STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

JERUSALEM EMPOWERED AFRICAN METHODIST EPISCOPAL CHURCH

Plaintiff,

v.

Case No. 12-CV-8079

CITY OF MILWAUKEE,

Defendant.

PLAINTIFF'S SURREPLY BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

INTRODUCTION

Any defendant who asks the Court to dismiss any plaintiff's complaint by preliminary motion bears the burden of establishing that he or she is entitled to that relief. This case is no different. Yet here the City attempts to turn this axiom on its head by arguing that JEAMEC's constitutional claims must be dismissed because it has not yet proven its constitutional claims beyond a reasonable doubt. It is beyond question that under Wisconsin law the plaintiff's complaint need not prove anything; it need only state a claim on which relief *could* be granted if the plaintiff can prove its case at trial or through summary judgment. A motion to dismiss a claim seeking a declaration that a statute is unconstitutional tests only the legal sufficiency of the pleadings, *not* the merits of a plaintiff's claim.

The Court graciously permitted the filing of this brief in order to allow the Plaintiff an opportunity to respond to the Defendant's arguments against its constitutional claims, raised by the Defendant for the first time in its Reply Brief. First, we show that the Defendant's arguments on the merits of the Plaintiff's constitutional claims are premature and cannot support its motion

to dismiss. Second, we explain the proper standard for a motion to dismiss and show that each of the Plaintiff's constitutional claims could, if proven, provide the basis for the declaration of unconstitutionality that the Plaintiff seeks.[1]

ARGUMENT

I. A COURT MAY NOT DISMISS CONSTITUTIONAL CLAIMS FOR FAILURE TO PROVE THEM BEYOND A REASONABLE DOUBT IN THE COMPLAINT

The Defendant's brief repeatedly states that Wisconsin statutes are presumed to be constitutional and that a party seeking to have a statute invalidated on constitutional grounds has the burden of proof. (Reply Br. 1, 4, 5.) Indeed, the Defendant inexplicably refers to the Plaintiff as the "movant" and goes on to say that the burden remains on the movant to demonstrate the law's unconstitutionality beyond a reasonable doubt. (*Id.* at 4.) But the Plaintiff has not moved for anything and is obviously not the "movant" here. The Plaintiff does not dispute that it will bear the burden of proving the unconstitutionality of the statute at trial; we are not yet at that point. The Defendant is the moving party here, and at this juncture it is the Defendant who bears the burden of proving that there is no set of facts on which the Plaintiff could ever prevail on its constitutional claims. *See Kaloti Enters., Inc. v. Kellogg Sales Co.*, 2005 WI 111, ¶16, 283 Wis. 2d 555, 699 N.W.2d 205. It cannot do so by simply claiming that

[1] This Surreply Brief deals only with the Defendant's Motion to Dismiss the Plaintiff's three constitutional claims. This Court need not address the Plaintiff's constitutional claims at all if it concludes, as it should, that this case can be resolved on purely statutory grounds, as the Plaintiff explained in its Response Brief. (*See* Pl. Resp. Br. 7-13.) To summarize those arguments: first, Wis. Stat. § 74.35(5)(c) does not preclude a taxpayer from filing an "action" in circuit court under § 74.35(3)(d), once the taxing authority has considered and "disallowed" the taxpayer's claim, which the Defendant has done. Thus, the case may proceed directly to the Plaintiff's challenge to the Defendant's erroneous denial of the Plaintiff's claim for a property tax exemption. The Court need not reach a decision on whether the Defendant waived § 74.35(5)(c) or whether § 74.35(2m) is unconstitutional. Second, even if § 74.35(5)(c) can operate to bar an "action" in circuit court, the Plaintiff has alleged that the Defendant waived, forfeited, or is estopped from asserting that defense by its actions. This Court must assume that the Complaint's factual allegation that the Defendant waived § 74.35(5)(d) is true for purposes of a motion to dismiss. The Defendant admits that "a court's competency to hear a case, based upon statutory requirements, may be waived by the parties." (D. Reply Br. 7.) If so, the case may proceed with the question of waiver to be resolved at trial.

the Plaintiff has so far failed to prove its case beyond a reasonable doubt. The Plaintiff need not prove anything at this point. It is sufficient that the Complaint state a claim on which relief could be granted if the Plaintiff satisfies its burden of proof later in this litigation.

In fact, the Wisconsin Supreme Court has already determined that a circuit court cannot do what the Defendant asks this court to do: dismiss a constitutional challenge on a motion to dismiss for failure to prove the merits of its complaint. *See Tooley v. O'Connell*, 77 Wis. 2d 422, 253 N.W.2d 335 (1977). The plaintiffs in *Tooley* were residents and taxpayers in the City of Milwaukee who brought an action for a judgment declaring "the statutory plan for the financing of the Milwaukee public schools . . . unconstitutional" in violation of numerous provisions of the Wisconsin Constitution, including Article I, Sections 1 and 9. 77 Wis. 2d at 428. The circuit court sustained a demurrer on the grounds that the plaintiffs' complaint failed to state a cause of action, reasoning that the complaint contained only conclusory allegations that the statutory scheme was unconstitutional, not proof of the same.[2] *Id.* at 430-31.

The supreme court reversed, concluding that a complaint need not prove a constitutional violation to survive a demurrer: "The defendants argue that the plaintiffs are bound to lose on the merits of their constitutional claims and thus that no justiciable controversy is stated. The merits of the constitutional issues presented *need not and should not be addressed* at this stage of the proceedings." *Id.* at 434 (emphasis added).

The Defendant here makes the same mistake, confusing a motion to dismiss with a decision on the merits. The *Tooley* Court reversed the circuit court for doing exactly what the

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[2] "A motion to dismiss for failure to state a claim upon which relief can be granted under sec. 802.06(2), Stats., serves the same function as a demurrer under the former rules of civil procedure." *Halker v. Halker*, 92 Wis. 2d 645, 650, 285 N.W.2d 745, 747 (1979). "[T]he . . . rules on demurrers are equally relevant to matters involving sec. 802.06(2) motions and should be held to apply to them." *Hartridge v. State Farm Mut. Auto. Ins. Co.*, 86 Wis. 2d 1, 5, 271 N.W.2d 598, 599 (1978).

Defendant is asking the Court here to do – dismiss a complaint because the Plaintiff has not yet proved its constitutional claims beyond a reasonable doubt.

II. THE PLAINTIFF'S COMPLAINT STATES CLAIMS UPON WHICH RELIEF CAN BE GRANTED

The Defendant does not refer to the applicable rule for motions to dismiss – Wis. Stat. § 802.06 – or for that matter explain at all under what statutory grounds it is asking this Court to dismiss the Plaintiff's constitutional claims. Despite its decision to omit from its brief any reference to statutory authority, it appears that its challenge to the Plaintiff's constitutional claims can only be described as an 802.06(2)(a)6. motion to dismiss for "[f]ailure to state a claim upon which relief can be granted."

When deciding such a motion to dismiss, "[a]ll facts pleaded and all reasonable inferences therefrom are admitted as true." *Watts v. Watts*, 137 Wis. 2d 506, 512, 405 N.W.2d 303 (1987). All attachments to the complaint must be assumed to be true as well. *Peterson v. Volkswagon of Am., Inc.*, 2005 WI 61, ¶15, 281 Wis. 2d 39, 697 N.W.2d 61. The complaint must be "liberally construed" and "need not state all the ultimate facts constituting the cause of action." *Kaloti Enters.*, 2005 WI 111, ¶11.

A court may not grant a motion to dismiss "'unless it appears certain that no relief can be granted under any set of facts that a plaintiff can prove in support of his or her allegation. *Id.*, ¶16 (quoting *Watts*, 137 Wis. 2d at 512). "As such, courts are to liberally construe a complaint and should deny a motion to dismiss when the facts alleged, if proven true, would constitute a cause of action." *Id.* "Dismissal of a claim is improper if there are any conditions under which the plaintiffs could recover." *Doe v. Archdiocese of Milwaukee*, 211 Wis. 2d 312, 331, 565 N.W.2d 94 (1997).

A. The Plaintiff Sufficiently Pled a Denial of Due Process

The Complaint's first constitutional claim, ¶¶28-38, lays out a claim that Wis. Stat. § 74.35(2m) violates the Plaintiff's right to due process of law. Section 74.35(2m) provides that the *sole method* for challenging a denial of an exemption request is to bring such a claim via § 74.35 ("Recovery of unlawful taxes"). It expressly prohibits utilizing § 74.33 ("Sharing and charging back of taxes due to palpable errors") and declaratory actions under § 806.04, but also operates to prohibit an exemption claim from being brought in any other action.

According to the Defendant's interpretation of § 74.35(5)(c), property owners cannot bring an action in circuit court under § 74.35(3) to challenge a tax exemption denial unless they first pay the disputed property taxes to the taxing authority.[3] (D. Br. 3; D. Reply Br. 8.) The Plaintiff is incapable of paying the disputed tax. (Compl. ¶27.) Under the Defendant's interpretation of these statutes, then, the Plaintiff is at present completely barred from bringing an action challenging the tax exemption denial in any court of law, regardless of the circumstances.[4] In fact, in the Defendant's view, if the Plaintiff somehow later came into the funds necessary to pay the disputed taxes, it could *not even then* bring an action challenging the tax exemption denial, because § 74.35(5)(c) requires the tax to be "timely paid."[5]

In other words: no money, no relief. The Plaintiff claims that the tax being imposed upon it is unlawful. To condition the assertion of that claim on the payment of this unlawful tax – something the Plaintiff is unable to do – effectively deprives it of the ability to vindicate its legal rights.

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[3] The Plaintiff disputes this interpretation. (*See* Pl. Resp. Br. 7-11.)

[4] Whether the Plaintiff could challenge the denial of its property tax exemption in the event the City decides to seize or sell the property at some unknown future date is beside the point. The City's unlawful taxation has created a cloud on the Plaintiff's title now, and the City claims that there is nothing at all the Plaintiff can do about that unless and until it pays the disputed tax.

[5] A property tax is timely paid if it is paid before January 31 of the following year or July 31 of the following year if an installment plan is permitted. Wis. Stat. §§ 74.11, .12.

The Complaint raises the issue sufficiently. It first cites to the guarantees of due process found in the United States and Wisconsin Constitutions. (Compl. ¶¶30-32.) It then lays out the pay-first structure and procedural limitations of challenging tax exemption denials. (*Id.*, ¶¶33-35.) It then brings up two specific and well-established applications of the right to due process: (1) that due process requires meaningful access to the courts; and (2) forbids denying access to the courts based on a litigant's inability to pay. (*Id.* ¶¶36-37.) The Complaint alleges that those aspects of the right to due process are violated by § 74.35(2m). (*Id.* ¶38.)

The Defendant has not offered any authority for its position that § 74.35(2m) does not violate the due process guarantees of the Wisconsin and U.S. Constitutions, and there is no case that defeats the claim raised by the Plaintiff. *Matthews v. Eldridge*, 424 U.S. 319 (1976) stands only for the basic idea that due process is a flexible rather than fixed concept. The Plaintiff agrees, but that proposition hardly defeats the Plaintiff's constitutional claim.

The Defendant fails to demonstrate that *Boddie v. Connecticut*, 401 U.S. 371 (1971), precludes the Plaintiff's claim. To the contrary, *Boddie* stands for the rule that conditioning the vindication of a right on payment of an amount the Plaintiff cannot afford violates due process. To be sure, this case does not, like *Boddie*, involve the payment of a court filing fee, but it beggars belief to conclude that the law cannot deny access to the courts to one who cannot pay a relatively modest filing fee, but it can deny access to the courts – and relief from unlawful taxation – to one who cannot afford to make a substantial payment of disputed taxes.

The Defendant argues that due process is satisfied here by the administrative proceedings before the City itself; but due process cannot be satisfied by an appeal proceeding run by the taxing authority itself – a party with a financial stake in the outcome. Due process requires, at its most fundamental level, a fair and unbiased arbiter. *McKesson Corp. v. Div. of Alcoholic*

Beverages and Tobacco, 496 U.S. 18, 38 (1990) ("[A] State must provide taxpayers with . . . a *fair opportunity* to challenge the accuracy and legal validity of their tax obligations.") (emphasis added); *Withrow v. Larkin*, 421 U.S. 35, 46 (1975) ("[A] 'fair trial in a fair tribunal is a basic requirement of due process.'") (quoting *In re Murchison*, 349 U.S. 133, 136 (1973)). That is why, for example, administrative agencies tasked with quasi-judicial functions must take pains to ensure a particular level of independence for their administrative law judges. *See Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970) (reversing an administrative decision because a biased adjudicator violated constitutional due process requirements); *see generally* 5 U.S.C. §§ 556(b) (requiring an unbiased adjudicator in administrative proceedings), 4301 (prohibiting performance evaluations and substantive review of ALJs), 5372 (vesting in the independent Office of Personnel Management the authority to place ALJs within a structured pay schedule); Wis. Stat. § 227.46(6) (requiring an unbiased adjudicator in administrative proceedings); *Nash v. Califano*, 613 F.2d 10, 14-17 (2d Cir. 1980) (reviewing the statutory and case law requirements placed on the employment of ALJs to avoid the appearance that ALJs are "mere tools of the agency concerned").

The City's self-interested determination does not comport with due process, and no other review of the City's decision is available. Thus, the only method available to satisfy the Plaintiff's right to an impartial hearing on its claims that the City has violated its statutory and constitutional rights by denying its tax exemption is redress to the courts. Due process forbids the government from denying the Plaintiff that right. *Cf. Weber v. City of Cedarburg*, 129 Wis. 2d 57, 384 N.W.2d 333 (1986) (holding that without the availability of common law tort proceedings, alleged victim of defamation by police officers would be denied due process of law). Here, the legislature has extended a statutory right to a tax exemption to church property

up to 30 acres "necessary for location and convenience of buildings while such property is not used for profit," Wis. Stat. § 70.11(4). It cannot at the same time deny to everybody unable to pay an unlawfully assessed tax any method of vindicating that right.

Due process thus prohibits the legislature from slamming the courthouse door on those who deserve a tax exemption but cannot pay an unlawful tax first. Nor can the legislature slam the courthouse door on those who claim that disparate granting of tax exemptions violates their constitutional right to equal protection of the laws. *See In re Eberhardy*, 102 Wis. 2d 539, 550, 307 N.W.2d 881, 886 (1981) (noting that the Wisconsin Constitution's grant of plenary jurisdiction to circuit courts "does not permit the legislature to divest the constitutional grant of jurisdiction from the unified court system").

Finally, due process requires that if a remedy is delayed until after a deprivation has already occurred that remedy must be "clear and certain . . . to ensure that the opportunity to contest the tax is a meaningful one." *McKesson*, 496 U.S. at 38. Here, there is no such clarity and certainty. The literal language of § 74.35(2m) prevents property owners from raising the claim of exemption in *any action* but a § 74.35 action. It says that "a claim that property is exempt, may be made *only in an action under this section.*" § 74.35(2m).

Even if some future court might allow such a claim to be raised in an ancillary proceeding, *e.g.*, an enforcement action by the City, that possibility is remote and dubious, not clear and certain. It is far from clear that an exemption claim could be raised in, for example, an action to enforce a tax lien because such an action is not a § 74.35 action. *See* § 74.35(2m). More to the point, the Defendant claims that the Plaintiff has no clear and certain remedy at all for that clear and certain injury. It claims that the Plaintiff has no way of determining now whether the significant taxes, interest, and penalties the City is piling on the Plaintiff are lawful

or not. The City's improper denial of a statutory tax exemption and imposition of an unlawful tax has clouded Plaintiff's title as of right now – potentially limiting its ability to seek financing for the development of the congregation and expansion of the services it provides to members and the community.

The Defendant has failed to show that there are no circumstances under which the Plaintiff can prove its claim that § 74.35(2m), as applied to it, violates the constitutional requirements of due process. Indeed, if the Defendant has no more to say in response to that claim than what it has said here, the Plaintiff is almost certain to prevail.

B. The Plaintiff Sufficiently Pled a Denial of Equal Protection

The Complaint's second constitutional claim, ¶¶39-46, lays out a claim that § 74.35(2m) violates the Plaintiff's right to equal protection of the law. It first cites to the guarantees of equal protection found in the United States and Wisconsin Constitutions. (Compl. ¶¶40-42.) It then cites to a Wisconsin Supreme Court case, *Metropolitan Associates v. City of Milwaukee*, 2011 WI 10, 332 Wis. 2d 85, 796 N.W.2d 717, that has already determined that statutes providing for disparate and unequal methods of challenging property taxes for different property owners can violate equal protection. (*Id.* ¶43.) It then describes how some property owners can challenge a tax in multiple ways – two of which do not require paying the tax first – but other property owners can only challenge a tax in one way, which requires paying the tax first. (*Id.* ¶¶44-45.) Finally, the Complaint asserts that such disparate and unequal treatment violates equal protection. (Compl. ¶¶44-46.)

The Defendant has not pointed to any authority for the proposition that this unequal and disparate treatment of different classes of citizens does not violate the equal protection guarantees of the Wisconsin and U.S. Constitutions, and there is no case that defeats the claim

raised by the Plaintiff. *Dominican Nuns v. City of La Crosse*, 142 Wis. 2d 577, 419 N.W.2d 270 (Ct. App. 1997), stands simply for the unremarkable proposition that exemptions are exceptions from taxation and must be construed narrowly. Again, the Plaintiff agrees but this is beside the point. We have not yet arrived at the juncture where the Plaintiff must prove that its property is exempt; the Defendant is trying to prevent the Plaintiff from ever reaching that point. How this Court may eventually apply § 70.11(4) to the facts of this case is irrelevant to the question now before the court.

Wisconsin courts apply a three-step test as to whether laws that do not implicate a suspect class or a fundamental interest violate equal protection: (1) determine whether the law creates distinct classes of citizens; (2) determine whether the law treats members of those classes in significantly different ways; and (3) determine whether a rational basis exists for the difference. *Metro. Assocs.*, 2011 WI 10, ¶23. That test is satisfied by the allegations of the Complaint.

First, the statutory scheme of § 74.35 creates a distinct class of citizens: those who wish to challenge their property taxes as unlawful because an exemption applies, as compared to those who wish to challenge their property taxes as unlawful for any other reason.

Second, § 74.35(2m) treats that distinct class of citizens significantly differently than other citizens. Such citizens must pay a substantial sum before challenging their property taxes, while others need not do so. The sums involved are not trivial: they are significant. The differences in procedures, too, are significant differences. *Metropolitan Associates* teaches that when the procedures for challenging taxes vary between classes of citizens, those differences are significant for purposes of this test. *Id.*, ¶¶25-59.

And third, there is no rational basis for this difference in treatment. The traditional justification for "pay first" requirements is that depriving government of its stream of revenue

during lengthy judicial proceedings could in remote circumstances disrupt the financial stability of local governments. *See McKesson*, 496 U.S. at 37. But here, the legislature has already chosen to permit some disruption of that stream of revenue for *every other tax dispute*. Property owners challenging assessments as too high or the levying of a tax in violation of some procedural requirement can withhold their payment of the allegedly unlawful tax while they pursue their claim; property owners challenging the denial of an exemption cannot. There is no rational for this disparate and unequal treatment. There is nothing special about a claim of exemption compared to other claims challenging taxes.

A claim that § 74.35(2m) discriminates against those who lack financial resources can also be reasonably inferred from the Complaint.[6] The law creates a distinct class of citizens: those who can afford to pay a disputed tax before challenging it on the basis of an exemption and those who cannot afford to pay the tax first. Those classes are treated significantly differently – one group is permitted to challenge a property tax exemption denial in court, the other is barred from doing so. There is no rational basis for creating a judicial remedy for those who are well off but none for those who are not.

The Defendant has failed to show that there are no circumstances under which the Plaintiff can prove its claim that § 74.35(2m), as applied to it, violates equal protection.

C. The Plaintiff Sufficiently Pled a Denial of the Right to a Remedy

The Complaint's third constitutional claim, ¶¶47-50, lays out a claim that § 74.35(2m) violates the Plaintiff's right to a remedy. It first cites to the guarantee of a right to a remedy

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[6] A plaintiff can survive a motion to dismiss based on a legal theory not presented in the complaint, if supported by the alleged facts. *Apple Hill Farms Dev., LLP v. Price*, 2012 WI App 69, ¶17, 342 Wis. 2d 162, 816 N.W.2d 914 ("Wisconsin applies a liberal, notice pleading rule. A complaint need not identify legal claims; rather, it must set forth the basic facts giving rise to the claims.") (citations omitted); *see also Shelstad v. Cook*, 77 Wis. 2d 547, 553, 253 N.W.2d 517, 519 (1977) ("A plaintiff is bound by the facts alleged, not by his theory of recovery.").

obtained "freely, and without being obliged to purchase it" in Article I, Section 9 of the Wisconsin Constitution. (Compl. ¶48.) It then describes how requiring a property owner to pay a disputed tax before challenging it violates the plain language of that constitutional provision. (Compl. ¶¶49-50.)

The Defendant has not pointed to any authority for the proposition that § 74.35(2m) does not violate Article I, Section 9. Although the Defendant does not cite them, there actually are two Wisconsin cases that conclude that *some* types of pay-first provisions for challenging taxes do not violate this provision. Neither is apposite here.

In *Flanders v. Town of Merrimack*, the Wisconsin Supreme Court addressed a statute that required a property owner challenging an unlawful assessment to "pay the amount *legally chargeable to him* as a condition of relief." 48 Wis. 567, 4 N.W. 741, 745 (1880) (emphasis added). *Flanders* does not bar the present suit; to the contrary, it supports the Plaintiff's position here. First, the property owner in *Flanders* did not have to pay the amount of the *disputed* tax, he had to pay the tax that the court determined was *lawfully chargeable* to him; the owner had to pay the amount of tax he should have been charged, as determined by the court. 4 N.W. at 744. Second, the property owner did not have to pay that amount before *filing* the lawsuit, but rather before the court would enter judgment. *Id.* Third, the law required the tax to be paid to the *court*, not to the taxing authority. *Id.*

In other words, if a property owner was charged $1,000 in tax, and he convinced a court that the proper charge was $800, the owner would have to deposit with the court $800 before the court would enter judgment modifying the assessment. The property owner suffered no detriment by having to pay that amount, because he would have to pay it in any event. Unlike

here, the statute in *Flanders* did not condition the ability to challenge the legality of a tax on prepayment of the very tax alleged to be unlawful.

The structure of the law addressed in *Flanders* differs significantly from the structure of the law at issue here, and *Flanders* cannot reasonably be read to preclude this suit. Having to pay the full amount in dispute to the taxing authority itself before filing suit wreaks an injury on a property owner, like the Plaintiff here, not suffered by one who must deposit only the *lawful* amount of taxes to the court in order to perfect a judgment.

The second case addressing a pay-first provision is *Whittaker v. City of Janesville*, 33 Wis. 76 (1873). The court there upheld a statute requiring the prepayment of disputed taxes against an Article I, Section 9 challenge, but *only* in cases challenging an irregular assessment of the land, not attacking the underlying lawfulness of the tax.[7] *Id.* at 90. The court noted that if the statute were to be read to apply to all challenges to taxes, it "would undoubtedly be obnoxious to the constitutional objection raised by counsel." *Id. Whittaker*, in other words, provides support for the Plaintiff's position here, because the Plaintiff is not challenging an irregular assessment, but the fundamental unlawfulness of the tax.

As the Defendant notes (D. Reply Br. 5), Article I, Section 9 does not create any rights itself, or permit a court to create rights, but it does guarantee that a right, once created (or already existing), must be afforded some judicial remedy for its violation. *Guzman v. St. Francis Hosp., Inc.*, 2001 WI App 21, ¶18, 240 Wis. 2d 559, 623 N.W.2d 776 ("[Section 9] preserves access to the courts for redress of rights as those rights may either be created by the legislature, or, of

[7] The statute required prepayment of only the "justly chargeable" amount. *Whittaker v. City of Janesville*, 33 Wis. 76, 80-81 (1873). Unlike the law at issue in *Flanders*, where the justly chargeable taxes had to be paid only after a judicial determination of what that amount was, in *Whittaker* the money had to be paid before filing a lawsuit. Apparently, property owners had to engage in something of a crapshoot, because if the owner guessed low and paid an insufficient amount (as later determined by the court), the owner's lawsuit had to be dismissed. *Id.* at 81.

rights recognized by the common law, and not modified or suspended by it under the authority granted to it by Wis. Const. art. XIV, § 13.").

The Plaintiff is not arguing that Article I, Section 9 creates its right to a tax exemption. The legislature has created that statutory right to a property tax exemption if the use of the real property meets certain criteria. *See* Wis. Stat. § 70.11. Once this right was created, Article I, Section 9 guarantees the provision of a remedy in court for an abrogation of that right, but the legislature has unconstitutionally limited access to the courts for redress of that right. By limiting the § 74.35 procedures to those litigants rich enough to be able to pay the disputed tax first, the legislature has precluded the redress of grievances for those who lack the funds to pay a disputed tax.

The Defendant has failed to show that there are no circumstances under which the Plaintiff can prove its claim that § 74.35(2m), as applied to it, violates its right to a remedy.

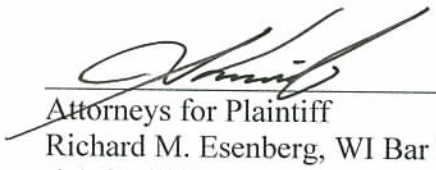
CONCLUSION

Even if this Court disagrees with the Plaintiff's statutory arguments presented in its Response Brief, it cannot dismiss the Plaintiff's constitutional challenges at this time. The Defendant has not demonstrated that there are no circumstances under which the Plaintiff can prove its constitutional claims, and the Complaint sufficiently stated claims upon which relief

can be granted. For the foregoing reasons, this Court should deny the Defendant's Motion to Dismiss and order the Defendant to file an Answer.

Dated this 22nd day of January, 2013.

Respectfully submitted,
Wisconsin Institute for Law & Liberty, Inc.



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