STATE OF WISCONSIN **CIRCUIT COURT**
DANE COUNTY **BRANCH 8**

For Official Use:

ANNIE LAURIE GAYLOR et al.,

Plaintiffs,

v.

THE CITY OF MADISON et al.,

Defendants.

Case No. 25CV173

DEFENDANT PRESBYTERIAN STUDENT CENTER FOUNDATION'S BRIEF IN SUPPORT OF MOTION TO DISMISS

Defendant Presbyterian Student Center Foundation moves this Court for an order dismissing Plaintiffs' Complaint with prejudice.

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INTRODUCTION AND SUMMARY

Defendant Presbyterian Student Center Foundation (Pres House) owns an apartment complex on the University of Wisconsin campus known as the Pres House Apartments. Since 2010, Pres House has benefited from the property tax exemption for student housing facilities under Wisconsin Statutes section 70.11(3m) (the Exemption). The Exemption is one of dozens of property tax exemptions authorized by section 70.11, covering everything from non-profit hospitals, to art galleries, to youth hockey associations, to a cranberry research station in Jackson County, among many others. *See* Wis. Stat. § 70.11(1)–(47). In addition to Pres House, at least three other student housing facilities have qualified for the Exemption, including the Lumen House Apartments (owned by Defendant St. Raphael's Congregation), the Babcock House, and the Association of Women in Agriculture (AWA) House. Compl. ¶¶ 28, 29.

Selectively homing in on only two of the Exemption's beneficiaries, Plaintiffs bring suit against Pres House and St. Raphael's Congregation. Plaintiffs allege that the Exemption violates the Uniformity Clause, the Equal Protection Clause, the Establishment Clause, and the Private Bill Clause. Plaintiffs' claims must be dismissed.

As a threshold matter, Plaintiffs lack standing. The individual Plaintiffs claim standing as taxpayers, but they fail to allege any unlawful expenditure—the *sine qua non* of taxpayer standing. Plaintiff Freedom from Religion Foundation (FFRF) alleges only hypothetical injury, which is insufficient under Wisconsin standing law.

On the merits, Plaintiffs fail to state a claim upon which relief can be granted. The Exemption is a lawful legislative determination that comports with the Wisconsin Constitution and well-established precedent interpreting it. At core, Plaintiffs

quibble with the Legislature's policy decisions on property tax exemptions. But "specific and limited property tax exemptions are based on a theory of mutual consideration: the public relieves an organization of its property tax burden when it provides a public benefit." *Univ. of Wis. Med. Found., Inc. v. City of Madison*, 2003 WI App 204, ¶ 11, 267 Wis. 2d 504, 671 N.W.2d 292 (citing *Int'l Found. of Employee Benefit Plans, Inc. v. City of Brookfield,* 95 Wis. 2d 444, 455, 290 N.W.2d 720 (Ct. App. 1980), *aff'd,* 100 Wis. 2d 66, 301 N.W.2d 175 (1981)). The Legislature has determined that the organizations benefiting from this Exemption "provide[ ] a public benefit." *Id.*; *see* Wis. Stat. § 70.11(3m)(a)3. To the extent Plaintiffs disagree with that legislative determination, their dispute properly lies with the Legislature.

Finally, the case should also be dismissed because Plaintiffs failed to join indispensable parties to this action: (1) the two non-religious organizations who benefit from the Exemption but whose very existence demonstrates the defective nature of many of Plaintiffs' claims, and (2) the Wisconsin Department of Revenue, the ultimate enforcer of all state tax laws including those pertaining to exemptions. Plaintiffs' exclusion of these parties creates a straw man, manifesting as a religious gloss over the case that does not belong; indeed, the subject statute has no religious references, and its beneficiaries include non-religious parties. Absent these necessary parties, this case should not proceed.

This Court should dismiss all of Plaintiffs' claims with prejudice.

LEGAL AND FACTUAL BACKGROUND

Plaintiffs challenge the constitutionality of the Exemption, § 70.11(3m)(a), a property tax exemption for student housing facilities. The Exemption provides, in relevant part:

> All real and personal property of a housing facility, not including a housing facility owned or used by a university fraternity or sorority, college fraternity or sorority, or high school fraternity or sorority, for which all of the following applies:
>
> 1. The facility is owned by a nonprofit organization.
>
> 2. At least 90 percent of the facility's residents are students enrolled at the University of Wisconsin-Madison and the facility houses no more than 300 such students.
>
> 3. The facility offers support services and outreach programs to its residents, the public or private institution of higher education at which the student residents are enrolled, and the public.
>
> 4. The facility is in existence and meets the requirements of this subsection on July 2, 2013, except that, if the facility is located in a municipally designated landmark, the facility is in existence and meets the requirements of this subsection on September 30, 2014.

The Exemption was created with 2009 Wis. Act 28, the 2009–10 biennial budget bill, signed into law by Governor Doyle. *See* 2009 AB 75; Compl. ¶ 18. In 2011, the Joint Finance Committee and the Legislature repealed the Exemption, but Governor Walker vetoed the repeal because it "would place a substantial financial burden on current and potential future student housing facilities at the University of Wisconsin–Madison that provide unique services to students attending the university, including scholarships for residents, student worship groups, and volunteer services

not available at university or commercial student housing facilities." Gov. Walker Veto Message, 2011 Wis. Act 32, at 22.[1]

In 2013, the Legislature amended the Exemption to exclude fraternities and sororities and to limit the Exemption to a facility that "is in existence and meets the requirements of this subsection on the effective date of this subdivision . . . , except that, if the facility is located in a municipally designated landmark, the facility is in existence and meets the requirements of this subsection on September 30, 2014." *See* 2013 Wis. Act 20, § 1278h. & i. This effectively sunset the Exemption.

The Exemption has been applied to at least four known organizations since its creation in 2009: the Pres House Apartments, the Lumen House Apartments, the Babcock House, and Association of Women in Agriculture (AWA) House. Compl. ¶¶ 28, 29.[2] Pres House, a church-affiliated organization in Madison, Wisconsin, owns the Pres House Apartments. *Id.* ¶ 16. St. Raphael's Congregation, operating under the Diocese of Madison, owns the Lumen House Apartments. *Id.* ¶ 17. Both organizations benefit from the Exemption—Pres House since 2010 and St. Raphael's Congregation since 2014. *Id.* ¶¶ 16–17. The Babcock House and AWA House are not religiously affiliated.

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[1] "Courts may take judicial notice of official state agency publications," *Theuer v. Lab. & Indus. Rev. Comm'n*, 2001 WI 26, ¶ 10 n.8, 242 Wis. 2d 29, 38, 624 N.W.2d 110 (citing Wis. Stat. § 902.03(1)(b)), as well as "state records that are available at the seat of government in Madison that are easily accessible," *State v. Wachsmuth*, 73 Wis. 2d 318, 331, 243 N.W.2d 410 (1976) (citation omitted).

[2] In its motion to dismiss brief, the City explains that there are a total of six beneficiaries of the Exemption—those listed above, plus two others (one non-religious and one religiously affiliated). *See* City Br. 3 n.1.

LEGAL STANDARD

"A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint." *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 19, 356 Wis. 2d 665, 849 N.W.2d 693 (2014) (citation omitted). "[T]he sufficiency of a complaint depends on [the] substantive law that underlies the claim made because it is the substantive law that drives what facts must be pled." *Id.* ¶ 31. A plaintiff is required to "allege facts that plausibly suggest they are entitled to relief." *Id*. The Court "[i]n determining whether a complaint sufficiently alleges a claim upon which relief may be granted, . . . accept[s] as true all facts pled and the reasonable inferences therefrom," but does not "accept as true any legal conclusions stated in the complaint." *Voters with Facts v. City of Eau Claire*, 2018 WI 63, ¶ 27, 382 Wis. 2d 1, 913 N.W.2d 131 (citing *Data Key Partners*, 356 Wis. 2d 665, ¶ 19). "Therefore, it is important for a court considering a motion to dismiss to accurately distinguish pleaded facts from pleaded legal conclusions." *Id.* (quoting *Data Key Partners*, 356 Wis. 2d 665, ¶ 19).

Where the constitutionality of a statute is challenged, it is the "duty of this court . . . if possible, to so construe the statute as to find it in harmony with accepted constitutional principles." *Gottlieb v. City of Milwaukee*, 33 Wis. 2d 408, 415, 147 N.W.2d 633 (1967) (quoting *State ex rel. Harvey v. Morgan*, 30 Wis. 2d 1, 13, 139 N.W.2d 585 (1966)). "All legislative acts are presumed constitutional, and every presumption must be indulged to sustain the law if at all possible." *Id.* (citing *State ex rel. McCormack v. Foley*, 18 Wis. 2d 274, 279, 118 N.W.2d 211 (1962); *Sch. Dist. No. 6 of City of Greenfield v. Marine Nat. Exchange Bank of Milwaukee*, 9 Wis. 2d 400,

403, 101 N.W.2d 112 (1960)). "This presumption of constitutionality is the strongest for tax statutes." *Nw. Airlines, Inc. v. Wisconsin Dep't of Revenue*, 2006 WI 88, ¶ 26, 293 Wis. 2d 202, 717 N.W.2d 280 (citing *Norquist v. Zeuske,* 211 Wis. 2d 241, 250, 564 N.W.2d 748 (1997)). Any doubt "must be resolved in favor of the constitutionality of a statute." *Id.* (citing *State ex rel. Thomson v. Giessel*, 265 Wis. 558, 564, 61 N.W.2d 903 (1953)); *see also Nw. Airlines, Inc.*, 293 Wis. 2d 202, ¶ 26 ("To overcome the presumption of constitutionality, the party challenging the statute must prove it unconstitutional beyond a reasonable doubt.") (citation omitted).

ARGUMENT

I. Plaintiffs lack standing.

As a threshold matter, all Plaintiffs lack standing. First, the individual Plaintiffs lack standing because they do not allege what's necessary for taxpayer standing. Second, FFRF lacks standing because its only alleged injury is hypothetical.

A. The individual taxpayer Plaintiffs lack standing.

Plaintiffs Annie Laurie Gaylor, Dan Barker, and David Peterson bring this action as residents and property owners in the City of Madison. They allege that they "have been paying higher property taxes, along with all other Madison property taxpayers, in part to make up for the unconstitutional omission of these properties from the City's tax rolls." Compl. ¶ 61. They further allege that they are "harmed by this unequal taxation because the Exemption results in the plaintiffs paying higher property taxes than they otherwise would if the exempt properties were returned to the property rolls." *Id.* ¶ 70. In short, these Plaintiffs allege standing as taxpayers.

The cornerstone of taxpayer standing is an alleged unlawful *expenditure* of taxpayer funds. Indeed, the Supreme Court's taxpayer standing cases "have always involved an alleged illegal *expenditure*." *Teigen v. Wisconsin Elections Comm'n*, 2022 WI 64, ¶ 163 & n.2, 403 Wis. 2d 607, 976 N.W.2d 519, *overruled on other grounds by Priorities USA v. Wisconsin Elections Comm'n*, 2024 WI 32, 412 Wis. 2d 594, 8 N.W.3d 429 (Hagedorn, J., concurring) (emphasis added) (citing several cases); *see Fabick v. Evers*, 2021 WI 28, ¶¶10–11, 396 Wis. 2d 231, 956 N.W.2d 856). Along those lines, the Court of Appeals just this year held that a plaintiff had taxpayer standing "to challenge any governmental actions leading to an *illegal expenditure* of taxpayer funds, so long as he can show some pecuniary loss in the form of the government's allegedly *unlawful expenditure*." *Wis. State Legislature v. Kaul*, 2025 WI App 2, ¶ 28 (emphases added) (citation omitted).

Plaintiffs do not allege any unlawful *expenditure* of taxpayer funds. They instead allege a failure to *tax*, or to *collect more funds*. But Plaintiffs do not have standing as taxpayers to litigate their policy-laden disagreement with the Exemption. They can cite no precedent for such an expansive view of taxpayer standing. Under their theory, any taxpayer could file suit to challenge any of the dozens of exemptions in section 70.11—just by virtue of being a taxpayer who believes it should pay lower taxes. The law does not support that. *See Vill. of Slinger v. City of Hartford*, 2002 WI App 187, ¶ 10, 256 Wis. 2d 859, 650 N.W.2d 81 ("A taxpayer does not have standing to challenge an ordinance merely because he or she disagrees with the legislative body."); *cf. Freedom from Religion Found., Inc. v. Lew*, 773 F.3d 815 (7th Cir. 2014)

(denying same plaintiffs standing, under federal standing law, in similar tax exemption case).

B. FFRF lacks standing.

FFRF, for its part, does not claim taxpayer standing. Instead, FFRF hinges its case for standing on an entirely hypothetical state of the world. But hypothetical standing flunks Wisconsin's test for standing.

"Under Wisconsin law, the standing of a party whose interest is challenged is determined by: (1) personal interest in the controversy; (2) injury or adverse effect; and (3) judicial policy that 'calls for protecting the interest of the party whose standing has been challenged.'" *Reetz v. Aurora Advocate Health, Inc.*, 2022 WI App 59, ¶ 7, 405 Wis. 2d 298, 983 N.W.2d 669 (quoting *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc.*, 2011 WI 36, ¶ 5, 333 Wis. 2d 402, 797 N.W.2d 789). "In order to have standing to bring an action for declaratory judgment, a party must have a personal stake in the outcome and must be directly affected by the issues in controversy." *Lake Country Racquet & Athletic Club, Inc. v. Vill. of Hartland*, 2002 WI App 301, ¶ 15, 259 Wis. 2d 107, 655 N.W.2d 189.

To have standing, a plaintiff must have "sustained, or will sustain, some pecuniary loss or otherwise will sustain a substantial injury to his or her interests. *Id.* ¶ 17. Critically, any alleged "injuries must be neither *hypothetical* nor *conjectural*." *Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶ 21, 402 Wis. 2d 587, 977 N.W.2d 342 (emphases added).

Here, FFRF's entire basis for standing is "hypothetical" and "conjectural." *Id.* FFRF does not allege any pecuniary loss. It does not allege any injury to its interests.

It does not, for instance, allege that it *qualifies for* but was unlawfully *denied* the Exemption. It does not allege that it *intends to* open student housing that would qualify for the Exemption. It does not allege that it has taken any affirmative step whatsoever to enter the student housing market.

Instead, FFRF's standing theory depends on a hypothetical state of affairs. Over and over, FFRF uses the subjunctive in its allegations, betraying a complete lack of any actual or remotely likely injury:

- "FFRF, unlike the Presbyterian Student Center Foundation or St. Raphael's Congregation, cannot benefit from the Exemption *if FFRF were to open apartments aimed at renting to students*." Compl. ¶ 14 (emphasis added).
- "FFRF is unable to ever qualify for the Exemption *if it were to* invest in rental properties aimed at renting to UW-Madison students." Compl. ¶ 62 (emphasis added).
- "Plaintiff FFRF is a nonprofit that cannot ever benefit from the Exemption *if it were to open* rental housing aimed at UW-Madison students." Compl. ¶ 80 (emphasis added).
- "FFRF is prevented from ever qualifying for the Exemption *if it were to open* rental properties aimed at serving atheist and agnostic students." Compl. ¶ 92 (emphasis added).

Yet nowhere does FFRF allege that it has taken even one single affirmative step toward opening or investing in student rental properties, that it has any actual intent to open or invest in student rental properties, or that the Exemption has affected it in any way whatsoever. FFRF's if-I-were-to-do-that conjecture cannot manufacture standing. *See also Hechimovich v. Acuity*, 2014 WI App 14, ¶ 23, 352 Wis. 2d 513, 842 N.W.2d 493 ("If the resolution of a claim depends on hypothetical or future facts, the claim is not ripe for adjudication and will not be addressed by this court."

(citation omitted)); *Schwittay v. Sheboygan Falls Mut. Ins. Co.*, 2001 WI App 140, ¶ 16, 246 Wis. 2d 385, 630 N.W.2d 772 (similar); *cf. Freedom from Religion Found.*, 773 F.3d 815 (denying same plaintiff standing, under federal standing law, in similar tax exemption case).

Because all Plaintiffs lack standing, the Court should dismiss the case.

II. Plaintiffs fail to state a claim for relief.

Even if Plaintiffs have standing, their Complaint still cannot proceed. All four of Plaintiffs' alleged bases for challenging the Exemption—the Uniformity Clause, the Equal Protection Clause, the Establishment Clause, and the Private Bill Clause—face insurmountable obstacles at the pleading stage. And if this Court were to grant the relief Plaintiffs ask for, it would violate the Free Exercise Clause of the First Amendment to the U.S. Constitution.

A. Plaintiffs fail to state a claim under the Uniformity Clause.

Plaintiffs' Uniformity Clause claim fails for the overarching reason that the Uniformity Clause does not prohibit property tax exemptions. So long as an exemption is complete, it is constitutionally permissible, and the Uniformity Clause has nothing to say. Only *partial* exemptions—that is, exemptions that are not truly exemptions, but instead relieve taxed properties from *part* of their tax obligation—face scrutiny. Here, Plaintiffs do not allege that the Exemption is partial. Their claim thus fails.

Drilling down, the relevant constitutional language "is simple: 'The rule of taxation shall be uniform . . . . Taxes shall be levied upon such property . . . as the legislature shall prescribe.'" *Gottlieb*, 33 Wis. 2d at 416 (quoting Wis. Const. art. VIII, §1). But the rule of uniformity kicks in only for those properties that are taxed *at all*.

To that end, even under the Uniformity Clause, "the legislature can classify as between property that is to be taxed and that which is to be wholly exempt." *Nw. Airlines, Inc. v. Wis. Dep't of Revenue*, 2006 WI 88, ¶ 62, 293 Wis. 2d 202, 717 N.W.2d 280 (quoting *State ex rel. Ft. Howard Paper Co. v. State Lake Dist. Bd. of Review,* 82 Wis. 2d 491, 506, 263 N.W.2d 178 (1978)). "The Uniformity Clause grants the legislature the right to select some property for taxation and to totally omit or exempt other property." *Id.* ¶ 66 (citing *Gottlieb*, 33 Wis. 2d at 420); *see also* Noga Ardon, *Property Tax Administration*, Legis. Fiscal Bureau Information Paper 17, at 2 (Jan. 2025) ("The uniformity clause has been interpreted to permit property tax exemptions as long as entire classes of property are exempted.").

To be sure, "[t]here cannot be any medium ground between absolute exemption and uniform taxation." *Gottlieb*, 33 Wis. 2d at 420. A taxing authority cannot, for instance, relieve certain properties from *part of*, but not *all of*, their tax obligation. That is the kind of *partial* exemption the Supreme Court held unenforceable in *Gottlieb*. But at no point do Plaintiffs here allege that the Exemption is partial. It is not: for properties like Pres House that qualify for the Exemption, they are *completely* exempt and pay no property tax. The Uniformity Clause allows for that.

Instead, under the Uniformity Clause, "[t]he only limitation upon the legislature's authority to exempt property is that the distinction between taxed and wholly exempt property must bear 'a reasonable relation to a legitimate purpose of government[.]'" *Nw. Airlines*, 293 Wis. 2d 202, ¶ 62 (quoting *Madison Gen. Hosp. Ass'n v. City of Madison,* 92 Wis. 2d 125, 129–30, 284 N.W.2d 603 (1979)). Plaintiffs allege that "there is no rational basis for exempting four Madison-specific majority UW-Madison student commercial rental properties from the property tax." Compl. ¶ 67.

The Exemption "bear[s] a reasonable relation to a legitimate purpose of government." *Nw. Airlines*, 293 Wis. 2d 202, ¶ 66 (quotation marks omitted). Indeed, the Exemption rationally and reasonably filled a gap in the property tax exemption laws. Apart from the Exemption, dorms on college grounds, fraternities and sororities, and religious or benevolent organizations are all already exempt under *other* exemptions. *See* Wis. Stat. § 70.11(3), (4). Yet without the Exemption, similar property operated by a nonprofit, religious, or benevolent organization that serves as a residence, but is not on college grounds, would otherwise be taxable.

It was rational for the Legislature to close that gap with the Exemption in 2009. The Legislature could have rationally believed that residences like Pres House, which exist to house students attending the state's flagship university, should be on the same footing as dorms on college grounds, fraternities, religious organizations, and the like. As the state's flagship university, UW-Madison attracts students from across the state, resulting in an inherently statewide impact of legislative policies targeted to UW-Madison and a corresponding "legitimate purpose" of ensuring the

University's flourishing. It is reasonable for the Legislature to have crafted an exemption for facilities housing those students and offering programming, outreach, and services, resulting in enhanced student outcomes and a long-term "positive impact on economic development" both in Madison and statewide. *Nw. Airlines*, 293 Wis. 2d 202, ¶ 64. The Exemption's beneficiaries increase the economic vitality of the city and state, boost community on and off campus, and reduce the strain on the state to provide such services.

Likewise, it was rational for the Legislature to sunset the Exemption in 2014. The Legislature could have rationally believed that the Exemption unduly diminished the City of Madison's tax base. The Legislature could have also rationally believed that extending the Exemption into the future indefinitely might create unwanted incentives or rental market distortions. None of these legislative goals is illegitimate; they are all rational, and the Exemption—both its creation and its sunset—easily pass constitutional muster.

Finally, the claim fails as a matter of law for an additional reason. Contrary to Plaintiffs' claim, the Exemption does not "treat[ ] specific church-affiliated" properties unequally: the Exemption contains no text about religious affiliation, and at least two non-religious properties (the Babcock House and the AWA House) benefit from the Exemption. There are precisely zero Plaintiffs in this lawsuit alleging that they qualify for the Exemption, but the City of Madison unlawfully denied it to them or otherwise assessed property using a non-uniform assessment methodology.

In sum, not only does the Uniformity Clause fail to regulate exemptions which alone disqualifies this claim, there is also no party alleging a lack of uniform assessment methodology in this case. This means "there is no argument that can prove beyond a reasonable doubt that the [Exemption] violates the Uniformity Clause." *Nw. Airlines*, 293 Wis. 2d 202, ¶ 65. "[E]very presumption must be indulged to uphold the law if at all possible," especially "where the challenged statute involves a tax measure[.]" *Id.* The Court should dismiss the claim.

B. Plaintiffs fail to state a claim under the Equal Protection Clause.

Plaintiffs' claim that the Exemption violates the Equal Protection Clause of the Wisconsin Constitution also fails as a matter of law.

At the outset, a party "seeking to challenge the constitutionality of a statute on equal protection grounds must demonstrate that the statute treats members of a similarly situated class differently." *Aicher ex rel. LaBarge v. Wis. Patients Comp. Fund*, 2000 WI 98, ¶ 56, 237 Wis. 2d 99, 613 N.W.2d 849. Therein lies a problem for Plaintiffs: none of them alleges that they are similarly situated to the Exemption's beneficiaries. Plaintiffs do not allege, for instance, that they either currently do or have any intent to own or operate student rental housing like the Pres House, St. Raphael's, the Babcock House, or the AWA House does. For this reason alone, Plaintiffs' claim fails.

But there is more. Even if Plaintiffs were similarly situated, they still could not prevail because "[s]tate tax classifications require only a rational basis to satisfy the Equal Protection Clause." *Nw. Airlines*, 293 Wis. 2d 202, ¶ 54. This is so because

"in taxation, even more than in other fields, legislatures possess the greatest freedom in classification." *Id.* (citation omitted).

Courts "will uphold a statute against an equal protection challenge if the classification bears a rational relationship to some legitimate government interest." *Madison Tchrs., Inc. v. Walker*, 2014 WI 99, ¶ 77, 358 Wis. 2d 1, 851 N.W.2d 337. "A legislative classification satisfies rational basis review if any conceivable state of facts could provide a rational basis for the classification." *Matter of Adoption of M.M.C.*, 2024 WI 18, ¶ 30, 411 Wis. 2d 389, 401, 5 N.W.3d 238 (quoting *State v. Alger*, 2015 WI 3, ¶ 50, 360 Wis. 2d 193, 858 N.W.2d 346). Courts are therefore "not limited to those grounds the legislature may have identified; rather, 'it is the court's obligation to locate or to construct, if possible, a rationale that might have influenced the legislature and that reasonably upholds the legislative determination.'" *Id.* (quoting *Sambs v. City of Brookfield*, 97 Wis. 2d 356, 371, 293 N.W.2d 504 (1980)).

The Exemption is "rationally related to a legitimate government interest." Under "any conceivable state of facts," recognizing that the "actual motivations of the" legislators enacting the Exemption are "irrelevant," *Madison Tchrs., Inc. v. Walker*, 358 Wis. 2d 1, ¶ 77, and in light of the court's "obligation to locate or construct . . . a rationale that might have influenced the legislature," *M.M.C.*, 411 Wis. 2d 389, ¶ 30, the Legislature "could have rationally concluded that a number of legitimate governmental purposes are advanced by exempting" such housing facilities. *Nw. Airlines*, 293 Wis. 2d 202, ¶ 57.

An explanation of the Legislature's rational basis is set forth at length above (at 12–14). Recognizing this basis requires dismissal of the Equal Protection claim.

C. Plaintiffs fail to state a claim under the Establishment Clause.

Plaintiffs allege that the Exemption violates Art. I, Section 18's requirement that "no 'preference' shall 'be given by law to any religious establishments or modes of worship[.]'" Compl. ¶ 87 (quoting Wis. Const. art. I, § 18). This provision of the Wisconsin Constitution is "Wisconsin's equivalent of the Establishment and Free Exercise Clause of the United States Constitution." *King v. Vill. of Waunakee*, 185 Wis. 2d 25, 52, 517 N.W.2d 671 (1994). The Court "interpret[s] and appl[ies] Art. I, sec. 18 in light of United States Supreme Court cases interpreting the Establishment Clause." *Id.* at 55 (citing *Am. Motors Corp. v. ILHR Dept.,* 93 Wis. 2d 14, 29, 286 N.W.2d 847 (Ct. App. 1979), *rev'd. on other grounds*, 101 Wis. 2d 337, 305 N.W.2d 62 (1981)).

Plaintiffs allege that the "Exemption, as amended, primarily benefits these two religious organizations that own the Pres House and Lumen House Apartments." Compl. ¶ 90. Plaintiffs further contend that a tax exemption for religion is equivalent to a government subsidy for religion.

Of course, the Exemption says nothing about religion, and half the Exemption's beneficiaries are non-religious.

But even setting that aside, well-settled precedent defeats this claim. Without doubt, religious use can be exempt from property taxes. *See Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 676 (1970) ("All of the 50 States provide for tax exemption of places of worship, most of them doing so by constitutional guarantees.").

"[T]here is no 'establishment of religion' involved in determining that a church or religious organization is entitled to a tax exemption." *Wis. Evangelical Lutheran Synod v. City of Prairie du Chien*, 125 Wis. 2d 541, 553–54, 373 N.W.2d 78 (Ct. App. 1985); *see also State ex rel. Reynolds v. Nusbaum*, 17 Wis. 2d 148, 159, 115 N.W.2d 761 (1962) (recognizing that Wis. Stat. § 70.11(4) exemptions do not violate the Wisconsin Constitution's Establishment Clause). This is because providing a tax exemption does not "connote[ ] sponsorship, financial support, and active involvement of the [government] in religious activity." *Id.* at 668. "The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state." *Walz*, 397 U.S. at 675; *see also Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 337 (1987) ("[W]e do not see how any advancement of religion achieved by the [exempt religious organization] can be fairly attributed to the Government, as opposed to the Church.").

Simply put, there is no law supporting Plaintiffs' claim—and well-settled precedent precludes it. Even if the Exemption is construed as religious (for which there is no basis), then the Exemption's primary effect is not to advance religion on behalf of the government, but to "*allow*[ ] churches to advance religion, which is their very purpose." *Amos*, 483 U.S. at 337 (emphasis in original). "The legislative purpose of a property tax exemption is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility." *Walz*, 397 U.S. at 672. "[C]ertain entities that exist in a harmonious relationship to the community at large, and that foster its

'moral or mental improvement,' should not be inhibited in their activities by property taxation or the hazard of loss of those properties for nonpayment of taxes." *Id.* at 672–73. That sentiment applies to the student housing facilities here, which the state considers to be "beneficial and stabilizing influences in community life." *Id.* at 673. Through the development of the UW-Madison student community, in offering housing, services, and programming, the beneficiaries of the Exemption can "foster [the] 'moral or mental improvement'" of the "community at large." *Id.* at 672–73.

Ultimately, the Exemption is even further removed from an Establishment Clause violation than the myriad religious-use exemptions repeatedly upheld. The Exemption does not favor religious organizations either on its face or as applied. Nothing in the Exemption's text limits the exemption to religious organizations. And as Plaintiffs have alleged, the Exemption has benefitted non-religious organizations: of its beneficiaries, half are religious and half are not. Compl. ¶ 28 (acknowledging that the Babcock House and the AWA House, "small, UW-Madison student co-ops" not associated with any religious organization, also benefit from the Exemption).

The Court should dismiss the Establishment Clause claim.

D. Plaintiffs fail to state a claim under the Private Bill Clause.

Plaintiffs allege that the "Exemption is an unconstitutional private bill in violation of Article IV, section 18." Compl. ¶ 101. Section 18 provides that "[n]o private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title."

Plaintiffs allege that "[t]he circumstances under which the Exemption was enacted in 2009 are those of an unconstitutional private bill." Compl. ¶ 96. According to

Plaintiffs, "the Exemption was not adequately considered by the legislature," and "the evidence available does not suggest that the legislature really considered the enactment of § 70.11(3m) but rather suggests that that a single state representative and a group of Assembly Democrats worked to get the Exemption into the 2009–10 budget bill in order to aid the Presbyterian Student Center Foundation[.]" *Id.* ¶ 100. These allegations do not state a claim under the Private Bill Clause.

The Private Bill Clause aims to "guard against the danger of legislation, affecting private or local interests, being smuggled through the legislature." *Lake Country Racquet & Athletic Club, Inc. v. Morgan*, 2006 WI App 25, ¶ 9, 289 Wis. 2d 498, 710 N.W.2d 701 (quoting *Davis v. Grover*, 166 Wis. 2d 501, 519, 480 N.W.2d 460 (1992)). It "protects against 'internal logrolling,' the legislative practice of bundling several unrelated issues, none of which could be passed singly, and securing passage by a combination of the legislative factions who favor separate pieces of the legislation." *Id.* (quoting *Davis*, 166 Wis. 2d at 519, n.7). Although "multi-subject bills such as the biennial state budget 'by their nature are subject to a greater susceptibility of smuggling and logrolling,'" "the fact that a multi-subject bill contains a program such as [the student housing facility exemption] does not necessarily condemn the process in which the program was enacted as unconstitutional." *Id.* ¶ 20 (quoting *Davis,* 166 Wis. 2d at 519, 520).

To evaluate a Private Bill Clause claim, the Court "employ[s] a two-part analysis." *Id.* ¶ 10. "First, [the Court] must determine whether the process used by the legislature was adequate to entitle the bill to the presumption of constitutionality

usually afforded legislative enactments." *Id.* "Second, [the Court] must decide whether the legislation is private and/or local and, if so, whether it violates the single-subject, clear-title requirements of section 18." *Id.*

First, the Exemption is entitled to a presumption of constitutionality because the legislative history reveals there was adequate consideration in the enactment of the provision and the subsequent amendments. After the Assembly created the provision for inclusion in the 2009–10 budget bill, the Senate deleted the language, and the Conference Committee/Legislature ultimately restored and amended the provision. *See* Comparative Summary of Budget Recommendations, 2009 Act 28, Vol. II, Legis. Fiscal Bureau, at 975 (Oct. 2009); *Davis*, 166 Wis. 2d at 523 (considering that "the senate specifically amended the [program] prior to enactment of the budget bill" in concluding that "the legislature 'intelligently participate[d] in considering' this program" (citation omitted)).

The subsequent legislative history reinforces this "intelligent[ ] participat[ion] in considering" the Exemption. The Legislature reconsidered the Exemption in the two budget bills following its enactment, including in 2011 and again in 2013, revealing the iterative approach to the Exemption's features. Compl. ¶¶ 22–24; *see also* Comparative Summary of Budget Recommendations, 2011 Act 32 (Including Budget Adjustment Acts 10, 13, and 27), Vol. II, Legis. Fiscal Bureau, at 628–29 (Aug. 2011) (reflecting that the Joint Finance Committee proposed to repeal the Exemption as of January 1, 2012, the Legislature delayed the repeal to 2013, and the Governor vetoed the repeal); Gov. Walker Veto Message, 2011 Wis. Act 32, at 22 (vetoing the repeal of

the Exemption and recognizing the "unique services [the facilities provide] to students attending the university, . . . not available at university or commercial student housing facilities"); Comparative Summary of Provisions, 2013 Act 20, Legis. Fiscal Bureau, at 675–76 (Aug. 2013) (reflecting that the Joint Finance Committee modified the Exemption to exclude fraternities and sororities and to limit the Exemption facilities in existence on the general effective date of the bill and the Legislature modified the provision to further narrow the limitation on qualification).

The Legislature's consideration of the Exemption here mirrors the consideration held to be adequate in *Lake Country*. Upholding a tax exemption for YMCAs and YWCAs, the court concluded "that the legislature adequately considered the legislation for purposes of article IV, section 18." *Id.* ¶ 19. The court observed that "a majority of the members of the Assembly co-sponsored a single-subject bill exempting YMCAs from property taxation before the measure was added to the Budget Bill" and "a majority of senators either co-sponsored the stand-alone bill (thirteen) or considered and voted for the proposal as members of the Joint Finance Committee (four)." *Id.* Further, "all legislators were informed via memo . . . of the policy reasons to oppose or support the bill," and heard public comment at budget hearings. *Id.* ¶ 20. Recognizing "that a legislator who sponsors a bill has adequately considered the proposal," just as "a committee member who votes to recommend a proposal to the full legislature," the court concluded that "a majority of the members of both houses adequately considered the measure," so "collectively, the legislature gave adequate consideration to the bill." *Id.* ¶ 19.

Second, and in any event, the Exemption is not private legislation. To pass muster, legislation "must: (1) in its 'general subject matter relate[ ] to a state responsibility of statewide dimension; and (2) [in] its enactment . . . have a direct and immediate effect on a specific statewide concern or interest.'" *Lake Country*, 289 Wis. 2d 498, ¶ 23 (citation omitted). "To appeal to a specific concern, the bill must be enacted for a purpose more particular than generic legislative concerns such as safety, health, welfare, morals and security." *Id.*

Plaintiffs are unable to "show[ ] beyond a reasonable doubt that the statute does not relate to a state responsibility of statewide dimension, or that its passage would not have a direct and immediate impact on a statewide concern or interest." *Id.* ¶ 28. The Exemption expressly requires that a qualifying facility be "owned by a nonprofit organization" and "offer[ ] support services and outreach programs to its residents, the public or private institution of higher education at which the student residents are enrolled, and the public." Wis. Stat. § 70.11(3m)1., 3. The Exemption "relates to a statewide responsibility of statewide dimension" because it targets facilities housing students at the state's flagship university and provides services and programs to those students as well as to the public at large. *Lake Country*, 289 Wis. 2d 498, ¶ 29.

In *Lake Country*, the exempt YMCAs and YWCAs at issue were "located in communities throughout Wisconsin"; here, UW-Madison's status as the state's flagship university also impacts "communities throughout Wisconsin" through the stu-

dents who attend and then re-populate the State at large, resulting in a "responsibility of statewide dimension." *Id.* The Exemption's beneficiaries, including the Pres House Apartments, are owned and used by nonprofit organizations that provide services and programming to those students, as well as the local community. *See id.* ¶ 30 ("Whether YMCAs are exempt from property taxation directly and immediately affects the resources available to YMCAs to provide benevolent programming to local communities.").

Plaintiffs' view of statewide effect or state interest, by contrast, is improperly narrow. Compl. ¶ 84 (alleging that the "properties do not present an issue of state policy," because "[w]hether or not the Pres House or Lumen House Apartments are property-tax exempt does not impact the entire state"). But whether the *Pres House* impacts the entire state is the wrong question. The question is instead whether "housing facility[ies]" contemplated by the Exemption impact the entire state. True, those housing facilities are by legislative design close to UW-Madison. But if legislation specific to UW-Madison is suddenly problematic, then down go several statutes in one fell swoop. *See, e.g.*, Wis. Stat. §§ 36.25, 36.33, 36.49, 36.68, 36.115 (among many others, all specifically addressing issues at the "University of Wisconsin - Madison"). This cannot be the law.

The Legislature has already made judgments about all the aspects of the properties subject to the Exemption, including deeming the services and programming worthy, desiring to exempt residential properties near college grounds, and acknowledging the importance of UW-Madison to the state. Because the Exemption "is not

private legislation beyond a reasonable doubt," this Court should "conclude it does not violate article IV, section 18." *Lake Country*, 289 Wis. 2d 498, ¶ 31.

E. Plaintiffs' requested relief would violate the Free Exercise Clause of the First Amendment to the U.S. Constitution.

Not only does well-settled precedent stymie each of Plaintiffs' claims, but Plaintiffs' lawsuit invites a violation of the federal Free Exercise Clause. Plaintiffs' requested relief must be rejected at the outset because of this plain discord and the necessary reconciliation in favor of federal Constitutional supremacy.

The Exemption is written in neutral, generally applicable language and makes no mention of religion. In practice, it benefits both religiously affiliated and non-religious organizations, including the Babcock House and the AWA House. Compl. ¶ 28. Yet Plaintiffs have singled out two religiously affiliated defendants—Pres House and St. Raphael's—and sought relief that would deny them the benefit of the Exemption.

Granting Plaintiffs' requested relief would violate the Free Exercise Clause of the First Amendment to the U.S. Constitution. A state cannot "deny[ ] a qualified religious entity a public benefit solely because of its religious character." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 466 (2017). If it does, it runs afoul of the Free Exercise Clause. *Id.*; *see also Welker v. Welker*, 24 Wis. 2d 570, 576, 129 N.W.2d 134 (1964) ("The right to religious freedom under the United States constitution 'requires the state to be a neutral in its relations with groups of religious believers and non-believers.'" (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 218 (1963)).

Plaintiffs' requested relief—denying the two religiously affiliated defendants the benefits of a neutral, generally applicable law—collides with the Free Exercise Clause's protections.

III. Plaintiffs failed to join indispensable parties.

Plaintiffs failed to meet the requirement under Wisconsin Statutes section 803.03(1) that they join all necessary and indispensable parties. "[T]he 'indispensable party' inquiry is in two parts." *Dairyland Greyhound Park, Inc. v. McCallum*, 2002 WI App 259, ¶ 9, 258 Wis. 2d 210, 655 N.W.2d 474. First, the Court first determines if absent parties are "'necessary' parties for one of the three reasons set forth in Wis. Stat. § 803.03(1)." *Id.* Second, if the parties are necessary, then the Court determines whether "'in equity and good conscience,' the action should not proceed in the absence of the [parties], as provided in § 803.03(3)." *Id.*

First, three absent parties are "necessary." Wis. Stat. § 803.03(1). Plaintiffs failed to join both Babcock House and AWA House. Compl. ¶ 28.[3] As beneficiaries of the Exemption, those parties have an "interest relating to the subject of the action," and their absence will "impair or impede" their "ability to protect that interest." § 803.03(1)(b)1. Moreover, as *non*-religiously affiliated entities, those parties' arguments and interests may differ from the parties present here, which are religiously affiliated. Finally, they may know of additional rational bases for why Legislature saw fit to exempt organizations like theirs.

[3] And the two additional beneficiaries noted by the City in its motion to dismiss brief. *See* City Br. 3 n.1.

Plaintiffs also failed to join the State of Wisconsin Department of Revenue (DOR). In the DOR's absence, "complete relief cannot be accorded among those already parties." Wis. Stat. § 803.03(1)(a). Sure, Plaintiffs named the City of Madison and have requested that the Court enjoin *it* from enforcing the exemption. But the City is a mere middleman. It is the DOR—not the City—that has ultimate authority over enforcement of the state tax laws, *see* Wis. Stat. § 73.03, and is in the best position to speak on behalf of the Exemption's defense. Without its presence in this lawsuit, the DOR will not be bound by any declaratory judgment or injunction, and all parties could be subject to conflicting interpretations of state law.

Second, proceeding in the absence of these parties is not "in equity and good conscience." *Dairyland*, 258 Wis. 2d 210, ¶ 9. The missing parties comprise half the interested beneficiaries of the Exemption and the agency ultimately responsible for enforcing tax laws. At the very least, without them, this case is missing critical pieces.

By omitting the two non-religious beneficiaries from the action, Plaintiffs impose an artificial overlay of religion on the case. As already discussed, the Exemption is not limited to religious institutions—whether on its face or in practice. At least two religious organizations have qualified for the Exemption, but so too have at least two non-religious organizations. The decision to forego joining the non-religious parties while simultaneously asserting Establishment Clause claims cannot be explained in meritorious ways. Plaintiffs' desired framing of their action as one of religious preference should not come at the expense of indispensable parties entitled to assert their rights and whose presence risks undermining that narrative.

CONCLUSION

The Court should dismiss the case with prejudice.

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Electronically signed by Joseph S. Diedrich

Anthony J. Anzelmo, 1059455
HUSCH BLACKWELL LLP
511 North Broadway, Suite 1100
Milwaukee, Wisconsin 53202
(414) 273-2100
anthony.anzelmo@huschblackwell.com

Joseph S. Diedrich, 1097562
Alyssa M. LeRoy, 1115648
HUSCH BLACKWELL LLP
33 East Main St, Suite 300
Madison, WI 53703
(608) 258-7380
joseph.diedrich@huschblackwell.com

Counsel to Defendant Presbyterian Student Center Foundation