No. 2015AP1858

In the Supreme Court of Wisconsin

VOTERS WITH FACTS, PURE SAVAGE ENTERPRISES, LLC, WISCONSIN THREE, LLC, 215 FARWELL LLC, DEWLOC, LLC, LEAH ANDERSON, J. PETER BARTL, CYNTHIA BURTON, CORINNE CHARLSON, MARYJO COHEN, JO ANN HOEPPNER CRUZ, RACHEL MANTIK, JUDY OLSON, JANEWAY RILEY, CHRISTINE WEBSTER, DOROTHY WESTERMANN, JANICE WNUKOWSKI, DAVID WOOD, *and* PAUL ZANK,
PLAINTIFFS-APPELLANTS-PETITIONERS,

v.

CITY OF EAU CLAIRE *and* CITY OF EAU CLAIRE JOINT REVIEW BOARD,
DEFENDANTS-RESPONDENTS

On Appeal from the Eau Claire County Circuit Court, The Honorable Paul J. Lenz, Presiding, Case No. 2015CV175

NON-PARTY BRIEF OF THE STATE OF WISCONSIN IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Other Authorities

INTRODUCTION

Plaintiffs seek to invalidate a common feature of Wisconsin's tax-increment financing ("TIF") law: cash grants paid to developers to help finance projects that promote economic development. Although Plaintiffs incorrectly assert that cash grants only appeared under Wisconsin's TIF law in 2003, these grants have been a feature of TIF development in Wisconsin since the law was enacted in 1975 and have never been thought to be constitutionally suspect. If this Court were to accept Plaintiffs' unprecedented attack on these grants, this would imperil numerous projects critical to Wisconsin's economic growth, including the Village of Mount Pleasant's recent agreement with Foxconn Technology Group.

STATEMENT OF INTEREST

The Attorney General, through the Department of Justice, has the authority to "appear for the state" in all matters, "civil or criminal," before the Wisconsin Supreme Court "in which the state is interested." Wis. Stat. § 165.25(1). Where the constitutionality of a law is at stake, as in the present attack upon the TIF law's cash grant aspects, the Attorney General is "entitled to be heard." Wis. Stat. § 806.04(11); *see also State v. City of Oak Creek*, 2000 WI 9, ¶ 35, 232 Wis. 2d 612, 605 N.W.2d 526. In addition, the Department of Revenue and the Department of Administration are involved in implementing the TIF law. *See, e.g.*, Wis. Stat. § 66.1105(18)(d); *id.* § 66.1105(20)(ce).

STATEMENT

A. Municipalities around the country regularly use tax-increment financing to forward important development goals. *See* Richard Briffault, *The Most Popular Tool: Tax Increment Financing And The Political Economy Of Local Government*, 77 U. Chi. L. Rev. 65, 65 (2010). A TIF district begins when a municipality designates land as a "tax increment district" ("TID"). *See Sigma Tau Gamma Fraternity House Corp. v. City of Menomonie*, 93 Wis. 2d 392, 396, 288 N.W.2d 85 (1980). The municipality calculates the value of the taxable property within the TID, which becomes the "tax incremental base." *Id.* "In the years following the creation of the district," the municipality taxes the property within the TID, and the tax proceeds "over and above" the proceeds from "the tax incremental base" are "deposited into a special fund to be used to pay for the costs of the project[s] undertaken" within the TID. *Id.* at 397. The TID usually runs until "the city completely recovers its costs or until the expiration of" a term of years. *Id.* Once the TID ends, the tax proceeds from the property's "entire assessed valuation—base value and increment"—become available "for [ ] general purposes." Briffault, *supra*, at 68.

Cash grants in the form of payments to developers, pursuant to terms of developer agreements, are an important feature of TIF-based development. Municipalities regularly issue some cash grants before they collect revenue from the tax increment, especially for larger projects. Briffault, *supra*,

at 67–68. These payments can come in a lump-sum, up-front amount, to "jumpstart[ ] the development process." *Id.*

B. The Legislature enacted Wisconsin's TIF law in 1975, Wis. Stat. § 66.46 (1975–76); Laws of Wis. ch. 105 (1975), https://goo.gl/66Z2y8, and amended it to its current form, Wis. Stat. § 66.1105, in 2003, *see* Legislative Fiscal Bureau, *Tax Increment Financing: Informational Paper 17*, p. 1 (Jan. 2017), https://goo.gl/wzCXsL (hereinafter "LFB 2017 Report"). The Legislature authorized TIFs for the "public purpose [of] improving and otherwise promoting the[ ] health, safety, welfare, and prosperity" "of the people of this state." 1975 Chapter 105, § 1(2)–(3).

Wisconsin's TIF law grants municipalities "any powers necessary and convenient to carry out [its] purposes." Wis. Stat. § 66.1105(3). This includes the authority to "[c]reate tax incremental districts," *id.* § 66.1105(3)(a), by the municipality holding a public hearing, *id.* at § 66.1105(4)(a); drawing the TID and identifying eligible property, *id.* § 66.1105(4)(b)–(c); "[p]repar[ing] and adopt[ing]" a project plan, which must include the "proposed public works or improvements" in the TID, the "project costs," and the "methods of financing," *id.* § 66.1105(4)(d),(f); and holding additional hearings and votes, *see id.* § 66.1105(4)(e), (g), (gm), (gs). Once a municipality creates a TID, it can "[e]nter into any contracts or agreements" "determined . . . to be necessary or convenient to implement the [plan's] provisions and effectuate [its] purposes." *Id.* § 66.1105(3)(e).

The TIF statute defines broadly the permissible "project costs" that a municipality can bear; that is, the "expenditures" that a municipality can make or the "monetary obligations" it can incur "within a tax incremental district." Wis. Stat. § 66.1105(2)(f)1.a. Examples include "[c]apital costs" (like the cost of constructing "new buildings"); "[f]inancing costs"; "[p]rofessional service costs" (like "costs incurred for architectural" services); "[r]elocation costs"; and "[p]ayments made, in the discretion of the local legislative body, which are found to be necessary or convenient to the creation of tax incremental districts or the implementation of project plans." *Id.* § 66.1105(2)(f)1.a–p. Municipalities may pay for these costs by issuing "tax incremental bonds and notes," *id.* § 66.1105(3)(c), (9)8, by issuing other types of bonds, *id.* § 66.1105(9)3–4, 6–8, 10, or by simply using "its general funds," *id.* § 66.1105(9)2.

Most relevant for purposes of this case, "cash grants" to private developers have *always* been part of the definition of "eligible project costs" under Wisconsin's TIF law, well before the recent change in the TIF law in 2003. Rebecca Boldt, Wis. DOR's Comment On Proposed Changes To TIF Law, p. 9 (Nov. 6, 2003), https://goo.gl/ePHc9G. In 1975, as today, the law defined "project costs" broadly as "[p]ayments . . . found to be necessary or convenient to the creation of tax incremental districts or the implementation of project plans," and the law empowered municipalities to "[e]nter into *any contracts* . . . determined . . . to be necessary or convenient . . .

to implement the provisions and effectuate the purposes of project plans." Wis. Stat. § 66.46(2)(f)9, (3)(e) (1975–76) (emphasis added). While records of older developer agreements can be difficult to obtain, municipalities clearly made such grants under Wisconsin's TIF law before 2003. *See, e.g.*, App. 45–46 ($5 million cash grant in 2002); City of Milwaukee, *Milwaukee TID Project Summaries*, https://goo.gl/hEVKUM (same); App. 58 ($9.4 million cash grant in 1999); *Milwaukee TID Project Summaries*, https://goo.gl/hEVKUM (same); App. 60, 66, 69 (cash grant in 1995). In 2003, the Legislature added a *limitation* on "[c]ash grants made by the city to owners, lessees, or developers of land" by requiring the recipient to first "sign[ ] a development agreement with the city." Wis. Stat. § 66.1105(2)(f)2.d; 2003 Wis. Act 126, § 3. Contrary to Plaintiffs' assertions, Opening Br. 43, this change did not authorize cash grants in any way, but merely *limited* the circumstances when they could be paid.

Wisconsin municipalities regularly and successfully utilize tax-increment financing. *See* Wis. DOR, *TID Annual Report* (2016), https://goo.gl/KPgfuU (listing annual TID reports of hundreds of Wisconsin municipalities, with a combined total of over 1,000 "active TIDs"); LFB 2017 Report 23–24. In 2016, the incremental value of all property within TIDs increased by $17 billion over the base value, and the annual rate of value growth for property within a TID since 2011 (i.e., post-recession) has been higher than the rate of

value growth for all property. *See* LFB 2017 Report 25; *see generally* Wis. DOR, *2017 TIF Value Limitation Report* (Aug. 9, 2017), https://goo.gl/TCBheJ. For example, in Verona's TID #7—where Epic is located—the value of the district's previously undeveloped land increased to $393 million, and the TID closed in 2016 with an estimated $21.2 million surplus; that is, the tax increment exceeded the actual project costs by this amount. Jeff Glaze, *Verona Prepares To Cash Out Epic Systems TIF District For Estimated $21.2M*, Wis. State J., April 27, 2016, https://goo.gl/8xbN1j; *see also* League of Wisconsin Municipalities, *TIF Success Stories*, https://goo.gl/srczK9.

Mount Pleasant is creating a TID with cash grants for Foxconn. *See* App. 1. Foxconn will invest "$10 billion" to build an "advanced display manufacturing campus," which is "expected to create 13,000 new jobs in the region." Press Release from Governor Scott Walker, *Agreement Provides Incentives To Support State's Largest Economic Development Project While Protecting Interests Of Wisconsin Taxpayers* (Nov. 10, 2017), https://goo.gl/FBn6hQ; *see generally* 2017 Wis. Act 58; Aug. 2017 Special Session Assembly Bill 1. The developer agreement between Foxconn and Mount Pleasant includes multiple cash grant payments. *See* App. 14–15, 44.

ARGUMENT

I. Cash Grant Payments Under Wisconsin's TIF Law Comply With The Uniformity Clause

A. The Uniformity Clause provides that "[t]he rule of taxation shall be uniform." Wis. Const. art. VIII, § 1. Relevant here, the Clause requires a direct property tax to attach to only one "constitutional class" of property, to impose an identical tax rate for all property within that class, and to exempt absolutely from taxation any property not within the class. *Sigma Tau*, 93 Wis. 2d at 411 (quoting *Gottlieb v. Milwaukee*, 33 Wis. 2d 408, 424, 147 N.W.2d 633 (1967)).

This Court has held that the Uniformity Clause prohibits laws that "partially exempt particular property" from taxation, *Gottlieb*, 33 Wis. 2d at 425–26 (citation omitted), or provide "exemption[s] from [property] taxation or [property] tax credit[s]," *Sigma Tau*, 93 Wis. 2d at 412. Thus in *Gottlieb*, this Court invalidated a law that "fr[o]ze" rates on some commercial property while allowing rates to rise on others. 33 Wis. 2d at 429, 432. Similarly, in *State ex rel. Follette v. Torphy*, 85 Wis. 2d 94, 108, 270 N.W.2d 187 (1978), this Court invalidated a law that paid a property-tax "rebate . . . to certain [residential] property owners" who improved their property, which rebate was calculated by "multiplying the full value tax rate . . . by the improvement assessment on the property," Wis. Stat. § 79.25(2) (1977–78). In classifying the law as an improper tax rebate, the *Torphy* Court found important that the law was "stated to be a 'tax relief' statute"

that gave "tax credits" to "offset increased property taxes," and that the law was "integrated to the property tax process" because the "local taxing authority" had to provide "assessment figures necessary to calculate the credits." 85 Wis. 2d at 105.

This Court's caselaw makes clear that the Uniformity Clause does not restrict the payment of funds to those who happen to be property-tax payers, and prohibits only "exemption[s] from [property] taxation or [property] tax credit[s]." *Sigma Tau*, 93 Wis. 2d at 412. This conclusion follows from the text of the Uniformity Clause, which only requires "[t]he *rule of taxation*" to be "uniform," Wis. Const. art. VIII, § 1 (emphasis added), and does not govern the spending of tax revenue or other public funds, *see* Rule, *Black's Law Dictionary* (10th ed. 2014) ("an established and authoritative standard or principle"); Taxation, *Black's*, *supra* ("The imposition or assessment of a tax; the means by which the state *obtains the revenue* required for its activities." (emphasis added)). That is why this Court explained that the Uniformity Clause "does not apply to the distribution of . . . tax revenues to pay for government and public improvements." *Torphy*, 85 Wis. 2d at 107; 65 Op. Att'y Gen. 202, 205 (1976). Other States are in accord under their own state-law uniformity clauses. *See* Resp. Br. 26 n.8 (collecting cases); Briffault, *supra*, at 75 n.54 (even more).

Consistent with these controlling principles, this Court in *Sigma Tau* upheld Wisconsin's TIF law against a "fac[ial]

and as applied" uniformity challenge. 93 Wis. 2d at 396. The TIF law does not partially exempt any property from taxation, and so does not have a "disproportionate impact upon taxpayers" because "[a]ll taxpayers within the . . . local governmental unit," whether they reside inside or outside a TID, "continue to be taxed at a uniform rate." *Id.* at 411–12. Further, any spending authorized by the law is lawful under the Uniformity Clause because it does not "single[ ] out" any taxpayers "for preferential treatment" with the provision of "a [property] tax credit." *Id.* at 412.

B. Consistent with this Court's conclusion in *Sigma Tau* that Wisconsin's TIF law complies with the Uniformity Clause, this Court should reject Plaintiffs' core argument that TIDs that "involve cash grants to property-tax-paying owners" violate the Uniformity Clause. Reply Br. 7. Notably, Wisconsin's TIF law at the time of *Sigma Tau* permitted such grants, *see supra* p. 5, and this Court gave no indication that those payments were constitutionally problematic.

A cash grant under Wisconsin's TIF law does not violate the Uniformity Clause because such a payment involves the *expenditure* of public funds, pursuant to an agreement between the developer and the municipality, and is not *any* form of "exemption from taxation or a tax credit." *Sigma Tau*, 93 Wis. 2d at 412. The cash grants are not denominated as "tax credits" to "offset increased property taxes." *See Torphy*, 85 Wis. 2d at 105. Nor are they "integrated to the property tax process" such that the "local taxing authority" has to

provide numbers "necessary to calculate the credits." *See id.* Instead, they are typically in predetermined dollar amounts, unrelated to the amount of property tax.

Notably, the State and its Department of Administration and Department of Revenue are not aware of any cash grants in TIF projects that involve an "exemption from taxation or a tax credit." *Sigma Tau*, 93 Wis. 2d at 412. To take just the most prominent, recent example, Mount Pleasant's grants to Foxconn are in fixed cash values, $10 million a year, and do not provide any tax exemption or tax credit. *See* App. 14–15, 44.

In all, cash grants under Wisconsin's TIF law are lawful under the Uniformity Clause because they involve money payments to developers, pursuant to development agreements, not any form of tax exemption or tax credit requiring involvement from local taxing authorities. No "taxpayers owning equally valuable property [a]re required to pay disproportionate amounts *of taxes*." *Sigma Tau*, 93 Wis. 2d at 412 (emphasis added).

C. Plaintiffs' argument that cash grants are "unconstitutional tax rebate[s]," Opening Br. 43, 45, whenever developers who receive those grants *also* happen to pay property taxes is contrary to the Uniformity Clause's text and this Court's caselaw. The Clause only applies to the "[t]he rule of taxation," Wis. Const. art. VIII, § 1, and does not govern cash payments from the public fisc. A property-tax rebate, in turn, is "[a] *return* of a part of a payment, serving

as a discount or a reduction." Rebate, *Black's*, *supra* (emphasis added); *see also* Tax Rebate, *Black's*, *supra* ("tax refund," defined as "[m]oney that a taxpayer overpaid and is thus returned by the taxing authority"). Cash grants in Wisconsin do not *return* any property tax payment that the developer has made; rather, they are typically in fixed dollar amounts, negotiated with the developer, and—as far as the State has been able to determine—never "hinge[ ]" on the amount of the "property tax" bill. *See Gottlieb*, 33 Wis. 2d at 426. Nor are "local taxing authorit[ies]" involved to determine the amount of the payment. *See Torphy*, 85 Wis. 2d at 105.

Notably, Plaintiffs' apparent theory of the Uniformity Clause—that *any* cash payment made by a public entity to anyone who also happens to pay *any* property taxes is unconstitutional—would threaten numerous expenditures under other state programs. Wisconsin, like every other State, has enacted many spending programs designed to promote the public good, ranging from cash payments to needy families, Wis. Stat. § 49.19(1)(c)1, (5)(a), to scholarships for deserving students, Wis. Stat. § 36.27(3). Unsurprisingly, the Legislature does not disqualify property-tax payers from receiving any such payments. Those programs comply with the Uniformity Clause because they are not "hinged" on any "property tax," *Gottlieb*, 33 Wis. 2d at 426, and the same logic applies to cash grants under Wisconsin's TIF law.

II. Cash Grant Payments Under Wisconsin's TIF Law That Encourage Economic Development Comply With The Public-Purpose Doctrine

Under the Wisconsin Constitution, the State may only spend tax revenues "for a public rather than a private purpose." *Sigma Tau*, 93 Wis. 2d at 412. The identification and pursuit of public purposes belongs, first and foremost, to the Legislature, and judicial intervention is reserved for only acts "so obviously designed in all [their] principal parts to benefit private persons and so indirectly or remotely to affect the public interest." *Town of Beloit v. Cnty. of Rock*, 2003 WI 8, ¶ 27, 259 Wis. 2d 37, 657 N.W.2d 344.

Cash grants under the TIF law that are designed to promote economic development satisfy the public-purpose doctrine because they "promot[e] [ ] the general welfare." *Town of Beloit*, 259 Wis. 2d 37, ¶ 32. The Legislature enacted the TIF law for this purpose—to "improv[e] and otherwise promot[e]" the "welfare" and "prosperity" of the State. Laws of Wis. ch. 105, § 1(2)–(3) (1975). And furthering economic opportunity for the public remains the aim of Wisconsin TIFs, including those with cash-grant provisions. For example, Foxconn is expected to create 13,000 jobs in the region, *see supra* p. 6, which is certainly in the public interest.

As a result, a municipality engaging in tax-increment financing to promote economic development satisfies the public-purpose doctrine. *See* Laws of Wis. ch. 105, § 1(2)–(3) (1975); LFB 2017 Report 8 (all TIF project costs must "directly

relate to the elimination of blight or directly serve to rehabilitate or conserve the area or to promote industrial development"); *see Sigma Tau*, 93 Wis. 2d at 405–06.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Dated this 5th day of December, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 2,906 words.

Dated this 5th day of December, 2017.

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MISHA TSEYTLIN
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CERTIFICATE 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 certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 5th day of December, 2017.

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