's tax assessor ignores a certain category of "recent arm's-length sales of reasonably comparable property" under Section 70.32(1)—vacant properties—so Respondent can raise taxes without regard for the Legislature's policy choices, codified in statute, and impose double taxation on big-box retailers. But recent sales of vacant properties are often the most useful proxies for determining the fee simple value of comparable properties because these properties present little danger that the current operator's business success—or lack thereof—will mislead the assessor as to the property's

actual market value. This Court should reject Respondent's effort to override the Legislature's taxation policy choices.

STATEMENT OF INTEREST

Amicus is the Chamber of Commerce of the United States of America ("the Chamber"), the world's largest business federation, which has a direct and substantial interest in this case. *See* Wis. Stat. (Rule) § 809.19(7)(a). The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community. The Chamber has either filed or intends to file *amicus* briefs defending the proper appraisal of commercial property to prevent unduly onerous property tax bills, including as to the so-called "dark store" dispute. *See Amicus* Br. of the Chamber, et al., *Darden Restaurants, Inc., et al. v. Singh*, No. 5D16-4049 (Fla. Ct. App. Oct. 13, 2017);[1] *see also* Order

[1] Available at https://www.chamberlitigation.com/sites/default/files/cases/files/17171717/U.S.%20Chamber%20Amicus%20Brief%20--%20Darden%20Restaurants%2C%20Inc.%20v.%20Singh%20%28Florida%20Fifth%20District%20Court%20of%20Appeal%29.pdf (all websites last accessed Mar. 15, 2022).

Granting Mot. For Br. *Amicus Curiae* By The Chamber, *In The Matter Of The Equalization Appeals Of Wal-Mart Stores, Inc.*, No. 122,162 (Ks. App. Cts. Mar. 10, 2022).[2]

ARGUMENT

I. Appraisal Of Property Under Section 70.32(1) Looks To Recent Arm's-Length Sales Of Reasonably Comparable Property, Including Vacant Commercial Property, And Tax Assessors Cannot Displace That Policy Choice

A. "The power to determine the appropriate methodology for valuing property for taxation purposes lies with the legislature." *Walgreen*, 2008 WI 80, ¶ 19. The Legislature exercised this power through Section 70.32(1). *State ex rel. Markarian v. City of Cudahy*, 45 Wis. 2d 683, 685, 173 N.W.2d 627 (1970). Assessors must strictly adhere to Section 70.32(1)'s requirements,[3] and "[i]t is error for an assessor to look to other information to value [ ] property" outside of what Section 70.32(1) commands. *Waste Mgmt. of Wis., Inc. v. Kenosha Cty. Bd. of Rev.*, 184 Wis. 2d 541, 556, 516 N.W.2d 695 (1994).

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[2] Available at https://pittsreporting.kscourts.org/Appellate/CaseDetails?caseNumber=122162.

[3] Notably, while not directly relevant here, Section 70.32(1) would, of course, trump any inconsistent language in the Property Assessment Manual. *See Walgreen*, 2008 WI 80, ¶ 98 (Abrahamson, C.J., concurring) ("[t]he 'common law which accurately reflects the state of the law, and the language of § 70.32(1), . . . not the [*Manual*], control.").

Section 70.32(1) creates three methodology tiers that an assessor must use to appraise real property for property tax purposes. *See Markarian*, 45 Wis. 2d at 686.

Under Tier I, the assessor must value the real property "at the full value which could ordinarily be obtained therefor at private sale." Wis. Stat. § 70.32(1); *Markarian*, 45 Wis. 2d at 685 n.1. "Full value . . . has often been defined as the amount the property could be sold for in the open market" by a willing owner to a willing purchaser. *Markarian*, 45 Wis. 2d at 685. It "presumes a transfer of ownership" (not, for example, a lease) of the property. David C. Lennhoff, *Through The Looking-Glass: Debunking The "Dark Store" Idiom*, 87 The Appraisal Journal 180, 180–81 (Summer 2019);[4] *accord Markarian*, 45 Wis. 2d at 685–86.

If the Tier I methodology is unavailable, then an assessor must use Section 70.32(1)'s Tier II. *Markarian*, 45 Wis. 2d at 686. Under Tier II, the assessor must consider "sales of reasonably comparable property," Wis. Stat. § 70.32(1); *Markarian*, 45 Wis. 2d at 686, following the "principle" that "buyers will not pay more for [the target] property than it would cost them to acquire substitute property of equal desirability and utility," *Walgreen*, 2008 WI 80, ¶ 22. Whether a property is sufficiently "comparable" to the target property depends on multiple factors, such as its

[4] Available at https://www.altusgroup.com/services/wp-content/uploads/2020/03/Though-the-looking-glass_-Debunking-the-Dark-Store-Idiom.pdf.

"location, including the distance from the [target] property"; "its business or residential advantages or disadvantages"; and "its improvements, size and use." *Rosen v. City of Milwaukee*, 72 Wis. 2d 653, 665, 242 N.W.2d 681 (1976). None of these factors include whether the property has a tenant or user.

Finally, the assessor may only use Tier III methodology "in situations where there has been no arm's-length sale of the subject property [*i.e.*, Tier I] and there are no reasonably comparable sales [*i.e.*, Tier II]." *Nestle USA, Inc. v. Wis. Dep't of Revenue*, 2011 WI 4, ¶ 28, 331 Wis. 2d 256, 795 N.W.2d 46. Tier III methodology is thus statutorily disfavored, partly because it gives the assessor broad discretion in the appraisal process. *See Waste Mgmt.*, 184 Wis. 2d at 558.

B. This case considers when a piece of recently-sold commercial property is "comparable" to a target commercial property, such that an assessor should use that sale to appraise the target commercial property under Section 70.32(1)'s Tier II methodology. *See* Per Curiam Opinion ¶¶25–33, *Lowe's Home Centers, LLC v. City of Delavan*, No. 2019AP1987 (hereinafter "Op."). A straightforward application of Section 70.32(1)'s text resolves this question: a sale of a vacant commercial property will most often be a "recent arm's-length sale[ ] of reasonably comparable property" that the assessor must consider under Section 70.32(1)'s Tier II methodology.

Analyzing sales of vacant commercial property as a Tier II comparator for occupied property is usually extremely

relevant. Vacant properties, which are not actively leased by any business, pose little risk that the current operator's business success or failure will mislead the assessor as to the actual market value of the property being assessed. Section 70.32(1) generally requires excluding such "business efforts" from the appraised value of commercial property. *Walgreen*, 2008 WI 80, ¶34. Excluding these considerations may prove difficult under a Tier II appraisal if the only comparable sales are from occupied commercial property. *See generally Bonstores Realty One, LLC v. City of Wauwatosa*, 2013 WI App 131, ¶ 26, 351 Wis. 2d 439, 839 N.W.2d 893. On the other hand, a vacant property may be a helpful comparator because it enables the assessor to ascertain the fee simple value of the property without any operator success or failure clouding the property value analysis.

A commonsense example illustrates the point. Assume that a startup company owns a workspace, adjacent to other identical workspaces, from which it develops and markets a wildly successful, web-based product. This startup's "business efforts," *Walgreen*, 2008 WI 80, ¶ 34, or "business value," *ABKA Ltd. P'ship v. Bd. of Rev. of Vill. of Fontana-On-Geneva Lake*, 231 Wis. 2d 328, 338–41, 603 N.W.2d 217 (1999), attributable to its web-based product do not change the value of the company's *real property*—its workspace and the land the workspace is built upon. So, if an assessor were to appraise an identical but not-so-successful workspace adjacent to the startup, the best comparator of the

workspace's fee simple property value would be a similarly situated vacant workspace, *not* the startup's workspace. Use of the vacant workspace as a comparator would ensure that the startup's success does not influence the assessment of the similar workspace's value.

As the above example shows, using *vacant* commercial property as a Tier II comparator can effectively exclude business performance from the appraised value because valuing vacant property necessarily "separat[es]" the "*value of the property itself* from the *value of the business* being conducted on it." *Matter of Target Corp.*, 410 P.3d 939, 944 (Kan. App. Ct. 2017) (emphases added); *see also Lowe's Home Centers, Inc. v. City of Grandville*, No. 317986, 2014 WL 7442250, at *5 (Mich. Ct. App. Dec. 30, 2014) (similar). So, using the sale of vacant property as a Tier II comparator can eliminate the risk that "business efforts" may be included in the comparator property's sale price, causing a higher appraisal price for the occupied target property.

Notably, per Section 70.32(1), assessors must *presume* that the appraisal of commercial property does *not* include value "attributable to the labor, skill, or business acumen" of the business that occupies the commercial property. *Walgreen*, 2008 WI at ¶ 63. Accordingly, "an assessor's task" under Section 70.32(1) "is to value the real estate, not the

business concern which may be using the property." *Waste Mgmt.*, 184 Wis. 2d at 565.[5]

C. The Court of Appeals concluded that using sales of "vacant" commercial property to value an occupied commercial property under the Tier II methodology is "a fundamental and overarching fatal flaw." Op. ¶ 37. In the Court of Appeals' view, a Tier II appraisal of occupied commercial property should generally not use the sale of vacant commercial property as a comparator, even if that vacant property is otherwise comparable to the occupied property in all other respects—its size, location, condition, and the like. *See* Op. ¶¶ 29–41. That conclusion contravenes Section 70.32(1)'s text, including because sales of otherwise-comparable, vacant commercial property most logically allow an assessor to disentangle the value of "business efforts" from "property" when completing a Tier II appraisal. *Supra* Part I.B.; *Walgreen*, 2008 WI 80, ¶34.

D. Further, the Court of Appeals' decision improperly gives assessors far greater discretion to raise the property tax bills than the Legislature authorized in Section 70.32(1), thereby usurping the Legislature's "power to determine the

[5] The only "narrow exception" to this "general rule" that Section 70.32(1) appraisals include only the value of "property" and not "a property's business value or income-producing capacity," *Walgreen*, 2008 WI 80, ¶¶ 34, 62, 63, is for a narrow class of "atypical" commercial properties, *Waste Mgmt.*, 184 Wis. 2d at 567, such as "landfills," *id.* at 567–71, and "a surface parking lot" near Milwaukee's General Mitchell International Airport, *Allright Props., Inc. v. City of Milwaukee*, 2009 WI App 46, ¶¶3, 46, 317 Wis. 2d 228, 767 N.W.2d 567.

appropriate methodology for valuing property for taxation." *Walgreen*, 2008 WI 80, ¶ 19. By improperly excluding sales of vacant commercial properties as valid Tier II comparators for occupied commercial property, the Court of Appeals' decision allows assessors to bypass Tier II more frequently by claiming that no proper comparators exist and jumping straight ahead to Tier III methodologies. *See* Op. ¶¶ 29–41. These Tier III methodologies, in turn, give assessors much wider berth to overestimate the actual market value of the relevant property, increasing taxes beyond what the Legislature expected. *See Waste Mgmt.*, 184 Wis. 2d at 556–57; *accord Walgreen*, 2008 WI 80, ¶ 65. This is why the Legislature *requires* assessors in Section 70.32(1) to use the Tier II method to the exclusion of any Tier III method whenever possible. *Waste Mgmt.*, 184 Wis. 2d at 556.

Letting assessors skip the Tier II method, in favor of Tier III flexibility, allows them to evade Section 70.32(1)'s strictures and punish successful businesses through overvaluation and over-taxation by improperly including "business efforts." Wis. Manufactures & Commerce, *5 "Dark Store" Myths Debunked* (Feb. 11, 2019).[6]

As explained above, the "general rule" that "business efforts" are *not* subject to property tax applies with full force here. *See Walgreen*, 2008 WI 80, ¶¶ 63, 82–86. Since this

[6] Available at https://www.wmc.org/news/press-releases/5-dark-store-myths-debunked/

restricts assessors from directly including the value of "business efforts" with their assessment powers, they developed an indirect way to tap into this value in an attempt to circumvent the Legislature's choices. *See* Wis. Manufactures & Commerce, *The Facts Are Clear: There is No "Dark Store" Loophole* (Apr. 3, 2019).[7] So, these assessors rebranded an ordinary, longstanding practice as a so-called "Dark Store Loophole" that allegedly lowered businesses' property taxes illegitimately. *See id.* Because they failed to persuade the Legislature to close this so-called "loophole" legislatively, *see* 2019 Wis. A.B. 146, *failed to pass* Apr. 1, 2020;[8] 2019 Wis. S.B. 130, *failed to pass* Apr. 1, 2020;[9] 2022 Wis. S.B. 1107, failed to pass Mar. 15, 2022;[10] *see* Resp'ts. Br. 27 n.10, they turned to the courts to evade Section 70.32(1). This Court should reject that gambit because the Legislature decides such policy matters for the State, *Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 539, 576 N.W.2d 245 (1998)—*especially* in the property tax realm, *Walgreen*, 2008 WI 80, ¶ 19.

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[7] Available at https://www.wmc.org/news/press-releases/the-facts-are-clear-there-is-no-dark-store-loophole/.

[8] Available at https://docs.legis.wisconsin.gov/2019/related/proposals/ab146.

[9] Available at https://docs.legis.wisconsin.gov/2019/proposals/sb130.

[10] Available at https://docs.legis.wisconsin.gov/2021/proposals/reg/sen/bill/sb1107.

II. Interpreting Section 70.32 To Tax "Business Efforts," In Addition To "Property," Results In Double Taxation—Especially For Big-Box Stores Using Common, Build-To-Suit Leases

Double taxation must be "avoided," unless the Legislature's "intention" to impose a double tax is "shown by clear and unequivocal language which leaves no doubt as to the legislative intent." *Ramrod, Inc. v. Wis. Dep't of Revenue*, 64 Wis. 2d 499, 513, 219 N.W.2d 604, 612 (1974) (citation omitted). This anti-double-taxation principle accords with the broader interpretive canon, recognized in *Walgreen*, that "taxation statutes" must be given a "strict construction." 2008 WI 80, ¶ 63. Here, the Legislature clearly and unequivocally provided in Section 70.32 that Wisconsin law does not permit the form of double taxation Respondents hope to impose.

The Court of Appeals' holding below contravenes this anti-double-taxation principle. The Court of Appeals' understanding of Wisconsin's property tax regime authorizes the double taxation of the "business efforts" of Wisconsin businesses. *Walgreen*, 2008 WI 80, ¶ 34. The first level of taxation comes from Wisconsin's sales tax regime, Wis. Stat. § 77.52(1) and its business income tax regime, *e.g.*, Wis. Stat. § 71.21—forms of taxation that straightforwardly target "business efforts," since a business's sales and income are *per se* its "business value" and "income-producing capacity," *Walgreen*, 2008 WI 80, ¶62. Under the Court of Appeals' decision, "business efforts" would be taxed twice—once through sales and income taxes, and again by increasing the

property's appraised value by the value of its "business efforts." *Id.* ¶¶ 34, 62–63.

Big-box stores are particularly susceptible to this double taxation when they use the "build-to-suit" leasing agreements that are common in the industry. *See id.* ¶¶ 52, 61; *see generally* Lauren Thomas, *As Store Owners Sign More Short-Term Leases, Landlords Are Taking A Risky Bet On The Future Of Retail*, CNBC (Feb. 26, 2021).[11] Under these leases, big-box stores engage a developer to find a suitable location for a new store, who then constructs that store to suit their needs, often "pursuant to a uniform business model." *Walgreen*, 2008 WI 80, ¶ 6. Then, the big-box store leases the newly constructed store from the developer, paying "above market rent rates" to compensate the developer for its "financing, land acquisition, [and] construction" services. *Id.* ¶¶ 6, 61. In so doing, big-box stores risk an assessor relying on above-market-rent rates and appraising the newly built store at a higher value, as these rates give the appearance that the property's value is higher than the market would actually bear. *See id.* ¶¶ 64–66 (condemning this practice). But since such lease rates are just a "financing tool used by [these] companies to keep capital available for other core business purposes," *id.* ¶ 52, they merely reflect another form of "business effort[ ]" that an assessor cannot lawfully include

[11] Available at https://www.cnbc.com/2021/02/26/retailers-sign-more-short-term-leases-in-a-risky-bet-for-mall-owners.html.

in a property tax appraisal, *id.* ¶ 34—meaning an assessor's erroneous inclusion of them in an appraisal causes the exact double taxation problem described above.

Thus, upholding the Court of Appeals' decision would allow appraisers to contravene the Legislature's conscious policy choice to prevent double taxation of businesses by not including business success in property tax assessments. If Respondents prefer a different tax system, that policy decision must come from the Legislature, not this Court.

CONCLUSION

This Court should reverse the judgment of the Court of Appeals.

Dated: March 16, 2022

Respectfully submitted,

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CERTIFICATION BY ATTORNEY

I hereby certify that this Nonparty Brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a Nonparty brief produced with a proportional serif font. The length of this brief is 2,824 words.

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