STATE OF WISCONSIN
DANE COUNTY

CIRCUIT COURT
BRANCH 8

For Official Use:

ANNIE LAURIE GAYLOR et al.,

Plaintiffs,

v.

THE CITY OF MADISON et al.,

Defendants.

Case No. 25CV173

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

INTRODUCTION

Before the Exemption at issue was enacted, the Legislature had already exempted from taxation dorms and other university-owned housing. Wis. Stat. § 70.11(3). And it had already exempted religious institutions, fraternal organizations, and other nonprofits. § 70.11(4). So it made rational sense to fill a gap and extend an exemption to certain other student housing facilities—those owned by nonprofits, offering support services, and serving the state's flagship university. § 70.11(3m). The Legislature wrote the Exemption neutrally to encompass religious and non-religious facilities, and equal numbers of religious and non-religious facilities have benefitted.

Plaintiffs disagree with the Legislature's policy choice and ask this Court to vindicate their contrary preferences. Because their mission is to be "Free from Religion," Plaintiffs named only the religious beneficiaries of the Exemption as defendants. This strategy, Plaintiffs hoped, would drape this case with a religious veil and allow them to cry Establishment Clause foul.

Plaintiffs' gambit must be rejected. To start, they lack standing. The individual taxpayer Plaintiffs fail to allege any unlawful expenditure, the touchstone of taxpayer standing. And FFRF alleges only hypothetical injury, which falls short under Wisconsin standing law.

Even if Plaintiffs had standing, they fail to state a claim. Plaintiffs' arguments hinge on an improperly limited view of the Court's role at this stage—namely, that "merits" questions should not be decided on the pleadings. Resp.17. In "test[ing] the legal sufficiency of a complaint," courts routinely decide merits questions on a motion to dismiss. *See, e.g.*, *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶¶ 19, 32–66, 356 Wis. 2d 665, 849 N.W.2d 693 (applying "notice pleading standards to the substantive law of the case because substantive law drives what facts must be pled"). The Court must do the same here, and dismiss the case as a result.

ARGUMENT

I. Plaintiffs lack standing under Wisconsin law.

Pres House's standing argument is and always has been under *Wisconsin* standing law. Both the individual taxpayers and FFRF lack standing.

A. The individual taxpayer Plaintiffs fail to allege any unlawful expenditure.

The taxpayer plaintiffs' assertion that they "need only allege a pecuniary loss associated with unlawful taxing provisions" is wrong. Resp.25. They cite *Fabick*, but there—like always—the unlawful "expenditure of taxpayer funds" gave Fabick "a legally protected interest." *Fabick v. Evers*, 2021 WI 28, ¶ 11, 396 Wis. 2d 231, 956 N.W.2d 856. What Plaintiffs seek here is a novel expansion of taxpayer standing to encompass the failure to tax someone else.

Specifically, Plaintiffs reason they "have been paying higher property taxes . . . in part to make up for the unconstitutional omission of the Pres House and Lumen House from the tax rolls." Resp.13, 15. Citing *S.D. Realty*, Plaintiffs equate "the absence of income generated by an improperly granted exemption" to "an illegal expenditure." Resp.26 (quoting *S.D. Realty Co. v. Sewerage Comm'n of City of Milwaukee*, 15 Wis. 2d 15, 22, 112 N.W.2d 177 (1961)).

But *S.D. Realty*, like all other taxpayer standing cases, does not support Plaintiffs' view. That case identified the "illegal *expenditure* of public funds" as "result[ing] 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 at 22 (emphases added). Plaintiffs do not allege that "the levy of additional taxes" was the result of an "expenditure"; instead, they allege that additional taxes flow from a *failure* to tax.

Plaintiffs' view is not and cannot be the law: expanding taxpayer standing as Plaintiffs request would mean *any* taxpayer could challenge the constitutionality of *any* exemption. Over 100 exemptions exist, all of which involve legislative policy choices to benefit a class of taxpayer. Noga Ardon, *Property Tax Administration*, Legis. Fiscal Bureau Informational Paper 17, Attachment 1 (Jan. 2025). Under Plaintiffs' view, any beneficiary would be subject to having to defend its exemption in court when other taxpayers believe they are "picking up the [beneficiary's] property tax slack." Resp.9. To prevent miring courts in these policy-laden disputes, a limiting principle is necessary. That limiting principle is, and always has been, unlawful expenditure. *Teigen v. Wis. Elections Comm'n*, 2022 WI 64, ¶ 163 & n.2, 403 Wis. 2d 607, 976 N.W.2d 519 (Hagedorn, J., concurring), *overruled on other grounds*, 2024 WI 32, 412 Wis. 2d 594, 8 N.W.3d 429.

B. FFRF's allegation of only hypothetical injury is insufficient.

FFRF fails under *Wisconsin* standing law. *See Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶ 21, 402 Wis. 2d 587, 977 N.W.2d 342. FFRF tries to distinguish *Kohler* as arising under Wisconsin's Administrative Procedure Act. Though *Kohler* opined on the *additional* "person aggrieved" requirement for statutory standing under that Act ("step two"), it first underscored the general *injury-in-fact* requirement *applicable in all civil cases* ("step one"). *Id.* ¶¶ 18, 21. That is the *only* part of *Kohler* that Pres House relies on.

In *every* case, standing requires that "injuries must be neither hypothetical nor conjectural." *Id.* ¶ 21. But in its response just like in the Complaint, FFRF uses exclusively hypothetical language to describe its alleged injury: e.g., "*if* FFRF were to invest in rental properties aimed at

renting to UW-Madison students, FFRF would be unable to qualify for the Exemption." Resp.27. Wisconsin law is clear and unchanging: "[t]he facts on which the court is asked to make a judgment should not be contingent or uncertain[.]" *Putnam v. Time Warner Cable of Se. Wis., Ltd. P'ship*, 2002 WI 108, ¶ 44, 255 Wis. 2d 447, 649 N.W.2d 626; *see Hechimovich v. Acuity*, 2014 WI App 14, ¶ 23, 352 Wis. 2d 513, 842 N.W.2d 493 (explaining that a claim relying on hypothetical or future facts is not ripe for adjudication). FFRF does not allege that it has any plans to enter the student housing market, that it intends to at any point in the future, or even that it desires to. FFRF's purely subjunctive musings are insufficient to establish standing.

In the end, FFRF asks the court to overlook this defect and hear the case as a *policy* matter. But FFRF "is simply registering its disagreement with legislative decisions" of the Legislature, which is "insufficient to confer standing." *Lake Country Racquet & Athletic Club, Inc. v. Vill. of Hartland*, 2002 WI App 301, ¶ 23, 259 Wis. 2d 107, 655 N.W.2d 189.

II. Plaintiffs fail to state a claim for relief.

Across the board, Plaintiffs misapply the standard governing a motion to dismiss. "[T]he sufficiency of a complaint depends on [the] substantive law that underlies the claim made because it is the substantive law that drives what facts must be pled." *Data Key*, 356 Wis. 2d 665, ¶ 31 (citation omitted). The Court "accept[s] as true all facts pled and the reasonable inferences therefrom," but it does not "accept as true any legal conclusions stated in the complaint." *Voters with Facts v. City of Eau Claire*, 2018 WI 63, ¶ 27, 382 Wis. 2d 1, 913 N.W.2d 131.

Under this well-established standard, the Court *should* wrangle with the substantive law on a motion to dismiss. Plaintiffs' suggestion that "Defendants' arguments often veer into the merits" is understated: the arguments collide head-on with the merits, as they should when testing the Complaint's legal sufficiency. Resp.17. Plaintiffs are "not free to ignore substantive law that govern[s] their claim," and must allege facts suggesting "more than a 'possibility' of a claim." *Data*

Key, 356 Wis. 2d 665, ¶ 27 (citation omitted). Because this carries "the potential for abuse, . . . basic deficienc[ies] should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court." *Id.* (cleaned up).

This is of serious concern in perhaps any case, but particularly here. The nonprofit defendants face mounting legal costs for having to defend against meritless claims, diverting resources from their mission. *Data Key*'s exhortation to engage on the merits at the pleading stage is not just lawfully appropriate, but meaningful and just.

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

On the Uniformity Clause, Plaintiffs get the burden wrong. They assert that at the pleadings stage, "the allegations in the Complaint are what count, not any alternative facts the Defendants may offer." Resp.36. They further contend that "[n]o record demonstrating a rational basis for the Exemption exists here, nor do Plaintiffs believe it ever will." *Id.* at 37. But that contention distorts the standard. Under Wisconsin law, no such record *need* ever exist for the Court to decide that the Exemption has a rational basis. "[A] state 'has no obligation to produce evidence to sustain the rationality of a statutory classification.'" *Brown v. State Dep't of Child. & Fams.*, 2012 WI App 61, ¶ 38, 341 Wis. 2d 449, 819 N.W.2d 827 (citation omitted). "Legislative choices are not subject to courtroom fact-finding and need not be supported by evidence or empirical data; rational speculation is enough." *Id.* "[T]he burden is on the one attacking the legislative arrangement to [negate] every conceivable basis which might support it." *Id.*

Plaintiffs' allegations "fail to state a claim upon which relief can be granted because, even if taken as true," they fall short of "[negating] every conceivable basis which might support" the Exemption. *Id.*; *see Voters with Facts*, 2018 WI 63, ¶ 30 (deciding statutory interpretation and Uniformity Clause challenges on a motion to dismiss). It is not enough for the Complaint to allege "there is no reasonable basis for the Exemption." Resp.36. That is a *legal* conclusion, which this

Court does not need to accept as true. Plaintiffs argue that "Defendants' speculative theories about the potentially legitimate government purposes of" the Exemption are "irrelevant" and "alternative facts." *See id.* Not so. Those theories are the "conceivable bas[es]" under the "substantive law"—the exact thing the Court must search for on rational basis review. *Brown*, 341 Wis. 2d 449, ¶ 38.

Plaintiffs' own Complaint contradicts their allegation "that the Legislature cherry-picked two properties from among the many similar properties in Madison": at least two others received the Exemption, as the Complaint acknowledges. Resp.37 (citing Compl. ¶¶ 29–42). A Uniformity Clause (or any rational basis) evaluation does not depend on the motivations of the Legislature; even where "some bias or conflict of interest may have shaped [the] legislation, the motives of legislators are irrelevant to rational basis scrutiny." *Brown v. City of Lake Geneva*, 919 F.2d 1299, 1302 (7th Cir. 1990). "What [Plaintiffs are] asking this court to do is investigate the motives of the Legislature in passing the act," but "such judicial inquiry" is improper. *State ex rel. Reuss v. Giessel*, 260 Wis. 524, 530–31, 51 N.W.2d 547 (1952). "[I]f a statute appears on its face to be constitutional and valid, the court cannot inquire into the motives of the Legislature." *Id.*

The Exemption is supported by a rational, reasonable basis. It was rational for the Legislature to close a gap in property tax exemption laws, under which dorms, fraternities, and religious or benevolent organizations were already exempted. § 70.11(3), (4). It was relatedly rational for the Legislature to tailor the Exemption to the state's flagship university with an inherently statewide impact. And it was rational to sunset the Exemption in 2014 because it unduly diminished the City's tax base or created rental market distortions. None of these reasons needs to have *actually* motivated the legislation or be found in a record; the legislation need only have a "conceivable basis." *Brown*, 341 Wis. 2d 449, ¶ 38. It does, and so the claim fails at the outset.

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

Plaintiffs' Equal Protection claim also fails. Here, too, Plaintiffs blur the standard on a

motion to dismiss. On the flip side of Plaintiffs' accusation that Defendants attempt to "leapfrog the dismissal stage" is their intention to sail through with a free pass. Resp.37. The Court should not abdicate its gatekeeping role.

A party "seeking to challenge the constitutionality of a statute on equal protection grounds must demonstrate that the statute treats members of a similarly situated class differently." *Aicher ex rel. LaBarge v. Wis. Patients Comp. Fund*, 2000 WI 98, ¶ 56, 237 Wis. 2d 99, 613 N.W.2d 849. Plaintiffs' assertion—that they "have clearly alleged they are similarly situated to Pres House and St. Raphael's" as "Madison property-owners who *should* be paying property taxes"—falls flat. Resp.39. First, Plaintiffs' allegation that they are "similarly situated," without more, is a legal conclusion that need not be accepted as true. Second, Plaintiffs' allegation that they "all are Madison property-owners who *should* be paying property taxes" is insufficient to constitute a "similarly situated class." *See id.* Plaintiffs' view that the class contains *every non-exempt property owner* in the City eviscerates classifications entirely and, if accepted, would invalidate *every* exemption. Further, none of the equal protection cases on which Plaintiffs rely concerns property tax exemptions. *See id.* at 37–39 (citing *Aicher*, 237 Wis. 2d 99; *Thorp v. Town of Lebanon*, 2000 WI 60, 25 Wis. 2d 610, 612 N.W.2d 59; *Nankin v. Vill. of Shorewood*, 2001 WI 92, 245 Wis. 2d 86, 630 N.W.2d 141). What's more, Plaintiffs could not even apply for the Exemption, because they are not—and have not alleged any intention or plans to be—a student housing facility.

Plaintiffs' reliance on *Thorp* dooms their claim. Resp.38 (citing 25 Wis. 2d 610, ¶ 44). In *Thorp*, the Court concluded based on the pleadings that the challenged zoning ordinance "may not be 'rationally related to the public health, safety, morals, or general welfare'" of the Town's residents. *Thorp*, 235 Wis. 2d 610, ¶ 41. *Thorp*, however, relies on *Grand Bazaar*, which employed "rational basis with teeth (or bite)"—a standard which "has since been explicitly repudiated by our

supreme court." *Wis. Cottage Food Ass'n v. DATCP*, 2024 WI App 69, ¶ 33, 414 Wis. 2d 439, 16 N.W.3d 266. A "rational basis with teeth" analysis implicates the "'factual question' of whether a law actually furthers its purported objectives," while "[u]nder traditional rational basis scrutiny, [the court is] not concerned with the actual reasons the legislature passed the" legislation. *Porter v. State*, 2017 WI App 65, ¶¶ 20, 23, 378 Wis. 2d 117, 902 N.W.2d 566. Also, *Thorp* concerned a zoning ordinance, while Plaintiffs challenge a tax exemption. "Where a tax measure is involved, the presumption of constitutionality is strongest." *Simanco, Inc. v. Wis. Dep't of Revenue*, 57 Wis. 2d 47, 54, 203 N.W.2d 648 (1973). To that end, the Wisconsin Supreme Court "has recognized that the equal-protection clause, unless apparent misclassifications are gross indeed, is of little moment in determining the constitutionality of a state tax." *Id.* at 55.

C. Plaintiffs fail to state a claim under the Establishment Clause, and their requested relief would run afoul of the Free Exercise Clause.

Plaintiffs cannot have it both ways. On the one hand, Plaintiffs concede that religious places can benefit from tax exemptions. Resp.42. So Plaintiffs cast Pres House and Lumen House as "lucrative rental properties." *Id.* But in so doing, Plaintiffs pull the rug out from under their Establishment Clause claim.

Plaintiffs further assert that "[o]n the facts alleged in the Complaint, the Exemption is not neutral." *Id.* Quite the contrary: No language in the Exemption is religious. And an equal number of religious and non-religious housing facilities have benefitted.

Plaintiffs' repeated drumbeat supplies the starkest reminder of the defects in this case. To the extent the Exemption has any semblance of religious preference, it is not because of its text or its effect—it is solely due to Plaintiffs' litigation strategy. Plaintiffs chose to name only the two religiously affiliated beneficiaries. Yet that choice has consequences. Because Plaintiffs ask the

Court to deny those two religiously affiliated Defendants the benefit of the otherwise neutral Exemption, they seek relief that would violate the federal Free Exercise Clause.

On the Free Exercise Clause, Plaintiffs are wrong twice over. First, Plaintiffs claim they are mounting a facial challenge, having "requested that this Court declare the Exemption unconstitutional as a whole, not only as applied to either the Pres House or Lumen House properties." Resp.43 (citing Compl. ¶ 102a). A facial challenge would require Plaintiffs to show the Exemption is unconstitutional in all applications. *SEIU v. Vos*, 2020 WI 67, ¶ 38, 393 Wis. 2d 38, 946 N.W.2d 35. But Plaintiffs cannot show that the neutrally worded Exemption, when applied to any of the secular beneficiaries, violates the Establishment Clause. Plaintiffs must therefore concede either: (1) that they are not raising a facial challenge or (2) that there is no Establishment Clause problem. And if Plaintiffs are not raising a facial challenge, then they *are* inviting a Free Exercise problem.

Second, especially in an as-applied (not facial) challenge, a declaration and injunction are binding only on the parties to the action. *See* § 806.04(11); *In re Zur Ruhe Cemetery*, 193 Wis. 108, 213 N.W. 657, 658 (1927) ("It is a general rule that an injunction is only binding upon the persons or parties named in the decree."). Even an injunction against the City would operate only with respect to the *named* plaintiffs and defendants.[1] So, if the Court awards Plaintiffs what they asked for in the Complaint—an injunction against the Exemption's enforcement as to *Pres House* and *St. Raphael's*—then that state court order would violate the federal Free Exercise Clause. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 466 (2017). If Plaintiffs want to avoid this Free Exercise problem, then they need to name *all beneficiaries* of the Exemption. Only under that approach would an injunction apply to all.

[1] *See* William Baude & Samuel L. Bray, *Proper Parties, Proper Relief*, 137 Harv. L. Rev. 153 (2023); Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933 (2018).

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

Plaintiffs claim it "is enough at this stage" to "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." Resp.48. As shown by *Soo Line*, the substantive law requires more.

The statute in *Soo Line* "[b]y its language . . . relate[d] to a specific point on a specific highway" and "directly and immediately affects a particular entity, the Soo Line Railroad." *Soo Line R. Co. v. Dep't of Transp., Div. of Highways*, 101 Wis. 2d 64, 76–77, 303 N.W.2d 626 (1981). The statute "also reverse[d] a decision reached by a specific administrative agency and affirmed by a particular court relating to a particular crossing at a particular location involving a particular railroad." *Id.* Unlike the *Soo Line* statute, the Exemption's language does not "directly and immediately affect[ ] a particular entity." *Id.* Instead, it is crafted in general terms to apply to any entity meeting the requirements—of which at least four, and likely six, did.

Even if the Exemption could be considered "geographically specific or entity specific," it "will not automatically be considered 'private or local,' however, where the general subject matter of the legislation relates to a state responsibility—that is, where 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." *City of Oak Creek v. State Dep't of Nat. Res.*, 185 Wis. 2d 424, 439–40, 518 N.W.2d 276 (Ct. App. 1994). Further, it "must have a 'direct and immediate effect on a specific statewide concern or interest.'" *Id.*; *see also Lake Country Racquet & Athletic Club, Inc. v. Morgan*, 2006 WI App 25, ¶ 23, 289 Wis. 2d 498, 710 N.W.2d 701. Here, the state has an interest in promoting the benefits of housing facilities with tailored and specified non-profit services for students at its flagship university as well as the public. The Exemption creates a direct and immediate effect on those facilities being able to provide housing and services.

III. The DOR and non-religious beneficiaries are indispensable parties.

Plaintiffs failed to join necessary and indispensable parties DOR, Babcock House, and AWA House. § 803.03(1). The DOR has an interest because it has ultimate authority over enforcement of the state tax laws and is in the best position to speak on behalf of the Exemption's defense. § 73.03. Babcock and AWA House, as beneficiaries of the Exemption, have an "interest relating to the subject of the action," and their absence will "impair or impede" their "ability to protect that interest." § 803.03(1)(b)1. Actually seeking to intervene is not required. And despite Plaintiffs' blithe assumption, there is a big difference between the Defendants and Babcock and AWA House—the latter are the *non-religious* beneficiaries.

CONCLUSION

The Court should dismiss the case with prejudice.

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