STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 8

ANNIE LAURIE GAYLOR, DAN BARKER,
DAVID PETERSON, AND
FREEDOM FROM RELIGION FOUNDATION,

Plaintiffs,

v.

THE CITY OF MADISON,
PRESBYTERIAN STUDENT CENTER
FOUNDATION, AND
ST RAPHAEL'S CONGREGATION,

Defendants.

Case No. 25-CV-173

Hon. Frank D. Remington

INTERVENOR WISCONSIN STATE LEGISLATURE'S NOTICE OF MOTION AND MOTION TO DISMISS

PLEASE TAKE NOTICE that, pursuant to Wis. Stat. § 802.06(2)(a)6., Intervenor Wisconsin State Legislature, by and through its undersigned attorneys, hereby moves to dismiss Plaintiffs' Complaint. As set forth more fully in the contemporaneously filed brief, Plaintiffs fail to state a claim upon which relief can be granted. This motion will be heard at a date and time to be set by the Court.

Dated: March 21, 2025

Respectfully submitted,

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INTERVENOR WISCONSIN STATE LEGISLATURE'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

Wisconsinites displeased with their tax bills—believing, like Plaintiffs here, that they should pay less and others more—have several options. They can write their representatives. They can take to social media. They can form advocacy groups. And, of course, they can (and should) participate in elections. What they cannot do, at least in our system, is turn to the courts. Yet that is what Plaintiffs have done here. Because their request for tax reform is in the wrong forum, this case should be dismissed.

The Freedom From Religion Foundation, along with three individual taxpayers, look to bar the City of Madison from granting two religious nonprofit organizations a tax exemption for student housing, while curiously omitting from their list of defendants the four other exempt organizations (including, conveniently, three *non*-religious organizations). *See* Wis. Stat. § 70.11(3m). This remedy, they hope, will reduce their own tax burden. And this, they assert, gives them standing.

There are many reasons that this unprecedented lawsuit should be dismissed. To start, it flouts the rule that a declaratory judgment and injunctive relief are "not [ ] substitute[s] for the administrative procedure" imposed by the applicable tax laws. *Metzger v. Wisconsin Dep't of Tax'n*, 35 Wis. 2d 119, 125, 150 N.W.2d 431 (1967). Plaintiffs must exhaust their administrative remedies and sue only through the statutorily prescribed procedures. None of the plaintiffs here did so, so their suit must be dismissed.

Plaintiffs fail other declaratory-judgment prerequisites, too. Most obviously, they lack standing. The Foundation claims merely that it *might* want to open student housing at some point, but "[s]uch 'some day' intentions" are classically insufficient to "support a finding of the 'actual or imminent' injury" traditionally required. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992). The individual taxpayers, meanwhile, fail to show causation and redressability. They have not even tried to allege that this exemption provided to other entities somehow affects what they pay in taxes. Indeed, if the exemptions were cancelled, it is just as likely that the City would keep and spend the extra money. Separately, the Foundation lacks any claim of right, no defendant is adverse to the City, and the Foundation's claims are not ripe. In all, Plaintiffs utterly fail to show that this case is justiciable.

Even if this case were not procedurally barred, Plaintiffs' theories fail on the merits, largely because the exemption is rationally related to a legitimate government purpose. The statute applies to nonprofit organizations that provide housing to students at the State's flagship university, provide programming for those students, and provide services to the students, the university, and the public at large. The Legislature's choice to confer benefits upon these kinds of benevolent organizations was more than reasonable. For similar reasons, the exemption is not a local or private bill. Nor does it run afoul of Wisconsin's Religion Clause, since it does not discriminate in favor of religion and, even if it did, religious tax exemptions are entirely permissible.

STATEMENT OF THE CASE

The Freedom From Religion Foundation along with Annie Laurie Gaylor, Dan Barker, and David Peterson ("individual taxpayers") have filed this declaratory judgment action against the City of Madison, the Presbyterian Student Center Foundation ("Pres House"), and St. Raphael's Congregation ("Lumen House") to seek a declaration that the property tax exemption codified at Wis. Stat. § 70.11(3m) (the "Exemption") is facially unconstitutional and to seek an injunction preventing the City or any of the other defendants from "applying" the Exemption "to any property." Compl. ¶ 102.

Wisconsin Stat. § 70.11(3m)(a) exempts certain student housing facilities from property taxation, specifically,

> 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."

Wis. Stat. § 70.11(3m)(a).

This Exemption was enacted by the Legislature in 2009 as part of the biennial budget bill. 2009 Wis. Act 28, § 1516c. Before presentment to the Governor, this provision went through several revisions. The Assembly initially introduced the provision, but the Senate deleted it. Comparative Summary of Budget Recommendations, 2009 Act 28, Vol. II, Legis. Fiscal Bureau, at 975 (Oct. 2009). An amended version of the provision was reintroduced by the Committee of Conference on June 25, 2009. Conference Amendment 1 to Senate Substitute Amendment 1 to 2009 Assembly Bill 75.[1] This amendment limited the application of the exemption to University of Wisconsin-Madison students. 2009 Drafting Request, Assembly Amendment (AA-ASA1-AB75).[2]

On June 4, 2013, the Joint Committee on Finance proposed a bill to amend Section 70.11(3m). After clarifying that the exemption could not apply to fraternity or sorority housing, the proposed amendment foreclosed novel applications of the exemption after September 30, 2014. 2013 Drafting Request, Assembly Amendment (AA-AB40).[3] A June 12 Executive Session of the Joint Survey Committee on Tax Exemptions found that "there is good public policy concerning the tax exemptions in Assembly Bill 40." Record of Committee Proceedings, Joint Survey Committee on Tax Exemptions.[4] The bill passed and was signed into law. 2013 Wis. Act 20.

[1] https://perma.cc/6F4D-SN5G.
[2] https://perma.cc/NK7N-ECFT.
[3] https://perma.cc/HZ4A-DDB8.
[4] https://perma.cc/75KV-W7UN.

At least six nonprofit organizations providing student housing have requested and qualified for this property tax exemption. Those exempt properties include:

1. The Pres House Apartments, owned by the Presbyterian Student Center Foundation and located at 439 East Campus Mall ("Pres House"), Compl. ¶¶ 3, 16;
2. The Lumen House Apartments, owned by St. Raphael's Congregation and located at 142 West Johnson Street ("Lumen House"), Compl. ¶¶ 3, 17;
3. The Babcock House, owned by the Babcock House Foundation and located at 1936 University Avenue, Compl. ¶ 28;
4. The Association of Women in Agriculture House, owned by the Association of Women in Agriculture Benefit Corp. and located at 1909 University Avenue, Compl. ¶ 28;
5. The French House, owned by The French House, Inc. and located at 633 North Frances Street, which provides "a French language and cultural immersion program," Dkt.31:3 n.1.;
6. The Phos House, owned by Youth With a Mission, Inc. and located at 602 Langdon Street, which "houses students in a faith-based environment," Dkt.31:3 n.1.

As alleged in the Complaint, fifteen years after the Exemption was enacted, counsel for the Foundation began a letter correspondence with the City of Madison. *See* Compl. ¶¶ 14, 47, 49, 52–57.

On January 14, 245 days after the City informed them that it would not review their claims, the Foundation and individual taxpayers brought this suit against the City of Madison and the owners of two of the six exempt properties—that is, only the Pres House and the Lumen House. *Id.* ¶¶ 15–17. They asserted four claims: (1) that the Exemption violates the Uniformity Clause, Wis. Const. art. VIII, § 1, *id.* ¶ 73; (2) that it violates "the Equal Protection Clause," Wis. Const. art. I, § 1, *id.* ¶ 81; (3) that it violates the

Religion Clause, Wis. Const. art. I, § 18, *id.* ¶ 90; and (4) that it violates the Private or Local Bill Clause, Wis. Const. art. IV, § 18. *id.* ¶¶ 84, 100.

On March 3, the City of Madison and Pres House moved to dismiss, and Lumen House moved to dismiss on March 10. Dkts. 30–31, 34–35, 39–40. The Wisconsin State Legislature now moves to intervene and dismiss.

LEGAL STANDARD

To survive a motion to dismiss, "[p]laintiffs must allege facts that plausibly suggest they are entitled to relief" based "on [the] substantive law that underlies the claim made." *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 31, 356 Wis. 2d 665, 849 N.W.2d 693. The Court will accept only well-pleaded facts in the complaint and "the reasonable inferences therefrom." *Id.* ¶ 19. A plaintiff must allege well-pleaded facts that "satisfy each element of a cause of action" to state "a claim upon which relief may be granted." *Cattau v. Nat'l Ins. Servs. Of Wis., Inc.*, 2019 WI 46, ¶ 6, 386 Wis. 2d 515, 926 N.W.2d 756. "[C]ourts cannot add facts to a complaint," *id.* ¶ 5, and do not accept "legal conclusions" therein "as true," *Data Key Partners*, 2014 WI 86, ¶ 19.[5]

[5] On a motion to dismiss, a court may take "[j]udicial notice" of certain facts, including facts on "website[s]." *See Meyers v. Bayer AG, Bayer Corp.*, 2007 WI 99, ¶ 81, 303 Wis. 2d 295, 735 N.W.2d 448 (Roggensack, J., dissenting) (citing *Perkins v. State*, 61 Wis. 2d 341, 346, 212 N.W.2d 141 (1973) (taking "judicial notice" of "easily accessible" facts)); *Coppins v. Allstate Indem. Co.*, 2014 WI App 125, ¶ 6, 359 Wis. 2d 179, 857 N.W.2d 896 (taking judicial notice of "the Allstate website"); *Wisconsin Carry, Inc. v. City of Madison*, 2017 WI 19, ¶ 2 n.2, 373 Wis. 2d 543, 892 N.W.2d 233 (taking judicial notice of the City of Madison's website); *see also* Wis. Stat. § 902.01(2)(b).

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE PROCEDURALLY BARRED

A would-be claimant under the Uniform Declaratory Judgments Act must satisfy several threshold requirements before a judge "may" adjudicate her claims on the merits. *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 28, 309 Wis. 2d 365, 749 N.W.2d 211. Plaintiffs do not come close to satisfying those prerequisites.

A. Explicitly Foreclosing Declaratory-Judgment Actions, the Tax Laws Set Forth the Exclusive Process By Which Property Tax Assessments and Exemptions May Be Challenged, and Plaintiffs Have Not Followed It

To start, Plaintiffs cannot bring a declaratory-judgment action because the tax code provides the sole remedies for their claims, and Plaintiffs did not avail themselves of those remedies.

1. The Foundation unlawfully bypassed the tax-exemption-challenge procedures.

For those wishing to challenge a taxing entity's property-tax-exemption decision, our State's tax code provides the exclusive—and mandatory—process "to recover the unlawful tax." Wis. Stat. § 74.35(2)(a); *see* Wis. Stat. § 74.35(2m) (exclusive process). "A tax is considered 'unlawful' if imposed on a 'property that is exempt by law from taxation.'" *N. Cent. Conservancy Tr., Inc. v. Town of Harrison*, 2023 WI App 64, ¶ 14, 410 Wis. 2d 284, 1 N.W.3d 707 (quoting Wis. Stat. §§ 74.35(1), 74.33(1)(c)) (alteration adopted). And, as the Supreme Court has recently emphasized, Section 74.35 sets forth "the

exclusive procedure for taxpayers to 'claim that property is exempt' from taxation." *Saint John's Cmtys., Inc. v. City of Milwaukee*, 2022 WI 69, ¶ 16, 404 Wis. 2d 605, 982 N.W.2d 78 (quoting Wis. Stat. § 74.35(2m)); *see* Wis. Stat. § 74.35(2m) (stating that taxpayers may dispute exemption decisions only through "an action under this section"). Leaving no doubt, the statute also outright prohibits a property owner from filing "an action for a declaratory judgment under s. 806.04" instead of following the process prescribed in Section 74.35. Wis. Stat. § 74.35(2m). There is no exception for constitutional claims. *Hermann v. Town of Delavan*, 215 Wis. 2d 370, 376, 394, 572 N.W.2d 855 (1998); *Hogan v. Musolf*, 163 Wis. 2d 1, 22, 471 N.W.2d 216 (1991).

To begin this process, a property owner seeking an exemption must file a Property Tax Exemption Request form with the municipality's tax assessor. *See N. Cent. Conservancy Tr.*, 2023 WI App 64, ¶ 13 (citing Wis. Stat. § 70.11).[6] "The assessor then values the property and determines whether it is exempt." *Id.* If the assessor denies the exemption request, the property owner must complete two steps before proceeding to court. The owner must first timely pay either the tax or an "authorized installment payment of the tax." Wis. Stat. § 74.35(5)(c); *see also Saint John's Cmtys., Inc.*, 2022 WI 69, ¶ 20. Next, the owner must "file a claim to recover the unlawful tax against the taxation district which collected the tax." Wis. Stat. § 74.35(2)(a). The "claim" an owner must file under Section 74.35 is to be "filed with the taxation district" itself,

[6] https://perma.cc/W5NV-5JZT (Department of Revenue Property Tax Exemption Request form); https://perma.cc/JGU9-8MVX (City of Madison assessor).

not in "a complaint filed with the circuit court." *N. Cent. Conservancy Tr.*, 2023 WI App 64, ¶ 14 n.4. After reviewing the property owner's claim, "[t]he taxation district may 'disallow' the claim" by rejecting it outright or "failing to take final action on the claim within 90 days after the claim is filed." *Id.* ¶ 14 (quoting Wis. Stat. § 74.35(3)(a)) (alterations adopted). Only after the taxation district disallows the claim may the property owner "commence an action in circuit court to recover the amount of the claim not allowed." *Id.* ¶ 15 (quoting Wis. Stat. § 74.35(3)(d)) (emphasis omitted).

This "request, pay, challenge" regime makes good sense. As the Wisconsin Supreme Court has emphasized repeatedly, courts should "refrain from interfering with traditional administrative procedures for addressing tax claims against the state." *Hogan*, 163 Wis. 2d at 14. "Injunctive relief is not a substitute for the administrative procedure" imposed by the applicable tax laws. *Metzger*, 35 Wis. 2d at 125; *see also Hogan*, 163 Wis. 2d at 20–21 (explaining that the tax statutes' ban on "equitable relief . . . has a sound basis in judicial and legislative policy"). After all, "certainty in tax collections is necessary for the continued function of government." *Metzger*, 35 Wis. 2d at 129. Federal law supports this principle, too. "The procedures for mass assessment and collection of state taxes and for administration and adjudication of taxpayers' disputes with tax officials are generally complex and necessarily designed to operate according to established rules." *Hogan*, 163 Wis. 2d at 16 (quoting *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*,

454 U.S. 100, 108–09 n.6 (1981); *id.* at 137–38 n.27 (Brennan, J., concurring)). Attempts to circumvent these processes cause "disarray," sow confusion, and interfere with administrators' ability "to discharge their responsibilities in accordance with the state procedures." *Id.* (quoting *McNary*, 454 U.S. at 108–09 n.6 (1981); *id.* at 137–38 n.27 (Brennan, J., concurring)).

Hence a property owner must satisfy *all* statutory requirements, or her suit will be dismissed. For example, in *Saint John's Communities, Inc.*, Saint John's filed a claim with City of Milwaukee challenging the denial of a property tax exemption before it paid the first installment of its property tax bill, and then it sued the City after the City disallowed the claim. 2022 WI 69, ¶¶ 6–8. Even though Saint John's had paid the first installment before it had filed suit, the Wisconsin Supreme Court dismissed the action, holding that Saint John's failure to pay the tax before it filed its claim rendered that claim "procedurally deficient." *Id.* ¶ 30. Put simply, "a taxpayer must first pay the tax before filing [an exemption] claim." *Id.* ¶ 19.

Likewise here, because the Foundation failed to follow the mandatory procedure to obtain a tax exemption, its claims must be dismissed. That is because, although the Foundation is less than clear in its Complaint, the relief it ultimately seeks is a tax exemption. It asserts that it "may desire to run

student apartments in the future" but is concerned that its request for an exemption would be unlawfully denied. Compl. ¶ 8.[7]

Yet the Foundation has failed to complete even the first statutory requirement: requesting that the City of Madison grant it the property tax exemption. *See N. Cent. Conservancy Tr.*, 2023 WI App 64, ¶ 13. Instead, the Foundation simply speculates that it would not "qualify for the Exemption if it were to invest in rental properties aimed at renting to UW-Madison students." Compl. ¶ 62; *see also id.* ¶¶ 80, 92. Because the Foundation failed to request the exemption or pay the tax, its suit must be dismissed.

While the Foundation alleges that it sent two letters to the City of Madison Board of Assessors, *id.* ¶¶ 47, 52–53, Ex. F, that did not constitute the "fil[ing of] a claim." Wis. Stat. § 74.35(2)(a). That is because the Foundation failed to assert in either letter that its property qualified as exempt or to state the amount of its claim. *See* Wis. Stat. § 74.35(2)(b)2.–3. (requiring claims filed under Section 74.35 to "include the basis for the claim as specified in s. 74.33(1)(a) to (e)" and "[s]tate . . . the amount of the claim"). And even if such a letter could qualify, the Foundation filed it out of order. Before filing a claim, it needed to request an exemption and pay the tax. *N. Cent. Conservancy Tr.*, 2023 WI App 64, ¶ 13; *Saint John's Cmtys., Inc.*, 2022 WI 69, ¶ 19.

[7] Indeed, half of the claims center solely on harm to the Foundation based on a denied tax exemption. *See* Compl. ¶¶ 80, 92. For both its equal protection and religion claims, the Foundation asserts that the restrictions on the exemption harm the Foundation because it "cannot ever benefit from the Exemption if it were to open rental housing aimed at UW-Madison students." *Id.* ¶ 80; *see also id.* ¶ 92.

The Foundation's claims are thus dead on arrival. It must request the exemption, pay the tax, and *then* file a claim with the City before it can bring a circuit court action challenging the City's decision. *See* Dkt. 31:6.

2. The individual taxpayers unlawfully sidestepped the excessive-property-tax challenge process.

Similarly, the individual taxpayers failed to follow the prescribed procedures governing claims that an assessment is *excessive* rather than *unlawful*. *Compare* Wis. Stat. § 74.37 *with* Wis. Stat. § 74.35. Such a claimant must first file an "objection" to their property tax assessment with their municipality's "board of review." *N. Cent. Conservancy Tr., Inc.* 2023 WI App 64, ¶ 17. If the board of review "disallows the challenge," then the property owner may (1) challenge that decision "through an action for certiorari to a circuit court," *id.* ¶¶ 17–18 (citing Wis. Stat. § 70.47(13)); (2) "file a written complaint" with the Wisconsin Department of Revenue (and, if needed, seek judicial review of its decision), *id.* ¶ 18 (citing Wis. Stat. § 70.85); or (3) proceed under the same process available for tax exemptions, by filing a "claim for an excessive assessment" against the City and then filing "an action in circuit court" if the claim is disallowed, *id.* ¶ 19 (citing Wis. Stat. § 74.37(2)(a), (3)(d)).

This process, too, is exclusive. "[W]here a method of review is prescribed by statute, that prescribed method is exclusive," *Hermann*, 215 Wis. 2d at 383, and this statute is no exception. "A property owner seeking to challenge a general property tax must either challenge the tax as excessive or unlawful." *N. Cent. Conservancy Tr., Inc.*, 2023 WI App 64, ¶ 17 n.6. And the excessive-

tax review process "provides a detailed method for taxpayers to appeal a decision of the board of review." *Hermann*, 215 Wis. 2d at 379. The process is therefore exclusive, and "rights of a taxpayer are not impinged upon by requiring him to exhaust his remedies as prescribed by [the tax code]." *Metzger*, 35 Wis. 2d at 125 (quoting favorably the trial court's decision); *see id.* at 125–28.

Even if one assumes that, as the individual taxpayers allege, the letter that they sent to the City's Board of Assessors qualified as an "objection," *see* Compl. ¶ 51, the taxpayers failed to follow the required process for challenging that denial. The Board of Review disallowed the challenge on May 14, 2024, so if the individual taxpayers wanted to proceed directly to court (rather than to the Department of Revenue or through the claims process), they needed to seek certiorari in a circuit court by August 12, 2024. *See* Wis. Stat. § 70.47(13). Not only did they wait to file suit until several months after August 12, 2024, but the individual taxpayers also entirely ignored the certiorari process and instead filed under the Declaratory Judgments Act—against not just the City but also other property owners. The individuals' claims thus must also be dismissed.

B. This Case Is Not Justiciable

On top of their sins of omission under the tax statutes, Plaintiffs also fall short under the Uniform Declaratory Judgments Act's justiciability commandments. A person may not sue under this Act, Wis. Stat. § 806.04, unless they can demonstrate that the "controversy is justiciable" by

establishing (1) a claim of right, (2) adversity between the parties, (3) a legally protectible interest, and (4) ripeness. *Olson*, 2008 WI 51, ¶ 29. The third requirement—the "legally protectable interest"—is "voiced in terms of standing," *Fabick v. Evers*, 2021 WI 28, ¶ 11, 396 Wis. 2d 231, 956 N.W.2d 856, which plaintiffs must satisfy in every case as a matter of "sound judicial policy." *Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶ 17, 402 Wis. 2d 587, 977 N.W.2d 342. And plaintiffs must prove each justiciability element against each defendant. *See Murthy v. Missouri*, 603 U.S. 43, 61 (2024) (holding that "standing is not dispensed in gross" and that plaintiffs must establish standing "for each claim," "against each defendant," "for each form of relief" sought) (citation omitted). Plaintiffs here fail on multiple elements.

1. The Foundation and the individual taxpayers lack standing.

Under Wisconsin law, a party may not sue unless it establishes (1) that the action of the defendant "directly cause[d] injury to [its] interest" and (2) that "the interest asserted is recognized by law." *Friends of Black River Forest*, 2022 WI 52, ¶ 18 (citation omitted). In developing its standing jurisprudence, the Wisconsin Supreme Court "has largely embraced federal standing requirements, and [Wisconsin courts] 'look to federal case law as persuasive authority regarding standing questions.'" *Id.* ¶ 17 (citation omitted). The two frameworks thus impose the same three basic requirements: (1) a concrete injury (meaning it is "neither hypothetical nor conjectural") (2) caused by

(traceable to) the defendant's action (3) that is recognized by law and thus redressable by the court in the instant action. *See id.* ¶¶ 13, 21.

a. The Foundation fails at the first step, because it alleges only a "hypothetical" injury. Such an injury "may never happen" because it depends on the completion of a distinct, yet-untaken action and hence is only "conjectural or hypothetical." *In re Delavan Lake Sanitary Dist.*, 160 Wis. 2d 403, 413, 466 N.W.2d 227 (Ct. App. 1991). Allegations of hypothetical injury are at their weakest when "the acts necessary to make the injury happen are at least partly within the plaintiff's own control." *Lujan*, 504 U.S. at 564 & n.2.

Here, the Foundation only speculates about the *possibility* of steps it could take that, in turn, *might* lead to future harm. It states that it *could* suffer harm "if it *were* to invest in rental properties aimed at renting to UW-Madison students," if it *were* to apply for the Wis. Stat. § 70.11(3m) tax exemption, and if the City *were* to deny its request. Compl. ¶ 62 (emphasis added). These facts parallel those in *In re Delavan Lake Sanitary District*, where the court held that alleged injuries were only hypothetical because they depended on a *potential* municipal annexation, 160 Wis. 2d at 412–13. There is potential for the Foundation to open student housing, and it *might* apply for the Exemption, and the City *might* deny its request, but none of these events has happened. And any one of them might never happen. Compounding this problem, the first step is solely within the Foundation's control. *See Lujan*, 504 U.S. at 564 & n.2.

Yet it does not *allege* that it intends—or even desires—to invest in student rental property. *See Friends of Black River Forest*, 2022 WI 52, ¶ 21.

Even if the Foundation had suffered an actual injury, it would not be traceable—or caused by—the Pres House or Lumen House. The Foundation must show that its injury is "fairly traceable" to some "allegedly unlawful conduct" by the two houses. *California v. Texas*, 593 U.S. 659, 669 (2021). But the Foundation has not even alleged that the houses did something unlawful, let alone that they would play any role in the City's decision to grant or deny a tax exemption. A hypothetical denied exemption would be traceable only to the City of Madison. The houses have no role or hand in the dispute between the Foundation and the City of Madison regarding whether the Foundation should qualify for an exemption. The Foundation thus lacks standing against the Pres House and the Lumen House twice over.

b. The individual taxpayers likewise fail to establish standing at both the second and third steps, because they do not (and cannot) show that the exemption has any impact on their tax assessments, and none of their requested remedies will affect their taxes.

Under the causation analysis (or, in the federal parlance, the traceability element), the plaintiff must prove that "the challenged action cause[d] the [plaintiffs'] injury in fact." *Friends of Black River Forest*, 2022 WI 52, ¶ 18. The individual taxpayers must establish "a close causal relationship" between their injury and the defendants' action—that is, between an increase in their tax

assessments and the granting or holding of the tax exemption to or by other property owners—because without a connection between the two, no judicial remedy can redress the harm. *Milwaukee Brewers Baseball Club v. Wisconsin Dep't of Health & Soc. Servs.*, 130 Wis. 2d 56, 65, 387 N.W.2d 245 (1986); *see also Lujan*, 504 U.S. at 562.

"[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Lujan*, 504 U.S. at 562 (citation omitted). In these cases, "causation and redressability ordinarily hinge on the response of [a] third party," and so it "becomes the burden of the plaintiff" to prove that the third party will act "in such manner as to . . . permit redressability of injury." *Id.* Courts thus refuse "to endorse standing theories that rest on speculation about the decisions of independent actors." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013).

At the most basic level, the individual taxpayers fail even to allege plausibly that their taxes are higher because *two* other properties—out of tens of thousands in Madison—received a tax exemption. They assert only that they "pay higher property taxes to make up for the unlawful omission of these properties from the tax rolls" but do not allege any facts that establish a connection between the two acts. Compl. ¶ 7. They do not identify any statute or regulation, any statement by a government official, or any other source to support their claim. Nor do they allege that their property taxes were adjusted

in any way when the Exemption was first enacted, when various properties secured the Exemption, or when the Exemption was later amended. In short, they assert without any factual support that their alleged harm—higher property tax—is caused by the grant of the Exemption. This is enough to dismiss their complaint. *See Data Key Partners*, 2014 WI 86, ¶ 19.

Indeed, the taxpayers *cannot* establish traceability. They cannot manufacture a "fairly traceable" injury by linking together separate sections of the tax code that "operate independently." *California*, 593 U.S. at 679. In *California v. Texas*, the Supreme Court rejected the state plaintiffs' attempt to challenge the individual mandate provision of the Affordable Care Act by asserting that other aspects of the statutory scheme caused "them to incur additional costs directly." *Id.* at 678. But the Court rejected that attempt to manufacture standing. Because other provisions caused the states' harm, not the "independent[]" individual mandate, the harm was not fairly traceable to the individual mandate. *Id.* at 679; *see also LSP Transmission Holdings II, LLC v. Huston*, — F.4th —, No. 24-3248, 2025 WL 798079, at *8 (7th Cir. Mar. 13, 2025) (holding that plaintiffs cannot "manufacture standing" by challenging one statutory provision and relying on another for redressability). So too here. The individual taxpayers try to fuse two distinct aspects of the tax administration scheme: the assessment and valuation of their property, *see Lowe's Home Centers, LLC v. City of Delavan*, 2023 WI 8, ¶¶ 27–31, 405 Wis. 2d 616, 985 N.W.2d 69; *see also* Wis. Stat. § 74.37, and the determination of

whether other properties qualify for a tax exemption, *see* Wis. Stat. § 70.11(3m). These two aspects of the tax system "operate independently" of each other. *California*, 593 U.S. at 679; *see also* Dkt. 31:7 ("there is no legal authority that the City is aware of that would give an unrelated third party the right to directly challenge another person's application for or receipt of a property tax exemption"). The City's determination of the individual taxpayers' assessments thus cannot be "an injury fairly traceable" to the grant of a tax exemption to other property owners. *Id.*

Nor have the individual taxpayers shown that their alleged injury would be redressed by the relief they seek. To begin, the connection that they try to draw relies on speculation about the actions of independent third parties. City of Madison property tax rates depend in part on the City's budgets,[8] and "[b]udget development is a multi-step process that involves City agencies, the Finance Committee, and Common Council" who must determine how much to spend on "daily operations, including staff salaries, community-based organizations that deliver services on behalf of the City, and other costs such as supplies and equipment [as well as] physical infrastructure like roads, bike lanes, building improvements, affordable housing developments, and other projects."[9] The individual taxpayers have provided no allegations even suggesting that these various third parties will independently decide to reduce

[8] https://perma.cc/L2RW-Y26V (noting that the tax levy depends on both budgets and "expected sources of revenue such as state aids and shared taxes, license fees, and tuition"); *see* Wis. Stat. § 902.01.

[9] https://perma.cc/M43M-9U4T; *see* Wis. Stat. § 902.01.

the individual taxpayers' property tax rates if the City is enjoined from granting the tax Exemption. Indeed, it is just as likely—perhaps even more likely—that the City would simply keep and spend the extra funds, making no change to anyone else's tax assessments. Because any reduction in the individual taxpayers' assessments is speculative, they have failed to plausibly allege redressability. *See Clapper*, 568 U.S. at 414.

Finally, even if the individual taxpayers could establish causation and redressability, they would still lack standing to bring nearly every claim here. A plaintiff "must demonstrate standing for each claim he seeks to press" and "each form of relief sought." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). The individual taxpayers purport to raise equal protection, religious establishment, and Uniformity Clause claims, but each claim pertains not to the *existence* of the tax exemption but to the *restrictions* on who can qualify for the Exemption. They complain that the Exemption violates these clauses because it is limited in time and limited to UW-Madison students, preventing groups like the Foundation from securing the same Exemption. Compl. ¶¶ 67–69, 78–81, 90–92. The Foundation's inclusion as a plaintiff proves this point: the proper relief to address these claims would not be to enjoin the Exemption but to enjoin the *restrictions* on the Exemption to allow the Foundation and others to claim it as well. But expanding the Exemption, under the individual taxpayers' theory, would further decrease the City's tax revenue and thus lead to higher assessments for the individual taxpayers. The individual taxpayers

thus lack standing to raise any of these claims, because expanding the Exemption would *increase*, not *decrease*, their supposed harm. There is no principle of standing that permits a plaintiff to bring a constitutional claim that, if successful, would in fact *increase* its harm.

Thus, even if the individual taxpayers could establish that they have standing based on their "higher assessment" theory, the only claim they would have standing to raise is their Local Bill claim.

c. Although the individual taxpayers try to make up for their other justiciability problems by asserting that taxpayer standing applies here, that is wrong. The doctrine allows taxpayers to sue to challenge illegal government action that involves the expenditure of public funds. *Fabick*, 2021 WI 28, ¶ 10. The idea is that, when the government makes an "illegal expenditure of taxpayer funds," it inappropriately depletes the public fisc, and so "the complaining taxpayer and taxpayers as a class have sustained, or will sustain, some pecuniary loss." *Id.* ¶¶ 10–11 (quoting *S.D. Realty Co. v. Sewerage Comm'n of the City of Milwaukee*, 15 Wis. 2d 15, 21, 112 N.W.2d 177 (1961)). The unlawful activity effectively taints the tax imposed on the taxpayer as well: when the government's taxpayer-funded action is unlawful or "invalid," the result is "taxation for illegal purposes." *Frothingham v. Mellon*, 262 U.S. 447, 486 (1923) (recognizing this connection but declining to permit taxpayer standing in federal court for separate reasons).

Nothing like that is alleged here. The individual taxpayers are not asserting that their tax dollars are being used to *fund* unlawful government action. In fact, the tax Exemption does the exact opposite, permitting the nonprofits to retain funds and use them to support their residents and the general public. The individual taxpayers complain instead that they are paying slightly more to fund lawful government services. That does not justify taxpayer standing, because the individual taxpayers' funds continue to go to lawful government activities. *See Mellon*, 262 U.S. at 486.

Nor do the taxpayers here seek to block unlawful government action to the benefit of the "taxpayers as a class." *Fabick*, 2021 WI 28, ¶ 11 (citation omitted). Their taxes should go down, they allege, as a consequence of Pres and Lumen Houses' "pay[ing] higher property taxes." Compl. ¶ 7. But taxpayer standing is grounds for stopping tax money from funding unlawful activities; it is not a means for some taxpayers to increase the taxes of others.

If there were any doubt as to whether taxpayer standing authorizes this unorthodox case, policy reasons and case law should put it to rest. Under Plaintiffs' theory, a taxpayer may bring a declaratory judgment action—at any time—to challenge any grant of a tax Exemption or any taxing decision by the State that decreases the tax burden for any other taxpayer. This dangerous framework would transform tax enforcement from being a dispute between the taxpayer and the government into a dispute between taxpayers. And given that the whole point of such a suit would be to directly impose higher taxes on

another person, these sorts of suits are ripe for abuse. Opening the door to animus-driven tax litigation resembling this case would undoubtably wreak havoc on tax administration and interfere with state tax agencies' ability "to discharge their responsibilities in accordance with the state procedures." *Hogan*, 163 Wis. 2d at 16.

2. The Plaintiffs fail to meet several of the remaining elements of a declaratory judgment action.

A plaintiff must satisfy four elements to prove that a declaratory judgment action is "justiciable":

> (1) A controversy in which a claim of right is asserted against one who has an interest in contesting it.
> (2) The controversy must be between persons whose interests are adverse.
> (3) The party seeking declaratory relief must have a legal interest in the controversy—that is to say, a legally protectible interest.
> (4) The issue involved in the controversy must be ripe for judicial determination.

Olson, 2008 WI 51, ¶ 29.

Starting with the first requirement, the Foundation has no "claim of right"—against anyone. Such a claim "must assert 'present and fixed rights' rather than 'hypothetical or future rights.'" *Fabick*, 2021 WI 28, ¶ 10 (citing *Tooley v. O'Connell*, 77 Wis. 2d 422, 434, 253 N.W.2d 335 (1977)). In other words, the claim must reflect a live controversy. *See Tooley*, 77 Wis. 2d at 434; *State ex rel. La Follette v. Dammann*, 220 Wis 17, 264 N.W. 627, 629 (1936) ("The court . . . will wait until the event giving rise to the rights has happened, or, in other words, until rights have become fixed under an existing state of

facts."). The Foundation's claim is hypothetical—not live. As explained above, the Foundation must take several steps towards housing students and seeking a tax exemption before the City can deny the Foundation anything. Such a claim, with respect to the City, requires the Foundation to take certain independent and preceding steps before this claim becomes "present and fixed." The Foundation also does not have a claim of right against the Pres House or Lumen House. There is no way for the Foundation to develop a claim of right against them because all of its claims run against the government—any claim against an unrelated third party benefiting from the Exemption is hypothetical. *See State ex rel. La Follette*, 264 N.W. at 629.

More, none of the Plaintiffs is "adverse" to the City. The second requirement is a showing that the parties have "[s]ufficient adverseness" such that the "presentation of issues" is "sharpen[ed]." *Tooley*, 77 Wis. 2d at 437 (citation omitted). "[A] difference of opinion" does not suffice to satisfy this requirement. *State ex rel. La Follette*, 264 N.W. at 629. And no difference of opinion exists here. As the City points out in its brief, it would be more than happy to grant fewer exemptions and collect more taxes. Dkt. 31:10 ("the City would be benefited financially if this exemption is ruled unconstitutional").

Finally, even if the City were adverse to Plaintiffs, the Foundation's claims against the City are not ripe. "[A] matter is not ripe"—for purposes of declaratory judgment—"unless the facts are sufficiently developed to allow a conclusive adjudication." *Milwaukee Dist. Council 48 v. Milwaukee County*,

2001 WI 65, ¶ 41, 244 Wis. 2d 333, 627 N.W.2d 866. "The facts on which the court is asked to make a judgment should not be contingent or uncertain, but not all adjudicatory facts must be resolved as a prerequisite to a declaratory judgment." *Papa v. Wis. Dep't of Health Servs.*, 2020 WI 66, ¶ 30, 393 Wis. 2d 1, 946 N.W.2d 17 (citation omitted). As explained, the Foundation's claims are contingent on several steps the Foundation would need to take to house students and seek a tax exemption. The Foundation's claims are "not now ripe for adjudication" since the Foundation needs to take preceding steps before "the court may vindicate" its claims "by a declaratory judgment." *State ex rel. La Follette*, 264 N.W. at 629. The Foundation may dislike the limits on the Exemption in theory, but it has not even attempted to secure the Exemption (much less housing) for itself. The Foundation's disdain for the Exemption does not ripen its claim to a justiciable controversy.

II. PLAINTIFFS' LEGAL THEORIES ARE MERITLESS

Plaintiffs' disjointed constitutional challenges to the tax exemption—some claiming that the Exemption goes too far, others that it does not go far enough—all fall short. The Exemption does not implicate any fundamental rights, and so is easily constitutional under both the Uniformity Clause and equal protection because its purpose and limits—particularly its focus on nonprofit student housing serving UW-Madison students—are reasonable. *See infra* II.A., II.B. As for the Religion Clause, the Exemption does not mention or discriminate against religious entities, and even if it were expressly religious,

such tax exemptions have long been consistent with the Religion Clause. *See infra* II.C. And because the Exemption both "relates to a state responsibility of statewide dimension" and has "a direct and immediate effect on a specific statewide concern or interest," it is not a private or local bill. *Davis v. Grover*, 166 Wis. 2d 501, 525, 480 N.W.2d 460 (1992); *see infra* II.D.

A. The Exemption Does Not Violate the Uniformity Clause Because It Applies Uniformly to All Within Its Scope

Plaintiffs must prove beyond a reasonable doubt that the Exemption violates the Uniformity Clause. "All legislative acts are presumed constitutional and every presumption must be indulged to uphold the law if at all possible." *Nw. Airlines, Inc. v. Wis. Dep't of Revenue*, 2006 WI 88, ¶ 65, 293 Wis. 2d 202, 717 N.W.2d 280 (quoting *Norquist v. Zeuske,* 211 Wis. 2d 241, 250, 564 N.W.2d 748 (1997)). "This is especially true where the challenged statute involves a tax measure, because the presumption of constitutionality is strongest for taxation-related statutes." *Id.* (citing *Norquist,* 211 Wis. 2d at 250).

The Uniformity Clause states, "[t]he rule of taxation shall be uniform but the legislature may empower cities, villages or towns to collect and return taxes on real estate located therein by optional methods." Wis. Const. art. VIII, § 1. The Clause has been interpreted to require that, for the purposes of direct taxation, all property within a class be taxed equally on an *ad valorem* basis—*i.e.*, in proportion to the value of the property. *Nw. Airlines, Inc.*, 2006 WI 88, ¶ 62 (citations omitted). For practical purposes this means that "each dollar's

worth of one sort of property is liable for exactly the same tax as a dollar's worth of any other sort of property." *State ex rel. Ft. Howard Paper Co. v. State Lake Dist. Bd. of Rev.*, 82 Wis. 2d 491, 507, 263 N.W.2d 178 (1978) (quoting *Gottlieb v. City of Milwaukee*, 33 Wis. 2d 408, 424–25, 147 N.W.2d 633 (1967)).

Even so, the Uniformity Clause permits the Legislature to fully exempt a property from taxation provided two conditions are met. First, the property must be absolutely exempt from taxation. *Gottlieb*, 33 Wis. 2d at 420; *id.* at 425 (explaining that the Legislature "can classify as between property that is to be taxed and that which is to be wholly exempt"). That is, the Legislature must either completely exempt a property from taxation, or else tax it on an *ad valorem* basis with all other property—there can be no middle ground or partial exemption. *Id.* at 420, 425.

Second, the Legislature's classification of a property as wholly exempt must bear a "reasonable relation to a legitimate purpose of government." *Madison Gen. Hosp. Ass'n v. City of Madison*, 92 Wis. 2d 125, 129–30, 284 N.W.2d 603 (1979). Indeed, the only "test" of the Legislature's classification of a property as "wholly exempt" is "reasonableness." *Nw. Airlines, Inc.*, 2006 WI 88, ¶ 62. Exemptions are generally reasonable where the "facts show[ ] a direct benefit to a taxpayer who was appropriately favored by the tax exemption." *Madison Gen. Hosp. Ass'n*, 92 Wis. 2d at 130–31. This rationale has been extended to indirect and less immediate benefits as well, on the grounds that "[h]ow directly" an exemption benefits a taxpayer "is a matter of legislative policy."

Id. at 131. "All that a court need determine is that the legislature could have reasonably determined that the tax exemption would inure directly or indirectly to the benefit of a taxpayer who could legitimately be favored as a matter of public policy." *Id.* Accordingly, courts often find that complete tax exemptions bear a reasonable relation to a legitimate government purpose. *See Nw. Airlines, Inc.*, 2006 WI 88, ¶¶ 6, 61 (holding that an exemption for the "hubs" of air carriers meeting certain qualifications, which only to two air carriers qualified for, was reasonable because the Legislature could have believed that the hub exemption would influence other air carriers to expand in Wisconsin); *First Nat'l Leasing Corp. v. Madison*, 81 Wis.2d 205, 213, 260 N.W.2d 251 (1977) (finding that a tax classification benefiting nonprofit hospitals was permissible because the facts showed a direct benefit to the "hospital, and ultimately to the consumers of the health services."); *Madison Gen. Hosp. Ass'n*, 92 Wis. 2d at 130–32 (concluding that an exemption of property owned by IBM and leased to a hospital was reasonable because it would indirectly inure to the benefit of a nonprofit hospital).

Section 70.11(3m) meets the requirements for a property tax exemption under the Uniformity Clause. The provision fully exempts qualifying properties, thus satisfying the requirement to avoid partiality. *See* Wis. Stat. § 70.11; *Gottlieb*, 33 Wis. 2d at 425. Secondly, the provision is reasonably related to a legitimate government interest. *See Madison Gen. Hosp. Ass'n*, 92 Wis. 2d at 129–30. Residences like the Pres and Lumen Houses (not to mention

the Babcock, French, and Phos Houses) offer community and belonging to UW-Madison students looking for particular forms of engagement.[10] Indeed, to meet the Exemption's requirements, the houses *must* provide services to both the UW students and to the community in general. Wis. Stat. § 70.11(3m)(a)3. The Legislature could well have concluded that offering programing and reduced-cost housing options to students searching for forms of community that UW-Madison did not otherwise provide would lead well-rounded, emotionally stable, and community-minded students capable of contributing to the State's welfare. *See Nw. Airlines, Inc.*, 2006 WI 88, ¶ 61 (holding that a tax exemption is reasonable where it would "bolster economic development in Wisconsin"); *First National Leasing Corp.*, 81 Wis. 2d at 213 (finding that a tax exemption was reasonable when it prevented a property tax from being passed on individuals benefiting from a nonprofit hospital's services); *see also Madison Gen. Hosp. Ass'n*, 92 Wis. 2d at 131 (explaining that an exemption is reasonable when it benefits a taxpayer). Moreover, after reviewing the state resources, the Legislature could have made the equally reasonable choice that, in 2013, the

[10] UW-Madison's other learning and theme communities, such as the BioHouse or OpenHouse, do the same under the University's own auspices. *University Housing, Learning and Theme Communities*, University of Wisconsin-Madison, https://perma.cc/53MG-8C8M; *see also* Wis. Stat. § 902.01 (permitting judicial notice of facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."); *State v. Harvey*, 2001 WI App 59, ¶ 8, 242 Wis. 2d 189, 625 N.W.2d 892, (taking judicial notice of a park's status as a city park because it was readily verifiable by contacting the City of Madison, consulting the city's publications, or visiting the city's website); *Caldwell v. Univ. of New Mexico Bd. of Regents*, 679 F. Supp. 3d 1087, 1104 n.4 (D.N.M. 2023) (taking notice of an academic calendar on the university's website).

benefits of additional tax-exempt properties outweighed their costs. *See Pace v. Oneida Cnty.*, 212 Wis. 2d 448, 455, 569 N.W.2d 311 (Ct. App. 1997).

Plaintiffs' argument derives from a fundamental misunderstanding of Uniformity Clause law. Plaintiffs assert that "[u]niformity is violated when a statute imposes arbitrary methods of assessment and unequal taxation of comparable properties." Compl. ¶ 66. But the requirement that "comparable properties" be taxed equally is triggered only when the property of both the plaintiff and the plaintiff's would-be comparator are *both* taxed the *ad valorum* rate, and the plaintiff contends that they are taxed unequally. *See U.S. Oil Co. v. City of Milwaukee*, 2011 WI App 4, ¶ 25, 331 Wis. 2d 407, 794 N.W.2d 904; *State ex rel. Levine v. Bd. of Rev. of Vill. of Fox Point*, 191 Wis. 2d 363, 371–72, 528 N.W.2d 424 (1995) ("[T]axpayers may demonstrate that although their properties were assessed at fair market value, other comparable properties were assessed significantly below fair market value, thus amounting to a discriminatory assessment of their property."). Because the student housing facilities at issue here are exempt from taxation entirely, questions of arbitrariness and comparative inequality are not triggered in this case.

Finally, Plaintiffs' allegations that Section 70.11(3m) is "arbitrary" and "without a rational basis" are conclusory. Compl. ¶ 73, *see also id.* ¶ 67. Thus, the court should not accept them. *Data Key Partners*, 2014 WI 86, ¶ 19. And Plaintiffs' factual allegations that this Exemption is specific to "church-affiliated nonprofit-owned rental properties," Compl. ¶ 73, is inaccurate, as the

Complaint notes elsewhere that the Exemption applies more broadly, *see* Compl. ¶ 28. Thus, these allegations should not be considered. *Data Key Partners*, 2014 WI 86, ¶ 19. And, as explained above, there is a reasonable basis for this Exemption. *See supra* pp. 28–30.

B. The Exemption Comports with Equal Protection

Plaintiffs invoke Wisconsin Constitution Article I, Section 1, which provides the "same equal protection" rights as the federal Constitution. *Mayo v. Wis. Injured Patients & Fams. Comp. Fund*, 2018 WI 78, ¶ 35, 383 Wis. 2d 1, 914 N.W.2d 678. Under that analysis, when no fundamental right or protected class is implicated, a law is "upheld if there is any rational basis for the legislation." *Id.* ¶¶ 28–29. This standard is easy to meet. A statute is constitutional even if "some inequality results from the classification." *Id.* ¶ 29. So long as the court can "identify or, if necessary, construct a rationale supporting the legislature's determination," the statute must be upheld. *Blake v. Jossart*, 2016 WI 57, ¶ 32, 370 Wis. 2d 1, 884 N.W.2d 484. Courts "will not reweigh the policy choices of the legislature." *Mayo*, 2018 WI 78, ¶ 40.

The decision to provide a property tax exemption for certain nonprofit student housing for UW-Madison students does not involve a fundamental right or protected class and thus, as Plaintiffs admit, is subject only to rational-basis review. *See* Compl. ¶¶ 20–21. The Exemption is reasonable several times over. To start, the Exemption fills a gap for student housing options, as dormitories and residences on college grounds are also exempt from taxation. *See* Wis. Stat. § 70.11(3). In addition, it was reasonable for the Legislature to

recognize the unique needs and statewide impact of the state's flagship university and thus target the Exemption to UW-Madison. UW-Madison brings together students from across the state and around the world, and brings significant revenue to the State. *See* UW-Madison and the State Budget, University of Wisconsin-Madison;[11] About UW-Madison, University of Wisconsin-Madison;[12] *see also* Wis. Stat. § 902.01(2).[13] Strengthening the nonprofit organizations that "offer[ ] support services and outreach programs to [their] residents," who are largely UW-Madison students, to the University, and to "the public" ensures that students with diverse experiences and interests feel welcomed and supported in the State's most important University. Wis. Stat. § 70.11(3m)(a)3.; *see supra* pp. 28–30.

Finally, the decision to restrict the Exemption to preexisting nonprofit student housing also serves several important state interests. For one, the Exemption impacts the City's tax base, so limiting the expansion to existing properties prevents the Exemption from imposing an unreasonable tax burden on the City. To be clear, however, the Exemption did not "close" when it was amended in 2013. It remains open to any nonprofit student housing that meets the criteria and has not yet sought the Exemption. Rather, the time limit prohibits companies from converting commercial student housing into nonprofit housing to try to benefit from the tax Exemption. The Exemption

[11] https://perma.cc/G3BS-6XZA.
[12] https://perma.cc/UX5X-T22G.
[13] *See supra* nn. 5, 10.

thus provides reasonable limits that maximize the purpose of the Exemption—to put nonprofit student housing on the same foot as other tax-exempt student housing. *See supra* pp. 28–30.

C. The Exemption Does Not Give Preference to Religious Establishments or Modes of Worship

The Exemption does not violate the Religion Clause, for two independent reasons. *First*, even under the discredited, more restrictive *Everson* test,[14] the Exemption passes muster because it is neutral towards religion, and Plaintiffs may not impute an "illicit legislative motive" to invalidate the statute. *United States v. O'Brien*, 391 U.S. 367, 383 (1968). *Second*, even if the Exemption specifically benefitted only religious entities, such exemptions are permissible under the reigning "historical practices and understandings" test. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 535 (2022) (citation omitted).

The Wisconsin Constitution provides, "nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship." Wis. Const. art. I, § 18. "This is Wisconsin's equivalent of the Establishment Clause of the First Amendment," and it "carries the same import." *Jackson v. Benson*, 218 Wis. 2d 835, 876–77, 578 N.W.2d 602 (1998). Wisconsin courts thus "interpret

[14] As the Supreme Court and some of its members have explained in various opinions, *Everson v. Bd. of Educ. of Ewing Tp.*, 330 U.S. 1 (1947)—like the infamous "*Lemon* test"—is an artifact of constitutional jurisprudence and has been supplanted by the historical test. *See, e.g.*, *Espinoza v. Montana Dep't of Revenue*, 591 U.S. 464, 489–91 (2020) (Thomas, J., concurring). For the same reason, it should have no relevance under Wisconsin's Religion Clause.

and apply the benefits clause of art. I, § 18 in light of the [ ] Supreme Court cases interpreting the Establishment Clause of the First Amendment." *Id.* at 877.

A neutral law that benefits both religious and non-religious entities equally does not violate the Religion Clause, even under the Supreme Court's older, more restrictive jurisprudence. *See Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 840 (1995). Indeed, to hold a neutral law invalid merely because it *also* benefits religious entities would be a violation of the Free Exercise Clause. *Everson*, 330 U.S. at 16. Here, as Plaintiffs admit, the Exemption applies to both religious and non-religious entities. *See* Compl. ¶ 28. And this makes sense, as it is wholly neutral towards religion: the Exemption applies equally to any organization that meets its criteria. *See* Wis. Stat. § 70.11(3m)(a). And to hold that the law violates the Religion Clause simply because it also benefits religious organizations would violate the right of those organizations to the free exercise of their religion. *See Everson*, 330 U.S. at 16; *see also Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 466 (2017); Dkt. 35:29.

Further, courts "will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *O'Brien*, 391 U.S. at 383; *see also State v. Villamil*, 2017 WI 74, ¶ 21, 377 Wis. 2d 1, 898 N.W.2d 482. In *O'Brien*, the Supreme Court rejected the plaintiff's attempt to establish an improper legislative motive (there, to restrict free speech) based on comments

made by three congressmen. *Id.* at 385–86. The Court explained, "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for [courts] to eschew guesswork." *Id.* at 384.

By asserting religious discrimination on the basis of a statement by a single legislator, Plaintiffs here make the same mistake as O'Brien. They rely on comments from one state representative and statements by a third party—the Catholic Diocese of Madison—to assert that the tax exemption was primarily religiously motivated. Compl. ¶¶ 21, 27. Neither statement can support Plaintiffs' claim. For "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for [courts] to eschew guesswork." *O'Brien*, 391 U.S. at 384. The plain language of the Exemption—and its real-life application—shows that it has no religious restrictions, and Plaintiffs cannot create religious animus by invoking the statements of individual legislators.

In any event, even if the statute discriminated in favor of religious organizations exclusively, the Establishment Clause permits religious tax exemptions. Under current doctrine, "the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'" *Kennedy*, 597 U.S. at 535 (citation omitted). And "[f]ew concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government" to provide religious tax exemptions.

Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 676–77 (1970); *see also Gaylor v. Mnuchin*, 919 F.3d 420, 436 (7th Cir. 2019) (citing "substantial evidence of a lengthy tradition of tax exemptions for religion" and rejecting Establishment Clause challenge to different Wisconsin 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) ("there is no 'establishment of religion' involved in determining that a church or religious organization is entitled to a tax exemption") (citation omitted).[15]

D. The Exemption Is Not a Private or Local Bill

The Private Bill clause states 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." Wis. Const. art. IV, § 18. To decide whether a bill qualifies as a "private or local bill," rather than a general bill, triggering the additional procedural requirements of § 18, courts apply "a two-fold analysis." *Davis*, 166 Wis. 2d at 520. *First*, the court considers "whether the process in which the bill was enacted deserves a presumption of constitutionality." *Id.* If the legislative record shows that the legislature "adequately considered or

[15] In fact, Wisconsin law contains numerous religious tax exemptions. Churches and religious associations are exempt from paying property tax, including on property housing pastors or other members of religious orders. Wis. Stat. § 70.11(4); *see Missionaries of Our Lady of La Salette v. Michalski*, 15 Wis. 2d 593, 597, 113 N.W.2d 427 (1962). Religious schools and religious nonprofit camps receive generous property tax exemptions. Wis. Stat. § 70.11(4), (11); *see Wis. Evangelical Lutheran Synod*, 125 Wis. 2d 541, 551. Churches and religious organizations are exempt from paying unemployment tax. Wis. Stat. § 108.02(15)(h). And religious organizations are exempt from paying sales tax, Wis. Stat. § 77.54(9a)(f), or corporate income tax, Wis. Stat. § 71.26(1)(a).

discussed the legislation," then the burden falls on the plaintiff to "overcome the strong presumption" of constitutionality. *Id.* at 520–522.

Second, to complete that analysis, the court assesses "whether the bill is private or local." *Id.* at 520. And the fact that a bill is "specific on its face as to particular people, places or things" does not necessarily make it a "private or local" bill. *Id.* at 524. When the "general subject matter of the provision relates to a state responsibility of statewide dimension and its enactment will have a direct and immediate effect on a specific statewide concern or interest," *id.* at 525 (quoting *City of Brookfield v. Milwaukee Metro. Sewerage Dist.*, 144 Wis. 2d 896, 911, 426 N.W.2d 591 (1988)), then the law is considered to be a "general law as opposed to a 'private or local' law." *City of Oak Creek v. State Dep't of Nat. Res.*, 185 Wis. 2d 424, 440, 518 N.W.2d 276 (Ct. App. 1994).

Because the Legislature thoroughly considered the tax exemption, it is entitled to a presumption of constitutionality, and Plaintiffs face a heavy burden to overcome that presumption. Section 70.11(3m) was first introduced through an amendment to the Assembly's 2009 budget bill, then the Senate deleted it, and finally the Committee of Conference revived it. Comp. Summ. of Budget Recommendations, 2009 Act 28, Vol. II, Legis. Fiscal Bureau, at 975 (Oct. 2009).[16] This back and forth shows that the Legislature intelligently and

[16] https://perma.cc/23LP-UDR7. *Cf. State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 504, 261 N.W.2d 434 (1978) (taking judicial notice of "materials in the Wisconsin Legislative Reference Bureau").

purposefully considered whether to enact the Exemption. *See Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 537, 576 N.W.2d 245 (1998).

And after it was enacted, the Exemption underwent several more rounds of scrutiny and review. The Legislature reconsidered the Exemption in both the 2011 and 2013 budget processes, first proposing to repeal the Exemption, which the Governor vetoed, Gov. Walker Veto Message, 2011 Wis. Act 32 at 22 (June 26, 2011),[17] and then amending the Exemption to exclude fraternities and sororities and to limit the Exemption to nonprofit student housing as of mid-2014, 2013 Drafting Request, Assembly Amendment (AA-AB40).[18] The fact that this Exemption was a hotly contested issue, which Plaintiffs themselves admit by pointing to media articles discussing the Legislature's consideration of the Exemption, Compl. ¶ 23, shows that the decision to grant the Exemption was plainly given "due consideration" and thus entitled to a strong presumption of constitutionality. *Davis*, 166 Wis. 2d at 524.

Moving to the second step, the Exemption qualifies as a general, not private, law. The controlling analysis for a law that is, as Plaintiffs claim, specific to a particular place or particular entities, is whether the exemption "relates to a state responsibility of statewide dimension" and has "a direct and immediate effect on a specific statewide concern or interest." *Davis*, 166 Wis. 2d at 525. A responsibility of statewide dimension includes "[a]ll that is held

[17] https://perma.cc/K763-V87U. *Cf. Medlock v. Schmidt*, 29 Wis. 2d 114, 122, 138 N.W.2d 248 (1965) (noting proper to take judicial notice of an "executive message").

[18] https://perma.cc/M7Z6-CS2J. *See* n. 16.

by the state, as proprietor, trustee, or in some governmental capacity." *Milwaukee Brewers Baseball Club*, 130 Wis. 2d at 110–11 (citation omitted). For example, in *Milwaukee Brewers Baseball Club*, the bill in question directed the department to "establish a correctional institution located in Milwaukee." 130 Wis. 2d at 117–18. The Court explained that the subject matter of the bill, "the construction of a medium/maximum prison," was "a matter of state responsibility of statewide dimension," as "[i]t is the responsibility of the state to maintain a statewide prison system." *Id.* at 118–19. And the bill had a "direct and immediate effect" on that concern because the building of the prison addressed overcrowding in the state's prison system. *Id.* at 119–20.

Furthermore, "benevolent organization[s] that provide[ ] a broad range of programming to the public" are statewide concerns or interests. *Lake Country Racquet & Athletic Club v. Morgan*, 2006 WI App 25, ¶ 28, 289 Wis. 2d 498, 710 N.W.2d 701. Enacting tax exemptions for such organizations "is a responsibility of the state." *Id.* ¶ 29. And exempting those organizations from taxation "directly and immediately affects the resources available to [them] to provide benevolent programming to local communities." *Id.* ¶ 30.

Here, the Exemption both "relates to a state responsibility of statewide dimension" and has "a direct and immediate effect on a specific statewide concern or interest." *Davis*, 166 Wis. 2d at 525 (citation omitted). First, there is no question that the state university system, including and especially UW-Madison, is a state responsibility of statewide concern. *See* Wis. Stat. ch. 36

(University of Wisconsin System). And exempting from taxation (thereby affecting the resources available to) organizations providing housing and services to the University and its students directly and immediately impacts that statewide concern. *See Lake Country Racquet & Athletic Club*, 2006 WI App 25, ¶ 30. More, the Exemption is directed at nonprofit organizations that provide community services. Wis. Stat. § 70.11(3m)(a)3. (requiring that the nonprofit "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"). Such an exemption has a direct and immediate impact on matters of statewide concern—*i.e.*, benevolent organizations. *Lake Country Racquet & Athletic Club*, 2006 WI App 25, ¶¶ 28–30.

Plaintiffs argue that the Exemption is unconstitutional because it is limited to the Pres House and the Lumen House, Compl. ¶ 3, but that is plainly wrong from the face of the statute and the statute's real-world application, as Plaintiffs themselves admit, *id.* ¶ 28. Nothing in the text of the statute restricts the Exemption to these two entities, or even to religious nonprofits. *See, supra,* Part II.C. And, as explained, providing a tax exemption to these nonprofits relates to a state responsibility and has a direct and immediate impact on a statewide interest, and is therefore a "general law" not subject to Article I, Section 18.

CONCLUSION

This Court should dismiss the Complaint with prejudice.

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Respectfully submitted,

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