STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2018AP1133

DARRELL KLEIN,
RICHARD MITCHELL,
LINDA MITCHELL and
SCOTT BRETTING,

Plaintiffs-Respondents,

v.

THE WISCONSIN
DEPARTMENT OF
REVENUE and RICHARD
CHANDLER, SECRETARY,

Defendants-Appellants.

INTERLOCUTORY APPEAL FROM A
NON-FINAL ORDER ENTERED BY THE
ASHLAND COUNTY CIRCUIT COURT, THE
HONORABLE JOHN M. YACKEL, PRESIDING

# APPELLANT'S OPENING BRIEF AND APPENDIX

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## INTRODUCTION

This property tax case seeking monetary and mandamus relief against the Wisconsin Department of Revenue (DOR) should not have survived summary judgment. The plaintiffs here—four property owners who reside in the Town of Sanborn ("Plaintiffs")—seek money from DOR based on a disputed decision by local Sanborn officials not to tax certain tribal-owned property in the town. But sovereign immunity bars monetary relief against the State and state agencies. Plaintiffs have never identified a sovereign immunity waiver or any other valid reason for why their monetary claims can proceed against DOR. The circuit court therefore erred by granting summary judgment to Plaintiffs without even mentioning sovereign immunity.

The circuit court erred at summary judgment in two other important ways. First, a state statute does not provide a cause of action to private individuals unless it expressly says so. Plaintiffs argue that DOR violated various state statutes and thereby injured them, but they have never identified a statute that mentions a private right of action. The circuit court ignored this problem and granted summary judgment to Plaintiffs on their state law claims anyway. Those claims should have been dismissed.

Second, the circuit court erroneously allowed Plaintiffs' mandamus claim against DOR to proceed. They seek an order compelling DOR to investigate and discipline local tax officials for failing to follow DOR's property tax guidance. But DOR must necessarily use its discretion when deciding how best to exercise those powers. Because discretionary powers are not subject to mandamus, this claim also should not have survived summary judgment.

The circuit court erred as a matter of law on each of these three issues, and so its order should be reversed and summary judgment should be granted to DOR.

## ISSUES PRESENTED

1. Does sovereign immunity bar Plaintiffs' claims against DOR for monetary relief, where Plaintiffs identified no waiver nor any other exception to sovereign immunity recognized by Wisconsin law?

The circuit court did not expressly address this question, but this Court should answer yes.

2. Does Plaintiffs' failure to identify a private right of action in the state statutes they accuse DOR of violating prevent them from asserting such claims against DOR?

The circuit court did not expressly address this question, but this Court should answer yes.

3. Must Plaintiffs' mandamus claims fail, since they all concern DOR's discretionary powers to investigate and discipline local property tax officials?

The circuit court did not expressly address this question, but this Court should answer yes.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Because resolving this appeal requires applying well-established legal principles to undisputed facts, neither oral argument nor publication is necessary.

## STATEMENT OF THE CASE

### I. Statement of facts.

This appeal turns entirely on questions of law, but a brief history of the underlying dispute will help place the legal issues in context. These facts were undisputed below; the parties only dispute whether they can support Plaintiffs' claims against DOR as a matter of law.

### A. In 2007, the Town of Sanborn stopped taxing tribal-owned land on the Bad River tribe's reservation.

In response to a federal court decision, *Keweenaw Bay Indian Community v. Naftaly,* 452 F.3d 514 (6th Cir. 2006), the Town of Sanborn ("Sanborn") resolved in 2007 to stop assessing property taxes on land owned by members of the Bad River Band of the Lake Superior Chippewa Tribe (the "Bad River" tribe). (A-App. 139–40 (Complaint ¶¶ 18, 19, 23).) *Keweenaw Bay* held that the State of Michigan could not tax fee simple property owned by the Keweenaw Bay Chippewa tribe or its tribal members within that tribe's reservation, since the land was allotted to the tribe pursuant to an 1854 federal treaty that prohibited taxation. *Id.* at 525.

Sanborn officials, based on their reading of *Keweenaw Bay*, concluded that the same 1854 federal treaty meant that all land allotted to Bad River tribal members within municipal boundaries could not be subjected to local property taxes. (R. 19:2.) Accordingly, Sanborn decided to remove all such property from its tax roll. (R. 19:2.) No evidence indicates that DOR directed Sanborn to take this action or otherwise knew about it in advance.

Separately from Sanborn's 2007 decision, DOR issued guidance to municipalities about how to apply the *Keweenaw Bay* decision to different categories of Native American property. (A-App. 140–42 (Complaint ¶¶ 21, 22, 24, 33); R. 89:1–2, 13–16.) DOR ultimately published the following state-wide guidance in its Wisconsin Property Assessment Manual:[1]

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[1] The Wisconsin Property Assessment manual implements DOR's statutory duty under Wis. Stat. § 73.03(2a) to "prepare and publish . . . assessment manuals" that "discuss and illustrate accepted assessment methods, techniques and practices with a

> On February 8, 1887, Congress enacted the General Allotment Act which applies to all Wisconsin tribes. Under that Act, real property that an individual Native American owns on a reservation in fee simple is subject to property tax. However, due to certain language in the Treaty of 1854, real property located within the reservation boundary of Bad River, Lac Courte Oreilles, Lac du Flambeau, and Red Cliff Chippewa bands is exempt if:
>
> - It was allotted before February 8, 1887 under that Treaty,
> - It is owned in fee simple by the tribe or tribal members, and
> - There has been no conveyance of the land to nontribal members since it was first allotted under the 1854 Treaty. For example, if the land had been exempt under the provisions of the 1854 Treaty, but was then sold to a nontribal member, the land would lose its exemption and be subject to property tax. Even if the land was later repurchased by an 1854 Tribe, the land would remain subject to property tax.
>
> Assessors should review tax roll information at the Municipality and County along with ownership information at the Register of Deeds office. The information will assist in determining if a property has changed ownership, was subject to property tax, and remains subject to property tax even though re-purchased by an 1854 Tribe.

(R. 88:7–8.)

Plaintiffs' core complaint is that Sanborn's 2007 decision not to tax property owned by Bad River tribal members conflicted with this DOR guidance and that DOR failed to fix the problem. (*E.g.* A-App. 141, 143 (Complaint ¶¶ 25–26, 38).) DOR's guidance required Sanborn to

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view to more nearly uniform and more consistent assessments of property at the local level."

individually analyze each parcel to determine its taxability status; Sanborn's blanket approach, however, removed all tribal-owned property from taxable status without applying DOR's case-by-case criteria.

DOR did not decide whether any specific Sanborn properties were taxable, collect taxes on them, or hear challenges to their taxable status. Instead, local Sanborn officials had those responsibilities. *See* Wis. Stat. §§ 70.045, 70.05, 70.10, 70.50. This division of labor reflected Wisconsin's decentralized system of property tax administration, whereby each municipality assesses and collects its own taxes guided by state law and the Wisconsin Property Assessment Manual. *See* Wis. Stat. § 73.03(2a).

### B. In 2015, DOR declined to order a reassessment of all Sanborn properties, but it worked with Sanborn's assessor to address Plaintiffs' concerns.

On June 15, 2015, Plaintiffs petitioned DOR under Wis. Stat. § 70.75 to order a DOR-supervised reassessment of all Sanborn properties. (R. 90:1–3.) That statute allows property owners to challenge property tax assessments in their town:

> The owners of taxable property in any taxation district . . . whose property has an aggregate assessed valuation of not less than 5 percent of the assessed valuation of all of the property in the district . . . , may submit to the department of revenue a written petition concerning the assessed valuation of their property. . . .

Wis. Stat. § 70.75(1)(a)1. After considering the petition, DOR uses its discretion to decide whether to order a town-wide reassessment:

> [I]f the department finds that the assessment of property in the taxation district is not in substantial compliance with the law and that the interest of the

> public will be promoted by a reassessment, the department may order a reassessment of all or of any part of the taxable property in the district . . . .

*Id.*

In their petition, Plaintiffs argued that Sanborn had improperly failed to tax certain tribal-owned properties, and thus that Sanborn's assessments were not in "substantial compliance with the law" under Wis. Stat. § 70.75(1)(a)(1). (R. 90:1–3.) On August 19, 2015, Plaintiffs received a hearing before DOR officials and presented evidence. (R. 90:4.) Exercising its statutory discretion, DOR decided that ordering a reassessment of all Sanborn properties would not serve the public interest. (R. 90:4.) Plaintiffs did not appeal DOR's decision.

Plaintiffs' counsel continued corresponding with DOR officials, arguing that Sanborn continued to misapply DOR's property tax guidance. (R. 90:5–14.) DOR responded that it had been working with Sanborn's new assessor to address Plaintiffs' concerns. (R. 90:15.)

Specifically, DOR had asked Sanborn's assessor in April 2016 to "review each parcel" in Sanborn for its taxability status, a project that was to be completed by 2018. (R. 88:11–12.) In June, July, and October of 2016, DOR gave further guidance to Sanborn's assessor on how to address Sanborn's property tax issues. (R. 88:13–16.)

## II. Procedural history.

### A. Plaintiffs challenge their tax assessments before Sanborn's town board and appeal to the circuit court in a certiorari action.

At the end of 2015, Plaintiffs paid their 2015 property taxes under protest and served claims on the Sanborn Board of Review for excessive and unlawful taxation, which the Board denied. (R. 87:27–28 (Pls.' Resp. to Interrog.

Nos. 33–34).) Plaintiffs' challenges arose under Wis. Stat. §§ 74.35 and 74.37, both of which provide statutory procedures for taxpayers to dispute their property taxes. Wisconsin Stat. § 74.35 provides a procedure for the "[r]ecovery of unlawful taxes," while Wis. Stat. § 74.37 allows claims arising from excessive property assessments. Both statutes provide for a tax refund remedy "against the taxation district . . . which collected the tax." Wis. Stat. §§ 74.35(2)(a), 74.37(2)(a).

Plaintiffs appealed the Board's denial of their claims through a certiorari proceeding in Ashland County Circuit Court, *Bretting v. Town of Sanborn Board of Review*, No. 16-cv-30 (Wis. Cir. Ct. Ashland Cty.). (R. 87:28 (Pls.' Resp. to Interrog. No. 35).) The circuit court agreed with Plaintiffs, deciding that Sanborn lacked authority for its 2007 decision to remove property owned by Bad River tribal members from Sanborn's tax roll. (R. 90:21–24.) The court ordered Sanborn's Board of Review to resume taxing all properties affected by Sanborn's 2007 decision, unless property owners presented evidence of nontaxability under the DOR guidance excerpted above. (R. 90:22–23.) The circuit court's certiorari decision was not appealed.

### B. Plaintiffs separately sue Sanborn officials and DOR in the case underlying this appeal.

#### 1. Plaintiffs' claims.

While the certiorari case proceeded, Plaintiffs filed a separate complaint in Ashland County Circuit Court. (A-App. 134–62.) Plaintiffs' claims centered on one basic theory: that Sanborn improperly failed to tax property owned by Bad River tribal members, which caused Plaintiffs' property taxes to go up. Plaintiffs alleged that this conduct violated various constitutional provisions: (1) the Uniformity Clause of article VIII, section I of the Wisconsin Constitution

(A-App. 155, 158 (Compl. ¶¶ 97, 114)); (2) the due process and equal protection guarantees under the United States Constitution's Fourteenth Amendment and article I, section I of the Wisconsin Constitution (A-App. 156 (Compl. ¶ 104)); and (3) the prohibition against unlawful takings under the United States Constitution's Fifth Amendment and article I, section XIII of the Wisconsin Constitution (A-App. 157 (Compl. ¶ 105)).

In addition to suing entities and officials affiliated with the Town of Sanborn, Plaintiffs also sued DOR and its then-Secretary, Richard Chandler. Plaintiffs purported to assert claims under various state and federal statutes: (1) Wis. Stat. § 74.35's prohibition against unlawful taxation (A-App. 153 (Compl. ¶ 84)); (2) Wis. Stat. § 74.37's prohibition against excessive taxation (A-App. 153 (Compl. ¶ 83)); (3) Wis. Stat. §§ 73.03 and 73.06's requirements that DOR supervise and discipline local tax assessors (A-App. 155–56 (Compl. ¶ 98)); and (4) federal civil rights statutes, 42 U.S.C. §§ 1981–1983 and 1985 (A-App. 156–57 (Compl. ¶¶ 101–103, 106)). As relief, Plaintiffs sought a tax refund, damages, attorneys' fees, an injunction, and declaratory relief. (A-App. 160–61 (Compl. Prayer for Relief ¶¶ 1–11).)

### 2. The summary judgment decision.

Plaintiffs moved for summary judgment against DOR on three sets of claims (R. 76–77): (1) that DOR participated in a violation of the Wisconsin Constitution's Uniformity Clause; (2) that DOR breached a purported statutory duty to correct Sanborn's non-uniform taxation; and (3) that DOR breached a purported duty to command Sanborn's assessor to follow DOR's written property tax guidance. Plaintiffs also moved for a judgment that DOR owed them attorneys' fees they incurred both in this case and in the separate certiorari case.

DOR also moved for summary judgment. (R. 83–84.) It argued that sovereign immunity barred Plaintiffs' claims against it and that no state statute authorized Plaintiffs' money damages claims. DOR also argued that Plaintiffs' mandamus claims had to be dismissed because they involved DOR's discretionary powers.

The circuit court granted Plaintiffs' summary judgment motion. (A-App. 101–09.) As for DOR's motion, the circuit court did not explicitly address any of its arguments and instead implicitly rejected them by denying DOR's motion.[2] (A-App. 109.)

On the Uniformity Clause claim, the court held that DOR was liable because it purportedly "had an obligation to take affirmative action to correct the illegal and non-uniform taxation scheme in . . . Sanborn and failed to do so." (A-App. 107 (Order ¶ 2).)

The court also held that DOR violated various state statutes. First, it found that DOR violated Wis. Stat. § 73.03 by (1) "failing to exercise general supervision of the administration of the assessment laws;" (2) "failing [to] direct proceedings, actions and prosecutions to enforce the laws relating to . . . assessment and taxation of property;" and (3) "failing to cause complaints to be made against assessors, members of boards of review or other taxing officers." (A-App. 107 (Order ¶¶ 3–5).) Second, it found that DOR violated Wis. Stat. § 73.06 by "failing to supervise and direct the work of the local assessor" and failing to "bring the omitted property in . . . Sanborn to the attention of the local assessor and, if the assessor neglected or refused to correct the assessment, to report that fact to the board of review." (A-App. 107–08 (Order ¶¶ 6–7).) Third, the court held that

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[2] The circuit court granted summary judgment in Secretary Chandler's favor based on his lack of personal involvement and dismissed all claims against him. (A-App. 106, 109.)

DOR "failed to supervise and failed to test the work of the assessors in violation of Wis. Stat. §§ 70.32(1) and 73.03." (A-App. 107 (Order ¶ 5).)

The court further concluded that Plaintiffs were entitled to attorneys' fees they incurred in both this case and the separate certiorari case. (A-App. 108 (Order ¶¶ 8–9).)

With these liability theories resolved against DOR, the circuit court now intends to hold a damages trial. (A-App. 109 (Order ¶ 5).)

## STANDARD OF REVIEW

When reviewing the circuit court's decision on cross-motions for summary judgment, this Court "review[s] the disposition of such motions de novo, applying the same methodology the circuit courts apply." *Am. Family Mut. Ins. Co. v. Cintas Corp. No. 2*, 2018 WI 81, ¶ 9, 383 Wis. 2d 63, 914 N.W.2d 76. This Court will "reverse a decision granting summary judgment if either (1) the trial court incorrectly decided legal issues, or (2) material facts are in dispute." *Official Comm. of Unsecured Creditors of Great Lakes Quick Lube LP v. Theisen*, 2018 WI App 70, ¶ 25, 384 Wis. 2d 580, 920 N.W.2d 356.

## ARGUMENT

### I. The circuit court erred by ignoring DOR's sovereign immunity.

It is black-letter law in Wisconsin that sovereign immunity bars monetary relief against the State and state agencies. A narrow exception exists when the State has expressly waived its sovereign immunity, but that never happened here. Plaintiffs' monetary claims, like their request for attorneys' fees, cannot evade this roadblock.

### A. Sovereign immunity bars suits against the State and state agencies.

Sovereign immunity for Wisconsin and its agencies is enshrined in article IV, section 27 of the Wisconsin Constitution: "The legislature shall direct by law in what manner and in what courts suits may be brought against the state." This constitutional provision means that "the State cannot be sued without its consent." *PRN Assocs. LLC v. Wis. DOA*, 2009 WI 53, ¶ 51, 317 Wis. 2d 656, 766 N.W.2d 559. "If the legislature has not specifically consented to the suit, then sovereign immunity deprives the court of personal jurisdiction over the State." *Id.* ¶ 51. *See also German v. Wis. DOT*, 2000 WI 62, ¶ 17, 235 Wis. 2d 576, 612 N.W.2d 50 ("It is axiomatic that the state cannot be sued without the express consent of the legislature."); *Metzger v. Wis. Dep't. of Taxation,* 35 Wis. 2d 119, 131, 150 N.W.2d 431 (1967) ("Well established in Wisconsin is the principle that in the absence of express legislative permission the state may not be subjected to suit."); *State ex rel. Martin v. Reis,* 230 Wis. 683, 685, 284 N.W. 580 (1939) ("[I]t is an established principle of law that no action will lie against a sovereign state in the absence of express legislative permission.").

Sovereign immunity also bars suits against state agencies, just as it bars suits against the State, itself. *Mayhugh v. State*, 2015 WI 77, ¶ 13, 364 Wis. 2d 208, 867 N.W.2d 754 ("[F]or purposes of sovereign immunity, an action against a state agency or board is deemed an action against the state."). Similarly, "[a] proceeding against a state officer in his official capacity is a suit against the state." *Appel v. Halverson*, 50 Wis. 2d 230, 235, 184 N.W.2d 99 (1971). And "[w]hen an action is in essence one for the recovery of money from a state, the state is the real substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants."

*Lister v. Bd. of Regents of Univ. Wis. Sys.*, 72 Wis. 2d 282, 292, 240 N.W.2d 610 (1976) (citation omitted).

### B. Sovereign immunity defeats Plaintiffs' claims against DOR for monetary relief.

By granting summary judgment against DOR on Plaintiffs' state law claims and denying DOR's request for summary judgment on Plaintiffs' federal claim under 42 U.S.C. § 1983, the circuit court failed to properly apply sovereign immunity. Neither the circuit court's oral ruling nor its written order even mentioned sovereign immunity. This mistake of law resulted in reversible error.

Although the Wisconsin Legislature may waive the State's sovereign immunity, Plaintiffs never identified such a waiver—because none exists. Likewise, 42 U.S.C. § 1983—Plaintiffs' only federal cause of action—did not abrogate the State's sovereign immunity. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) ("We cannot conclude that § 1983 was intended to disregard the well-established immunity of a State from being sued without its consent."). Since no waiver has occurred, Plaintiffs' federal and state claims against DOR for monetary relief cannot proceed.

Plaintiffs have tried a few different ways to get around sovereign immunity, none of which succeed.

#### 1. Sovereign immunity bars constitutional claims seeking monetary relief from the State.

In responding to DOR's petition for leave to appeal, Plaintiffs repeated the same misunderstanding of sovereign immunity on which they have relied throughout this litigation. They asserted, without any support, that "[sovereign] immunity does not apply for violations of the state and federal constitutions or for a failure to fulfill non-discretionary statutory obligations." (Pet. Resp. 3.) But

Plaintiffs have never cited a single Wisconsin case that stands for this proposition. That is unsurprising because accepting it would upend Wisconsin's long-standing sovereign immunity jurisprudence. Simply put, the only exception to sovereign immunity from damages is when the Legislature has waived it, and no such waiver exists here.

Plaintiffs' mistake seems to stem from their view that accepting DOR's position would eliminate all remedies for the constitutional violations they allege. That assertion is neither legally relevant nor factually correct.

First, legally, that is not the right question—immunity does not rise and fall on whether someone can recover money some other way. "If there are inequities resulting from the doctrine of sovereign immunity, it is the sole function of the legislature to act, not the courts." *Erickson Oil Prod., Inc. v. State*, 184 Wis. 2d 36, 54, 516 N.W.2d 755 (Ct. App. 1994).

Second, Plaintiffs are wrong that they would lack a remedy if sovereign immunity is applied. Plaintiffs could still seek prospective equitable relief against state officials. *See PRN Assocs.*, 317 Wis. 2d 656, ¶ 55 ("[S]overeign immunity does not bar a suit for a declaratory ruling that an individual state official or agency has violated a statute when there is an anticipatory or preventative purpose for the ruling . . . ." (emphasis omitted) (quoting *Brown v. State*, 230 Wis. 2d 355, 382, 602 N.W.2d 79 (Ct. App. 1999))). Moreover, Plaintiffs could (and did) sue local Sanborn officials, who do not enjoy sovereign immunity. *See Umansky v. ABC Ins. Co.*, 2008 WI App 101, ¶ 38, 313 Wis. 2d 445, 756 N.W.2d 601, *aff'd*, 2009 WI 82, 319 Wis. 2d 622, 769 N.W.2d 1 ("Unlike the State, municipal bodies are not protected by sovereign immunity . . . ."). Sovereign immunity does not block all remedies Plaintiffs seek, just monetary recovery from DOR.

Two cases from this Court demonstrate how, in property tax disputes like this one, sovereign immunity bars monetary claims against DOR but allows such claims against local officials. In *Town of Eagle v. Christensen*, 191 Wis. 2d 301, 529 N.W.2d 245 (Ct. App. 1995), the plaintiffs argued that local assessors and DOR officials violated the Uniformity Clause through their practices for classifying property. One town's assessor classified untilled agricultural land as residential while the neighboring town's assessor did not. *Id.* at 309–310. The plaintiffs alleged that this disparity caused them to "pay[ ] a disproportionate share of property taxes." *Id.* at 309. That claim is effectively identical to Plaintiffs' claims here—that they paid a disproportionate share of Sanborn's property taxes due to the Town's decision not to tax tribal-owned properties.

This Court held that sovereign immunity did not bar claims against DOR, but only "*because damages [were] not being sought from the state.*" *Id.* at 320 (emphasis added). Only claims for equitable relief could proceed: "The complaint alleges that the state officers are acting in violation of the constitution and certain statutes, thus injunctive and declaratory relief are appropriate and are not precluded by sovereign immunity." *Id. Town of Eagle* therefore disproves Plaintiffs' theory that they can obtain monetary relief from DOR simply because they allege constitutional violations.

This Court reached a similar result in *Manitowoc Co. v. City of Sturgeon Bay*, 122 Wis. 2d 406, 362 N.W.2d 432, (Ct. App. 1984). There, the plaintiffs claimed that the City of Sturgeon Bay improperly assessed taxes on certain property and sued the city for a refund; they also sued DOR seeking a declaratory judgment. This Court explained that the claims against DOR could proceed because the state "is entitled to invoke its sovereign immunity only when an action is in essence for the recovery of money from the state." *Id.* at 412. Since the "tax refund actions . . . [sought] recovery from

Sturgeon Bay" and "only the city [was] liable for an erroneous classification," sovereign immunity allowed the declaratory judgment claim against DOR to proceed. *Id.* at 412. Just like in *Town of Eagle*, claims for money could proceed against local officials and entities—who do not enjoy sovereign immunity—but only prospective equitable claims could proceed against DOR.

This case is not meaningfully different from *Town of Eagle* or *Manitowoc Co.* Just like in those cases, sovereign immunity means that Plaintiffs cannot assert claims against DOR for monetary relief. But that result does not leave Plaintiffs without a remedy—monetary claims remain available against local entities who do not enjoy sovereign immunity.

### 2. Pleading a due process claim does not defeat DOR's sovereign immunity.

Reprising their mistaken theory that pleading a constitutional violation entitles them to monetary relief from DOR, Plaintiffs have also relied on two inapposite federal due process cases involving state taxes. But this argument again confuses prospective equitable relief with monetary relief. Sovereign immunity sometimes permits the former, but never the latter (absent express consent by the Legislature). Neither federal case contradicts this black-letter rule in Wisconsin.

First, Plaintiffs have cited a 1971 federal district court case from the Middle District of Alabama, *Weissinger v. Boswell*, 330 F. Supp. 615 (M.D. Ala. 1971). Of course, a single 50-year old decision from an Alabama federal district court does not change the black-letter law in Wisconsin. In any event, *Weissinger* does not support Plaintiffs' position. The case allowed a due process claim to proceed against the Alabama Department of Revenue, but only for prospective equitable relief—not money damages. The plaintiffs sought "a permanent injunction . . . ordering [the defendant] to take

whatever affirmative steps are necessary to equalize the assessment of all like taxable property in the state." *Id.* at 619. The court granted the injunction, giving the state "one year . . . to bring assessments throughout the state into conformity" with the order. *Id.* at 625. Nowhere does the case mention the word "damages," let alone hold that alleging a due process violation somehow defeats a state's sovereign immunity.

Second, Plaintiffs relied on *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, Department of Business Regulation of Florida*, 496 U.S. 18 (1990), but that case also differs in key respects. In *McKesson*, the State of Florida collected a liquor excise tax that exempted certain products made with Florida-grown crops. *Id.* at 22–24. The Florida supreme court held that the scheme improperly discriminated against out-of-state products under the Commerce Clause. *Div. of Alcoholic Beverages & Tobacco, Dep't of Bus. Regulation v. McKesson Corp.*, 524 So. 2d 1000, 1009 (Fla. 1988). The state court enjoined future enforcement of the tax, but it declined to award retrospective tax refunds to the plaintiffs. *Id.* at 1009–10.

The United States Supreme Court reversed the decision to deny refunds of the invalid tax. *McKesson*, 496 U.S. at 22. It reasoned that denying refunds violated due process: "When a State . . . require[es] [taxpayers] to pay first before obtaining review of the tax's validity, federal due process principles . . . require the State's postdeprivation procedure to provide a 'clear and certain remedy,' for the deprivation of tax moneys in an unconstitutional manner." *Id.* at 51 (citation omitted).

*McKesson* does not apply here for at least two reasons.

First, it does not apply where, as here, the state is not the tax collector. *McKesson* held only that the State of Florida had to "refund[ ] to petitioner the difference between the tax it paid and the tax it would have been assessed" absent the

constitutional violation. 496 U.S. at 40. That is not a *damages* remedy against some other entity that did not collect the challenged tax—it is a *refund* remedy against the entity that collected the unlawful tax. *McKesson* thus means that states must provide a refund mechanism when *the state itself* collects unlawful taxes. This case is different: Sanborn, not DOR, assessed and collected the property taxes here.

Second, and in any event, Wisconsin law provides the "clear and certain" refund mechanism that was missing in *McKesson*. Plaintiffs could—and did—pursue statutory refund remedies against local Sanborn officials under Wis. Stat. §§ 74.35 and 74.37. (A-App. 152–53 (Complaint ¶¶ 80–84).) Plaintiffs have never explained why these statutory refund remedies against Sanborn—the entity that collected their property taxes—are inadequate. Any such argument would fail, anyway, because the Wisconsin Supreme Court has called these Wis. Stat. ch. 74 procedures "detailed and comprehensive" methods of challenging property tax assessments. *Hermann v. Town of Delavan*, 215 Wis. 2d 370, 382, 572 N.W.2d 855 (1998). Those clear and certain refund mechanisms also explain why *McKesson* does not apply here.

Here, the proper entity for a refund action under *McKesson* would be the Town of Sanborn, not DOR. No one disputes that Sanborn, not DOR, collected Plaintiffs' property taxes. Therefore, even if Wisconsin law did not create an adequate refund remedy, *McKesson* would ensure one existed against Sanborn, not DOR.

### 3. The Uniformity Clause does not waive the State's sovereign immunity.

Plaintiffs have also cited *Zinn v. State*, 112 Wis. 2d 417, 437 (1983), which held that the Wisconsin Constitution waives the State's sovereign immunity for Takings Clause claims. They have argued that *Zinn* allows their Uniformity

Clause claim to escape sovereign immunity. But *Zinn* does not mention the Uniformity Clause and has never been applied to such a claim—for good reason.

The two constitutional provisions differ in a key way. The Takings Clause reads, "[t]he property of no person shall be taken for public use *without just compensation therefor*." Wis. Const. art. 1, § 13. The express requirement of "just compensation" explains why, for Takings Clause claims, "[t]he 'waiver' to the doctrine of sovereign immunity is found in the constitution itself." *Zinn,* 112 Wis. 2d at 437. But no "just compensation" requirement—or anything comparable—exists in Uniformity Clause. Instead, the Uniformity Clause says simply that "the rule of taxation shall be uniform." Wis. Const. art. VIII, § 1. Because the Uniformity Clause does not expressly entitle taxpayers to monetary compensation for non-uniform taxation, it does not waive the State's sovereign immunity like the Takings Clause does.

This Court endorsed this exact analysis in *Grall v. Bugher*, 181 Wis. 2d 163, 171, 511 N.W.2d 336 (Ct. App. 1993), *rev'd on other grounds*, 193 Wis. 2d 65, 532 N.W.2d 122 (1995). There, the plaintiffs alleged that DOR imposed a sales tax that violated the Uniformity Clause. They sued DOR to recover the challenged sales tax, but the Court held that sovereign immunity barred the suit. The *Grall* plaintiffs cited *Zinn* and argued that the Uniformity Clause waived the State's sovereign immunity. This Court rejected the argument, explaining that "[t]here is nothing in [the uniformity] clause even remotely authorizing suits against the state under the circumstances presented here." *Id.* at 172. This Court explained that *Zinn* and the Takings Clause are distinguishable, because, unlike the Uniformity Clause, the "express terms" of the Takings Clause "provide[ ] for compensation." *Id.*

Although the supreme court reversed this Court's opinion in *Grall*, the reversal did not turn on *Grall*'s sovereign

immunity analysis. Instead, the sales tax statute at issue was amended after this Court's decision, which required reconsideration due to the amendment. 193 Wis. 2d 65, 66–68, 532 N.W.2d 122 (1995). This Court's sovereign immunity analysis in *Grall* remains persuasive authority—and it is undoubtedly correct under the Wisconsin Constitution.

#### 4. Plaintiffs abandoned any Takings claim; further, it would not evade sovereign immunity.

Plaintiffs pleaded a Takings Claim but then failed to pursue it before the circuit court and failed to respond to DOR's request for summary judgment on it. Then, they made no mention of the Takings Claim in their response to DOR's petition for leave to appeal. A party that fails to pursue a claim abandons it, and that claim should not be considered further in this litigation. *See Santiago v. Ware*, 205 Wis. 2d 295, 312 n.10, 556 N.W.2d 356 (Ct. App. 1996) (a claim is abandoned by a "failure to offer argument or evidence to support it").

Although the claim need not be addressed at all, DOR notes that Plaintiffs abandoned the claim for good reason: it had no merit, as a matter of law. First, "a valid takings claim [must] include allegations of affirmative government action." *Fromm v. Vill. of Lake Delton*, 2014 WI App 47, ¶ 23, 354 Wis. 2d 30, 847 N.W.2d 845. In *Fromm*, this Court held that a town's "failure to act on . . . information" about potential floods "[could not] form the basis for [the plaintiff's] takings claim." *Id.* ¶ 23. Plaintiffs theory here is that DOR failed to act on information about alleged disparate taxation in Sanborn, which cannot support a takings claim for the same reason as in *Fromm*.

Second, the United States Supreme Court holds that "[i]t is beyond dispute that '[t]axes . . . are not "takings."'

*Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2600 (2013); *see also A. Magnano Co. v. Hamilton*, 292 U.S. 40, 44 (1934) (taxing power of state or federal government not considered a taking under the Fifth or Fourteenth Amendments). The Wisconsin Supreme Court recognized this rule in *Northwestern Lumber Co. v. Wisconsin Tax Commission*, 202 Wis. 372, 231 N.W. 865 (1930). There, a company argued that the Wisconsin Tax Commission violated the Takings Clause by denying a depletion allowance for certain assets. *Id.* at 383. But the court held that the Commission's "method . . . cannot constitute an unconstitutional taking of the taxpayer's property." *Id.* Here, too, neither the method Sanborn used to tax Plaintiffs' property, nor the fact that other towns may have used different methods, can support a takings claim against anyone, including DOR.

Third, Plaintiffs' property was not "taken" for public use. Only two kinds of government action can constitute a taking: "(1) 'an actual physical occupation' of private property or (2) a restriction that deprives an owner 'of all, or substantially all, of the beneficial use of his property.'" *E-L Enters., Inc. v. Milwaukee Metro. Sewerage Dist.*, 2010 WI 58, ¶ 22, 326 Wis. 2d 82, 785 N.W.2d 409 (citation omitted). The second type requires a "legally imposed restriction upon the property's use." *Eberle v. Dane Cty. Bd. of Adjustment*, 227 Wis. 2d 609, 622, 595 N.W.2d 730 (1999) (citation omitted). Neither type of taking occurred here. DOR never physically occupied Plaintiffs' property. Nor has there been a "legally imposed restriction" on Plaintiffs' use of their property, just a property tax—and taxes are not takings.

### C. Sovereign immunity defeats Plaintiffs' request for attorneys' fees.

The circuit court also erred by holding that DOR is liable for Plaintiffs' attorneys' fees incurred both in this case

and in their parallel certiorari case (to which DOR was not even a party). Sovereign immunity means that "attorney's fees . . . may not be taxed against the state without express statutory authorization." *Wis. DOT v. Wis. Pers. Comm'n*, 176 Wis. 2d 731, 736, 500 N.W.2d 664 (1993). To overcome this bar, a "statute [must] expressly authorize[ ]" the fees against the relevant state entity. *Id.* at 736. Statutory language is "strictly construed" against allowing the fees, "construe[ing] any uncertainties in favor of the State." *State v. Detert-Moriarity*, 2017 WI App 2, ¶ 12, 373 Wis. 2d 227, 890 N.W.2d 588.

Plaintiffs have never identified any express statutory authorization for attorneys' fees against DOR. Instead, they have cited two common law doctrines that sometimes allow for fees against private parties where a statute does not expressly provide for them. That effort cannot succeed because a common law doctrine is not, by definition, express statutory authorization.

First, Plaintiffs have cited the common law "private attorney general" doctrine. Under that narrow doctrine, "[w]here an individual is acting to enforce the public's rights, an award of attorneys' fees to a prevailing party may be recoverable because to fully enforce those guaranteed rights 'assistance of counsel is fundamental.'" *Hartman v. Winnebago Cty.*, 216 Wis. 2d 419, 433 n. 8, 574 N.W.2d 222 (1998) (citation omitted). But no Wisconsin case has ever used the "private attorney general" doctrine to award fees against the State or a state agency. That is unsurprising. This court-created doctrine cannot supply what is missing here: express statutory consent for fees by the Legislature.

Plaintiffs have also invoked the so-called "*Weinhagen* rule," which they say allows them to recover attorneys' fees from DOR derived from a separate certiorari action, *Bretting, et al. v. Town of Sanborn Board of Review*, Ashland County Case No. 16-CV-30. That argument also fails because, like the

private attorney general doctrine, this court-created doctrine does not supply the Legislature's required statutory consent to fees. That explains why no Wisconsin case has ever applied *Weinhagen* to allow a party to recover fees from the State or a state agency.

Plaintiffs also have cited Wis. Stat. § 783.04, which provides remedies for mandamus actions. It cannot save their fee request, either. First, as explained below, Plaintiffs' mandamus claim fails as a matter of law. Second, no fees could be imposed against a state entity under the statute, even if mandamus were appropriate.

The statute provides that "[i]f judgment be for the plaintiff, the plaintiff shall recover damages and costs." *Id.* Because that language does not expressly mention either attorneys fees or the State, it does not provide the "express[ ] authoriz[ation]" required for fees against DOR. *Wis. Pers. Comm'n*, 176 Wis. 2d at 736. To the extent any uncertainty exists in that language, it must be construed in DOR's favor to disallow fees. *See Detert-Moriarity*, 373 Wis. 2d 227, ¶ 12. And, as with the two common law doctrines above, no reported cases have held that this statute allows attorneys' fees against state entities.

* * *

Plaintiffs' various arguments against sovereign immunity have no basis in Wisconsin law. Courts uniformly dismiss claims against state agencies for monetary relief absent an express waiver of sovereign immunity. No waiver exists here, and so DOR is entitled to summary judgment on Plaintiffs' claims for monetary relief. The circuit court's error on this dispositive issue should be reversed.

## II. The circuit court also erred by assuming that state law creates a private right of action against DOR.

Applying sovereign immunity defeats all of Plaintiffs' monetary claims against DOR. A second, related, reason also requires dismissal of those claims resting on state law: Plaintiffs never identified a valid state law cause of action against DOR. Although the circuit court's order is unclear, it seemed to hold that at least one provision in Wis. Stat. §§ 70.32(1), 73.03, or 73.06 can support a private damages action against DOR. (A-App. 107–08.) That is incorrect.

"For a rule or statute to form a basis for civil liability, expression of legislative intent is necessary that the section become a basis for such liability." *Fortier v. Flambeau Plastics Co., a Div. of Flambeau Corp.*, 164 Wis. 2d 639, 658, 476 N.W.2d 593 (Ct. App. 1991). "[C]lear provisions for state action without corresponding provisions for private action are strong evidence of the absence of legislative intent to create a private right of action." *Grube v. Daun*, 210 Wis. 2d 681, 691, 563 N.W.2d 523 (1997). Likewise, "a statute that does not itself create a civil liability, 'but merely makes provision to secure the . . . welfare of the public . . . is not subject to a construction establishing a civil liability.'" *Deegan v. Jefferson County*, 188 Wis. 2d 544, 559, 525 N.W.2d 149 (Ct. App. 1994) (citation omitted).

Much like Plaintiffs' failure to identify a sovereign immunity waiver anywhere in Wis. Stat. ch. 70 or 73, they also cannot identify any express private right of action in those statutes. The provisions on which Plaintiffs rely give DOR the powers and duties of supervising (Wis. Stat. §§ 73.03(1)–(2), 73.06(1)), investigating (Wis. Stat. §§ 73.03(5g) and (9)–(12), 73.06(3)), and prosecuting (Wis. Stat. § 73.03(3)–(4)) local officials regarding their property tax practices. Likewise, Wis. Stat. § 70.32(1) places

a duty on local assessors to follow DOR's property tax guidance.

But these provisions simply give DOR powers and impose certain duties on it. None of them mention civil liability against DOR for failing to carry out those powers and duties, let alone expressly allow taxpayers to sue DOR for damages based on such alleged failures. Since all the state statutes on which Plaintiffs rely empower DOR to further public welfare without also providing for private enforcement actions, the circuit court had no basis to assume that the statutes create private damages causes of action against DOR. This error of law also requires reversal.

## III. The circuit court erred by allowing Plaintiffs' mandamus claim to proceed.

By declining to grant summary judgment to DOR on Plaintiffs' mandamus claim, the circuit court erred again. A valid mandamus claim could empower a court to order a government actor to perform a duty, but only in exceptional circumstances that are not present here. Mandamus requires that "the duty sought to be enforced is positive and plain"; "[i]t is an abuse of discretion to compel action through mandamus when the duty is not clear and unequivocal and requires the exercise of discretion." *Law Enf't Standards Bd. v. Vill. of Lyndon Station*, 101 Wis. 2d 472, 493–94, 305 N.W.2d 89 (1981) (citations omitted); *see also State ex rel. Althouse v. City of Madison*, 79 Wis. 2d 97, 106, 255 N.W.2d 449 (1977) ("When the action sought to be compelled is discretionary, mandamus will not lie.").

Plaintiffs have never said what exactly they want DOR to do; their complaint simply requests a "[a] writ of mandamus compelling the Defendants to comply with their statutory obligations under all applicable statutes, including those applicable to WDOR pursuant to Chapter 73 of the Wisconsin Statutes . . . ." (A-App. 161 (Complaint, Prayer For

Relief ¶ 7).) However this request might be construed, it cannot support a mandamus claim against DOR.

To the extent Plaintiffs sought to compel *Sanborn* officials to place tribal-owned property back on Sanborn's tax roll, such a claim would run against Sanborn, not DOR. And, in any event, it is now moot. "An issue is moot 'when a determination is sought upon some matter which, when rendered, cannot have any practical legal effect upon a then existing controversy.'" *In re Mental Commitment of Christopher S.*, 2016 WI 1, ¶ 31, 366 Wis. 2d 1, 878 N.W.2d 109 (citation omitted). In the parallel certiorari case, the circuit court ordered that the Sanborn "Town Board of Review shall immediately instruct the Town of Sanborn assessor to tax all properties that stopped being taxed due to the [2007] Resolution." (R. 90:23 (Order ¶ 5).) No decision on a mandamus claim seeking that same relief in this case will have any practical effect.

As for Plaintiffs' vague request for an order directing DOR to comply with various provisions in Wis. Stat. ch. 73, that claim fails because all the duties Plaintiffs have identified are discretionary.

Although it is difficult to pin Plaintiffs down, their mandamus claim seems to rely on the same three buckets of state tax statutes as their purported damages claims: those related to DOR's supervisory powers (Wis. Stat. §§ 73.03(1)–(2), 73.06(1)); DOR's investigatory powers (Wis. Stat. §§ 73.03(5g) and (9)–(12), 73.06(3)); and DOR's prosecutorial powers (Wis. Stat. § 73.03(3)–(4)). But every one of these duties requires DOR to use discretion.

Wisconsin Stat. § 73.03(12), for example, empowers DOR to "carefully examine . . . all cases where evasion or violation of the laws for assessment and taxation of property is alleged." The exact nature of the contemplated "careful examination" is left to DOR. As part of its investigation, DOR

can, among other things, "summon witnesses to appear and give testimony, and to produce records . . . relating to any matter which the department shall have authority to investigate." Wis. Stat. § 73.03(9). Again, the statute leaves to DOR which witnesses to depose and which records to request. Depending on what DOR learns, it can "direct proceedings, actions and prosecutions to be instituted to enforce the laws relating to the . . . punishment of public officers . . . for failure or neglect to comply with the provisions of the statutes governing the return, assessment and taxation of property." Wis. Stat. § 73.03(3). But the statute does not say that DOR ever has an absolute duty to prosecute a local official.

The supreme court has squarely held that investigative and prosecutorial functions like these are discretionary and not subject to mandamus. In *State ex rel. Kurkierewicz v. Cannon*, 42 Wis. 2d 368, 378, 166 N.W.2d 255 (1969), *abrogated on other grounds by State v. Kenyon*, 85 Wis. 2d 36, 270 N.W.2d 160 (1978), the petitioner sought mandamus to compel a district attorney and coroner to investigate suspicious circumstances surrounding a death. The supreme court rejected the claim, explaining the broad discretion a prosecutor enjoys:

> [I]n [a district attorney's] functions as a prosecutor he has great discretion in determining whether or not to prosecute. There is no obligation or duty upon a district attorney to prosecute all complaints that may be filed with him. While it is his duty to prosecute criminals, . . . this does not per se require prosecution in all cases where there appears to be a violation of the law no matter how trivial.

*Kurkierewicz,* 42 Wis. 2d at 378. That broad discretion meant mandamus could not compel the investigation the petitioner sought. *Id.* at 384.

The supreme court expanded this principle to civil enforcement in *Vretenar v. Hebron*, 144 Wis. 2d 655, 424 N.W.2d 714 (1988). There, the petitioners sought

mandamus to force a town to civilly prosecute a local resident under municipal ordinances. The supreme court rejected this claim, too, explaining that "[t]he authority to prosecute has not been held to constitute a ministerial duty that would bring it within the purview of actions compellable by mandamus." *Id.* at 663. It declined to draw a meaningful distinction between the criminal prosecutorial authority of district attorneys and the civil authority of town boards, since "the prosecutorial duties are similar in that each is responsible for pursuing with discretion violations of laws under the office's jurisdiction." *Id.* at 664. Even a so-called "open and notorious" violation could not compel the town board to prosecute, since "[t]o hold otherwise would be tantamount to divesting a municipality of the discretion necessary for effective and efficient law enforcement." *Id.* at 665.

The same analysis applies here. Like district attorneys and town boards, DOR has the power to supervise, investigate, and discipline local tax officials, but that authority "does not per se require prosecution in all cases where there appears to be a violation of the law no matter how trivial." *Kurkierewicz*, 42 Wis. 2d at 378. And just as mandamus could not force the town board in *Vretenar* to enforce municipal ordinances—even against an "open and notorious" violation—mandamus cannot force DOR to enforce its property tax guidelines against local Sanborn officials, no matter the extent of their purported misconduct.

Examples of duties that can support mandamus further demonstrate why the statutes here cannot. In *Althouse*, petitioners sought to place a referendum on a city ballot after gathering enough signatures, and the city refused after concluding that the proposed ordinance was unconstitutional. 79 Wis. 2d at 102. But the relevant statute, Wis. Stat. § 9.20(4), gave city officials only two options: "The common council . . . shall . . . either pass the ordinance . . . or submit it to the electors at the next spring or general election."

*Id.* at 103. Because it had no other choice, mandamus could compel the city to pick one of those two options, despite the city's constitutional doubts. *Id.* at 119.

Similarly, in *State ex rel. North v. Goetz*, 116 Wis. 2d 239, 241, 342 N.W.2d 747 (Ct. App. 1983), the petitioner submitted a proposed ordinance to a city clerk, asking that it be given to the city council for consideration as directed by statute. Wisconsin Stat. § 9.20(3) provides that "[w]hen the . . . petition is found to be sufficient and the . . . ordinance or resolution is in proper form, the clerk shall . . . forward it to the common council or village board immediately." The clerk declined to forward the proposed ordinance, concluding that it did not cover proper subject matter for direct legislation. *Id.* This Court granted a mandamus petition, reasoning that the statute did not allow the city clerk to reject a proposal due to its subject matter; instead, the statute imposed a "mandatory, ministerial, nondiscretionary" duty to send the petition to the city council. *North,* 116 Wis. 2d at 244.

In these cases granting mandamus, the statutes at issue gave government officials clear direction, in the form of "*when this condition is met, you must take this specific action.*" That kind of clear directive is nothing like the discretionary, law enforcement-type duties at issue here, or those in *Kurkierewicz* and *Vretenar*. Unlike, for example, the clear choice in *Althouse* of either "pass[ing] the ordinance . . . or submit[ting] it to the electors at the next spring or general election," 79 Wis. 2d at 103, DOR's duties necessarily involve exercising judgment and discretion. Should it dedicate scarce agency resources to investigating the conduct of local assessors and examine reams of property tax documents? Which local officials should have been investigated or disciplined, if any? When? How aggressively? No statute provides a clear answer, and so Plaintiffs' mandamus claim must fail as a matter of law.

The circuit court's decision to let these mandamus claims proceed amounted to another reversible error.

## CONCLUSION

The circuit court's decision should be reversed and summary judgment entered in DOR's favor on all claims.

Dated this 17th day of April, 2019.

Respectfully submitted,

JOSHUA L. KAUL
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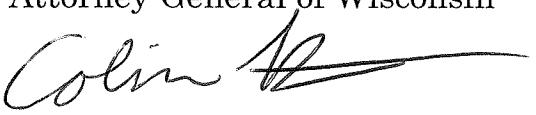

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## CERTIFICATION

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 8,100 words.

Dated this 17th day of April, 209.

COLIN T. ROTH
Assistant Attorney General

## CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 17th day of April, 2019.

COLIN T. ROTH
Assistant Attorney General

## APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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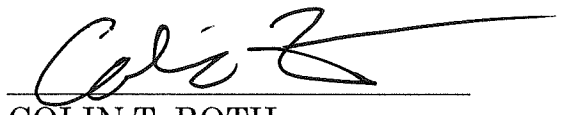

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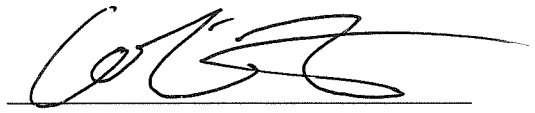

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