STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 8

ANNIE LAURIE GAYLOR, et al.,

Plaintiffs,

Case No. 2025 CV 173
Case Code: Declaratory Judgment 30701

v.

THE CITY OF MADISON, et al.,

Defendants

PLAINTIFFS' BRIEF IN RESPONSE TO DEFENDANTS' MOTIONS TO DISMISS and CITY OF MADISON'S MOTION TO REQUIRE JOINDER

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INTRODUCTION

This is a declaratory judgment action challenging a property tax exemption, Wis. Stat. § 70.11(3m), ("the Exemption"), that was slipped into a State budget bill and later amended to primarily benefit two religious organizations, the Presbyterian Student Center Foundation (owner of the Pres House Apartments) and St. Raphael's Congregation (owner of the Lumen House Apartments). The Pres House and Lumen House are both multi-million-dollar commercial rental properties in Madison that primarily rent to UW-Madison students, and the Exemption relieves them from paying property taxes to the tune of several hundred thousand dollars collectively. Plaintiffs are three City of Madison property owners and property-taxpayers, Annie Laurie Gaylor, Dan Barker, and David Peterson ("Property-Taxpayer Plaintiffs"), and a Madison-based nonprofit organization, the Freedom From Religion Foundation ("FFRF"), collectively, "Plaintiffs," who are among those picking up the Pres House and Lumen House's property tax slack.

Plaintiffs claim the Exemption violates several provisions of the Wisconsin Constitution, including the Uniformity Clause, Wis. Const. art. VIII, § 1; the Equal Protection Clause, Wis. Const. art. I, § 1; the Establishment Clause, Wis. Const. art. I, § 18; and, the Private Bill Clause, Wis. Const. art. IV, § 18. Defendants, City of Madison, the Presbyterian Student Center Foundation, St. Raphael's Congregation, and the Legislature, as intervening defendant, collectively, "Defendants," now move to dismiss these claims for failure to state a claim, lack of subject matter jurisdiction, and/or failure to join indispensable parties, but they do so based on arguments that are not supported by the facts alleged in the Complaint, that lack a legal basis, or are more suited to resolution at summary judgment or later phases of the case. Plaintiffs' Complaint properly states a claim that the Exemption is unconstitutional for

four separate reasons and the Court has jurisdiction to hear it; meanwhile, Defendants have each failed to meet the heavy burden to show their respective motions to dismiss should be granted. The Court should deny each defendant's motion to dismiss.

FACTS

On a motion to dismiss for failure to state a claim, the Court is confined to the facts presented in the Complaint, which must be taken as true, and all reasonable inferences from those facts. *See State* ex rel. *Luedtke v. Bertrand*, 220 Wis. 2d 574, 579, 583 N.W.2d 858 (Ct. App. 1998), *aff'd*, 226 Wis. 2d 271, 594 N.W.2d 370 (1999). The facts as stated in the Complaint are summarized as follows:

I. The Exemption

The Exemption at issue here was passed in 2009 to specifically benefit the Pres House Apartments, owned by the Presbyterian Student Center Foundation. Compl. ¶¶3, 18–21. The Exemption was originally drafted to apply to certain facilities that housed students at any public or private institution of higher education within the entire state of Wisconsin, but was narrowed to apply only to such facilities housing students at UW-Madison. Compl., ¶¶18–20, 31.[1] Then-Representative Spencer Black stated publicly that he introduced the measure because he believed that the Pres House Apartments should be tax exempt as "a religious-based residence, but the tax code was unclear." *Id.*, ¶¶18, 21. Pres House was at that time the only property eligible to benefit from the Exemption. *See* Compl. ¶¶21–23.[2]

[1] The Exemption applied to facilities where "[a]t least 90 percent" of residents were enrolled at UW-Madison. Compl. ¶19.

[2] In 2011, the Joint Finance Committee voted to repeal the Exemption, which the co-chair described as "an aberration and earmark." *Id.*, ¶21. The governor, however, vetoed the repeal even though Pres. House was the only property in the state that benefitted from the Exemption. *Id.*, ¶23.

In 2013, Defendant St. Raphael's lobbied to have its apartment complex included under the Exemption, and the measure was then amended to cover facilities that either met the other requirements of the Exemption on July 2, 2013, or that were "municipally designated landmarks" that met those requirements on September 20, 2014. Compl., ¶¶24, 27. The amendment and its date-of-existence requirement were drafted explicitly to benefit St. Raphael's Lumen House Apartments, a municipal landmark that completed construction in 2014. *Id.*, ¶¶24–28. The local Diocese of Madison publicly stated that the amendment "now clearly stipulates that Lumen House, a project of faith-based student housing and outreach ministry sponsored by the Cathedral Parish, will be tax-exempt, as was envisioned from the beginning[,]" and that the amended Exemption would permit a Lumen House renovation project to go forward. *Id.* ¶27; *see also id.* Exhibit C. And, by including a strict date-of-existence requirement, the amended Exemption ensures that no similar properties will qualify for tax-exempt status under the provision. *Id.*, ¶29.

In the four years between the original Exemption and the Amendment, two smaller facilities, the Babcock House and Association of Women in Agriculture House (AWA House), were granted the Exemption. Compl. ¶28. These facilities are two student co-ops, house a much smaller number of students (about 20 each), and were not the intended beneficiaries of the Exemption. Compl. ¶28.

The Exemption in its current form applies to:

> 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). The Exemption only applies to the four properties identified above, and because of the 2013 amendment, no other properties can ever qualify for the Exemption. These four properties are all in the City of Madison.

II. The Pres House and Lumen House Apartments

The Pres House and Lumen House Apartments are commercial properties that charge tenants rent at market rate prices similar to other commercial rental properties in the area. Compl. ¶33. Though they provide some programming for residents, the Pres House and Lumen House rentals are not charitable activities. *Id.* ¶34. The Pres House Apartments' current market value likely exceeds $25 million, with estimated annual property taxes owed in excess of $300,000. *Id.* ¶42. The Lumen House Apartments' current market value likely exceeds $7.6 million, with estimated annual property taxes likely exceeding $94,000. *Id.* Based on these estimates, omitting the Pres House and Lumen House Apartments alone from the property tax rolls is approximately the equivalent of exempting an entire neighborhood from paying property taxes. *Id.* ¶44.

III. The City of Madison is Unwilling to Cease Applying this Unlawful Tax Exemption

On April 4, 2024, Counsel for Plaintiffs sent a letter to the City Assessor, Michelle Drea, Esq., which explained the background of the Exemption, the 2013 amendment, and laid out the reasons why the Exemption is unlawful under the Wisconsin Constitution. *Id.* ¶47. Later that same day, Assessor Drea replied via email to the letter stating, in part, "In my opinion, your arguments are best suited for either the Attorney General or to the Legislature directly." Compl. ¶49.

In an effort to resolve the unlawful omission of these properties via available administrative remedies without resorting to litigation, the Plaintiffs filed formal objections to their most recent property tax assessments. *Id.* ¶50. On May 3, 2024, counsel for Ms. Gaylor, Mr. Barker, and Mr. Peterson filed written objections with the City of Madison Board of Assessors (BOA). *Id.* ¶¶51–52. Plaintiffs objected to their most recent property tax assessments on the basis that the omission of the above-discussed properties under the unconstitutional Exemption negatively impacted their own assessments. *Id.* ¶¶53–54.

On May 6, 2024, the Assessor responded to Plaintiffs' submitted objections, concluding that "the objections as submitted will be unable to proceed, as confirmed by our Board of Assessor and Review Clerk." *Id.* ¶55. On May 14, 2024, the City of Madison's Board of Review (BOR) sent an additional letter to FFRF, stating, in part, that "the Board of Assessors and Review will not be reviewing your claims." *Id.* ¶56.

In further efforts to resolve this matter and out of an abundance of caution, on July 30, 2024, Plaintiffs served the City, as the taxation district, with a Notice of Circumstances Giving Rise to a Claim and Notice of Claim ("the Notice") pursuant to Wis. Stat. § 893.80. *Id.* ¶57. The City did not respond to the Notice within 120 days after the presentation of the Notice. *Id.* ¶58. On November 27, 2024, the claim was disallowed by function of law pursuant to Wis. Stat. § 893.80(1g). *Id.* ¶59. The Plaintiffs' Complaint followed. Dkt. 4.

IV. The Exemption Continues to Harm Plaintiffs

For over a decade, Ms. Gaylor, Mr. Barker, and Mr. Peterson have been paying higher property taxes, along with all other Madison property taxpayers, in part to make up for the unconstitutional omission of the Pres House and Lumen House from the tax rolls. *Id.* ¶¶7, 61.

Additionally, the Exemption was enacted and later amended to unlawfully favor two religious organizations to the exclusion of all other religious or non-religious organizations, including plaintiff FFRF. *Id.* ¶62. If FFRF were to invest in rental properties aimed at renting to UW-Madison students, FFRF would be unable to qualify for the Exemption. *Id.*

V. Procedural History

Plaintiffs filed their Complaint on January 14, 2025. Dkt. 4. On March 3, 2025 the City filed its Motion to Dismiss in Lieu of Answer and Motion to Require Joinder of Parties and supporting brief, and the Presbyterian Student Center Foundation likewise filed a Motion to Dismiss and supporting brief. Dkts. 30, 31, 34, 35. On March 10, 2025, St. Raphael's Congregation filed its own Motion to Dismiss and supporting brief. Dkts. 39, 40. On March 12, 2025, the State Legislature notified the Court of its intent to intervene in this case and defend the Exemption, Dkt. 41, and on March 21, 2025 the Legislature filed its Motion to Intervene, Motion to Dismiss and supporting briefing. Dkts. 43, 45. At the March 24, 2025 scheduling hearing, the Court granted the Legislature's unopposed motion to intervene and ordered Plaintiffs to respond to all respective motions by April 24, 2025. Dkts. 46, 48.

Additional facts are discussed as applicable below.

APPLICABLE LEGAL STANDARDS

Motions to Dismiss

Defendants' motions seek to dismiss Plaintiffs' Complaint under Wis. Stat. § 802.06(2)(a)1. (lack of capacity to sue or be sued), 2. (lack of subject matter jurisdiction), 6. (failure to state a claim upon which relief can be granted), and 7. (failure to join a party). *See* Dkt. 30, 34, 40, 45. Additionally, Defendant City of Madison moves to require joinder of certain parties under Wis. Stat. § 803.03(3). Dkt. 30.

Under Wisconsin Stat. § 802.02(1), a complaint must plead facts, which if true, would entitle the plaintiff to relief. "A motion to dismiss tests the sufficiency of the complaint." *Reetz v. Advoc. Aurora Health, Inc.*, 2022 WI App 59, ¶6, 405 Wis. 2d 298, 983 N.W.2d 669 (cleaned up).[3] "[A]ll facts pleaded and all reasonable inferences from those facts are admitted as true,' for the purpose of [the Court's review]." *Id*. (cleaned up). The court must give the most liberal interpretation possible, and "[i]f the complaint states any facts on which the plaintiff can recover, it must be held to state a cause of action." *De Bauche v. Knott*, 69 Wis. 2d 119, 121–22, 230 N.W.2d 158, 160 (1975) (cleaned up). The court must disregard any and all factual matters in the parties' submissions which are not included in the complaint. *Onderdonk v. Lamb*, 79 Wis. 2d 241, 249, 255 N.W.2d 507, 511 (1977). The court is bound by the pleadings and may not add facts beyond the pleadings to assist or defeat the allegations of the complaint. *Id*. "A complaint will be dismissed only if it appears certain that no relief can be granted under any set of facts that the plaintiffs might prove in support of their allegations." *Scott v. Savers Prop. & Cas. Ins. Co.*, 2003 WI 60, ¶5, 262 Wis. 2d 127, 663 N.W.2d 715.

On motions to dismiss for failure to state a claim, if the court considers and does not exclude matters outside the pleadings, it must convert the motion to one deciding summary judgment. *See* Wis. Stat. § 802.06(2)(b). The court must provide all parties the opportunity to present all material made pertinent to such a motion by Wis. Stat. § 802.08. *Id*.[4]

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[3] This brief uses the signal "cleaned up" when internal quotation marks, ellipses, and other metadata have been omitted from a quotation to improve its readability without altering its meaning. *See* Jack Metzler, *Cleaning Up Quotations*, 18 J. App. Prac. & Process 143 (2017). Available at: https://lawrepository.ualr.edu/appellatepracticeprocess/vol18/iss2/3/.

[4] The Legislature suggests the Court can take judicial notice of websites and other matters outside the pleadings on a motion to dismiss for failure to state a claim. (Dkt. 45 at 5 n.5.) Its basis for doing so is shaky: the dissent in a Wisconsin Supreme Court case, a case decided on summary judgment and not the motion to dismiss phase, and a case where the court obtained the rule it was supposed to be considering from the city's website. (Id.) Regardless, the Legislature's suggestion ignores the Court's other option: to exclude consideration of matters outside the pleadings under Wis. Stat. §

Declaratory Judgments

Wis. Stat. § 806.04 provides courts with broad authority to "declare rights, status, and other legal relations" when brought by an interested person affected by a statute, ordinance, or other instrument. *Id*. § 806.04(1), (2). The statute, also known as the Uniform Declaratory Judgments Act, is "is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered." *Id*. § 806.04(12). "The underlying philosophy of the Uniform Declaratory Judgments Act is to enable controversies of a justiciable nature to be brought before the courts for settlement and determination prior to the time that a wrong has been threatened or committed." *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶28, 309 Wis. 2d 365, 749 N.W.2d 211 (cleaned up). "[A] declaratory judgment is fitting when a controversy is justiciable," which depends on a four-factors test. *Id*. ¶29 (cleaned up).

On a motion to dismiss a declaratory judgment action, courts review the factual allegations in the complaint and reasonable inferences from those allegations, to determine if they "plausibly suggest [the plaintiff is] entitled to relief." *Wisconsin Manufacturers & Com. v. Evers*, 2021 WI App 35, ¶34, 398 Wis. 2d 164, 960 N.W.2d 442, *aff'd*, 2022 WI 38, ¶¶ 33-34, 401 Wis. 2d 699, 977 N.W.2d 374. (cleaned up).

ARGUMENT

Defendants shoehorn a variety of arguments into the standards for a motion to dismiss under Wis. Stat. §§ 802.06(2)(a)1.-7., but none succeed. They first attempt to dispose of the

802.06(2)(b). This makes sense at the pleadings stage, where matters outside the pleadings can convert the motion to one for summary judgment, and where Plaintiffs have not had the opportunity to conduct discovery that could be used in opposing summary judgment. See Wis. Stat. § 802.06(1)(b).

Complaint through procedural arguments under Wis. Stat. § 802.06(2)(a)6., including that the Complaint is not justiciable under Wis. Stat. § 806.04. The Legislature (but not the other Defendants) additionally argues that Plaintiffs did not exhaust their administrative remedies. The Court should reject these arguments for the reasons Plaintiffs explain below.

Defendants also contend the Complaint fails to state a claim for all four of its substantive constitutional claims, but each is well-pled and should survive the pending motions to dismiss. Defendants' arguments often veer into the merits and rely on competing factual assumptions that contradict the Complaint. Applying the proper standard at this stage of the litigation, Plaintiffs have stated claims under the Uniformity Clause, the Equal Protection Clause, Section 18 of Article I, and Section 18 of Article IV.

Finally, Plaintiffs have included all the necessary parties in this Complaint. The motions to dismiss should be denied, as should the motion to require joinder.

VI. PLAINTIFFS' CLAIMS ARE JUSTICIABLE UNDER THE UNIFORM DECLARATORY JUDGMENTS ACT.

Plaintiffs' claims meet all the requirements for justiciability for a claim under the Uniform Declaratory Judgments Act, Wis. Stat. § 806.04. Defendants' arguments on this point largely (and unsuccessfully) dispute Plaintiffs' standing, and Plaintiffs' claims are justiciable under the remaining factors as well. Defendants' motions should be denied.

A. Justiciability is liberally construed in Wisconsin.

"A decision to grant or deny declaratory relief falls within the discretion of the circuit court." *Putnam v. Time Warner Cable of Se. Wis., Ltd. P'ship*, 2002 WI 108, ¶40, 255 Wis. 2d 447, 649 N.W.2d 626. "[A] declaratory judgment is fitting when a controversy is justiciable." *Id.*, ¶41 (cleaned up). A controversy is justiciable when four factors are met:

> (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.

Id. The third justiciability requirement of a "legally protectable interest" is often "voiced in terms of standing." *Fabick v. Evers*, 2021 WI 28, ¶11, 396 Wis. 2d 231, 956 N.W.2d 856.

"The merits of plaintiffs' cause of action do not determine its justiciability." *Tooley v. O'Connell*, 77 Wis. 2d 422, 434, 253 N.W.2d 335, 340 (1977). The "preferred view" is that "declaratory relief is appropriate wherever it will serve a useful purpose." *Olson*, 309 Wis. 2d 365, ¶42. In furtherance of its remedial purpose, the Uniform Declaratory Judgment Act permits any person whose "rights . . . are affected by a statute" to sue for declaratory judgment. Wis. Stat. § 806.04(2). Courts "construe § 806.04(2) liberally as it affords relief from an uncertain infringement of a party's rights." *Town of Eagle v. Christensen*, 191 Wis. 2d 301, 316, 529 N.W.2d 245 (Ct. App. 1995).

Here, the property-taxpayer plaintiffs and FFRF satisfy all four justiciability requirements, and thus this action is properly before the Court as a declaratory judgment.

B. Plaintiffs have asserted a claim of right against the City, and the City has an interest in contesting the claims (Justiciability Factor 1).

Plaintiffs have asserted a claim of right against the City, and the City has an interest in contesting Plaintiffs' claims, notwithstanding its arguments to the contrary. Dkt.31 at 6–9.

Plaintiffs have set forth constitutionally protected rights they allege have been infringed upon by the City in its actions pursuant to a property tax exemption they assert is unlawful, Wis. Stat. § 70.11(3m). The Wisconsin Constitution is the "foundational charter in which the people determine their fundamental law," *Wis. Just. Initiative, Inc. v. WEC*, 2023 WI 38, ¶15, 407 Wis. 2d 87, 990 N.W.2d 122; obviously, statutes must comply with the

Constitution. FFRF and the property-taxpayer plaintiffs have alleged, with particularity, how the Exemption violates the Wisconsin Constitution.

Specifically, Property-Taxpayer Plaintiffs Ms. Gaylor & Mr. Barker and Mr. Peterson all contend the assessment and collection of excessive property taxes by the City is unlawful so long as the City is implementing the unconstitutional Exemption. Compl. ¶¶6-7, 53-54, 61. The pecuniary loss the property-taxpayer plaintiffs suffer is directly carried out by the City through the City Assessor's Office. *Id.* ¶46-56. They allege in detail through their Complaint that their "rights . . . are affected," Wis. Stat. § 806.04(2), by the Exemption, and thus they now seek a declaration as to the Exemption's constitutional validity. Additionally, Plaintiff FFRF asserts that the Exemption treats it and similarly situated nonprofits unequally under the law as prohibited by the Wisconsin Constitution's Equal Protection Clause and that this unequal treatment will continue so long as the City continues to implement the Exemption. Id. ¶¶8, 62, 80-84. Plaintiff FFRF effectively pleads that its rights are affected by the Exemption. "Regardless of the merits of their constitutional claims, it cannot be said that the plaintiffs have failed to raise a justiciable controversy." *Tooley v. O'Connell*, 77 Wis. 2d 422, 437, 253 N.W.2d 335 (1977). Plaintiffs have each asserted a claim of right against the City.

This situation is similar to *Tooley v. O'Connell*, where the plaintiff property owners and taxpayers challenged a statute for school financing in Milwaukee and sued the Milwaukee Metropolitan School District and other local officials. *Id.* at 428. The court described the defendants as "public officers invested by law with the implementation of property tax assessment, levy and collection, part of which tax revenues finance the public school system in Milwaukee." *Id.* at 427. Said the court, in finding the first justiciability factor satisfied,

> The plaintiffs seek to have the present statutory scheme for the local financing of public schools via the local property tax declared unconstitutional and thus invalid. The

> defendants have a statutory duty to initiate the taxing process by transmitting their budgetary needs to the common council. Therein lies the adversity. The plaintiffs seek to invalidate the financing system; the defendants by statute are required to operate under and maintain the system. Sufficient adverseness to sharpen the presentation of issues for illumination of constitutional questions exists.

Id. at 437 (reversing dismissal of complaint) (cleaned up). The City, while theorizing that Plaintiffs are not adversarial, Dkt.31 at 6, cites no case to the contrary.[5]

Further, the City has an interest in contesting the claims—and indeed, is contesting them through its Motion to Dismiss. The City, via the City Assessor, values all real property within Madison and administers tax exemptions, as the City concedes. Dkt.31 at 8. Further, the City acknowledges that taking properties off the tax rolls results in all other property taxpayers paying higher property taxes. Dkt.31 at 9. It goes without saying that the City collects property taxes and then expends the collected taxes as a means of funding the City. Indeed, the City believes it must carry out all taxation statutes including property tax exemptions unless the statute is repealed or struck down, Dkt.31 at 8, notwithstanding any constitutional defects in a statute. Essentially, Plaintiffs contend that the City cannot implement the Exemption because it is constitutionally defective, and the City has an interest in contesting that assertion (and has chosen to do so in this action) as it believes it should

[5] At most, the City acknowledges in a footnote cases where local taxation districts were sued over property tax issues, but suggests these cases can be ignored. Dkt.31 at 6 & n.3 (citing *Gottlieb v. City of Milwaukee*, 33 Wis. 2d 408, 147 N.W.2d 633 (1967); *Metro. Assoc. v. City of Milwaukee*, 2011 WI 20, 332 Wis. 2d 85, 796 N.W.2d 717). That these cases involved constitutional challenges to different statutes does not mean local taxation districts are inappropriate defendants for such challenges, as the City contends. The City also contends these cases involved "the direct exercise of municipal powers," but does not explain this statement or why that distinguishes the present case. The Complaint here alleges the City assesses property taxes and grants the Exemption at issue, i.e. exercises municipal powers, Compl. ¶¶ 5-6, 15, 45-56, Exs. F-I, and the City admits as much, Dkt.31 at 8-9. If anything, case law shows that the choice of local taxation districts as defendants in challenges the constitutionality of tax statutes is unremarkable. *See, e.g., Nankin v. Village of Shorewood*, 2001 WI 92, 245 Wis. 2d 86, 630 N.W.2d 141 (deciding constitutional challenge to statutory tax appeal procedures).

continue to implement the Exemption unless it is repealed or declared unconstitutional by the Court. Dkt.31 at 8–9. Its interests are adverse to Plaintiffs.

The City suggests that Plaintiffs have sued the wrong defendant, and that the Department of Revenue ("DOR") would be more suitable. Dkt.31 at 6-7. Other than making general claims that the DOR also has duties related to taxation, the City does not explain how a suit against the DOR would lead to any relief for Plaintiffs, unlike the declaratory relief and injunction Plaintiffs have sought against the City here. Compl. ¶24. The City also cites two cases where the defendant was the DOR or its secretary, but those cases were brought by organizations with taxing interests that applied and/or were challenged in multiple jurisdictions. *Lake Country Racquet & Athletic Club, Inc. v. Morgan*, 2006 WI App 25, 289 Wis. 2d 498, 710 N.W.2d 701 (case brought by five for-profit health clubs against exemption for YMCAs); *Northwest Airlines, Inc. v. DOR*, 2006 WI 88, 293 Wis. 2d 202, 717 N.W.2d 280 (case brought by airline challenging exemption for other air carriers). It makes sense in those cases for the DOR to be the defendant, but that does not mean suits against individual taxing jurisdictions are improper. To the contrary, the defendants in *Tooley*, cited above, initially *included* the DOR secretary, but he was *dismissed* as a party defendant. 77 Wis. 2d at 428 n.1.

To the extent the other defendants challenge the first justiciability factor, they make arguments more suited to standing than adversity. For example, the Legislature claims FFRF as an organization (but not the other plaintiffs) has no adverse interest because its interest is "hypothetical." *E.g.*, Dkt.45 at 23–24. But as the case it cites notes, the "Declaratory Judgments Act allows litigants to seek a declaration of the 'construction or validity' of a statute," and that plaintiffs may do so if taxpayer standing is satisfied. *Fabick*, 396 Wis. 2d 231, ¶10 (quoting Wis. Stat. § 806.04(2)). The Legislature's argument is misplaced.

Plaintiffs have satisfied the first justiciability factor.

C. The Plaintiffs and the City are legally adverse parties (Justiciability Factor 2).

The Plaintiffs and the City are adverse parties within the meaning of justiciability doctrine—even if the City claims indifference to the Exemption as a matter of policy.

The issue of legal adversity is not determined by a defendant's opinion of a law at issue; adversity is determined by the parties' respective actions and duties. Such was the case in *Tooley*, where the court found adversity based on the plaintiffs' desire for the statutory taxation scheme to be declared invalid, and the defendant city's statutory duty to apply that scheme. 77 Wis. 2d at 437. The City's brief concedes this process will play out in the present case; if the Court determines the statute is constitutional, it will continue to apply it, and if not, the City will cease to apply it. Dkt.31 at 8.

In other words, the City continues to apply a property tax exemption that Plaintiffs assert is unconstitutional. The City's actions harm Plaintiffs, and the City states it has and will continue to take these actions because it believes the City Assessor's office has a duty to administer the Exemption. Simply put: Plaintiffs have repeatedly implored the City to stop taking an action they believe to be unconstitutional, but the City insists on continuing the action. "Therein lies the adversity." *Tooley*, 77 Wis. 2d at 437.

The Legislature presses the argument that this case is simply a "difference of opinion." Dkt.45 at 24, but then acknowledges that the City may agree that property tax exemptions are generally not in the City's best financial interest. Dkt.31 at 9-10. The Legislature's internally inconsistent argument demonstrates why opinions on either side of an issue do not create adversity; rather, actions of a local taxing jurisdiction like those challenged here and recognized by case law, do.

Plaintiffs satisfy the second justiciability factor.

D. Plaintiffs have standing and thus a legally protectible interest in the controversy (Justiciability Factor 3).

Three of the Defendants (Presbyterian Student Center and St. Raphael's Congregation, and intervening Defendant Wisconsin State Legislature) allege that Plaintiffs lack standing to bring this suit. These Defendants are incorrect: the three property-taxpayer plaintiffs, Ms. Gaylor and Mr. Barker, and Mr. Peterson, all allege the Exemption, Wis. Stat. § 70.11(3m), has unconstitutionally removed two cherry-picked, multi-million-dollar housing facilities from the City of Madison property tax base, resulting in a greater tax burden on them and every other person who pays property taxes in Madison. For its part, FFRF alleges that the Exemption, carefully crafted and amended specifically for these two properties, improperly excludes FFRF and others who could otherwise qualify for the Exemption and run similar student housing properties. All of the named plaintiffs have standing to bring these claims as laid out in the Complaint.

1. Standing in Wisconsin is liberally construed.

To have standing to bring a declaratory judgment action, the plaintiff must only "have a personal stake in the outcome and must be directly affected by the issues in controversy." *Lake Country*, 259 Wis. 2d 107, ¶15. Wisconsin courts apply the law of standing "liberally, and even an injury to a trifling interest may suffice." *McConkey v. Van Hollen*, 2010 WI 57, ¶15, 326 Wis. 2d 1, 783 N.W.2d 855 (cleaned up). As our Supreme Court recently affirmed, "the bar for demonstrating injury is low." *Brown v. WEC*, 2025 WI 5, ¶25, 414 Wis. 2d 601, 16 N.W.3d 619.

Wisconsin courts specifically recognize taxpayer standing, which relies on the plaintiff having suffered a pecuniary loss. "In order to maintain a taxpayer's action, it must be alleged

that the complaining taxpayer *and taxpayers as a class* have sustained, or will sustain, some pecuniary loss." *Fabick*, 396 Wis. 2d 231, ¶11 (emphasis added) (cleaned up); *see also Tooley*, 77 Wis. 2d at 439. Taxpayer standing exists even when the pecuniary loss alleged is "infinitesimal." *S.D. Realty Co. v. Sewerage Comm'n of City of Milwaukee*, 15 Wis. 2d 15, 22, 112 N.W.2d 177 (1961) (citation omitted).

The Legislature claims that Wisconsin courts look to federal law in assessing standing, Dkt.45 at 14, but they overstate the applicability of federal standing principles to state law claims. Federal law on standing is not binding upon Wisconsin courts. *Wis. State Legislature v. Kaul*, 2025 WI App 2, ¶25, 414 Wis. 2d 633, 17 N.W.3d 24 ("While we may look to federal case law as persuasive authority on standing, [f]ederal law on standing is not binding in Wisconsin.'") (cleaned up). "Unlike in federal courts, which can only hear 'cases' or 'controversies,' standing in Wisconsin is not a matter of jurisdiction, but of sound judicial policy." *McConkey*, 326 Wis. 2d 1, ¶15 (cleaned up); *see also Foley-Ciccantelli v. Bishop's Grove Condominium Ass'n, Inc.*, 2011 WI 36, ¶40 n.18, 333 Wis. 2d 402, 797 N.W.2d 789; *Milwaukee Dist. Council 48 v. Milwaukee Cnty.,* 2001 WI 65, ¶38 n.7, 244 Wis. 2d 333, 627 N.W.2d 866. The Wisconsin Supreme Court has outlined numerous policy reasons that support standing even in situations where plaintiffs may not meet traditional federal standing criteria. *McConkey*, 326 Wis. 2d 1, ¶¶17–18.

The Legislature also heavily relies on *Friends of the Black River Forest v. DNR*, 2022 WI 52, 402 Wis. 2d 587, 977 N.W.2d 342, but this case and others the Legislature cites concern standing under Wis. Stat. ch. 227, Wisconsin's Administrative Procedures Act, and not Wis. Stat. § 806.04. Unlike cases arising under Wis. Stat. ch. 227, which requires plaintiffs to be

"aggrieved,"[6] the Declaratory Judgment Act extends standing to persons whose "rights, status or other legal relations are affected by a statute." Wis. Stat. § 806.04(2). The Legislature cites no cases that import the multi-pronged standing analysis under ch. 227 to declaratory judgment cases, particularly those that rely on taxpayer standing. The Court should disregard the Legislature's citation of inapposite cases and attempt to leverage them into a higher standing bar for the case at issue.

2. The Property Taxpayer Plaintiffs have standing.

Property Taxpayer Plaintiffs have a legally protected interest and possess standing under the low bar for taxpayer standing in *Tooley* and *Fabick*.

Again, under these cases, Plaintiffs need only allege a pecuniary loss associated with unlawful taxing provisions. *Fabick*, 396 Wis. 2d 231, ¶11. The Complaint in this case alleges such pecuniary loss. It states that Property Taxpayer Plaintiffs have suffered and will continue to suffer a pecuniary loss because their property tax assessments are higher than they otherwise would be if the properties benefiting from the Exemption were added back to the City's tax rolls. Compl. ¶¶2, 7, 12–13, 33–46, 61.[7] The City itself acknowledges that when properties are taken off the tax rolls, this results in a higher burden on all other property taxpayers who must pay more to make up for the difference. Dkt.31 at 9. The Complaint thus properly alleges a pecuniary loss.

[6] As the supreme court recently explained, "aggrieved is a term of art" used in various statutes and has been assigned a specific meaning in case law. *Brown*, 414 Wis. 2d 601, ¶13.

[7] The Complaint also states that the City of Madison has not regularly ensured that the Pres House and Lumen House Apartments remain eligible for the Exemption, and the City has declined plaintiffs Gaylor's and Barker's objections to their property tax assessment based on the unlawful Exemption and the omission of the Pres House and Lumen House Apartments from the City's property tax base. Compl. ¶¶5, 45, 47–59.

This loss is also not hypothetical nor conjectural, as the Legislature and Presbyterian Student Center contend. The Complaint alleges that "[f]or over a decade, Ms. Gaylor & Mr. Barker, and Mr. Peterson 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." *Id*. ¶61. It also establishes these plaintiffs as property taxpayers, as recently as December 2024, *id*. ¶¶12-13, and that the Exemption has been applied during the years Property Taxpayer Plaintiffs have been paying taxes, *compare id*. ¶¶ 12–13 *with id*. ¶¶ 16–17. It is hard to fathom a more concrete allegation of injury.

Presbyterian Student Center Foundation and St. Raphael's miss the mark when they argue that the plaintiff taxpayers lack standing in this case because they are not challenging the *expenditure* of taxpayer funds. *See* Dkt.35 at 7–8 and Dkt.39 at 11–13. Although several taxpayer cases involve allegedly unlawful expenditures of public funds, not a single case cited by these Defendants stands for the proposition that litigants lack taxpayer standing under Wisconsin law *unless* they challenge an expenditure of tax revenues. And just like an illegal expenditure, the absence of income generated by an improperly granted exemption "results either in the governmental unit having less money to spend for legitimate governmental objectives, or in the levy of additional taxes to make up for the loss resulting from the expenditure." *S.D. Realty*, 15 Wis. 2d 15 at 22.

Defendants' arguments also misunderstand the effect of property tax exemptions. Wisconsin courts have long recognized that only a limited number of property taxpayers receive exemptions, because it is generally "in the public interest to stem the erosion of municipal tax bases." *Int'l Found. of Emp. Benefit Plans, Inc. v. City of Brookfield,* 95 Wis. 2d 444, 454, 290 N.W.2d 720 (Ct.App.1980), *aff'd,* 100 Wis. 2d 66, 301 N.W.2d 175 (1981). As the

court explained in *International Foundation*, "[t]he continuous removal of real property from taxation thus imposes a particular hardship upon local government *and the citizen taxpayer*." *Id*. (emphasis added). When a taxpayer demonstrates "an active or threatened invasion or destruction of a distinct right belonging to himself or to the body of citizens for whom he sues ... the taxpayer's right to sue is recognized." *Voters with Facts v. City of Eau Claire*, 2018 WI 63, ¶91, 382 Wis. 2d 1, 913 N.W.2d 131 (cleaned up); *see also Hart v. Ament*, 176 Wis. 2d 694, 699, 500 N.W.2d 312 (1993).

Ms. Gaylor, Mr. Barker, and Mr. Peterson all have standing to bring this action for declaratory judgment and thus satisfy the third justiciability requirement.

3. FFRF has standing.

Plaintiff FFRF likewise has standing, as it seeks declaratory judgment to determine the constitutionality of the Exemption.

Again, consistent with *Fabick*, the Complaint alleges the Exemption is unconstitutional, and that this causes a pecuniary loss to FFRF because it "cannot benefit from the Exemption if FFRF were to open apartments aimed at renting to students." Compl. ¶14. Defendants contend this loss is hypothetical because the Complaint does not allege that FFRF currently owns rental housing or has applied for the Exemption and been denied. However, there is little reason for FFRF to undergo the lengthy and expensive process of developing such property without the knowledge that the property either will or will not qualify for the Exemption.

In any event, as noted above, standing in Wisconsin is ultimately a matter of judicial policy, and the Court is within its power to determine that it would be prudential to permit FFRF standing at this early stage of litigation. *Foley-Ciccantelli*, 333 Wis. 2d 402, ¶40 n.18;

Milwaukee Dist. Council 48, 2001 WI 65, ¶38 n.7, 244 Wis. 2d 333, 627 N.W.2d 866; *see also Kaul*, 414 Wis. 2d 633, ¶23 The policy considerations underlying the Uniform Declaratory Judgment Act, including the purpose of determining rights before plaintiffs must undergo financial harm, also provide a basis for standing and satisfy the third justiciability factor. What is not persuasive is the federal cases cited by the Legislature, Dkt.45 at 16, because as noted above, those cases do not control here, in state court. The Court should find that FFRF has standing to participate on its own behalf and for the benefit of other entities that cannot take advantage of the Exemption even though they own properties like those involved here. *See Fabick,* 396 Wis. 2d 231, ¶11.

Ultimately, the Court need not decide the issue of FFRF's standing. As long as at least one of the other plaintiffs has standing, this Court need not consider whether other plaintiffs have standing as well, and the case may proceed. *See Clarke v. WEC*, 2023 WI 79, ¶39, 410 Wis. 2d 1, 998 N.W.2d 370, *reconsid. denied* (Jan. 11, 2024), *reconsid. dismissed*, 2024 WI 40, 15 N.W.3d 58; *see also City of Madison v. Town of Fitchburg*, 112 Wis. 2d 224, 232, 332 N.W.2d 782 (1983). Because the Property Taxpayer Plaintiffs have standing, the Court can deny the motion to dismiss on the third justiciability factor.

The Court should reject Defendants' arguments that FFRF lacks standing.

E. The controversy is ripe for judicial determination (Justiciability Issue 4.)

Finally, the controversy at hand is ripe for judicial determination despite the Legislature's half-hearted argument to the contrary. Dkt.45 at 24–25.

"The purpose of ripeness is to avoid courts entangling themselves in abstract disagreements." *Papa v. DHS*, 2020 WI 66, ¶30, 393 Wis. 2d 1, 946 N.W.2d 17 (cleaned up). "[T]he ripeness required in declaratory judgment actions is different from the ripeness

required in other actions because declaratory judgments are prospective remedies." *Id.* Plaintiffs "need not prove an injury has already occurred," instead "the facts must be sufficiently developed to allow a conclusive adjudication." *Id.* The facts of the case "should not be contingent or uncertain, but not all adjudicatory facts must be resolved as a prerequisite to a declaratory judgment." *Id.*

The Legislature's arguments regarding ripeness are aimed solely at FFRF and not the other Plaintiffs, based on the same argument it made under the standing analysis that FFRF's injury is hypothetical due to its failure to develop rental housing. The Court can reject these arguments for the same reasons articulated in the prior section. That the Legislature has not made this argument as to the other Plaintiffs is also a concession that the case is ripe as to them and can proceed. This case is ripe for review.

In sum, all four justiciability factors are met, and this action should proceed.

II. PLAINTIFFS' CLAIMS ARE NOT PROCEDURALLY BARRED

The Legislature (but no other defendant) claims Plaintiffs' Complaint is "procedurally barred" because, in essence, Plaintiffs did not exhaust their administrative remedies. Dkt. 45 at 7. This argument, which Plaintiffs understand as arguing failure to state a claim under Wis. Stat. § 802.06(2)(a)6., lacks legal merit and is not supported by the facts alleged in the Complaint. It should be rejected.

A. There was no obligation to exhaust administrative remedies; assuming an obligation existed, Property-Taxpayer Plaintiffs satisfied it.

This is a declaratory judgment, which contains no prerequisites for suit. *See* Wis. Stat. § 806.04. The Legislature looks to other statutes to claim an exhaustion requirement, but they do not apply or are not persuasive.

First, the exhaustion doctrine does not apply to this case, because Plaintiffs seek a declaration on the constitutionality of a statute administered by the City. "Although the exhaustion requirement is sometimes expressed in absolute terms and in terms of a court's subject-matter jurisdiction, the cases demonstrate that sometimes exhaustion is required and other times not and that the rule of exhaustion has numerous exceptions." *Nodell Inv. Corp. v. City of Glendale, Milwaukee Cnty.*, 78 Wis. 2d 416, 424–25, 254 N.W.2d 310 (1977). "Where an appeal to an administrative agency would not provide a party with adequate relief, a challenge may be properly made by commencing an action for declaratory relief." *Jackson Cnty. Iron Co. v. Musolf*, 134 Wis. 2d 95, 101, 396 N.W.2d 323 (1986) (cleaned up); *see also Town of Eagle v. Christensen*, 191 Wis. 2d 301, 317–18, 529 N.W.2d 245, 251 (Ct. App. 1995) (plaintiffs brought declaratory judgment action without attempting to exhaust administrative remedies; court ruled exhaustion requirement did not apply).

This scenario played out in *Kmiec v. Town of Spider Lake*, where the supreme court recognized a "well-defined distinction" in applying the policy of exhaustion of the statutory administrative remedies in zoning cases versus a challenge to the constitutional validity of a zoning ordinance, which "presents a question of law," and "[s]uch a challenge may properly be made by commencing an action for declaratory judgment and the doctrine of exhaustion of remedies is not applicable." 60 Wis. 2d 640, 645, 211 N.W.2d 471, 473 (1973) (cleaned up). "The reason for this exception is that an appeal to the administrative agency would not have afforded the party adequate relief since the administrative agency has no right to repeal or declare unconstitutional zoning ordinances enacted by the legislative body from which the board derives its existence." *Nodell*, 78 Wis. 2d at 426. Such is the case here; the exhaustion requirement did not apply because the City could not grant the Plaintiffs' requested relief..

The relief Plaintiffs seek is a ruling that the Exemption is unlawful on constitutional grounds and a restoration of the Exempt properties to the tax rolls. This case falls squarely within *Kmiec*, and the Court should reject the Legislature's argument.

To the extent the Plaintiffs did try to resolve this matter informally, their interaction with the City reinforces the conclusion in *Kmiec* that no exhaustion was required. On Friday May 3, 2024 the three property-taxpayer plaintiffs filed formal objections to their 2023 property tax assessments with the Madison Board of Assessors ("BOA")[8] in an effort to resolve this matter without litigation, even though the outlined administrative process is not a logical avenue for resolving whether the Exemption is constitutionally deficient. Compl. ¶¶50–54. The Madison BOA and City Assessor contacted Plaintiffs on Monday, May 6, 2024 and informed them the BOA would not be considering their formal objections. Compl. ¶55. The City Assessor and BOA stated, in part:

> [T]here is no mechanism by which the Board of Assessors or Board of Review may review your claims. Whereas, the Freedom from Religion Foundation is positioned to independently challenge the constitutionality of the statutes providing exempt status for the Pres House and Lumen House. You might even find municipalities and other organizations to be supportive of the claim.
>
> However, the Board of Assessors, Board of Review, nor [the City Assessor] have authority to decree laws unconstitutional. This is not the correct forum for that to occur. **As such, the objections as submitted will be unable to proceed, as confirmed by our Board of Assessors and Review Clerk.**

Compl. ¶55 (emphasis added); *see also id*. Exhibit G.

Before Plaintiffs could file an appeal to the Board of Review ("BOR") pursuant to Wis. Stat. §§ 70.075(6), 70.47, the BOR contacted Plaintiffs preemptively on May 14, 2024, stating

[8] The City of Madison, as a city of the 2nd class, created a Board of Assessors ("BOA") with which property owners must first raise their objections before appealing to the Board of Review ("BOR"). *See* Wis. Stat. § 70.075(1) ("in cities of the 2nd class the common council may by ordinance provide that objections to property tax assessments shall be processed through a board of assessors.").

in part that the BOA and BOR "will not be reviewing your claims." Compl. ¶56; *see also id*. Exhibit H. The BOR directed Plaintiffs to seek a different avenue for contesting the constitutionality of the Exemption and the lawfulness of the property taxpayer-plaintiffs' assessments. *See id*. Exhibit H. The BOA and BOR refused to consider the Property-Taxpayer Plaintiffs' objections, much less grant them a hearing, and repeatedly told them that the objection process was not the proper forum for their objections and legal arguments.[9] Again, the exhaustion doctrine did not apply, though even if it did, Plaintiffs surely satisfied it through their efforts here.

Finally, and notably, the City does not argue that Plaintiffs Ms. Gaylor & Mr. Barker, and Mr. Peterson failed to exhaust the administrative process for tax assessment objections under Wis. Stat. § 70.47. Presumably the City does not make this argument because the property-taxpayer plaintiffs did, in fact, exhaust the administrative process pursuant to Wis. Stat. §§ 70.075 and 70.47. Parties like the Legislature cannot raise waivable defenses or arguments on behalf of other parties. Each defendant must raise its own arguments, including "set[ting] forth affirmatively any matter constituting an avoidance or affirmative defense including but not limited to" those enumerated under Wis. Stat. § 802.02(3); *see, e.g.*, *Anderson v. City of Milwaukee*, 208 Wis. 2d 18, 35, 559 N.W.2d 563 (1997) (city did not plead affirmative defense of discretionary immunity, thus court held city had waived the defense). This Court need not entertain the Legislature's argument on exhaustion, given that the City has waived that argument.

Individual Taxpayer Plaintiffs were not required to exhaust administrative remedies.

[9] Ms. Gaylor, Mr. Barker, and Mr. Peterson never received a final assessment or an explanation of appeal rights from the BOA or BOR, as required under Wis. Stat. § 70.47(13), because both entities refused to consider their claims. Compl. ¶¶55–56.

B. The Exemption is not available to Plaintiff FFRF by law, so FFRF did not need to exhaust any administrative process

The Legislature's exhaustion claim as to FFRF falls flat, because no arguable administrative remedy applied to it.

Plaintiff FFRF does not contend that it exhausted the process outlined in Wis. Stat. § 74.35 for recovery of unlawful taxes. As a matter of state law, the Exemption is currently unavailable to FFRF so any process pursuant to § 74.35 is futile. FFRF is not able to undertake planning and construction of a rental property for UW-Madison students with the goal of also qualifying for the Exemption because FFRF knows the rental property would not qualify for the Exemption. The property would not be "in existence and meet[ing] the requirements of" § 70.11(3m)(4) "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."

Moreover, FFRF also qualifies for an exemption from the exhaustion requirement because the administrative process would not provide it with adequate relief. The relief FFRF seeks is a declaration that the Exemption violates the Wisconsin Constitution and the restoration of the exempt properties to the tax rolls. As outlined above, an exemption to the administrative exhaustion requirement exists where the administrative process concerns a legal question and would not ultimately provide a plaintiff with the relief they seek. Ultimately, if FFRF filed a claim for unlawful taxation against the taxation district pursuant to Wis. Stat. § 74.35(2), that claim would not afford FFRF "adequate relief" as the taxation district "has no right to repeal or declare unconstitutional" statutes enacted by the Legislature. *Nodell Inv. Corp.*, 78 Wis. 2d at 426.

III. PLAINTIFFS' COMPLAINT SUFFICIENTLY STATES A CLAIM FOR RELIEF BASED ON FOUR SEPARATE CONSTITUTIONAL VIOLATIONS.

The Plaintiffs have pleaded facts that, if true, will entitle them to relief. At the Motion to Dismiss stage, that is all they need to do. Wis. Stat. § 802.02(1); *see also Strid v. Converse*, 111 Wis. 2d 418, 422, 331 N.W.2d 350 (1983) ("pleadings are to be liberally construed to do substantial justice between the parties, and the complaint should be dismissed as legally insufficient only if it appears to a certainty that no relief can be granted under any set of facts that the plaintiff can prove in support of her allegations") (cleaned up). Eventually, the Plaintiffs will face a high bar to prevail on their constitutional challenges to the Exemption. *See Norquist v. Zeuske*, 211 Wis. 2d 241, 250, 564 N.W.2d 748 (1997). Plaintiffs believe they will establish that the Exemption and its 2013 are unconstitutional, but they need not meet that standard today based only on the pleadings. The Complaint in this case should survive the Motions to Dismiss because it properly states claims for relief under Wisconsin's Uniformity Clause, Equal Protection Clause, Establishment Clause, and Private Bill Clause. The Motions to Dismiss should be denied.

A. The Complaint States a Valid Claim Under Wisconsin's Uniformity Clause, Wis. Const. art. VIII, § 1

The Plaintiffs have pleaded facts that state a claim under the Uniformity Clause. The Court should reject Defendants' arguments to the contrary, which import the standard from the merits stage and ignore the facts as pleaded in the Complaint.

Wisconsin's Uniformity Clause provides that "taxation shall be uniform." Wis. Const. art. VIII, § 1. The clause requires that taxation act alike on all persons similarly situated. Classification of property to be taxed is permitted if it does not "effect an unequal burden upon the taxpayer." *State* ex rel. *La Follette v. Torphy*, 85 Wis. 2d 94, 108, 270 N.W.2d 187

(1978) (cleaned up). "[T]he rule of uniformity may be as effectually abrogated by arbitrary exemptions from taxation as by arbitrary impositions of unequal amount." *Id.* at 109 (cleaned up).

The Uniformity Clause grants the legislature the right to select some property for taxation and to omit completely or exempt other property. The 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, Inc. v. DOR*, 2006 WI 88, ¶66, 293 Wis. 2d 202, 717 N.W.2d 280 (cleaned up).

Wisconsin courts have held that tax provisions satisfy the Uniformity Clause when they meet the following standards:

> 1. For direct taxation of property, under the uniformity rule there can be but one constitutional class.
> 2. All within that class must be taxed on a basis of equality so far as practicable and all property taxed must bear its burden equally on an ad valorem basis.
> 3. All property not included in that class must be absolutely exempt from property taxation.
> 4. Privilege taxes are not direct taxes on property and are not subject to the uniformity rule.
> 5. *While there can be no classification of property for different rules or rates of property taxation, the legislature can classify as between property that is to be taxed and that which is to be wholly exempt, and the test of such classification is reasonableness.*
> 6. There can be variations in the mechanics of property assessment or tax imposition so long as the resulting taxation shall be borne with as nearly as practicable equality on an ad valorem basis with other taxable property.

Gottlieb v. City of Milwaukee, 33 Wis. 2d 408, 424, 147 N.W.2d 633 (1967) (emphasis added). This list of standards (particularly the fifth) clearly contradicts some Defendants' argument that the Uniformity Clause does not apply in this case because it covers only partial tax exemptions. *See* Dkt.35 at 10–13, Dkt.39 at 16–17. To be clear, Plaintiffs have never argued the Exemption is a partial tax. And as explained above, the Legislature can create complete property tax exemptions, but they must still be reasonable. *Gottlieb*, 33 Wis. 2d at 424.

On the facts alleged in the Complaint, there is no reasonable basis for the Exemption, and the Defendants' speculative theories about the potentially legitimate government purposes of singling out two student housing facilities in Madison for preferential, tax-exempt status are irrelevant. Dkt.35 at 12–13, Dkt.39 at 18–19, Dkt.45 at 29. Again, at this stage of the litigation, the allegations in the Complaint are what count, not any alternative facts the Defendants may offer. And it is certainly not true, as Pres House and the Legislature suggest, that the Plaintiffs must prove their claim "beyond a reasonable doubt" to defeat a motion to dismiss. Dkt.35 at 22, Dkt.45 at 26.

A case in which the Wisconsin Supreme Court *did* uphold a tax exemption only serves to illustrate why the Defendants' arguments should fail here. In *Northwest Airlines*, the court upheld an absolute exemption from ad valorem taxation for any air carrier operating a hub facility or headquartered in Wisconsin. *N.W. Airlines, Inc. v. DOR,* 2006 WI 88, ¶¶3–5, 293 Wis. 2d 202, 717 N.W. 2d 280. The court concluded that the legislature could have reasonably decided that "a number of legitimate governmental purposes are advanced by" an exemption. *Id.* ¶57. But the court made that determination at the summary judgment stage based on a record that included findings from the Legislative Finance Bureau and specific facts about the affected air carriers. *Id.* ¶¶10, 57–61.[10] The Legislature cites other cases which similarly highlight the impropriety of its argument at this stage of litigation: *First Nat. Leasing Corp. v. City of Madison*, 81 Wis. 2d 205, 207, 260 N.W.2d 251, 253 (1977) (decision based on stipulated facts); *Madison Gen. Hosp. Ass'n v. City of Madison*, 92 Wis. 2d 125, 284 N.W.2d 603

[10] The anticipated benefits discussed in that summary included: "(1) more nonstop flights to and from the state, which would encourage existing business to remain in-state and help attract new businesses to the state; (2) an increase of all flights to and from the state; and (3) an increase in jobs in the state." *N.W. Airlines*, 293 Wis. 2d 202, ¶58 (citation omitted). The court also noted "[t]hree historical facts demonstrate the rational basis for the belief that the hub exemption was necessary to protect Wisconsin's transportation infrastructure and economy." *Id.* ¶¶59–61.

(1979) (decision based on undisputed facts). Dkt.45 at 28. No record demonstrating a rational basis for the Exemption exists here, nor do Plaintiffs believe it ever will. This Court must decide the current motions to dismiss based on the facts alleged in the Complaint.

Plaintiffs have alleged that the Legislature cherry-picked two properties from among the many similar properties in Madison (or even the rest of the state where other University of Wisconsin institutions are located), improperly removing them from the city's tax base in a way that bears no reasonable relationship to a legitimate governmental purpose. Compl., ¶¶29–42. This, in turn, has "effect[ed] an unequal burden upon the[m as] taxpayer[s]." *Torphy*, 85 Wis. 2d 94 at 108 (cleaned up); Compl., ¶¶47–59, 61, 70. Plaintiffs have sufficiently alleged a valid claim under Wisconsin's Uniformity Clause.

B. The Complaint States a Valid Claim Under Wisconsin's Equal Protection Clause, Wis. Const. art. I, § 1

Plaintiffs have also stated a valid claim that the Exemption violates the Equal Protection Clause in article I, section 1 of the Wisconsin Constitution. Again, the Defendants ignore the facts alleged in the Complaint, relying on their own preferred facts, as well as the standard that will apply at the merits stage. The Court should reject this attempt to leapfrog the dismissal stage.

To prevail on an equal protection challenge to a state statute, a claimant must demonstrate the statute unconstitutionally treats members of similarly situated classes differently. *Aicher v. Wis. Patients Comp. Fund,* 2000 WI 98, ¶56, 237 Wis. 2d 99, 613 N.W.2d 849. When a statutory classification does not involve a suspect class or a fundamental interest, courts will uphold the classification if there exists any rational basis to support it. *Milwaukee Brewers v. DHSS,* 130 Wis. 2d 79, 98, 387 N.W.2d 254 (1986). An equal protection violation occurs when "the legislature has made an irrational or arbitrary classification, one that has no

reasonable purpose or relationship to the facts or a proper state policy." *Id.* at 99. To determine whether a rational basis exists, a court first examines the legislature's articulated rationale for its classification of taxpayers. *Nankin v. Vill. of Shorewood*, 2001 WI 92, ¶12, 245 Wis. 2d 86, 630 N.W.2d 141. If there is no articulated rationale, the court must construct one. *Id.* If that is not possible, the legislature's classification violates equal protection. *Id*. ¶15.

In *Aicher*, the Wisconsin Supreme Court established five criteria that determine whether a legislative classification satisfies this rational basis standard: (1) the classification must be based upon substantial distinctions that make one class truly different from another; (2) the classification adopted must be germane to the purpose of the law; (3) the classification cannot be based only on existing circumstances, meaning that it cannot be instituted to preclude further additions to those included in the class; (4) the classification must apply equally to each of its members; and (5) each class should be so different from other classes that those differences reasonably suggest at least the propriety, giving consideration to the public good, of substantially different legislation. 237 Wis. 2d 99, ¶58.

The Supreme Court has cautioned that although the bar is high for Equal Protection claims at the merits stage, on a motion to dismiss, a court's "determination relates to the sufficiency of the [plaintiffs'] pleadings, not their ability to prove an equal protection claim. As such, the frequently insurmountable presumptions and burdens associated with the rational basis test do not apply at this point in the inquiry." *Thorp v. Town of Lebanon*, 2000 WI 60, ¶ 44, 235 Wis. 2d 610, 612 N.W.2d 59 (cleaned up). In *Thorp*, the Plaintiffs raised an equal protection claim to a zoning determination, and the Supreme Court held that they had adequately stated a claim based on their assertions that their property was ill-suited to the zoning classification it received, and that the town had no good reason for its zoning

decisions—allegations comparable to those made here. *Id.* ¶¶4–8, 41, 44. Just as the Thorps' complaint survived dismissal, so too should the Complaint here.

On the facts in Plaintiffs' Complaint, there is no rational basis for the Exemption. With no official explanation of why, the Legislature designed a tax exemption for two student housing properties that rent to UW-Madison students. Two additional properties slipped in to join them, leaving a class of four properties. No similar properties can become eligible. Nothing makes these properties "substantially distinct" from similar properties in Madison (or those serving other state universities), and there is simply no reasonable basis to make just these few buildings exempt from property taxes and prohibit any further additions to the classification. *Aicher,* 237 Wis. 2d 99, ¶58.

Nothing indicates that these properties are "so far different from those of other classes as to reasonably suggest at least the propriety, giving consideration to the public good, of substantially different legislation." *Id.*; *see also Nankin*, 245 Wis. 2d 86, ¶¶41–43 (on rational basis review, statute that allowed only property owners in more populous counties to challenge assessments in circuit court violated equal protection clause, because "[t]here is no reason why an owner of property located in [a larger county] should be treated differently than an owner of property in [a smaller county] with respect to challenging their property assessments"). Contrary to Pres House's argument (Dkt.35 at 14), the Plaintiffs have clearly alleged they are similarly situated to Pres House and St. Raphael's—all are Madison property-owners who *should* be paying property taxes. The only thing that truly sets the Defendants apart is the blatant favoritism that seems to have led to their eligibility for the Exemption in the first place.

Once again, the Defendants improperly attempt to graft the analysis that will apply at the merits stage onto the pleading stage of the litigation, and worse, they ask the Court to analyze an alternative set of facts that contradicts the Complaint. Dkt.35 at 15, Dkt.39 at 19–20, Dkt.45 at 31–33. The Defendants are not entitled to have their proposed facts taken as true for purposes of the present motion—the Plaintiffs are. Pres House, in particular, supports its arguments with citations to cases where the factual record had been established through summary judgment proceedings or fact-finding hearings, only highlighting why its arguments should be rejected here. Dkt.35 at 15; *see Madison Tchrs., Inc. v. Walker*, 2014 WI 99, ¶10, 358 Wis. 2d 1, 851 N.W.2d 337 (case decided on summary judgment); *Matter of Adoption of M.M.C.*, 2024 WI. 18, ¶¶6–7, 411 Wis. 2d 389, 5 N.W.3d 238 (circuit court held hearing on adoption petition). The same posture is not present here.

Based on the allegations of the Complaint, this Court should deny the motions to dismiss and permit Plaintiffs to proceed on their Equal Protection claim.

C. The Complaint States a Valid Claim Under Wisconsin's Establishment Clause, Wis. Const. art. I, § 18

Article I, section 18 of the Wisconsin Constitution states in part that no "preference" shall "be given by law to any religious establishments or modes of worship[.]" Wis. Const. art. I, § 18. The Wisconsin Constitution's Establishment Clause guards against three primary government actions: sponsorship, financial support, and active involvement in religious activity. *Jackson v. Benson*, 218 Wis. 2d 835, 856, 578 N.W.2d 602 (1998) (citing *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)). Wisconsin's Establishment Clause prohibits state governments from enacting laws that have "the purpose or effect of advancing or inhibiting religion." *Id.*, at 855. (cleaned up). The Establishment Clause resembles the First Amendment to the United States Constitution, which applies to the states through the Due Process Clause

of the Fourteenth Amendment, *see Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940), but the two are not interchangeable.

Our courts have long held that Wisconsin's Establishment Clause is "far more specific" than its federal counterpart, providing "much broader protections for religious liberty than the First Amendment." *Coulee Cath. Sch. v. Lab. & Indus. Rev. Comm'n, Dep't of Workforce Dev.*, 2009 WI 88, ¶¶60, 66, 320 Wis. 2d 275, 768 N.W.2d 868.[11] In fact, Wisconsin's version has "probably furnished a more complete bar to *any preference* for, or discrimination against, any religious sect, organization, or society than any other state in the Union." *State ex rel. Weiss v. Dist. Bd. of Sch. Dist. No. 8 of City of Edgerton*, 76 Wis. 177, 208, 44 N.W. 967 (1890) (Cassoday, J., concurring) (emphasis added). Although cases interpreting the First Amendment may help guide Wisconsin courts in interpreting the Establishment Clause, "art. I, § 18 is not subsumed by the First Amendment." *Jackson v. Benson*, 218 Wis. 2d 835, 877, 578 N.W.2d 602, 620 (1998).

Defendants rely upon federal cases interpreting the federal constitution, but the federal constitution's Establishment Clause creates a floor for the Wisconsin Constitution's counterpart, not a ceiling. *See Matter of Adoption of M.M.C.,* 2024 WI 18, ¶ 52, 411 Wis. 2d 389, 426, 5 N.W.3d 238, 256, (Dallet, J. concurring), *cert. denied sub nom. A.M. B. v. McKnight*, 220 L. Ed. 2d 382 (Jan. 13, 2025) ("we have a long history of interpreting our constitution to provide greater protections for the individual liberties of Wisconsinites than those mandated by the federal Constitution"). Moreover, the First Amendment cases cited by the Defendants

[11] The Wisconsin Supreme Court recently reaffirmed this principle. *Cath. Charities Bureau, Inc. v. Lab. & Indus. Rev. Comm'n*, 2024 WI 13, ¶3, n4, 411 Wis. 2d 1, 12, 3 N.W.3d 666, 671, *cert. granted sub nom. Cath. Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm'n*, 145 S. Ct. 980 (2024), *amended,* 145 S. Ct. 1000 (2024), and *cert. granted in part sub nom. Cath. Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm'n*, 145 S. Ct. 1000 (2024).

are of only limited persuasive value, because they concern tax exemptions for places of religious worship or otherwise clear religious purpose—as opposed to the lucrative rental properties at issue in this case. Reliance on *Walz v. Tax Commission* is particularly inapt. Dkt.35 at 16 and Dkt.39 at 21. That case is not only grounded in the First Amendment, it also concerned the New York City Tax Commission's actions "granting property tax exemptions to religious organizations for religious properties used solely for religious worship." 397 U.S. 664 at 666. The Defendants ignore the allegations in the Complaint regarding the use and purpose of Lumen House and Pres House, which make this case easily distinguishable from *Walz.* The Legislature cites various state tax exemptions enjoyed by religious entities (Dkt.45 at 36), but fatally fails to engage with the specific, distinguishable facts alleged here.

On the facts alleged in the Complaint, the Exemption is not neutral (and therefore permissible), contrary to arguments raised by the Legislature and St. Raphael's. Dkt.45 at 34, Dkt.39at 22. It is true that neutral laws that equally benefit both religious and non-religious entities generally do not violate the First Amendment to the U.S. Constitution. *See Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 840 (1995). But a law created to benefit or favor particular religious organizations, like the Exemption here, is not "neutral," and nothing in *Rosenberger* makes it so. Plaintiffs have pleaded facts that show the intent of the Exemption was to benefit religious organizations, which they allege violates the Establishment Clause of the Wisconsin Constitution. The Legislature argues that a legislator's statements and motive are not relevant to the purpose of a law, citing *U.S. v. O'Brien*, 391 U.S. 367 (1968). Dkt.45 at 33. Again, both *Rosenberger* and *O'Brien* concerned the First Amendment to the U.S. Constitution—not the Wisconsin Constitution—and are not binding here. To the extent the Court finds *O'Brien* persuasive, it still does not defeat

Plaintiffs' claim. Plaintiffs do not ask the Court to overturn the Exemption based only on a single legislator's comments. Rather, those comments are part of the context Plaintiffs have offered to help this Court interpret the Exemption. Compl. ¶¶21–22, 100; See also Exhibit A; *see O'Brien*, 391 U.S. at 383–84 (when interpreting legislation, "the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose."). The chief evidence of the Exemption's purpose is its narrow applicability to two major religious property-owners.

Relatedly, granting the Plaintiffs their requested relief would not violate the Free Exercise Clause to the First Amendment, as some Defendants argue. Dkt.35 at 24–25; Dkt.39 15–16; Dkt.45 at 34. Defendants' Free Exercise arguments misunderstand Plaintiffs' position. Dkt.35 at 24–25, Dkt.39 at 15–16. The Plaintiffs have requested that this Court declare the Exemption unconstitutional as a whole, not only as applied to either the Pres House or Lumen House properties. Compl. ¶102a. If the Exemption is struck down and *no one* receives it, then no Free Exercise problem will exist. Wisconsin will not by denying "a qualified religious entity a public benefit" if that "public benefit" does not exist for anyone. *Trinity Lutheran Church of Columbia, Inc. v. Comer,* 582 U.S. 449, 466 (2017).

Plaintiffs' Complaint clearly alleges that the Exemption and its 2013 amendment were explicitly enacted to give preferential treatment to the owners of the Pres House and Lumen House Apartments, which are *not* places of worship, but profitable rental properties operated by religious organizations. based on their religious affiliation. That states a valid claim under Wisconsin's Establishment Clause.

D. The Complaint States a Valid Claim Under Wisconsin's Private Bill Clause, Wis. Const. art. IV, § 18.

Finally, the Exemption violates Article IV, section 18 of the Wisconsin Constitution because it is both a private and a local bill, under the facts pled in the Complaint.

1. Legal standards governing private and local bills.

Article IV, sec. 18 of the Wisconsin Constitution 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. This provision has three goals: (1) to encourage the legislature to focus on its primary responsibility—the state at large; (2) to avoid the threat of unfair preferential treatment inherent in laws with restricted scope; and (3) to notify the public through its elected representatives about the true nature and substance of legislation up for consideration. *Milwaukee Brewers v. DHHS.,* 130 Wis. 2d 79, 107–08, 387 N.W.2d 254 (1986). "[T]he point of the rules listed in the text is to determine whether some sham or artifice is being perpetrated by smuggling through a local bill in the sheep's clothing of a statewide interest or a general bill...." *Davis v. Grover,* 166 Wis. 2d 501, 520–21, 480 N.W.2d 460 (1992) (cleaned up).

Courts use a two-step process to determine whether a bill violates Article IV, section 18. *Id.* at 520. First, courts assess whether the process for enacting the bill at issue deserves a presumption of constitutionality. *Id.* No presumption is afforded when "the behavior of the legislature allegedly violates a law mandating the form in which bills must be enacted." *City of Oak Creek v. DNR*, 185 Wis. 2d 424, 437, 518 N.W.2d 276 (Ct. App. 1994) (citing *City of Brookfield v. Milw. Metro. Sewerage Dist.*, 144 Wis. 2d 896, 913 n.5, 426 N.W.2d 591 (1988)). For example, in *Oak Creek*, no presumption of constitutionality was afforded where a city-specific exemption to state waterway protections was passed as part of the state budget bill,

no hearings were had on its content, and no individual legislator sponsored it. *Id*. at 439. The court noted "[t]he budget bill contained many hundreds of unrelated provisions covering in excess of 700 pages of session laws" and thus that the proposal "did not receive the required legislative consideration necessary to assure this court that the legislation was not smuggled or logrolled through the legislature without the benefit of deliberate legislative consideration." *Id.* (cleaned up).

Second, courts must decide whether the bill is local or private. *Id.* If it is, article IV, section 18 requires the legislation to be a single subject bill and the title of the bill to state the subject clearly. *Id.*[12] Courts have explained what makes a bill private or local. "A law is local if it applies to a particular locality to the exclusion of others [and] '[a]n act is 'general,' as contradistinguished from and inconsistent with 'local,' ... only when its operation extends to the whole state, or perhaps to the whole of some class of localities therein....'" *Oak Creek,* 185 Wis. 2d at 439–40 (quoting *Soo Line R. Co. v. Transp. Dept.*, 101 Wis. 2d 64, 73–74, 303 N.W.2d 626 (1981)). "[A] private law is generally viewed as one applying to or affecting a particular individual or entity." *Id.* at 75 (finding a bill local where it exempted a city from statutory requirements regarding a creek).

A private or local bill is required to be enacted as a properly titled, single-subject bill pursuant to art. 4, sec. 18, unless its "general subject matter … relates to a state responsibility of statewide dimension[,]" and its "enactment will have direct and immediate effect on a specific statewide concern or interest." *Milwaukee Brewers*, 130 Wis. 2d at 115. Courts consider

[12] Even though both sec. 18 and equal protection claims focus on whether one group has received preferential treatment, courts deciding sec. 18 cases do not apply a presumption of constitutionality because "the legislature is alleged to have violated a law of constitutional stature which mandates the form in which bills must pass," and "to do so would make a mockery of the procedural constitutional requirement...." *Davis*, 166 Wis. 2d at 521 (cleaned up)

the operation of a law to apply to the whole state "when the subject thereof is such that the state itself has an interest therein as proprietor, or as trustee, or in its governmental capacity, for the benefit or in the interest of the general public." *Monka v. State Conservation Com'n*, 202 Wis. 39, 46, 231 N.W. 273 (1930). Because "most legislation is enacted under the state's relatively generic police power in the safety, health, welfare, morals, and security of the state's citizens[,]" our supreme court has held that "[a]n appeal to those generic concerns or interests is insufficient; there must be more." *Milwaukee Brewers*, 130 Wis. 2d at 115.

2. The Exemption is a private and local bill.

The two-step analysis from *Davis* shows that the Exemption is an unconstitutional private and local bill.

First, the Exemption is not entitled to a presumption of constitutionality. The Complaint demonstrates that both the Exemption and its 2013 amendment were buried in state budget bills, and neither received a hearing, request for public comment, commission reports, or other research or debate prior to becoming law. Compl., ¶¶18, 24, 30. The only revision the Exemption received merely ensured that it would apply only to its one intended beneficiary, Pres. House. *See id.*, ¶¶20–21. These are almost identical to the facts in *Oak Creek*, where no presumption was applied. This is also distinct from the case the Presbyterian Student Center cites, *Lake Country Racquet & Athletic Club*, where the exemption was initially introduced as a single-subject bill, received a Legislative Reference Bureau analysis of the proposed bill, co-sponsorship from numerous members of both the Assembly and the Senate, and six public hearings across the state. 289 Wis. 2d 498, ¶¶14–16. The only additional change to the Exemption came when St. Raphael's successfully lobbied to be included and

the 2013 amendment was slipped into the state budget bill, again without any evidence that the legislature truly considered its propriety or impact. *Id.*, ¶¶24–32.

The Legislature and Presbyterian Student Center cite additional legislative history from websites to claim the Legislature modified the provision and thus "thoroughly considered the tax exemption." Dkt. 45 at 37; Dkt. 35 at 20. Even if the Court could look outside the Complaint and consider these materials, they are not persuasive. The defendant in *Oak Creek* attempted similar arguments, claiming that "[b]ecause modifications were adopted during the bill's odyssey through the legislature … the bill was adequately considered and debated." 185 Wis. 2d at 438. The court flatly rejected these arguments, finding more persuasive facts related to the lack of public involvement and notice in the budget process. This Court should follow suit here.

That the Joint Finance Committee later voted to repeal the Exemption does not undo the lack of process the *original approval* (the approval at issue) received, as the Legislature suggests; in any case, the Governor vetoed the repeal. Compl. ¶ 23. Also, accepting the Legislature's characterization that the matter was "hotly contested" (Dkt. 45 at 38), it is even more surprising that the original and amended Exemption were slipped into the budget bill and received no hearings. The allegations in the Complaint regarding the enactment of the Exemption and its 2013 amendment illustrate precisely what article 4, section 18 serves to protect against: "the danger of legislation, affecting private or local interests, being smuggled through the legislature," *Lake Country*, 289 Wis. 2d 498, ¶9 (cleaned up).

Second, even if the presumption does apply, it matters little at this motion to dismiss stage, where the allegations in the Complaint show that the Exemption and its 2013 amendment are "local" and "private." *Davis*, 166 Wis. 2d at 520. The Exemption and its 2013

amendment were crafted to exempt two specific properties in the City of Madison. Compl., ¶¶18–31. This means both should have been enacted as properly titled, single-subject bills under Article 4, Section 18.[13] *See Soo Line R. Co. v. Transportation Dept.*, 101 Wis. 2d 64, 303 N.W.2d 626 (1981) (provision in budget review bill requiring a specific type of railroad crossing to be constructed at a designated location in the state violated Article IV, Section 18). It is not enough to argue, as Defendants do, Dkt.35 at 22–23, Dkt.45 at 2, that the Legislature has a general interest in higher education for Wisconsinites, or the UW-Madison has statewide impact. Courts have rejected such arguments. *Soo Line,* 101 Wis. 2d at 76–77 (statewide public interest in railway safety insufficient to transform bill about specific railway crossing into matter of general concern). The clear geographic limits of the Exemption, as well as its specificity to certain entities, are what matter and establish that it is private and local. *Oak Creek*, 185 Wis. 2d at 441.

Again, this case is different from *Lake Country.* The legislation at issue there provided tax exemptions for YMCA organizations located in and serving *thirty different communities* throughout the state. *Lake Country*, 289 Wis. 2d. 498, ¶2. Notably, *Lake Country* was also decided after the parties submitted evidence and related arguments on a motion summary judgment, not on a motion to dismiss. Here, Plaintiffs allege that the Exemption and its 2013 amendment were drafted explicitly to award tax-exempt status to two specific multi-million-dollar student housing properties belonging to the Presbyterian Student Center Foundation and St. Raphael's Congregation. Compl., ¶¶18–31. That is enough at this stage of the proceedings.

[13] Plaintiffs do not argue, as Pres. House suggests, that all statutes applying to specific entities or locations are automatically improper (*see* Dkt.35 at 23), only that such statutes must be passed in compliance with the Wisconsin Constitution.

On the allegations before the Court, the Exemption is an impermissible local and private law.

VII. THE DEPARTMENT OF REVENUE AND THE SMALLER PROPERTIES ARE NOT NECESSARY PARTIES

Defendants argue that Plaintiffs have failed to join necessary parties, primarily the Wisconsin Department of Revenue ("DOR"), but also the two smaller properties that benefit from the Exemption, the Babcock House and the AWA House.[14] Some defendants move to dismiss on this basis, while the City of Madison asks the Court to order joinder of the Department. Dkt.31 at 6–7, Dkt.35 at 25–26, Dkt.39 at 14–15. Dismissal for failure to join a necessary party under Wis. Stat. § 806(2)(a)7. or joinder under Wis. Stat. § 803.03 is not required.

Wis. Stat. § 803.03(1) provides, in relevant part:

> (1) a person subject to service of process shall be joined as a party in the action if,
> (a) in the person's absence, complete relief cannot be accorded among those already parties;
> (b) or the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may,
> (1) as a practical matter, impair or impede the person's ability to protect that interest or
> (2) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his or her claimed interest.

Id.; see also Koschkee v. Evers, 2018 WI 82, ¶17, 382 Wis. 2d 666, 913 N.W.2d 878.

First, complete relief can be accorded among the parties even in the absence of the additional parties. *See* § 803.03(1)(a). "In examining this prong of the statute," the court

[14] The City of Madison claims, in a footnote, that there are two other beneficiaries of the Exemption that the Plaintiffs did not identify. (Dkt. 31 at 3 & n.1.) The City does not support this claim, and neither does the Legislature in amplifying this claim. (Dkt. 45 at 5.) The Court should disregard these additional facts, which Plaintiffs intend to dispute at future phases of this case.

"look[s] to the requested relief for guidance." *Koschkee*, 382 Wis. 2d 666, ¶18, (determining that relief could be afforded in governor's absence because the declaratory relief sought by plaintiffs would have the same effect on the governor whether he was a party or not). Here, Plaintiffs seek a declaration that the Exemption violates the Wisconsin Constitution on the grounds outlined in the Complaint, as well as an order enjoining the City from applying the Exemption going forward. Compl. at 23-24. The declaratory and injunctive relief sought by Plaintiffs can be granted by the Court regardless of whether the DOR and two additional properties are joined.

Second, the DOR, the Babcock House, and the AWA House have not "claim[ed] an interest relating to the subject" of this action; indeed, the Department of Justice was served with the Complaint and did not seek to intervene on the DOR's behalf. Dkt. 9. And in the three-plus months since this action was filed, neither the Babcock House nor AWA House have sought to participate in the case in any capacity, despite case publicity.[15]

Even if the DOR had an interest, not participating as a named party here will not impair or impede the DOR's ability to protect any interest it may have. The same can be said for the two smaller properties. There is not a "clear test for when one has an 'interest' in the context of § 803.03(1)(b)1," but "[t]he relevant inquiry in Wisconsin is thus not whether a prospective party has a legal or legally protected interest in the subject of an action, but whether the person or entity has an interest of such direct and immediate character that the [prospective party] will either gain or lose by the direct operation of the judgment." *Koschkee*, 2018 WI 82, ¶21 (cleaned up). As stated above, the DOR will not gain or lose by direct

[15] Chris Rickert, *Madison atheist group files suit to axe tax exemptions for religiously affiliated apartment buildings*, Wis. State J. (Jan. 20, 2025), available at https://madison.com/news/local/crime-courts/article_7207f2c4-d459-11ef-b51a-db8d2aafed06.html.

operation of the judgment in this case. The DOR's statutory obligations related to the City of Madison's property taxation must follow the Constitution; it does not have an "interest" in an unconstitutional interpretation of the law. The DOR therefore has no legally protectable "interest" that would require necessary party status pursuant to § 803.03(1)(b)1. That, presumably, is why courts have not required the DOR to be named as a defendant—and indeed, has permitted them to be dismissed as a defendant—in cases filed against local taxing jurisdiction when a statute is challenged as unconstitutional. *See* Section I.B., *supra*.

While the Babcock House and AWA House currently benefit from the Exemption, their interests are adequately represented by the existing Defendants. Joinder is generally not required under Wis. Stat. § 803.03(1)(b)1.'s "impair or impede" provision if the absent party's interests will be adequately represented by parties that are already in the case. *Helgeland v. Wis. Municipalities*, 2008 WI 9, ¶¶131–137, 307 Wis. 2d 1, 745 N.W.2d 1 (cleaned up). "[A]dequate representation is ordinarily presumed when a movant and an existing party have the same ultimate objective in the action." *Id.* ¶90. Here, any interests the Babcock House or AWA House could claim for involvement in this action are adequately represented by the presence of the two larger property-owners who are vigorously defending the Exemption. Similarly, "when the putative representative is a governmental body or officer charged by law with representing the interests of the absentee, a presumption of adequate representation arises whether the would-be intervenor is a citizen or subdivision of the governmental entity." *Id.* ¶91. Babcock House and the AWA House are both constituents or citizens of the City of Madison, a governmental body that is defending this matter, and their interests are represented in this way as well. Joining the Babcock House or AWA House would not bring anything meaningful to this case or aid the court when it ultimately reaches the merits.

Finally, the absence of the DOR, Babcock House, and AWA House will not leave anyone who is already a party subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations. Therefore Wis. Stat. § 803.03(1)(b)2 does not require their presence.

Nonetheless, if the Court determines additional parties should be added as defendants to this action, Plaintiffs can amend the Complaint to do so. Dismissal is not warranted on this basis.

CONCLUSION

For the reasons stated above, the Defendants' respective motions should be denied, and Plaintiffs' case should be permitted to proceed on its merits.

Respectfully submitted this 24th day of April, 2025.

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