

STATE OF MICHIGAN
IN THE SUPREME COURT

BARUCH SLS, INC.,

Petitioner-Appellant,

v.

TOWNSHIP OF TITTABAWASSEE,

Respondent-Appellee.

Supreme Court No. 152047

Court of Appeals No. 319953

Michigan Tax Tribunal Nos.

0395010, 0415093

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BRIEF OF AMICUS CURIAE CHELSEA HEALTH & WELLNESS FOUNDATION (DBA FIVE HEALTHY TOWNS FOUNDATION)

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	1
STATEMENT OF FACTS	1
INTRODUCTION	1
STANDARD OF REVIEW	5
ARGUMENT	7
I. FACTOR 3 OF THE WEXFORD TEST SHOULD BE CLARIFIED, REVISED, OR REARTICULATED TO MAKE IT CLEAR THAT CHARITABLE ORGANIZATIONS ARE ALLOWED TO DEVISE AND EMPLOY MECHANISMS FOR IDENTIFYING AND EXTENDING SERVICE TO LOW INCOME MEMBERS OF THE CHARITABLE CLASS THEY SERVE, THAT THEY ARE NOT REQUIRED TO DEMONSTRATE THAT THEY SERVE EVERY LOW INCOME PERSON WHO MAY DESIRE THE SERVICE WITHOUT CHARGE, AND THAT THEY ARE NOT AUTOMATICALLY GUILTY OF "DISCRIMINATION" IF THEY TREAT LOW INCOME PERSONS DIFFERENTLY FROM THOSE WHO CAN AFFORD THE "REASONABLE CHARGE APPROXIMATING THE COST OF THE SERVICE" THAT FACTOR 5 OF THE WEXFORD TEST ALLOWS.	7
A. The current interpretation of Factor 3 of the Wexford test prohibiting discrimination to include persons of low income as a suspect classification is incorrect and raises barriers to exemption inconsistent with Wexford's reasoning and holding.....	8
B. How Factor 3's prohibition against offering charity on a discriminatory basis can be given "proper meaning."	17
RELIEF	20

INDEX OF AUTHORITIES

Cases

<i>Auditor General v R B Smith Mem Hosp Association,</i> 293 Mich 36; 291 NW 213 (1940)	8, 9, 12
<i>Boyne Area Gymnastics, Inc v City of Boyne,</i> 19 MTT 40 (Docket No. 320068)	11, 12
<i>Camp Retreats Found, Inc v Twp of Marathon,</i> unpublished opinion per curiam of the Court of Appeals, issued May 15, 2012 (Docket No. 304179)	11
<i>Clark Ret Cmty, Inc v City of Kentwood,</i> 20 MTT 145 (Docket No. 300634)	10, 12
<i>Continental Cablevision v Roseville,</i> 430 Mich 727; 425 NW 2d 53 (1988)	6
<i>Danse Corp v Madison Hts,</i> 466 Mich 175; 644 NW2d 721 (2002)	6
<i>Detroit Home and Day School v City of Detroit,</i> 76 Mich 521,523-24; 43 NW 593 (1889)	16
<i>Involved Citizens Enterprises, Inc v Twp of East Bay,</i> 16 MTT 199 (Docket No. 305734)	11
<i>Jackson v Phillips,</i> 96 Mass 539; 14 Allen 539 (1867)	18
<i>Michigan Baptist Homes & Dev Co v City of Ann Arbor,</i> 396 Mich 660; 242 NW2d 749 (1976)	17
<i>Michigan Bell Tel Co v Department of Treasury,</i> 445 Mich 470; 518 NW 2d 808 (1994)	6
<i>Retirement Homes of the Detroit Annual Conference of the United Methodist Church, Inc v Sylvan Lake Twp,</i> 416 Mich 340; 330 NW2d 682 (1982)	18
<i>Robinson v Detroit,</i> 462 Mich 439; 613 NW2d 307 (2000)	6
<i>Rowland v Washtenaw Cty Rd Commission,</i> 477 Mich 197; 731 NW2d 41 (2007)	6, 15
<i>Second Impressions, Inc v City of Kalamazoo,</i> 20 MTT 230 (Docket No. 322530)	10, 12

INDEX OF AUTHORITIES

Wexford Medical Group v City of Cadillac,
474 Mich 192; 713 NW2d 734 (2006).....passim

Rules and Regulations

MCR 7.215(C)(1) 11

Constitutional Provisions

Const 1963art 6, § 28 6

Statutes

Elliott Larsen Civil Rights Act (“ELCRA”)
MCL 37.2101, *et. seq.*..... 9

Persons With Disabilities Civil Rights Act (“PWDCRA”)
MCL 37.1101, *et. seq.*..... 9

QUESTIONS PRESENTED

Amicus Chelsea Health & Wellness Foundation (DBA Five Healthy Towns Foundation) (“the Foundation”) incorporates by reference the questions presented as they are stated in Petitioner-Appellant Baruch SLS, Inc.’s (“Baruch”) Application for Leave to Appeal, as augmented and modified by this Court’s Order of April 1, 2016, directing the parties to address the questions there stated.

STATEMENT OF FACTS

The Foundation incorporates by reference the statement of facts in Baruch’s Application for Leave to Appeal, which it supplements in the introduction that follows only as necessary to explain the distinct interest it seeks to represent as an amicus curiae.

INTRODUCTION

Chelsea Health & Wellness Foundation is an IRC 501(c)(3) non-profit organization that was formed in connection with a merger agreement, dated December 19, 2008, between Chelsea Community Hospital and Trinity Health-Michigan. Pursuant to the agreement, the Foundation was granted \$25 million in initial funding by the hospitals in order to support significant, measurable and sustainable improvements in the health and wellness of residents in its Service Area and in furtherance of the development of strategies to ensure access to health services for those in need. The agreement also transferred to the Foundation the Chelsea Wellness Center (“CWC”) which, like the subject property Dexter Wellness Center (“DWC”), is a certified medically integrated wellness center.¹ The CWC was owned and operated by Chelsea Community Hospital as a medically integrated wellness center since 2001, and was at all times exempt from property taxation under MCL § 211.7.

The Foundation’s mission is to cultivate improvements in personal and community wellness. The Foundation’s vision, described as its “four elements,” is to eat better, move more, avoid unhealthy substances and connect with others in healthy ways. To accomplish this mission, the Foundation employs

¹ The DWC was modeled after the CWC, and is in all relevant respects substantially the same as CWC.

two primary strategies: (1) charitable grant giving to, and/or on behalf of, causes relating to the health and wellness of the communities it serves (referred to as the “5 Healthy Towns Project”); and (2) the operation of four wellness centers in its service area. Like Chelsea Community Hospital before it, the Foundation uses the wellness centers to make a significant, positive, and sustainable impact on the health of its community members. Indeed, not only did the Foundation continue operating the CWC exactly as Chelsea Community Hospital had, but it has consistently expanded free and low-cost community health programming and services offered at its centers and continuously increased access and opportunities for those wishing to participate in those activities.

The Foundation recently sought exemption for the DWC under MCL § 211.7o and MCL § 211.7r in the Michigan Tax Tribunal (“MTT”).² The MTT decided the Foundation’s exemption claim under MCL 211.7o after a nine-day hearing from January 4 – 13, 2016. In its Final Opinion and Judgment, issued on April 6, 2016, the Tribunal found that the Foundation met the occupancy requirements of MCL § 211.7o and all but one of the factors described by this Court in *Wexford Medical Group v City of Cadillac*, 474 Mich 192, 214; 713 NW2d 734 (2006).³ Relying solely on *Wexford’s* “discriminatory basis” factor, the Tribunal affirmed Scio Township’s denial of the Foundation’s exemption claim. The Foundation timely claimed an appeal in *Chelsea Health & Wellness Foundation, v Scio Twp, et al*, Court of Appeals Docket No. 332483.

Though raised in a different charitable service context,⁴ the issues presented here, as framed by this Court’s order of April 1, 2016, are precisely the same as those presented in the Foundation’s appeal.

² The Foundation’s exemption claim under MCL § 211.7r was denied by the Tribunal’s December 22, 2015 Order denying the Foundation’s motion for summary disposition under MCL 211.7r and granting summary disposition in favor of the respondent Scio Township and intervening respondents, the City of Dexter, Dexter DDA and the Michigan Department of Treasury, in *Chelsea Health & Wellness Foundation v Scio Township and Interveners City of Dexter, Dexter DDA and Michigan Department of Treasury*, MTT Docket No. 14-001671.

³ A copy of the Tribunal’s Final Opinion and Judgment is attached to this Brief as **Attachment A**.

⁴ Indeed, there are greater economic obstacles for organizations like the Foundation that provide *non-hospital/clinic type* charitable services, for which no insurance cost-spreading mechanism is available, and to which no governmental subsidy for the indigent applies, such as the Medicaid program. Medicaid

The Foundation is vitally interested in the outcome of this appeal, because, like the Court of Appeals in *Baruch*, the MTT denied the Foundation's claim of exemption, because it found that the Foundation's scholarship mechanism for accommodating financially disadvantaged members of the communities it seeks to serve was "discriminatory:"

The issue under Factor 3 is not whether, or how many persons take advantage of Petitioner's scholarship program. Rather, the issue is whether Petitioner is offering its services on a discriminatory basis by choosing who, among the group it purports to serve, deserves the services. While Petitioner's CEO appears to the Tribunal to be genuinely interested in providing access to everyone, the evidence shows that persons with financial difficulties still have extra hoops to jump to be able to overcome financial barriers to use the facility. The written policy places requirements upon scholarship members that are not present for those who can pay the fee. Not only must prospective scholarship applicants verify their financial status, they must use the facility at least twice a week, or be in danger of losing their ability to use the facility.

The policy itself does not provide for on-going free membership, but rather, a 50% rate. Originally, that discount was also time limited to two months. Although the time limitation has apparently been removed in the latest policy articulation, a 50% rate would likely continue to limit those among the group Petitioner purports to serve, deserves the services [sic]. As Amy Heydlauff [the Foundation's CEO] testified, the poor tend to have poorer health.

While it is laudable that Petitioner has eliminated the \$200 initiation fee, and expanded (at least in theory) discounted services, the Tribunal finds that Petitioner failed to meet its burden in proving that Petitioner serves any person who needs the particular type of charity being offered. *Petitioner is correct in stating that Respondents have failed to show a single case in which a potential member was turned down or terminated for lack of payment.* What cannot be proven is how many low income persons never bothered to apply for membership because its costs, and written policy were prohibitive. Regardless, *the burden is on Petitioner to show that its policies do not discriminate against a particular group, in this case, low income persons.* The Tribunal finds that the policies as written, and even in modified form as testified to, do not meet this burden for Factor 3.

establishes a compensation floor for insured recipients of charity who either do not possess or have exhausted the financial means to pay the reasonable charge allowed under Factor 3 of the *Wexford* test discussed within. For the reasons discussed within, this additional economic obstacle that confronts non-medical charities underscores the need for this Court to reexamine, revise, and rearticulate the "discrimination" analysis to be applied under *Wexford's* Factor 3 "discrimination" test.

Attachment A at 44-45 (emphasis added).

Thus, though the Tribunal correctly concluded, particularly in light of evidence that the Foundation's operations consistently lose money, and that the Foundation had satisfied Factor 5 of the *Wexford* test, under which "a nonprofit corporation will not be disqualified for a charitable exemption because it charges those who can afford to pay for its services as long as the charges approximate the cost of the services," *id.*, at 45, 48, it denied the exemption on the ground that the Foundation's mechanisms for accommodating the low income portion of the population it sought to serve were "discriminatory" under Factor 3 of the *Wexford* test.

The MTT mistakenly equates "identification" with "discrimination." The *Wexford* Court surely considered it axiomatic that an organization first must determine who would be the recipients of its charity, i.e., what particular charitable need it seeks to address. Certainly the process of identifying a statutorily recognized charitable purpose can be termed "discrimination" in the primary, non-pejorative sense of the word "discriminate," that is "to distinguish" or "differentiate."⁵ But the process of identifying a statutorily recognized charitable purpose does not entail any "difference in treatment or favor on a basis other than individual merit" in the pejorative sense of that word. Once the charity identifies the statutorily permitted subset(s) of charitable purpose it seeks to address, *Wexford* merely says that the charity cannot discriminate, in the pejorative sense, among the recipients of that charity on the basis of their membership in any historically and statutorily protected class.

The rationale of the MTT's decision in the Foundation's case, and the tautology that consistently underlies Factor 3's application by the lower courts, highlights the dilemma for charitable organizations posed by the *Wexford* test as it is currently understood and applied: *Factor 3 of the Wexford test automatically produces a finding of "discrimination" whenever a charitable organization devises any*

⁵ See, Merriam-Webster's dictionary, which defines the verb "discriminate" as "*b.* distinguish, differentiate. *discriminate hundreds of colors.*"

mechanism for meeting the needs of low income members of the group the charitable organization seeks to serve that falls short of providing services free of any charge to an unlimited number of persons. Such an interpretation of Factor 3 flies in the face of and, indeed, effectively nullifies Factor 5 of the *Wexford* test, under which “a nonprofit corporation will not be disqualified for a charitable exemption because it charges those who can afford to pay for its services as long as the charges approximate the cost of the services.” That a low income person cannot afford to pay a charge that approximates the cost of the service provided does not mean that he or she cannot afford *any* charge. Nor does it mean that a charitable organization is forbidden to determine by some means whether a particular recipient of a benefit needs some relief from the reasonable charge permitted under Factor 5. But, as applied by the MTT and the courts in this case, the Foundation’s case, and numerous other cases, Factor 3 operates to frustrate the very purpose of the Legislature’s grant of a charitable exemption – the relief of governmental burdens by charity – and undermine the financial integrity of charitable organizations formed for that purpose.

This is the dilemma that prompted the Foundation’s board to authorize this amicus brief. The interpretation of this Court’s decision in *Wexford* by the lower courts presents a bewildering and seemingly insuperable obstacle to exemption, especially for charitable organizations that, unlike Baruch SLS, cannot look to any cost-spreading insurance mechanism or assured source of baseline contribution to the cost of the benefit they confer, such as Medicaid, to provide at least a minimum level of funding for the cost of serving low income persons. It is both this common concern, and this distinct interest, which the Foundation shares with non-hospital/clinic type charitable organizations, that inform the arguments the Foundation offers for this Court’s use as it considers the issues that the Order of April 1, 2016 directs the parties to address.

STANDARD OF REVIEW

The Foundation agrees with, and here incorporates, the rationale for employing a de novo standard of review set out in Baruch's Application for Leave to Appeal.⁶ The issue presented in this case is, at bottom, one of law, because it requires the Court to reexamine its interpretation of MCL 211.7o⁷ in *Wexford* in light of ten years' experience in administering *Wexford's* six-factor test for determining eligibility for charitable exemption. Such a reexamination entails no deference to the MTT's special expertise, nor to the Court of Appeals application of that test, either here or in other cases.⁸

⁶ The *Wexford* Court stated the standard of review applicable to appeals from the MTT as follows:

The standard of review for Tax Tribunal cases is multifaceted. Where fraud is not claimed, this Court reviews the tribunal's decision for misapplication of the law or adoption of a wrong principle. *Michigan Bell Tel Co v Dep't of Treasury*, 445 Mich 470, 476; 518 NW 2d 808 (1994). We deem the tribunal's factual findings conclusive if they are supported by "competent, material, and substantial evidence on the whole record." *Id.*, citing *Const 1963, art 6, § 28* and *Continental Cablevision v Roseville*, 430 Mich 727, 735; 425 NW 2d 53 (1988). *But when statutory interpretation is involved, this Court reviews the tribunal's decision de novo. Danse Corp v Madison Hts*, 466 Mich 175; 644 NW2d 721 (2002).

474 Mich at 201-202 (emphasis added).

⁷ MCL 211.7o pertinently provides:

- (1) Real or personal property owned and occupied by a nonprofit charitable institution while occupied by that nonprofit charitable institution solely for the purposes for which that nonprofit charitable institution was incorporated is exempt from the collection of taxes under this act.

⁸ To the extent that reexamination of the *Wexford* test may require the Court to consider whether it is appropriate to modify its prior decisions, such review is governed by the standard for determining whether and when it is appropriate for this Court to overrule and modify its decisions, as articulated most recently in *Rowland v Washtenaw Cty Rd Comm'n*, 477 Mich 197, 214-15; 731 NW2d 41 (2007), citing *Robinson v Detroit*, 462 Mich 439, 463-468; 613 NW2d 307 (2000). In determining whether to overrule a prior case, this Court first considers whether the earlier case was wrongly decided, and that if a case was wrongly decided, the Court should then examine reliance interests: whether the prior decision defies "practical workability"; whether the prior decision has become so embedded, so fundamental to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations; whether changes in the law or facts no longer justify the prior decision; and whether the prior decision misread or misconstrued a statute. *Id.*

For the reasons articulated in the argument that follows, the Foundation submits that the most salient of these factors favoring reexamination of the *Wexford's* test is the practical *unworkability* of the current interpretation of Factor 3.

ARGUMENT

- I. FACTOR 3 OF THE WEXFORD TEST SHOULD BE CLARIFIED, REVISED, OR REARTICULATED TO MAKE IT CLEAR THAT CHARITABLE ORGANIZATIONS ARE ALLOWED TO DEVISE AND EMPLOY MECHANISMS FOR IDENTIFYING AND EXTENDING SERVICE TO LOW INCOME MEMBERS OF THE CHARITABLE CLASS THEY SERVE, THAT THEY ARE NOT REQUIRED TO DEMONSTRATE THAT THEY SERVE EVERY LOW INCOME PERSON WHO MAY DESIRE THE SERVICE WITHOUT CHARGE, AND THAT THEY ARE NOT AUTOMATICALLY GUILTY OF "DISCRIMINATION" IF THEY TREAT LOW INCOME PERSONS DIFFERENTLY FROM THOSE WHO CAN AFFORD THE "REASONABLE CHARGE APPROXIMATING THE COST OF THE SERVICE" THAT FACTOR 5 OF THE WEXFORD TEST ALLOWS.

This Court's Order of April 1, 2016, directs the parties, first, to address the question whether *Wexford* "correctly held that an institution does not qualify as a 'charitable institution' under MCL 211.7o or MCL 211.9 if it offers its charity on a 'discriminatory basis.'"

The Foundation replies unequivocally to this question in the affirmative, but, as the Foundation's argument explains, it does not follow that *Wexford's* Factor 3 has been properly interpreted to include accommodation of indigent and lower income persons as a factor to consider under the heading of "discrimination." *Accommodation is not discrimination*, despite the contrary interpretations of *Wexford* by the courts and Michigan Tax Tribunal below in this and other cases. The Foundation believes that *Wexford* Factor 3 has been misinterpreted to include "low income" among the categories of "discrimination" prohibited by law.

The following argument demonstrates, first, why the current interpretation of Factor 3 creates an unreasonable and unnecessary obstacle to exemption that is inconsistent with this Court's reasoning and decision in *Wexford*, and, second, why and how the Foundation believes Factor 3 and the *Wexford* test can be clarified, improved, or modified, both to promote certainty in charitable giving and planning, and to simplify decisions in this and other charitable exemption cases.

A. The current interpretation of Factor 3 of the *Wexford* test prohibiting discrimination to include persons of low income as a suspect classification is incorrect and raises barriers to exemption inconsistent with *Wexford's* reasoning and holding.

Over the decade since *Wexford* was decided, the six-factor charitable exemption test⁹ that this Court derived from a detailed review of its prior decisions has become a familiar tool for designing charitable institutions and evaluating their claims for charitable exemption. With the exception of Factor 3, the test can be applied readily, because the other 5 factors are relatively binary – either they are satisfied, as measured against objective criteria, or they are not.

As applied by the MTT and the Court of Appeals since this Court's 2006 decision in *Wexford*, however, the subjective "discrimination" test of Factor 3 has proved to be a particularly difficult hurdle when institutions created for charitable purposes seek charitable exemption.

The origin of Factor 3, which prohibits offering charity on a "discriminatory basis," is deceptively straightforward: The *Wexford* Court traced it to a brief passage in *Auditor General v R B Smith Mem Hosp*

⁹ The *Wexford* Court identified six factors that "come into play when determining whether an institution is charitable":

- (1) A "charitable institution" must be a nonprofit institution.
- (2) A "charitable institution" is one that is organized chiefly, if not solely, for charity.
- (3) A "charitable institution" does not offer its charity on a discriminatory basis by choosing who, among the group it purports to serve, deserves the services. Rather, a "charitable institution" serves any person who needs the particular type of charity being offered.
- (4) A "charitable institution" brings people's minds or hearts under the influence of education or religion; relieves people's bodies from disease, suffering, or constraint; assists people to establish themselves for life; erects or maintains public buildings or works; or otherwise lessens the burdens of government.
- (5) A "charitable institution" can charge for its services as long as the charges are not more than what is needed for its successful maintenance.
- (6) A "charitable institution" need not meet any monetary threshold of charity to merit the charitable institution exemption; rather, if the overall nature of the institution is charitable, it is a "charitable institution" regardless of how much money it devotes to charitable activities in a particular year.

Ass'n, 293 Mich 36, 38; 291 NW 213 (1940), which quoted with approval and adopted without significant analysis the following statement from 34 ALR 634, 635: "In general, it may be said that any body not organized for profit, which has for its purpose the promotion of the general welfare of the public, expending its benefits without discrimination as to *race, color or creed*, is a charitable or benevolent organization within the meaning of the tax exemption statutes." *Wexford*, 474 Mich at 207, quoting *Auditor General, supra* (emphasis added). Presumably, the three accepted categories of "race, color or creed" enumerated in 1940 now include the additional impermissible bases for discrimination that have since been codified in Michigan's civil rights laws.¹⁰ With that expansion, the concept of discrimination embodied in Factor 3 is easily comprehended: the charitable purpose must promote "the general welfare of the public," and thus may not be performed or offered to the exclusion of any class of the public against which discrimination is prohibited by law.

The difficulty in applying (and satisfying) Factor 3 stems from a judicial gloss on the rudimentary categories of discrimination enumerated in *Auditor General* that adds to its prohibition against "discrimination as to race, color or creed" an additional class neither included nor suggested in that enumeration, against which discrimination is prohibited. That class – the needy, persons of low income -- is not mentioned in MCL 211.7o, is not included in *Wexford's* statement of Factor 3, and is not listed among the suspect classes against which discrimination is prohibited by statute, *i.e.*, ELCRA's prohibition against

¹⁰ See Elliott-Larsen Civil Rights Act ("ELCRA"), MCL 37.2101, *et seq.* (MCL 37.2102(1) prohibits discrimination on the basis of "*religion, race, color, national origin, age, sex, height, weight, familial status, or marital status.*"), and the Persons with Disabilities Civil Rights Act ("PWDCRA"), MCL 37.1101, *et seq.*, 37.1103(d)(i)-(iii) (defining a disability to mean, "[a] determinable *physical or mental characteristic of an individual, which may result from disease, injury, congenital condition of birth, or functional disorder*, if the characteristic ... limits 1 or more of the major life activities of that individual and is unrelated to the individual's ability to perform the duties of a particular job or position ... and is unrelated to the individual's qualifications for employment or promotion," ... is unrelated to an "individual's ability to utilize and benefit from a place of public accommodation or public service;" ... "is unrelated to the individual's ability to utilize and benefit from educational opportunities, programs, and facilities at an educational institution," ... or "substantially limits 1 or more of that individual's major life activities and is unrelated to the individual's ability to acquire, rent, or maintain property.") (Emphasis added).

discrimination based on "religion, race, color, national origin, age, sex, height, weight, familial status, or marital status," and PWDCRA's protection against discrimination based on a "determinable physical or mental characteristic of an individual, which may result from disease, injury, congenital condition of birth, or functional disorder." Yet, some courts, including the Court of Appeals in this case,¹¹ have held that Factor 3 requires the creation of a special sub-class that is entitled to treatment more favorable than that to which the rest of the class encompassed by Factor 3 is entitled, owing solely to their financially disadvantaged status. This sub-class comprises low-income members of the class to be served by any charity seeking exemption. Under the current interpretation of Factor 3, low-income members of the class served by the charity are entitled to preferential treatment to compensate for their low-income status. Such preferential treatment enables them to obtain equal access to the charitable benefit, and relieves them of the payment that may be required under Factor 5 by non-financially disadvantaged members of the class served.

Thus, while the entire class of beneficiaries must comprise "*all members of the public who need or desire the benefit offered by the charity*" claiming exemption," a sub-class within that segment of the public is entitled to "more than equal treatment." This, we are told, is because they are financially less fortunate, and consequently unable to afford the maintenance fees that Factor 5 of the *Wexford* test allows a charity to impose on the rest of the beneficiaries of the charity who are able to pay them.

Some decisions have held that *Wexford's* Factor 3 discrimination test actually requires the would-be exempt charity to serve the subclass of the financially disadvantaged at no charge, or at rates well below those permitted under *Wexford's* Factor 5,¹² under which a charity is permitted to impose charges that

¹¹ And, as the Foundation will show in its appeal, the MTT in *Chelsea Health and Wellness Foundation, v Scio Twp.*, *supra*.

¹² See, e.g., *Clark Ret Cmty, Inc v City of Kentwood*, 20 MTT 145, 170 (Docket No. 300634), issued March 25, 2011 ("There are undoubtedly many persons who need *the particular type of charity being offered* but who are excluded due to inability to meet the financial requirements. Clark does not use the subject property for the benefit of "needy" persons generally."); *Second Impressions, Inc v City of Kalamazoo*, 20 MTT 230, 239 (Docket No. 322530), issued May 24, 2011 ("Petitioner appears to argue that it meets this

approximate the cost of the services. Failure to do so is deemed “discrimination” within the meaning of Factor 3 against the financially less fortunate, who otherwise would be subject to the same cost of service maintenance fee that Factor 5 allows a charity to ask of all others in the class benefiting from the service or goods offered. Such a requirement effectively requires the charity to operate at an overall loss, because neither *Wexford's* articulation, nor the current interpretation of Factor 5, appears to permit the charge a charity imposes on those who are able to pay to exceed the cost of providing the benefit.¹³

This highlights the first apparent flaw in the current interpretation and application of the *Wexford* test: it includes no explicit authority for the use of a mechanism that would allow an exempt charity to spread the cost of providing charitable benefits to those unable to pay the charge allowed under Factor 5 over the remainder of the class benefited. This flaw is especially burdensome for charities that, unlike

test because it provides tuition assistance to any student in the KCSA schools whether or not they are in need of financial assistance. In other words, Petitioner has defined the “group” that it serves as only KCSA students. The Tribunal finds that this definition is self-serving and too narrow.”); *Involved Citizens Enterprises, Inc v Twp of East Bay*, 16 MTT 199, 227 (Docket No. 305734), issued Sept. 12, 2007 (“There is no evidence that Traverse City High Schools use the subject property free of charge or at a reduced rate.”); *Camp Retreats Found, Inc v Twp of Marathon*, unpublished opinion per curiam of the Court of Appeals, issued May 15, 2012 (Docket No. 304179), p *6. (finding *Wexford* factor 3 met where Petitioner allowed outside institutions to use the property “for minimal or no fees.”); *Boyne Area Gymnastics, Inc v City of Boyne*, 19 MTT 40, 44 (Docket No. 320068), issued March 23, 2011 (“Petitioner, through an unwritten policy, offers financial assistance, or “scholarships,” to children if they qualify for the public school lunch program. This policy fails to take into consideration other children who may not qualify for the public school lunch program, but whose families are unable to pay the \$72.00 per hour fee.”). T

In keeping with MCR 7.215(C)(1), as amended on March 23, 2016, the Foundation cites unpublished decisions here and elsewhere in this brief not as authority for a rule established by published precedent, but as examples of how published precedent has been interpreted and applied in those unpublished decisions, and as illustrations of the interpretational problem that prompts both Baruch's appeal and the Foundation's amicus submission. To view these cases, see **Attachment B**.

¹³ This interpretation is not compelled by the *Wexford* Court's language, however; it said only that “[a] “charitable institution” can charge for its services as long as the charges are not more than what is needed for its successful maintenance.” Conceivably this Court could remedy at least part of the problem posed by the current interpretation of Factor 3 by clarifying that under Factor 5 “what is needed for [a charity's] successful maintenance may permissibly include a “cost-shifting” to those able to pay the charge of some part of the subsidy necessary to address the needs of those unable to pay some or all of the charge.

hospitals and medical providers, have no cadre of insured, non-charity recipients of their services over which to spread the cost of providing charitable services.

The second flaw in the interpretation and application of *Wexford's* Factor 3 discrimination test is the common understanding that it prohibits a charity even to require members of the financially disadvantaged sub-class to (1) identify themselves, (2) request or apply for special treatment, or (3) provide evidence to establish that they are eligible for the special treatment to which they are entitled. As the MTT held in the Foundation's case, such a procedure for accommodating the needy itself constitutes discrimination.¹⁴

That the courts have added the subclass of the financially disadvantaged to those entitled to be free from discrimination is, of course, understandable. Indeed, implicit in the commonly accepted definition¹⁵ of "charity"¹⁶ is the notion that it is an act of benevolence bestowed upon those in need. But, in simple and indisputable point of fact, under MCL 211.7o(1), a charity is not limited – indeed, under any understanding of a non-discrimination requirement, *cannot* be limited -- to serving *only* the needy, because a charity must operate in the service of the "general welfare of the public." *Auditor General, supra*.

As *Wexford* is currently understood and applied by the lower courts, Factor 3 includes a sub-class composed of a *non-suspect category*, one neither encompassed by *Auditor General's* prohibition of "discrimination as to race, color or creed," nor by the classifications in Michigan's civil rights laws, so as to forbid discrimination against persons of lower income. This interpretation produces an inherent and unavoidable tension between Factor 3's prohibition of "discrimination" and Factor 5's permission to

¹⁴ "The written policy places requirements upon scholarship members that are not present for those who can pay the fee. . . . prospective scholarship applicants [must] verify their financial status, . . .". **Attachment A**, MTT Opinion, at 45. See also, e.g., *Clark Ret Cmty*, 20 MTT at 170; *Second Impressions*, 20 MTT at 239; *Boyne Area Gymnastics*, 19 MTT at 44, *supra* note 12 and **Attachment B**.

¹⁵ Merriam-Webster, for example, defines "charity" as "generosity and helpfulness especially toward the needy or suffering; *also*: aid given to those in need."

¹⁶ MCL 211.7o(1)'s single sentence uses the term "charitable" three times, but the term is undefined. See *Wexford*, 474 Mich at 739. The Legislature has left it to this Court to give that term meaning, and the *Wexford* test is its most current essay at doing so.

“charge[] those who can afford to pay for its services as long as the charges approximate the cost of the services.”

So interpreted, Factor 3 effectively overrides Factor 5, because it prevents a charity from recovering the cost of its services from those who cannot afford to pay that charge *and* from other members of the class of beneficiaries who are able to pay it, because the charge cannot exceed the cost of rendering the service. In effect, this interpretation of Factor 3’s discrimination provision requires the charity to operate at a loss that will deplete its resources. This is plainly contrary to *Wexford*, in which this Court stated: (1) that the function of setting monetary thresholds is “the Legislature’s purview,” because “a court would have to determine how to account for the indigent who do not identify themselves as such but who nonetheless fail to pay,” 474 Mich at 214; and (2) that “the idea that an institution cannot be a charitable one unless its losses exceed its income places an extraordinary – and ultimately detrimental – burden on charities to continually lose money to benefit from tax exemption.” *Id.* at 218. On the contrary, as this Court explicitly recognized, “[a] charitable institution can have a net gain – it is what the institution does with the gain that is relevant.” *Id.* If the gain is reinvested to maintain the institution’s viability, this actually “serves as evidence, not negation, of the institution’s ‘charitable’ nature.” *Id.*

The irreconcilable tension between Factor 5 and Factor 3 inherent in the current interpretations of both Factor 5 and Factor 3 is clearly present in Baruch’s case, in which exemption was denied, despite the absence of any evidence that any applicant had ever been denied admission because of inability to pay for the first two years’ charges customarily expected to be paid, or that any resident had ever been put out when the budgeted percentage of persons allowed to remain when the only payment available was that provided by Medicaid (25% of all residents) had been exceeded.

It is even more evident, almost to the point of absurdity, from the *ratio decidendi* of the MTT’s decision in the Foundation’s case. The MTT denied the exemption because the Foundation, “failed to meet its burden in proving that Petitioner serves *any person* who needs the particular type of charity being

offered." **Attachment A** at 45 (emphasis added). Why? Because, the MTT explained, the Foundation had "discriminated" under Factor 3 by (1) adopting a policy to make an exception for persons of low income to the requirement that members pay the reasonable charge permitted under Factor 5, and (2) devising a "scholarship" mechanism for implementing that policy that required a low-income scholarship applicant to verify their financial status.¹⁷ This "disparate treatment," which the MTT *speculated* (admittedly without *any* evidence to support its surmise) "might" have discouraged low income persons from even seeking to make use of the facility,¹⁸ was found to be "discriminatory." And this was so, even though, as the MTT acknowledged, the Foundation was "correct in stating that *Respondents have failed to show a single case in which a potential member was turned down or terminated for lack of payment.*" Ex. A, at 45 (emphasis added).

The Foundation submits that the current interpretation of Factor 3 by the lower courts fails to distinguish between "discrimination" for which a charitable organization is not responsible, *i.e.*, disadvantaged life circumstances and inadequate financial resources, and "discrimination" that it is forbidden to practice if it wishes to receive charitable exemption, *i.e.*, refusing to provide a benefit to a member of the class the charity exists to serve on the ground that the class member is unable to pay the reasonable cost of the benefit that Factor 5 allows the charity to assess to those able to pay it. What is a

¹⁷ In finding that the Foundation's scholarship policy was discriminatory, the MTT cited as an additional reason for its conclusion the requirement that scholarship recipients actually use the scholarships awarded. "Not only must prospective scholarship applicants verify their financial status, they must use the facility at least twice a week, or be in danger of losing their ability to use the facility." **Attachment A** at 44. Therefore, according to the MTT's interpretation of Factor 3 in the Foundation's case, if a low income member of the public no longer desires to use the charitable services offered at no charge by the charity, that charity must nonetheless continue to award its limited scholarship funds to such persons to avoid a finding of discrimination. Such a requirement serves only to diminish the finite resources that a charity can devote to serving without charge indigent members of the general public who need or desire the charitable services offered, and to reduce the number of indigent persons who can actually be served. The MTT's reasoning actually illustrates the perverse results produced when indigence is included as a suspect sub-class under Factor 3.

¹⁸ "What cannot be proven is how many low income persons never bothered to apply for membership because its costs, and written policy were prohibitive... ." **Attachment A** at 45.

charity to do if it is forbidden even to *identify* those who need relief from the charge it is *allowed* to impose, or to require some kind of verification that the recipient's circumstances entitle him or her to a waiver or reduction of that charge?

It requires but a moment's consideration to realize that, because all members of the public in need of the service must be eligible for the benefit for a charity's service to be deemed charitable, a charitable organization must have some means of identifying those whose incomes are insufficient to pay the reasonable charge that "approximate[s] the cost of the services" that Factor 5 of the *Wexford* test allows it to impose. Yet, according to the MTT, the very act of identifying such persons to provide relief from that charge, so as to prevent it from having a discriminatory effect is itself deemed "discriminatory." The result is two irreconcilable demands, a classic "double bind." This is "practical *unworkability*" warranting reexamination and clarification of *Wexford* under *Rowland v Washtenaw Cty Rd Comm'n, supra*.

Even more onerous is the notion that to avoid a finding that a charitable service is being rendered in a discriminatory fashion under Factor 3, it must be made available to "any person who needs the particular type of charity being offered." This requirement is inconsistent with the finite resources that a private charitable organization possesses, and *Wexford's* explicit recognition that a charity is not required to sustain losses that exceed its income to qualify as a charitable institution. The current interpretation of Factor 3, literally applied, requires a charity to spend itself out of existence by denying it the ability to impose some limit on the services it offers to the indigent to enable it to remain solvent, survive, and continue rendering the benefit to as many as its resources will allow. This ability is particularly important, indeed indispensable, for a non-medical charity that, unlike a hospital or nursing home, cannot look to insurers to spread the cost of charitable care, or to a publicly-funded program, such as Medicaid, to provide a funding baseline that will prevent exhaustion of its resources.

The interpretation of Factor 3 that finds "discrimination" if a charity cannot, without limitation, serve all persons unable to pay the reasonable charge under Factor 5 necessary to cover the cost of the services

provided actually defeats the purpose of the Legislature's enactment of a charitable exemption. As this Court long ago recognized, "exemption from taxation is the only form of encouragement that our laws provide." *Detroit Home and Day School v City of Detroit*, 76 Mich 521,523-24; 43 NW 593 (1889).

It is clear that the current interpretation of Factor 3 that the MTT and the courts below have employed cannot be correct. Not only is it at odds with economic reality, it cannot be squared with this Court's opinion in *Wexford*, which expressly stated that the prohibition against discrimination in Factor 3 cannot be equated with a requirement that a charity must serve all who require, desire, or need the charitable service offered:

A second indispensable principle is that the organization must offer its charitable deeds to benefit people who need the type of charity being offered. *In a general sense, there can be no restrictions on those who are afforded the benefit of the institution's charitable deeds. This does not mean, however, that a charity has to serve every single person regardless of the type of charity offered or the type of charity sought.* Rather, a charitable institution can exist to serve a particular group or type of person, but the charitable institution cannot discriminate within that group. *The charitable institution's reach and preclusions must be gauged in terms of the type and scope of charity it offers.*

From these precepts, it naturally follows that *each case is unique and deserving of separate examination. Consequently, there can be no threshold imposed under the statute. The Legislature provided no measuring device with which to gauge an institution's charitable composition, and we cannot presuppose the existence of one.* To say that an institution must devote a certain percentage of its time or resources to charity before it merits a tax exemption places an artificial parameter on the charitable institution statute that is unsanctioned by the Legislature.

Wexford, 474 Mich at 213 (emphasis added).

Despite this seemingly clear explanation, it is evident that here, and in the Foundation's case, the lower courts and the MTT have imposed both impossible standards of proof and economically impractical requirements regarding the scope of the services that must be rendered to low income persons to qualify for exemption. They have done so in the name of enforcing Factor 3's prohibition against "discrimination" that, taken to their logical conclusion, would require charities seeking exemption to spend themselves out of

existence in an unlimited effort to provide their benefit to all who may desire it, without regard to the limitations upon their ability to do so inherent in their finite funding. This unreasonable interpretational burden is compounded by the “discrimination” said to result from even seeking to identify the indigent the charity serves, and devise and employ a procedure that enables the charity to obey Factor 3 by relieving them from the reasonable charge equivalent to the cost of the benefit permitted under Factor 5.

It appears to the Foundation that the lower courts and MTT have focused exclusively and with mechanistic literalism on the *wording* of the summary of its decision reflected in the *Wexford* Court’s six-factor list, 474 Mich at 215, to the exclusion of the *reasoning* in this Court’s opinion on which that list was based. They have, as a consequence, applied those six factors so literally, in the name of the “narrow construction” required¹⁹ in cases of tax exemption, that they have, as often as not, actually defeated the Legislature’s purpose of relieving government burdens by encouraging charitable activity. As a consequence, they have not accorded Factor 3 its “proper meaning.”

B. How Factor 3’s prohibition against offering charity on a discriminatory basis can be given “proper meaning.”

This Court’s April 1, 2016, Order secondly directs that, if the parties believe that an institution cannot qualify as a “charitable institution” if it offers its charity on a discriminatory basis, the parties should address “how ‘discriminatory basis’ should be given proper meaning.”

The Foundation submits that, in light of the foregoing discussion, the answer is evident: Factor 3, prohibiting a charitable institution to “offer its charity on a discriminatory basis by choosing who, among the group it purports to serve, deserves the services,” is not the proper test or factor to apply to determine whether a charity adequately provides for the needs of those among “the group it purports to serve” who

¹⁹ “And where a tax exemption is sought, we recall that because tax exemptions upset the desirable balance achieved by equal taxation, they must be narrowly construed. *Id.*; see also *Michigan Baptist Homes & Dev Co v City of Ann Arbor*, 396 Mich 660, 669-670; 242 NW2d 749 (1976).” *Wexford*, 474 Mich at 740. However, as the issues in *Baruch* [and the Foundation’s] appeal involve proper application of the test established by this Court in its *Wexford* decision, the “narrow” or “strict” construction used to construe tax exemption statutes may be inapplicable.

have income insufficient to pay the charge for those services permitted under Factor 5. In the simplest terms possible: *The poor should not be a subclass of those against which a charity may not discriminate under Factor 3.* The Factor 3 analysis should be limited to determining whether the charity discriminates against those it exists to serve by denying service to those belonging to the suspect categories defined by Michigan laws prohibiting discrimination, *among whom the poor are not included.* See *supra* note 10.

The question whether a charity adequately addresses the needs of the poor can be addressed in a number of ways. For example, it can be assessed either as part of the analysis required under Factor 2, to determine whether it is “organized chiefly, if not solely, for charity;” under Factor 4, to determine if it performs any of the missions it enumerates so as to “lessen the burdens of government;” under Factor 6, as part of the determination whether the “overall nature of the institution is charitable, ... regardless of how much money it devotes to charitable activities in a particular year,” or under a combination of these factors. This approach, though feasible, poses some problems, because no one or combination of these factors is obviously or specifically adapted to assessing the charity’s service to the poor.

A perhaps superior alternative might be the addition of a new Factor 7, one that specifically obligates those planning a charitable institution, and courts evaluating such an institution’s claim of charitable exemption, to consider whether the poor are considered and provided for among those benefited, as undoubtedly they must be, under the *definition of charity that this Court approved in Wexford*:

“[Charity] *** [is] a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works or otherwise relieving the burdens of government.”

Wexford, 474 Mich at 214, quoting *Retirement Homes of the Detroit Annual Conference of the United Methodist Church, Inc v Sylvan Lake Twp*, 416 Mich 340, 348-349; 330 NW2d 682 (1982) (quoting *Jackson v Phillips*, 96 Mass 539; 14 Allen 539 (1867)).

The important point is that, however the analysis proceeds, it must be tempered by the *Wexford* Court's clear and, in the Foundation's opinion, clearly correct, observation that the courts are neither equipped nor authorized to formulate a "monetary threshold" that a charity must meet by providing free services to the indigent. *Wexford*, 474 Mich at 214. That is a matter that falls within "the Legislature's purview," *id.*, and, no such threshold having been prescribed, it is not for the courts "to determine how to account for the indigent who do not identify themselves as such but who nevertheless fail to pay." *Id.* As the *Wexford* Court recognized, "the idea that an institution cannot be a charitable one unless its losses exceed its income places an extraordinary – and ultimately detrimental – burden on charities to continually lose money to benefit from a tax exemption." In *Wexford* it was enough that the petitioner's charity medical care program operated "under an open-access policy under which it accepts any patient who walks through its doors," and that "it bears [the resulting] losses rather than restricting its treatment of patients who cannot afford to pay." 474 Mich at 216-217. Certainly it could not do so, the Foundation submits, without identifying those who were unable to pay and making arrangements to "bear the resulting losses" by looking to other resources.

Perhaps the best evidence that identifying those unable to pay for a charitable benefit and creating mechanisms, within the limits of the charitable entity's resources, to cover the cost of providing it to them cannot properly be deemed to be "discrimination" under a "proper" interpretation of Factor 3 is the anomaly posed by the finding that the Foundation "discriminated" by creating a scholarship program for the poor to enable them to use its facilities. Though Factor 5 permits the Foundation to impose a charge equal to the cost of its programs for those able to pay, the Foundation created a mechanism for identifying those who could not afford that charge, and a scholarship program that rendered the program accessible to those unable to pay the charge. It did so to *accommodate* the poor – *the very group whose health, as the*

Foundation's CEO testified, is most likely to be adversely affected by poor nutrition, obesity, and lack of exercise. Attachment A at 44.

The Foundation submits that it is not, and should not be held to be, "discrimination" for a charitable institution to offer an accommodation or exception to those who cannot afford the reasonable charge permitted under Factor 5 for the benefit it confers. Nor should it be held to be "discrimination" if a charity's finite resources preclude it from offering its benefit or service to an *unlimited* number of those who cannot afford to pay that reasonable charge. The *Wexford* Court made it clear beyond any question that it is not for the courts to establish an "arbitrary" "monetary threshold" for charitable exemption that is "not discernible from the statute." *Id.* at 213-214. To place a reasonable limit on the number served who cannot afford to pay the Factor 5 charge is entirely consistent with *Wexford* and the requirement that a charity must confer "a 'gift' for the benefit of 'the general public without restriction' or 'for the benefit of an *indefinite* number of persons.'" *Id.*, at 214 (emphasis added). The courts and the MTT below have misinterpreted *Wexford*, and its definition of charity, by effectively substituting for "an *indefinite* number of persons" a requirement that the charity must serve "an *infinite* number of persons." No charity, the Foundation submits, can sustain that burden, or pass that test for exemption.

RELIEF

The Foundation urges this Court to grant Baruch SLS, Inc.'s application for leave to appeal, and to use this case as an opportunity and vehicle to clarify for the courts and Tax Tribunal below how to apply the factors described in *Wexford* in a way that eliminates the tension that now exists between Factors 3 and 5, so that charities can design their programs and policies with greater certainty that they will qualify for the exemption that the Legislature has provided to encourage charitable work that relieves the burdens of government.

Respectfully submitted

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