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August 29, 2013

Hon. Christopher R. Foley
Milwaukee County Courthouse, Branch 14
901 N. 9th Street
Milwaukee, WI 53233

Re: Jerusalem Empowered African Methodist Episcopal Church v. City of Milwaukee
Case No. 12-CV-8079

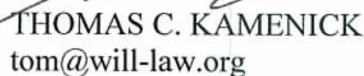
Dear Judge Foley:

Enclosed for filing please find the original of Plaintiff's Reply Brief. Please have your clerk file same, returning the stamped copy of this letter in the envelope provided.

I hereby certify that all counsel of record referenced below are receiving a copy of this document via first class mail.

Very truly yours,

WISCONSIN INSTITUTE FOR LAW & LIBERTY,



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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 REPLY BRIEF

"'Shut up,' he explained."
- *Ring Lardner*

The Plaintiff filed a motion seeking summary judgment on two separate issues: (1) whether § 74.35(2m) could constitutionally be applied to prohibit the Plaintiff from challenging its tax exemption denial; and (2) if not, whether the Plaintiff is entitled to a tax exemption for its Property. In its opening submissions, Plaintiff Jerusalem Empowered African Methodist Episcopal Church ("JEAMEC") set forth facts conclusively establishing that all of its Property is entitled to be exempt from taxation under Wisconsin law. These facts included, among other things, the testimony of the City of Milwaukee's own assessors that the Property should be tax exempt. The City's response does not call into question any of these facts or put into evidence any facts showing that there is a genuine issue for trial on this issue. *See* Wis. Stat. § 802.08(3); *Bd. of Regents of Univ. of Wis. Sys. v. Mussallem*, 94 Wis. 2d 657, 673-74, 289 N.W.2d 801 (1980) ("[O]nce [a primary facie case for summary judgment] is established the party in opposition to the motion may not rest upon the mere allegations or denials of the pleadings, but

must, by affidavits or other statutory means, set forth specific facts showing that there exists a genuine issue requiring a trial.").

The City did not even attempt to argue that the facts produced by JEAMEC *do not* conclusively establish that JEAMEC's use of the Property qualifies for a tax exemption under § 70.11(4). The City has therefore conceded that JEAMEC's Property should be tax exempt. *See DNR v. Building and All Related or Attached Structures Encroaching on the Lake Noquebay Wildlife Area*, 2011 WI App 119, ¶21, 336 Wis. 2d 642, 803 N.W.2d 86 (failure to respond to an argument concedes the argument).

Rather than dispute or argue the facts, the City asks the Court to ignore the underlying case on its merits. The City pays lip service to the foundational constitutional principle that JEAMEC is entitled to its "day in court," but at the same time argues that during its "day in court," JEAMEC has no right to assert its actual claim for relief.[1] This doublespeak is self-contradictory nonsense. JEAMEC is either entitled to its day in court, or it is not. If it is entitled, then this Court has the power to hear the merits of JEAMEC's claim and grant the property tax exemption. A day in court in which JEAMEC cannot obtain the relief to which it is legally entitled is no day in court at all.

JEAMEC is faced with the loss of its Property – and its very existence – because the City of Milwaukee has refused to provide JEAMEC with the property tax exemption to which it is lawfully entitled. Nevertheless, based upon the statutory scheme for contesting tax exemption issues, the City contends that JEAMEC should be denied the opportunity to establish its right to

[1] The City also claims that all of JEAMEC's statutory claims were dismissed. (Def. Reply Br., 2.) This is incorrect. The Court dismissed JEAMEC's claims that the statutory requirements of § 74.35(5)(c) did not apply and, in the alternative, had been waived by the City, concluding that such requirements applied and were jurisdictional requirements that could not be waived. (Def. Reply Br., Ex. A, 4-7.). However, the court did not dismiss – and therefore preserved – JEAMEC's declaratory judgment claim that its Property met the requirements of § 70.11(4), recognizing correctly that if JEAMEC prevailed on its constitutional claim, it would no longer be barred by § 74.35(5)(c) from bringing the exemption claim. (*Id.*, 7-8.)

the exemption before this Court. The City's position violates the protections afforded JEAMEC by the Due Process and Equal Protection Clauses of the Wisconsin and U.S. Constitutions. Accordingly, because there is no genuine issue of material fact and the City concedes that JEAMEC's Property meets the statutory requirements for a tax exemption, JEAMEC is entitled to judgment as a matter of law that all of its Property is exempt from taxation by the City of Milwaukee. Wis. Stat. § 802.08(2), (3); *Mussallem*, 94 Wis. 2d at 673-74 ("Where the party opposing summary judgment (the defendant in this case) fails to respond or raise an issue of material fact, the trial court is authorized to grant summary judgment pursuant to subsec. (3) of 802.08, Stats.").

I. JEAMEC IS ENTITLED TO A <u>REAL</u> DAY IN COURT AS A MATTER OF DUE PROCESS

The City agrees, as it must, that "meaningful access to the courts is a fundamental right." (Def. Reply Br., 3). But despite that concession, the City argues that because JEAMEC did not pay the disputed taxes in advance, JEAMEC "is foreclosed from litigating the merits of the case." (*Id.* at 2.) In other words, JEAMEC is welcome to "show up" but must "shut up" about its tax exemption claim. Although certainly novel, this is preposterous. How can there be "meaningful access to the courts" if the plaintiff is forbidden from raising its claim and the court is precluded from ruling on its merits? The City's argument takes the "meaningful" out of "meaningful access to the courts."

Here, it is undisputed that JEAMEC did not have the money to pay the taxes when the City claimed that they were due. (Banks Aff. ¶16; Answer to Amended Complaint ¶9.) The question before the Court is whether JEAMEC's due process rights include the ability to argue its case in court on the merits *even though* it is unable to pay the taxes in advance. The City admits that "[i]n concert with a litigant's Due Process right to bring suit in court is the right of all

parties to have the opportunity for a fair hearing by the court." (Def. Reply Br., 4.) But, according to the City, JEAMEC's right to a fair hearing in this Court does not actually include the right to a hearing on the issue of whether JEAMEC is entitled to the exemption. Which is, of course, the fundamental issue on which JEAMEC wants – and deserves – a hearing.

The City agrees that as a general rule the denial of these rights would violate the state and federal Constitutions, but then goes on to claim – for unexplained reasons – "not here!" But under § 74.35(2m), a property owner that is unable to pay the disputed taxes within a narrow window of time loses its right to meaningful access to the courts. By limiting the § 74.35 procedures to those litigants rich enough to be able to pay the disputed tax first – and by limiting all tax exemption denial challenges to § 74.35 – the legislature has precluded the redress of grievances for those who lack the funds to pay a disputed tax.

Moreover, the disputed taxes at issue are not a small amount. JEAMEC would have had to have paid over $5,000 each tax year to have its day in court. In fact, the City's records establish that as of July 31, 2013, for the three-year period of 2010-2012, a total of $27,207.37 was due, including interest and penalties. (Pl. Br., Kamenick Aff. Ex. D.) The City concedes that the small filing fee at issue in *Boddie v. Connecticut* constituted an improper barrier to the courts, but inconsistently argues that the much larger sum required here is acceptable. (Def. Reply Br., 3.) The City seeks to distinguish *Boddie* by arguing that the plaintiffs in *Boddie* were denied the ability to be in court in the first instance whereas here, JEAMEC can appear in court but must "shut up" about its argument on the merits. If this is a distinction, it is the quintessential distinction without a difference. A show trial where the plaintiff may appear but cannot make an argument is no real trial at all. According to the Wisconsin Supreme Court in *Penterman v. Wis. Elec. Power Co.*, the right of access to the courts "entitles the individual to a

fair opportunity to present his or her claim" and must be "adequate, effective, and meaningful." 211 Wis. 2d 458, 473-74, 565 N.W.2d 521, 530 (1997) (citations omitted). Being allowed to step inside the courtroom but not being allowed to make any argument on the merits does not meet this definition. This is especially galling given the City's concession that the decision to revoke JEAMEC's exemption was unlawful in the first instance.

The City attempts to justify its position by arguing that government entities have an interest in a consistent and predictable revenue stream. (Def. Reply Br., 4-5.) That interest exists, *see McKesson Corp. v Div. of Alcoholic Bevs. & Tobacco*, 496 U.S. 18, 37 (1990), but is not implicated by this case. JEAMEC does not challenge § 74.35(2m) facially; it does not argue that in no instance can a government entity require pre-payment of taxes as a condition for challenging an exemption denial. Rather, it raises an as-applied challenge that property owners *unable to pay* a disputed tax may not be denied access to the courts, and in this case it is undisputed that JEAMEC is unable to pay.

Permitting a party who cannot pay the disputed tax to bring a claim challenging the validity of a tax in court without paying the tax first imposes *no burden at all* upon governments' revenue flows and financial security. Such "cash-poor" property owners (Def. Reply Br. 5, n. 1), by their very nature cannot pay the tax. The government is not going to collect any money from them, regardless of whether or not they can challenge the tax. The existence of § 74.35(5)(c) is irrelevant if the property owner does not have the money to pay the tax; *e.g.*, the City would still be receiving no revenue from JEAMEC even if that statute did not exist. Permitting such plaintiffs to bring a declaratory challenge without first paying the tax does not disrupt the government's revenue flow in any way.

Section 74.35(2m) is unconstitutional as applied to JEAMEC because it denies JEAMEC the fundamental right of access to the courts under the Due Process Clauses of the U.S. and Wisconsin Constitutions and the Right to Remedy Clause[2] of the Wisconsin Constitution. JEAMEC does not have the resources to pay its taxes first, and § 74.35(2m) prevents JEAMEC from challenging the denial of its property tax exemption request by any other method.

II. SECTION 74.35(2m), AS APPLIED TO JEAMEC, VIOLATES JEAMEC'S RIGHT TO EQUAL PROTECTION OF THE LAW

JEAMEC has already shown that under the current system of tax appeals there are two categories of property owners – (1) those who wish to challenge a tax as unlawful because it is excessive; and (2) those who wish to challenge a tax as unlawful because they should be exempt from the tax – and that the system discriminates against the second class. The first category of property owners is provided with a variety of remedies not available to the second category including, among other things, that they may bring their challenge without paying the tax first. This unlawfully discriminates against the second category of property tax owners who do not have the same right.

The Wisconsin Supreme Court has twice held in recent years that providing one method of challenging property taxes to some classes of property owners but denying that same method to others violates equal protection, even under the rational basis test. *Metro. Assocs. v. City of Milwaukee*, 2011 WI 20, 332 Wis. 2d 85, 796 N.W.2d 717; *Nankin v. Vill. of Shorewood*, 2001 WI 92, 245 Wis. 2d 86, 630 N.W.2d 141. The City does not challenge, attempt to distinguish, or even *discuss,* either of these cases in its brief.

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[2] The City also makes no response to JEAMEC's arguments that § 74.35(2m) violates the Wisconsin Constitution's Right to Remedy Clause . (*See* Pl. Br., 12-13.)

Instead, the City spends a paragraph explaining why it is rational to permit both certiorari review and de novo review of the same underlying tax dispute. (Def. Reply Br., 7.) JEAMEC does not argue with that explanation; however, it is unrelated to JEAMEC's challenge. JEAMEC argues that it is irrational to give some property owners *the choice* of paying first or not paying first, while denying that same choice to other property owners and requiring them to pay first. (Pl. Br., 14-16 ("Members of JEAMEC's class . . . must pay the disputed tax first and proceed via § 74.35. Members of the other class . . . not only have three options to choose from, two of those options do not require the owner to pay the disputed tax first.").) The City nowhere attempts to answer that argument by explaining how such disparity is rational.

The City contends in its Due Process section that requiring a property owner to pay the taxes first is a rational system because it protects the government from unpredictable revenue shortfalls from litigation and by making the collection of taxes less difficult. (Def. Reply Br., 4-5.) That argument has a superficial applicability to the equal protection challenge as well, and we therefore address it. As explained above, that interest is not implicated in this case because a property owner who is unable to pay a disputed tax would not be paying into the government coffers regardless of whether § 75.35(2m) bars a suit from being brought.

Furthermore, that interest cannot justify the difference in treatment complained of by JEAMEC that allows one class of property owners to challenge their property taxes without paying them first but prevents another class (which includes JEAMEC) from doing so. If the government's interest is a steady flow of revenue, how is that interest served by allowing some property owners to avoid paying first, but not others? Why is it appropriate in one situation but not the other? Why not make everyone "pay to play"? The City never answers these questions, and there are no rational answers to them.

Nor does the City ever discuss the applicable law relating to an equal protection claim. In Wisconsin, an equal protection challenge involves a three-step test. The third step, *i.e.*, whether there is a rational basis for the difference in treatment, involves five criteria. JEAMEC reviewed each of the steps and criteria in detail in its opening brief. (Pl. Br., 15-17.) The City ignores this framework, responding to none of JEAMEC's points or cases. As a matter of law, in defending against JEAMEC's equal protection challenge, the City has to justify not the mere existence of a "pay first" scheme but the *difference in treatment* between similarly situated property owners. *See Metro. Assocs.*, 2011 WI 20, ¶60 ("Having concluded that Act 86 treats taxpayers in opt out municipalities significantly different from all other taxpayers, we next consider whether *this significantly different treatment* has a rational basis.") (emphasis added); *Nankin v. Vill. of Shorewood*, 2001 WI 92, ¶34 (asking "whether the legislature had a rational basis for establishing t[he] classification); *cf. State v. McManus*, 152 Wis. 2d 113, 130, 447 N.W.2d 654 (1989) (contrasting a due process challenge where the court looks at the rationale for the statute as a whole, with an equal protection challenge where the court looks at the "grounds for the *classifications* drawn by the legislature") (emphasis added). The City has catastrophically failed to even address, much less meet, this challenge.

III. SECTION 74.35(2m) DISCRIMINATES AGAINST PROPERTY OWNERS WHO LACK THE FUNDS TO PAY A DISPUTED TAX

The statute creates a second classification that also violates equal protection. It discriminates against a class of property owners who do not have the funds sufficient to pay a disputed tax. Again JEAMEC presented the court with actual legal argument on the three steps and the five criteria, showing that this disparate treatment has no rational basis. (Pl. Br., 17-18.) And again the City simply did not respond.

JEAMEC will not repeat its argument here, but it is important to highlight the fifth criterion looked at by the courts in determining whether there is a rational basis for the difference in treatment, *i.e.*, whether the characteristics of each class are such that the differences reasonably support the propriety of differing treatment. The statutory scheme at issue here cannot meet this criterion. In a just society, the differences between the rich and the poor do not support allowing the rich to have their day in court while the poor do not. If the City can point to a rational basis for that disparity, JEAMEC would like to have heard it and responded to it. Now, of course, it is too late.

CONCLUSION

JEAMEC is entitled to its day in court and is entitled to have its real property recognized as tax exempt. JEAMEC requests that the Court grant its motion for summary judgment and issue a declaration to that effect.

Dated this 29th day of August, 2013.

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