Filed: 2/27/2023 8:14 PM
Monroe Circuit Court 6
Monroe County, Indiana

STATE OF INDIANA	)	IN THE MONROE CIRCUIT COURT
COUNTY OF MONROE	)	CAUSE NO. 53C06-2203-PL-000608
	)	
CITY OF BLOOMINGTON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
CATHERINE SMITH,	)	
in her official capacity as	)	
Monroe County Auditor	)	
	)	
Defendant.	)	

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The Plaintiff, the City of Bloomington, by counsel, pursuant to Indiana Trial Rule 56, respectfully requests that this Court grant the Plaintiff summary judgment on Counts I, II, and III of its *Complaint for Declaratory and Injunctive Relief* ("Complaint") and in support states:

1. There is no genuine issue of disputed material fact and the City of Bloomington is entitled to judgment as a matter of law.

2. Indiana Code §§ 36-4-3-11.7(b)-(c), 13-18-15-2 (e)-(f), and 36-9-22-2(i)-(j) are unconstitutional on their face and as applied to Bloomington in violation of the Contracts Clause set forth in Article I, Section 24 of the Indiana Constitution.

3. Indiana Code §§ 36-4-3-11.7(b)-(c), 13-18-15-2 (e)-(f), and 36-9-22-2(i)-(j) are unconstitutional on their face and as applied to Bloomington in violation of the Contract Clause set forth in Article I, Section 10 of the United States Constitution.

4. Indiana Code §§ 36-4-3-11.7(b)-(c), 13-18-15-2 (e)-(f), and 36-9-22-2(i)-(j) may not be applied to Bloomington's 2017 annexation proposals because applying them to

Bloomington's in-progress annexations would effectively allow the General Assembly to benefit from its earlier unconstitutional delay of Bloomington's annexations.

5. Bloomington is submitting a Memorandum in Support of Motion for Partial Summary Judgment contemporaneously with this motion that sets forth the designated evidence, the reasons for awarding summary judgment to Bloomington, and the relevant law that compels judgment in Bloomington's favor.

WHEREFORE, Bloomington, by counsel, respectfully request this Court grant summary judgment in its favor on Counts I, II, and III of its Complaint and for all other just and proper relief.

Respectfully Submitted,

/s/ Michael Rouker
Michael Rouker, Attorney No. 28422-53
Beth Cate, Attorney No. 21218-49
Larry D. Allen, Attorney No. 30505-53

City of Bloomington
401 N. Morton Street
Bloomington, IN 47404
(812) 349-3426 (phone)
(812) 349-3443 (fax)

Attorneys for the Plaintiff

CERTIFICATE OF SERVICE

The undersigned certifies that on February 27, 2023, a copy of the foregoing document has been sent via the Indiana E-Filing System to the following persons:

Edward J. Cockerill
Monroe County Attorney
jcockerill@co.monroe.in.us

James A. Barta
Deputy Solicitor General
James.Barta@atg.in.gov

Thomas M. Fisher
Solicitor General
Tom.Fisher@atg.in.gov

Melinda R. Holmes
Deputy Attorney General
Melinda.Holmes@atg.in.gov

/s/

/s/ Michael Rouker

Michael Rouker
City of Bloomington
401 N. Morton Street
Bloomington, IN 47404
roukerm@bloomington.in.gov
(812) 349-3426

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CATHERINE SMITH,	)	
in her official capacity as	)	
Monroe County Auditor	)	
	)	
Defendant.	)	

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff City of Bloomington ("Bloomington"), by counsel, hereby submits this Memorandum in Support of its Motion for Partial Summary Judgment on Counts I, II, and III of its March 29, 2022, *Complaint for Declaratory and Injunctive Relief* ("Complaint").

I. INTRODUCTION

This case challenges the Indiana Generally Assembly's second unconstitutional attempt to block Bloomington's annexation of adjacent urban territory – this time by retroactively voiding contractual obligations in violation of Article I, Section 24 of the Indiana Constitution, and Article I, Section 10 of the United States Constitution.

At various times prior to 2017, Bloomington and landowners in multiple urban areas adjacent to the City's boundaries negotiated and executed hundreds of contracts in which the City agreed to extend its municipal sewer service to the non-Bloomington properties in exchange for said landowners waiving their right to remonstrate against any future annexation of those properties. As a result, the City vastly expanded its municipal utility infrastructure, anticipating

that it would later be able to annex areas on its borders that had significantly urbanized and whose residents were using but not yet fully paying for Bloomington's services. In February 2017, Bloomington began the process of annexing multiple adjacent urbanized areas into its municipal boundaries.

In April 2017, while Bloomington was following the steps prescribed by law to complete these annexations, the State Legislature intervened and adopted unconstitutional special legislation that stopped Bloomington in its tracks. *Holcomb v. City of Bloomington*, 158 N.E.3d 1250 (Ind. 2020). After more than three years of litigation, in December 2020 the Indiana Supreme Court struck down that legislation. *Id*. Yet in the interim, the Legislature interfered a second time with Bloomington's annexations, retroactively nullifying in 2019 the vast majority of Bloomington's sewer extension contracts and changing the outcome of the annexations. As a result, the Defendant – the Monroe County Auditor – has refused to recognize those sewer contracts, landowners who contractually consented to annexation have been permitted to block it, and, given the suddenly suspect enforceability of sewer extension contracts, Bloomington is unable to negotiate extension contracts with businesses and individuals who require sewer extensions for future development. The Act the Legislature passed in 2019 illegally impairs contractual obligations in violation of the Indiana and United States Constitutions. The 2019 Act should not be applied to scuttle Bloomington's essential and lawful growth and to prevent annexations that – but for the Legislature's earlier unlawful actions – would have been long over before 2019.

The relief Bloomington is seeking here is modest. The City does not question the Legislature's authority to prospectively alter the permissible length of remonstrance waivers. Cities that know how long future waivers may last can plan accordingly. The City seeks only to prevent the Legislature from reaching back to:

- wipe out waivers retroactively and nullify hundreds of sewer extension contracts whose terms only one party, Bloomington, has fulfilled;
- kill annexations well underway at the time and only unfinished due to the state's earlier unconstitutional behavior; and
- achieve through this second bite of the apple what this state's Supreme Court would not let it do before.

Because there is no genuine issue as to any material fact and Bloomington is entitled to judgment as a matter of law, Bloomington requests this Court enter summary judgment in its favor and against Defendant on Counts I, II, and III of the Complaint.

Designated Evidence

Exhibit A: Affidavit of Jeffrey Underwood, City Controller

Exhibit A-1: Sewer extension contracts
Exhibit A-2: Public outreach notice advertising proof from February 17, 2017
Exhibit A-3: Public outreach notice letter from February 17, 2017
Exhibit A-4: Remonstrance petitions from Auditor Smith
Exhibit A-5: Annexation ordinances previously adopted by the Bloomington City Council
Exhibit A-6: Bloomington City Council Resolutions 21-09 through 21-16 (updating fiscal plans)
Exhibit A-7: City Council Memoranda from May 19, 2021
Exhibit A-8: Template notice for annexation public hearing
Exhibit A-9: Memoranda from the public hearing from August 4 and August 11, 2021
Exhibit A-10: Memoranda from the September 15 and September 22, 2021 City Council meetings
Exhibit A-11: Memoranda and Amendments from the August 31, 2021 City Council meeting
Exhibit A-12: Notice of adoption of annexation ordinances (Ordinances 17-09 through 17-15)
Exhibit A-13: City's responses to Auditor Smith (documenting an applicable sewer extension contract with a waiver of protest of annexation related to a remonstrator)
Exhibit A-14: Map showing the areas the City proposed to annex, with each numbered area labeled

Exhibit B: Affidavit of Vic Kelson, City of Bloomington Director of Utilities

Exhibit B-1: Section 24, "Comprehensive Plan," City of Bloomington Utilities Service Board Rules, Regulations, and Standards of Service
Exhibit B-2: Map showing privately-owned parcels with sufficient contiguity to be eligible for voluntary annexation

Exhibit C: Trial Court Complaint, *Bloomington v. Holcomb*, 53C06-1705-PL-001138
Exhibit D: Trial Court Order, *Bloomington v. Holcomb*, 53C06-1705-PL-001138
Exhibit E: Record of Legislative Action on House Bill 1427
Exhibit F: Certified Opinion, *Holcomb v. Bloomington*, 19S-PL-00304
Exhibit G: Bloomington City Council Ordinances 17-09 through 17-15
Exhibit H: Auditor Smith's Certified Remonstrance Count
Exhibit I: House Bill 1427 (2019 Legislative Session)

II. FACTUAL BACKGROUND

A. Statement of Undisputed Material Facts

The following undisputed material facts constitute all of the facts necessary for this Court to order summary judgment in favor of Bloomington on Counts I, II, and III of the Complaint.

1. Bloomington negotiated and executed hundreds of contracts with landowners in multiple areas adjacent to the City's boundaries in which the City agreed to extend its municipal sewer service to non-Bloomington properties in exchange for the non-resident landowners waiving their right to remonstrate against any future annexation of that property. Exhibit A-1.
2. On February 17, 2017, Bloomington initiated multiple municipal annexations. Exhibits A-2 and A-3.
3. Using statutorily mandated timelines for the annexation process, Bloomington's annexation ordinances would have been adopted on or about June 30, 2017. *Holcomb*, 158 N.E.3d at 1254.

4. On April 27, 2017, Governor Eric Holcomb signed House Bill 1001 into law as Public Law 217-2017. Section 161 of Public Law 217-2017 (hereafter the "2017 Act") prohibited Bloomington's pending annexations from proceeding further. *Holcomb*, at 1254.
5. Bloomington challenged the 2017 Act on May 24, 2017, on the grounds that it violated the constitutional prohibition against special legislation in Article IV, Section 23 and the single subject requirement found in Article IV, Section 19 of the Indiana Constitution. Exhibit C.
6. On April 18, 2019, the Monroe Circuit Court granted Bloomington's motion for summary judgment and found that the 2017 Act violated the Indiana Constitution. Exhibit D.
7. On May 5, 2019, while the state's appeal regarding the 2017 Act was pending, Governor Holcomb signed House Bill 1427 into law, enacting provisions (hereafter the "2019 Act") that purport to retroactively invalidate all waivers of remonstrance more than 15 years old contained in Bloomington's sewer extension contracts. Exhibit E.
8. The 2019 Act was adopted after Bloomington would have been able to complete its annexations, had they not been unconstitutionally blocked by the 2017 Act. *Holcomb*, 158 N.E.3d at 1254.
9. On December 15, 2020, the Indiana Supreme Court struck down the 2017 Act. *Holcomb*, 158 N.E.3d at 1266.
10. On January 26, 2021, the Supreme Court Clerk certified the *Holcomb* opinion. Exhibit F.
11. Shortly thereafter, Bloomington updated the voluminous fiscal plans associated with the annexations and the sixteen pieces of proposed legislation necessary to effectuate the annexations. In April, after preparing updated fiscal data and legislation at significant expense, Bloomington announced that it was resuming the annexations. On September 15

and 22, 2021, Bloomington's City Council adopted seven of the eight proposed annexation ordinances. Exhibit G.

12. Property owners in the annexation areas submitted remonstrance petitions to Defendant Monroe County Auditor Catherine Smith, and on February 23, 2022, Auditor Smith certified her final remonstrance numbers for each annexation ordinance. Exhibit A-4; Exhibit H.

13. When she certified her remonstrance count, Auditor Smith treated the 2019 Act as valid and declined to consider any sewer extension contracts more than 15 years old. Exhibit H.

14. As part of the certified count, Auditor Smith also identified both the total number of waivers applicable to each parcel where a remonstrance petition was filed, and the number of waivers disqualified by the 2019 Act. Exhibit H.

15. The results certified and identified by Auditor Smith for each annexation area, which she expressed in percentages, were as follows:

Area	**Certified Results from Auditor Using 2019 Act to Retroactively Nullify Contracts**	**Non-certified Results from Auditor Without 2019 Act Nullifying Contracts**
	Percentage of Landowners Remonstrating Against Annexation	
1A	60.94%	37.75%
1B	57.50%	30.91%
1C	71.43%	3.81%
2	71.98%	34.93%
3	66.67%	50.00%
4	70.79%	59.55%
5	66.67%	51.85%

16. In the table above: the remonstrance petition results of those areas shaded red exceeded the 65% statutory threshold to automatically void an annexation; the petition results of those areas shaded blue are between the 51% and 65% statutory threshold for remonstrators to appeal the annexation through court; and the petition results of those areas shaded green

are insufficient to challenge the annexation, which means that the annexation would have already taken effect. See Indiana Code § 36-4-3-11.3. As the Auditor's data show, the 2019 Act has materially altered the contractual arrangements for all seven annexation areas.

B. Additional Factual Background

The following additional designated facts provide context to support this Court's entry of summary judgment in favor of Plaintiff on Counts I, II, and III as stated in Plaintiff's Complaint.

1. Sewer Extension Contracts

For more than 60 years, Bloomington has negotiated sewer extension contracts with nearby non-municipal residents. Exhibit A-1. Sewer extension contracts allow non-residents to access municipal wastewater service in exchange for consenting to future annexation. Exhibit A-1. Indiana Code § 36-9-22-2 expressly authorizes municipalities to condition the extension of utility service on waiving the right to contest future annexation.[1] Properties that are not located in Bloomington and do not pay property taxes to Bloomington may only receive service on an individually negotiated basis and only if Bloomington consents to a sewer extension.[2]

The execution of an extension contract containing a consent to annexation and waiver of remonstrance is, and has been, a critical part of any decision to extend sewer service beyond Bloomington's boundaries. Exhibit A, ¶4. While new developments have several wastewater solutions available, including septic systems and cesspits, centralized municipal wastewater service enables more and denser development than alternative wastewater solutions. Exhibit A,

[1] Waiving the right to contest annexation and consenting to annexation are two sides of the same coin; accordingly, we use the terms "consent to annexation," "remonstrance waiver," and similar formulations interchangeably in this Memorandum.

[2] "A municipality *may* contract with owners of real property for the construction of sewer works . . . within four (4) miles outside its corporate boundaries." (emphasis added) Ind. Code § 36-9-22-2(b).

¶5; Exhibit B, ¶3. Absent Bloomington's voluntary extension of its sewer service, many unincorporated contiguous areas simply cannot and will not develop. Exhibit B, ¶4.

Development directly along Bloomington's borders, and in particular the dense, urbanized development that follows the voluntary extension of sewer service, creates significant additional demand for Bloomington's other municipal services. Exhibit A, ¶6. These other services include, but are not limited to, police service, fire service, animal control services, economic development services, parking enforcement services, parks services, street engineering services, and street maintenance services. Exhibit A, ¶6. However, unincorporated areas directly along Bloomington's border – and in some cases wholly surrounded by incorporated areas of the city – do not contribute any property taxes to make these services possible, unless and until they are annexed.[3] Ind. Code 6-1.1-17, *et. seq.*; Exhibit A, ¶7. And, of course, municipalities that cannot rely on existing remonstrance waivers to incorporate urbanized adjacent areas face depressed census counts that affect federal funds distribution and a shrinking share of local tax revenue as the municipality's population stagnates and the unincorporated population increases.[4]

Therefore, when Bloomington voluntarily extends its sewer lines to properties outside the city, knowing that the extension will allow development and that this development will place a burden on Bloomington's municipal services, Bloomington requires as essential consideration that landowners consent to future annexation, for themselves and their successors in interest. Exhibit A-1. Over the years, periodic annexations relying on this consideration have been routine events

[3] This situation is a classic example of the "free-rider problem" described by economists and political scientists. *E.g.*, Baumol, William J., 1952, *Welfare Economics and the Theory of the State*, Cambridge, MA: Harvard University Press.

[4] For example, in Monroe County the Local Income Tax Council's ordinance directs a proportionate, population-based distribution of the Economic Development portion of the Local Income Tax. When Bloomington is unable to incorporate its adjacent, urbanized areas, its portion of these revenues shrinks vis-a-vis other Monroe County entities.

that have allowed orderly growth and fair distribution of the costs of widely enjoyed City services. Exhibit A-5. Indeed, during its history, Bloomington has negotiated more than 1,000 sewer extension contracts containing consent provisions and has adopted hundreds of annexations, many of which were made possible as a consequence of sewer extension agreements. Exhibit A-1; Exhibit A-5; Exhibit A ¶8.

2. Bloomington's 2017 Annexation Proposal

Bloomington initiated the annexation proposal giving rise to the present litigation in early February 2017. *Holcomb*, 158 N.E.3d at 1253; Exhibit A-2; Exhibit A-3. On March 29, 2017, Bloomington's City Council held a public meeting to consider the formal introduction of nine annexation ordinances and to consider adopting the fiscal plan associated with each ordinance. *Id*. Following input from community members, the Council introduced eight of the nine proposed ordinances. *Holcomb*, 158 N.E.3d at 1253-4. Bloomington officials planned to hold a public hearing on those ordinances on May 31, 2017, and to take action to adopt the ordinances on June 30, 2017. *Id*, at 1254.

While Bloomington was proceeding toward annexation, the General Assembly intervened and passed legislation, codified at Indiana Code § 36-4-3-11.8. That legislation plainly targeted Bloomington's proposed annexation and stopped only that annexation. *Id.*, at 1254-5. The 2017 Act read in relevant part:

> (d) An annexation ordinance that is introduced after December 31, 2016, and before July 1, 2017, that proposes to annex property to which this section applies is void and the annexation action is terminated. A municipality may not take any further action to annex any of the property to which this section applies until after June 30, 2022, including introducing another annexation ordinance covering some or all of the property covered by this section after June 30, 2017, and before July 1, 2022.

Ind. Code § 36-4.3-11.8. On May 24, 2017, Bloomington filed a complaint alleging that the 2017 Act was unconstitutional special legislation per Article IV, Section 23 of the Indiana Constitution. Exhibit C.

On December 15, 2020, after three and a half years of litigation, the Indiana Supreme Court held that the 2017 Act was unconstitutional special legislation. *Holcomb*, 158 N.E.3d at 1266. Had Bloomington not been unconstitutionally blocked from completing its annexation, Bloomington would have adopted its annexation ordinances on or about June 30, 2017. *Holcomb*, at 1254.

3. The 2019 Act

During the 2019 legislative session, while Bloomington was prohibited from moving forward with its 2017 annexation proposal, was actively challenging the 2017 Act, and had obtained a lower court ruling invalidating the 2017 Act, the General Assembly took additional steps that would effectively prevent Bloomington's annexations. Specifically, the General Assembly passed and the Governor signed HB 1427 (the 2019 Act), which contained provisions retroactively voiding the annexation remonstrance waivers that formed key terms of sewer extension contracts, if they were over 15 years old. Exhibit I.

The 2019 Act took effect on July 1, 2019, while the state's appeal of its loss at the trial court in *Holcomb* was ongoing. Exhibit E; Exhibit I. As a result of the 2019 Act, Indiana Code § 36-4-3-11.7 now reads in relevant part:

> (b) *A remonstrance waiver executed before July 1, 2003, is void*. This subsection does not invalidate an annexation that was effective on or before July 1, 2019.
> (c) A remonstrance waiver executed after June 30, 2003, and before July 1, 2019, is subject to the following:
> (1) The waiver is void unless the waiver was recorded:
> (A) before January 1, 2020; and
> (B) with the county recorder of the county where the property subject to the waiver is located.

> (2) *A waiver that is not void under subdivision (1) expires not later than fifteen (15) years after the date the waiver is executed.*

(emphasis added). Indiana Code §§ 13-18-15-2 and 36-9-22-2 contain identical language in differently labeled subsections.[5]

The 2019 Act retroactively voided remonstrance waiver provisions in 966 of Bloomington's sewer extension contracts, which is more than 80% of these contracts. Exhibit A-1. Through the 2019 Act, the General Assembly (1) relieved non-resident landowners of their contractual obligation to allow future annexation, even though Bloomington had already extended them sewer service and upheld its part of the bargain; and (2) drastically reduced the likelihood that Bloomington's 2017 annexation proposal could succeed—whether or not the Supreme Court ultimately affirmed Bloomington's successful challenge to the 2017 Act.

4. Impact of the 2019 Act on Further Sewer Extensions and Development

In response to the 2019 Act, and out of concern that the General Assembly might decide to nullify new annexation waivers at any time, Bloomington's Utilities Service Board prohibited the City from executing sewer extension contracts for service beyond Bloomington's municipal boundaries, except in exceptional circumstances or through a voluntary annexation agreement. Exhibit B-1.[6] Because of the cloud created by the 2019 Act, Bloomington has denied at least 14 requests for extensions outside of the city, ending possible development before it could get off the ground. Exhibit B ¶¶ 6-11. This number does not include local developers who know that sewer service is not available for development outside the City and so would not have even asked about

[5] Indiana Code §§ 36-9-25-14(m)-(n), which pertain to certain special taxing districts and do not have any direct impact on the instant case, also contain language identical to Indiana Code §§ 36-4-3-11.7(b)-(c), 13-18-15-2(e)-(f), and 36-9-22-2(i)-(j). Each of these sections was altered in 2019 with the enactment of HB 1427.

[6] Voluntary annexation options are considerably limited due to statutory contiguity requirements. Ind. Code § 36-4-3-1.5.

sewer extensions for potential developments. Exhibit B ¶12. These circumstances frustrate the City and private developers in planning the City's orderly growth, but the reality is that the City will not extend sewer service without a binding and enforceable contractual commitment to let the City annex the area served when its urbanization reaches the appropriate point. Exhibit A ¶4. Sewer service is so critical to development that it provides unique leverage for the City to ensure at the point of de facto urbanization that non-residents pay for the wide array of other City services they use, by becoming City residents.

5. Resumption and Completion of Bloomington's 2017 Annexation Proposal

In January 2021, after the Supreme Court certified the *Holcomb* Order, Bloomington resumed the annexations that had been unconstitutionally suspended. Exhibit A, ¶9. The City updated the fiscal plans for annexing each area to incorporate updated assessed values, tax rates, and property tax circuit breaker impacts, among other changes. Exhibit A, ¶9; Exhibit A-6.

On May 19, 2021, the Bloomington City Council adopted resolutions updating the fiscal plans for each of the eight annexation areas for which proposed ordinances had been introduced, and adopted amendments to update each area's ordinance. Exhibit A-7; Exhibit A-6.

On August 4, 2021, the Council opened a public hearing on the ordinances. Exhibit A-8; Exhibit A-9. The Council passed several amendments to the ordinances to reduce the annexation areas, and on September 15 and September 22, 2021, the Council adopted seven of the eight annexation ordinances – Ordinances 17-09 through 17-15 – and rejected the eighth, Ordinance 17-17. Exhibit A-5; Exhibit A-10; Exhibit A-11; Exhibit A ¶19.

6. Auditor Smith's Certified Remonstrance Counts

On October 8, 2021, Bloomington mailed notice of its annexation ordinances via certified mail to landowners in the annexation areas. This kicked off a 90-day period in which landowners

not subject to a contractual waiver could submit remonstrance petitions to Auditor Smith. Ind. Code § 36-4-3-11(a); Exhibit A-12.

During the remonstrance proceeding, if more than 65% of landowners in an annexation area sign a valid remonstrance petition, the annexation is void. If at least 51% but fewer than 65% of owners sign a valid remonstrance petition, remonstrators may appeal the annexation for judicial review. If fewer than 51% of owners sign a valid remonstrance petition, the annexation is approved. Indiana Code §§ 36-4-3-11, -11.3.

During the remonstrance period, Auditor Smith regularly transmitted remonstrance petitions to Bloomington in accordance with Indiana Code § 36-4-3-11.2(g). Exhibit A-4. The City timely responded to these transmissions by sending the Auditor documentation regarding valid waivers of remonstrance that existed for any property in the annexation areas, pursuant to Indiana Code § 36-4-3-11.2(h). Exhibit A-4; Exhibit A-13. The City provided documentation to the Auditor regarding all known sewer extension contracts containing remonstrance waivers, regardless of the age of the extension contract and waiver. Exhibit A-13.

On February 23, 2022, Auditor Smith certified her final numbers of remonstrance petitions for each annexation. Exhibit H. When she totaled the remonstrances, Auditor Smith relied on the 2019 Act to disregard all sewer extension contracts that were more than 15 years old. Exhibit H.

However, she also published alternative, non-certified numbers. Exhibit H. These alternative numbers reflected the number of owners the City had identified as being subject to a remonstrance waiver without regard to the age of the contract containing the waiver provision. Exhibit H. The table below reproduces the table provided in the Statement of Undisputed Facts, and indicates the impact of the 2019 Act on the outcome of Bloomington's annexations based on the certified and alternative numbers published by Auditor Smith. Exhibit H.

Area	Certified Results from Auditor Using 2019 Act to Retroactively Nullify Contracts	Non-Uncertified Results from Auditor Without 2019 Act Nullifying Contracts
	Percentage of Landowners Remonstrating Against Annexation	
1A	60.94%	37.75%
1B	57.50%	30.91%
1C	71.43%	3.81%
2	71.98%	34.93%
3	66.67%	50.00%
4	70.79%	59.55%
5	66.67%	51.85%

If the 2019 Act is unconstitutional, Areas 1A, 1B, 1C, 2, and 3 would become part of Bloomington, and the annexation of Areas 4 and 5 may be appealed to a court. Ind. Code § 36-4-3-11.3; Exhibit H. If the 2019 Act is valid, only the annexation of Areas 1A and 1B may be appealed, and the annexation of all other areas fails outright. Ind. Code § 36-4-11.3; Exhibit H. By voiding over 80% of Bloomington's sewer contracts, the General Assembly changed the outcome in every annexation area and prevented precisely the sort of expansion Bloomington anticipated and landowners agreed to when choosing to enter into those contracts. Ind. Code § 36-4-3-11.3; Exhibit H.

III. STANDARD OF REVIEW

Indiana Trial Rule 56(C) provides, in part, that summary judgment "shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." See *Myers v. Irving Materials, Inc.*, 780 N.E.2d 1226, 1227-28 (Ind. Ct. App. 2003). "The moving party bears the burden of showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law." *Id.* at 1228. Once the moving party meets this burden, "the non-moving party must respond by setting forth specific facts demonstrating a genuine need for trial, and cannot rest upon the allegations or denials in the pleadings." *Id.* "In ruling on a summary

judgment motion, a trial court must rely upon the pleadings, depositions, answers to interrogatories, admission, affidavits, and other evidentiary matters designated by the parties pursuant to T.R. 56(C)." *Abbott v. Bates*, 670 N.E.2d 916, 921 (Ind. Ct. App. 1996). In this case, the designated evidentiary material demonstrates that there is no genuine issue as to any material fact and that Bloomington is entitled to judgment as a matter of law.

IV. SUMMARY OF THE ARGUMENT

The 2019 Act is unconstitutional. It nullifies pre-existing contractual obligations in violation of Article I, Section 24 of Indiana's constitution and contravenes Article I, Section 10 of the Constitution of the United States. Moreover, allowing the Legislature to retroactively invalidate the waivers on which Bloomington's 2017 annexations relied effectively gives it the outcome – the end to Bloomington's annexation – that it was denied in the *Holcomb* case and allows it to benefit from having postponed for years the City's annexation while the state advanced plainly unconstitutional special legislation.

Our state's Contracts Clause, like those of our sister states, protects existing contractual obligations from nearly all legislative interference. It does so to protect vital policy interests in allowing parties to confidently commit resources and order their affairs, knowing they will receive the benefit of the bargains that they strike. Decades of jurisprudence provide a singular and narrow exception to this constitutional assurance: the General Assembly may intrude upon the terms of previously negotiated contracts only when exercising a *necessary* police power.

The 2019 Act is far removed from the Legislature's necessary police power. The state can identify no legitimate legislative objective for the 2019 Act. Nor can it show how the 2019 Act is reasonable or reasonably necessary to secure any legislative objective. Furthermore, the 2019 Act severely invades the bargain struck by the parties to existing sewer extension contracts, advances

the interests of a narrow minority at the expense of the broader Bloomington community, and renders it impossible for parties to confidently execute future sewer extension contracts. The 2019 Act effectively eliminates sewer extension contracts as a useful legal instrument for the City and the market and creates an uncertain environment that stifles healthy community development and growth.

The 2019 Act also violates Article I, Section 10 of the Constitution of the United States. Specifically, the Act substantially impairs the contractual relationship between Bloomington and nearby non-residents and is not appropriately and reasonably drawn to advance any significant and legitimate public purpose.

Finally, this annexation would have been completed in 2017 – long before the Legislature passed the 2019 Act – but for the state's earlier and blatantly unconstitutional interference and the multiyear delays this caused. In these unique circumstances, it is even more difficult to see how applying the 2019 Act to Bloomington's 2017 annexations serves a legitimate legislative objective or public purpose under the state and federal Contracts Clauses.

V. ARGUMENT

Bloomington is entitled to summary judgment on Counts I, II, and III of its Complaint because the 2019 Act violates Article I, Section 24 of the Indiana Constitution and Article I, Section 10 of the Constitution of the United States, and because applying the 2019 Act to Bloomington's 2017 annexations serves no valid legislative or public purpose when the annexations would never have been subject to the 2019 Act but for the state's earlier unconstitutional actions.

A. Bloomington has Standing to Challenge the Constitutionality of the 2019 Act

Bloomington seeks a declaratory judgment on the constitutionality of the 2019 Act. Declaratory judgment is an appropriate mechanism to challenge the constitutionality of a statute, and is available to "any person" "whose . . . rights are affected by a statute." Ind. Code § 34-14-1-2. Indiana's Declaratory Judgment Act allows a litigant to have determined "any question of construction or validity." *Id*. A plaintiff seeking declaratory relief must show that they have standing to pursue the relief requested. *Morris v. City of Evansville*, 390 N.E.2d 184, 186 (Ind. Ct. App 1979). To claim standing, a plaintiff must show there are at least the "ripening seeds" of a real or actual controversy. *Pitts v. Mills*, 333 N.E.2d 879, 902 (Ind. Ct. App. 1975). Here, Bloomington has a direct stake in the outcome of the litigation and will suffer a direct injury if the 2019 Act is upheld, because Bloomington will lose the benefit of hundreds of negotiated contracts. Therefore Bloomington has standing to challenge the 2019 Act.

This case, like many before it, involves a political subdivision challenging a state law under the Indiana constitution. In many prior such challenges, the state has attempted to dismiss the cause outright, arguing that local governments lack standing to raise constitutional claims. As part of this argument, the state has relied heavily on a 1975 decision, *Bd. of Comm'rs of Howard Cnty. v. Kokomo City Plan Comm'n*, 263 Ind. 282, 330 N.E.2d 92 (1975). In *Howard County*, our Supreme Court rejected Howard County's efforts to challenge the constitutionality of a state statute on extraterritorial activity by city plan commissions, where the County did not cite any harm to itself. As subsequent cases make plain, Indiana courts have not extended the standing limitations set forth in *Howard County* and instead have allowed local governments to pursue constitutional claims when, as in this case, they have suffered a direct harm. See, e.g., *State ex rel. State Bd. of Tax Comm'rs v. Marion Superior Ct., Civ. Div., Room No. 5*, 392 N.E.2d 1161, 1164 (Ind. 1979) ("A

county or an official thereof possesses standing to challenge an interpretation or application of a statute if it can be demonstrated that the party is seeking the resolution of a legitimate controversy surrounding the operation of the statute . . . Since the case at bar involves an 'immediate existing controversy between the parties,' we find that the county has standing to bring this action to test the legality of the State Tax Board's action."); *Indiana Dep't of Nat. Res. v. Newton Cnty.*, 802 N.E.2d 430, 433 (Ind. 2004) ("[T]he County has a legitimate interest in upholding the challenged validity of its ordinances just as it does in seeking interpretation of statutes that affect its governance."); *Marion Cnty. v. State*, 888 N.E.2d 292, 297 (Ind. Ct. App. 2008) ("The State asserts that, 'with rare exceptions, a county and its government have no standing and are powerless to challenge the constitutionality of a state statute,' and cites . . . *Howard County*. *Howard County* does not hold a county may not seek to invalidate a statute; rather, a county cannot do so in the absence of any injury to the county itself."); *City of Hammond v. Herman & Kittle Properties, Inc.*, 95 N.E.3d 116, 133-4 (Ind. Ct. App. 2018) ("HKP cites . . . *Howard County* . . . as support for its position that Hammond does not have standing to bring this case . . . [T]he extent of the Howard County decision is indeed questionable . . . Because Hammond has a direct stake in the outcome of this litigation and will sustain a direct injury if the statute is upheld, Hammond has standing to raise these claims.[7]).

The facts here mirror those in *Marion Superior Court*, 392 N.E.2d 1161, 1164 (the state tax board disallowed Lake County Council's action to increase the county property tax rate), *Newton County*, 802 N.E.2d 430 (Newton County challenged the constitutionality of a state statute that conflicted with its municipal ordinance, which the County had a direct interest in enforcing),

[7] The Court of Appeals' holding on the standing question in *Herman & Kittle* was summarily affirmed by the Indiana Supreme Court, "We summarily affirm the excellently crafted Court of Appeals decision that Hammond has standing to pursue its constitutional challenges." *City of Hammond v. Herman & Kittle Properties, Inc.*, 119 N.E.3d 70, 77 FN 4 (Ind. 2019).

Marion County, 888 N.E.2d 292, 296 (the County plaintiffs challenged the constitutionality of a statute requiring them to reimburse the state for the costs of juvenile facilities), and *Herman & Kittle*, 119 N.E.3d 70, 73-4 (Hammond challenged the constitutionality of a statute that limited the City's rental registration fee program). Like the local government entities that properly brought state constitutional challenges in each of these cases, here Bloomington itself has suffered an injury because it has a direct interest in protecting its contractual agreements. Therefore Bloomington has standing to challenge the constitutionality of the 2019 Act.

B. The 2019 Act Unconstitutionally Impairs Contractual Obligations in Contravention of Article 1, Section 24 of Indiana's Constitution

Like nearly all of its sister states and the federal government, Indiana's constitution protects contracts from retroactive impairment: "No *ex post facto law*, or law impairing the obligation of contracts, shall ever be passed." Ind. Const. art. 1, § 24. The second half of this provision, which reads "no . . . law impairing the obligation of contracts . . . shall ever be passed," is generally abbreviated as "the Contracts Clause."

The Supreme Court of the United States has long recognized the importance of such constitutional provisions, pointing out that "[t]he inviolability of contracts, and the duty performing them, as made, are foundations of all well-ordered society, and to prevent the removal or disturbance of these foundations was one of the great objects for which the Constitution was framed." *Murray v. City of Charleston*, 96 U.S. 432, 449 (1877). Of the prohibition against laws impairing contractual obligations, the Court has said that "it is one of the highest duties of this court to take care the prohibition shall neither be evaded nor frittered away. Complete effect must be given to it in all its spirit." *Id.* 448-9.

Like the United States Supreme Court, Indiana's Supreme Court has long been skeptical of legislative enactments that retroactively alter contracts. Over time, Indiana's Supreme Court has

established a framework for analyzing cases under Article 1, Section 24 of Indiana's Constitution that sets a high bar for allowing new laws to alter existing agreements. In its most recent pronouncement on the Contracts Clause, Chief Justice Rush, writing for a unanimous Court, declared:

> The Legislature's "general" police power gives it broad authority to limit prospectively what parties may contract for, but it may retroactively impair existing contracts only through the "necessary" police power, which is much narrower.

Girl Scouts of S. Illinois v. Vincennes Indiana Girls, Inc., 988 N.E.2d 250, 257 (Ind. 2013). The Court cited its earlier ruling in *Clem v. Christole, Inc.*, 582 N.E.2d 780 (Ind. 1991), where it stated:

> Only those statutes which are necessary for the general public and reasonable under the circumstances will withstand the contract clause. It is only this latter *necessary* police power, rather than the *general* police power, which provides the exception to the contract clause.

Clem, 582 N.E.2d at 784 (emphasis in original). Demonstrating that an enactment represents an exercise of a necessary police power and thus may retroactively alter the terms of existing contracts has proven a high bar to clear.

Our state Supreme Court began applying a form of the necessary police powers test in *Bruck v. State ex rel. Money*, 91 N.E.2d 349 (Ind. 1950). In *Bruck*, a teacher with the School City of Indianapolis, Charles Money, entered into an indefinite employment contract with Indianapolis in 1927. *Bruck*, 91 N.E.2d at 350. In 1933, six years after Money's contract with the School City was executed, the General Assembly amended the state code to indicate that a teacher's employment contract expired when the teacher reached age 66. *Id.* at 351-2. In May 1949 Money was over the age of 66, and therefore the School City mailed him a notice that his employment as a teacher was terminated. *Id*, at 350.

Money appealed, arguing that a 1933 law could not retroactively alter his 1927 employment contract. *Id.* at 352. The Indiana Supreme Court agreed, using an early form of the

necessary police powers test: "the status of permanent teacher with an indefinite contract . . . cannot be impaired by future legislation except in a proper exercise of the police power of the state." *Id*. In deciding whether or not the General Assembly's action was a proper exercise of the police power of the state, the Court inquired whether "the involved amendment ha[s] a tendency to promote either the order, safety, health, morals, or general welfare of society." *Id.* at 353. Siding with Money, the Court concluded that the 1933 law mandating the termination of a teacher's employment contract at age 66 was not a proper exercise of the police power and so could not retroactively alter an existing indefinite contract. *Id*. The Court found the state's justification for the 1933 law – namely, that teachers over the age of 66 were generally believed at the time to be less qualified to teach than younger teachers – an acceptable justification for limiting *prospective* teaching employment contracts, and thus an acceptable action under the state's *general* police power. The Court held, however, that the Contracts Clause precluded its *retroactive* application to *existing* employment agreements. *Id*.

The Indiana Court of Appeals applied a version of the necessary police powers test several years later, when it found that the General Assembly unconstitutionally impaired a municipal contract in *Wencke v. City of Indianapolis*, 429 N.E.2d 295 (Ind. Ct. App. 1981). In *Wencke*, the Court of Appeals held that the Contracts Clause barred retroactively applying a statute reducing the mandatory retirement age for law enforcement officers from 70 to 65, to an officer's existing contract with the City of Indianapolis authorizing him to work until age 70. *Wencke*, 429 N.E.2d at 297. The court found that the City and the officer had mutually consented to mandatory retirement at age 70, and the General Assembly could not lawfully alter that contract retroactively.

In 1991, the Indiana Supreme Court articulated the modern version of the necessary police powers test in *Clem v. Christole, Inc.*, 582 N.E.2d 780 (Ind. 1991). In *Clem*, Christole, Inc., a not-

for-profit corporation, purchased a single family home in the Fairwood Terrace Addition in Bloomington for use as a group home for developmentally disabled children. *Clem*, 582 N.E.2d at 781-2. Several residents of Fairwood Terrace sought an injunction, arguing that Christole's use of the property violated the neighborhood's restrictive covenants, which prohibited the use of neighborhood buildings for business or commercial purposes of any kind. *Id.* at 782. After these restrictive covenants had been established, the General Assembly enacted Indiana Code § 16-13-21-14, which purported to retroactively void any restrictive covenant that allowed a property to be used residentially but not as a facility for developmentally disabled persons. *Id.* at 781.

Notwithstanding the strong public policy rationale for the new statute, the Indiana Supreme Court refused to apply Indiana Code § 16-13-21-14 to the Fairwood Terrace covenants, finding that such an application would run afoul of Indiana's Contracts Clause. *Id.* at 785. In so reasoning, the Court explained:

> [S]imply because a statute is a valid exercise of legislative authority pursuant to such general police power does not necessarily immunize it from our state constitution's contract clause. Only those statutes which are necessary for the general public and reasonable under the circumstances will withstand the contract clause. It is only this latter *necessary* police power, rather than the *general* police power, which provides the exception to the contract clause.

(emphasis in original) *Id.* at 784.[8]

Girl Scouts represents our state Supreme Court's most recent Contracts Clause jurisprudence. There, the Court affirmed the necessary police powers test laid out in *Clem*, and applied that test to bar the application to an existing property contract of a later-adopted statute invalidating all possibilities of reverter after 30 years. In 1965, Vincennes University and Girl Scouts of Southern Illinois had attached a possibility of reverter to land the University transferred

[8] The General Assembly repealed Indiana Code § 16-13-21-14, effective January 1, 1992, following the *Clem* decision.

to the Girl Scouts. The possibility of reverter was set to last 49 years. *Id.* at 252. More than 30 years but fewer than 49 years after the conveyance, Girl Scouts of Southern Illinois' actions triggered the possibility of reverter. *Id.* at 253. Meanwhile, in 2002 the General Assembly adopted Indiana Code § 32-17-10-2, which provides that "[a] possibility of reverter . . . is invalid after thirty (30) years . . ." The parties disagreed about whether Indiana Code § 32-17-10-2 had retroactively voided the possibility of reverter attached to the land. *Id*. at 255. Applying the same Contracts Clause analysis it employed in *Clem*, the Supreme Court declared that "arbitrarily terminating [a reverter] after 30 years . . . is not within the necessary police power" and therefore the statute was "unconstitutional as applied." *Id.* at 258.

In these Contracts Clause cases and others, courts have considered a number of factors to determine whether the General Assembly is acting within its narrow "necessary" police powers space: (1) the Legislature's objective in passing the law and whether the law was reasonably necessary to secure the Legislature's objective; (2) the severity of the enactment's retroactive impact on the contractual obligation; (3) whether the statute addresses a broad, societal problem or instead protects a narrow class; and (4) the impaired contract's value from a public policy perspective. A thoughtful analysis of these factors demonstrates that the 2019 Act does not fit into the narrow, necessary police powers exception to the Contracts Clause, and therefore the 2019 Act violates Article I, Section 24.

1. The 2019 Act is neither reasonable nor reasonably appropriate to secure any potential legislative objective within the ambit of the General Assembly's "necessary" police powers.

For a law retroactively impairing an existing contract to survive a Contracts Clause challenge, it is the *state's burden* to identify the law's objective, show how the law relates to the claimed objective, and demonstrate that the law is both reasonable and reasonably appropriate to secure the claimed objective. *Clem*, 582 N.E.2d at 783. Here, no express legislative objective exists

for the 2019 Act and Defendant cannot conjure one up after the fact that would satisfy the necessary police powers test.

Girl Scouts is strikingly similar to the present dispute. In that case the Attorney General argued that the likely objective of a law nullifying possibilities of reverter after 30 years "was to promote marketable title by terminating clouds on title that had outlived their usefulness and limiting them to a period in which they are likely to retain their utility." *Girl Scouts*, 988 N.E.2d at 257. Our Supreme Court was unconvinced that cleaning up long-standing clouds on title represented an exercise of the General Assembly's necessary police powers: "[A]rbitrarily terminating a [possibility of reverter] after 30 years is neither 'reasonable' nor 'reasonably appropriate' . . . and therefore is not within the necessary police power." *Id.* at 258. The General Assembly's termination of remonstrance waivers after a mere 15 years is likewise arbitrary, and any attempt by the State to justify the 2019 Act as relieving landowners of a long-standing burden on their property is foreclosed by *Girl Scouts*, and by *Clem*, in which the restrictive covenants at issue, like nearly all restrictive covenants, contained no apparent expiration date. *Clem*, 582 N.E.2d at 781-2. *See also Bruck*, 91 N.E.2d at 352-53 (upholding Contracts Clause challenge to a statute retroactively terminating a teacher's indefinite term contract, and finding that neither the belief that teachers over 66 years of age are less qualified than younger persons to teach, nor the desire to limit teacher tenure, justified the *retroactive* as opposed to *prospective* use of police power).

Again, Bloomington does not challenge the General Assembly's power to prospectively limit the length of waivers of remonstrance, only to meddle with existing ones that formed the vital consideration for the City extending sewer service to the landowners' property.[9] The sewer

[9] Since 2015, Indiana law sets a limit on the length of any annexation consent provision in a *prospective* sewer extension contract. See, e.g., Ind. Code § 36-9-22-2(k). Such expiration clauses, operating prospectively, are not at issue in the present case, but we emphasize that without Contracts Clause protection, nothing would stop the General Assembly from retroactively

extension contracts at issue here are remarkably similar to the instruments in *Clem* and *Girl Scouts*—restrictive covenants and possibilities of reverter—which the General Assembly could not retroactively impact. Like restrictive covenants and possibilities of reverter, annexation consents may be exercised after some passage of time, run with the land, and are recorded in the chain of title for any prospective purchaser to review before making a decision to purchase a particular parcel. Ind. Code § 36-4-3-11.7(d). Retroactively nullifying contractual consents to annexation is no more permissible under Contract Clause principles than retroactively modifying restrictive covenants and possibilities of reverter.

2. The 2019 Act imposes the most severe possible impairment on Bloomington's sewer extension contracts: nullification.

To determine whether or not a statute runs afoul of Article I, Section 24 of the Indiana Constitution, courts must consider, among other factors, "to what extent . . . the state law operated as a substantial impairment of a contractual relationship." *Clem*, 582 N.E.2d at 783. In this case, the 2019 Act operated to nullify, not merely impair, the contract between Bloomington and the landowners, clearing one party's half of the bargain completely off the ledger. While non-residents have been entirely relieved of their contractual obligation to consent to annexation, Bloomington has already performed its side of the bargain and extended sewer infrastructure to non-residents' properties.

In *Clem*, our Supreme Court found that a law invalidating restrictive covenants had an impact that "is not temporary but permanent, irrevocable, and retroactive in altering the contractual arrangements." *Id.* at 783. Similarly, in *Girl Scouts* the Supreme Court concluded that "though the parties only intended the [possibility of reverter] to run for 49 years instead of indefinitely, their

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invalidating new 15-year consents at year 3, or 5, or 10. And that uncertainty, as explained earlier, has already stopped Bloomington from entering into new sewer extension contracts and stymied further development.

contract would nevertheless be substantially impaired if it were cut off after just 30 years." *Girl Scouts*, 988 N.E.2d at 257.

Moreover, courts in several cases have invalidated statutes that retroactively affected a single aspect of an existing contract, but left all other provisions of the agreement intact. For example, in *Wencke* the Court of Appeals prohibited the retroactive application of a statute reducing the mandatory retirement age for law enforcement officers from 70 to 65 in a case where an officer had a pre-existing contract with the City of Indianapolis authorizing him to work until age 70. *Wencke*, 429 N.E.2d at 297. The parties to the contract had consented to retirement at age 70, and the agreed-upon retirement age could not be legislatively altered, even by a mere five years, without violating the Contracts Clause. *Id*. In every other respect, the employment contract's terms remained in place. Yet even this relatively minor modification to one aspect of the contract could not survive judicial review under the Contracts Clause.

Likewise, in *Royer v. USAA Cas. Ins. Co.*, 781 F. Supp. 2d 767 (N.D. Ind. 2011), the Federal District Court for the Northern District of Indiana ruled that a 2007 statute requiring that insurance policies allow at least two years for suits by the insured against the insurer could not be applied to a policy purchased in 2006 that limited the policyholders' time for suits to one year after suffering a loss. The Plaintiffs, Stephanie and Brian Royer, had purchased homeowner's insurance in 2006 and the policy included a clause setting a one-year limitations period for suits against the insurer, USAA. *Id*, at 769. After the Royers procured their policy, the General Assembly passed a law directing that certain insurance contracts covering loss or damage to real and personal property must give insureds at least two years to bring suit against their insurer. When the Royer's home burned down in early 2007, they promptly filed a claim with USAA, and their claim was denied. *Id*. After this denial, the Royers delayed in initiating suit against USAA, filing a complaint more

than one year but less than two years later. *Id*. The Court ruled that the one-year limitations period controlled. *Id.* at 774. As in *Clem* and *Bruck* and *Girl Scouts* and *Wencke*, the Court reviewed our State's Contracts Clause and rejected the legislature's retroactive impairment of contractual rights and obligations, finding it neither necessary nor reasonable – even though in *Royer* the limitations period was just one term in an expansive insurance contract and the legislature only extended it by a single year. *Id.*

In each of these cases, courts struck down legislation under the Contracts Clause even though the enactments merely altered, rather than voided, the underlying contracts. By comparison, the 2019 Act nullifies any sewer extension contract that is 15 years old or older. Ind. Code § 36-4-3-11.7(b)-(c) (remonstrance waivers executed before July 1, 2003, are void, and waivers executed after 2003 are void "not later than fifteen (15) years after the date the waiver is executed."). The 2019 Act did not just change a provision in Bloomington's sewer extension contracts; it outright voided the vast majority of the waiver provisions that were the essential and indispensable consideration for those contracts.

Bloomington relied on the waivers in deciding to extend sewer service, and that reliance matters. In *Matter of City of Fort Wayne*, 381 N.E.2d 1093 (Ind. Ct. App. 1978), landowners opposing annexation sought to avoid the impact of waivers of remonstrance in the sewer contracts entered into by their predecessor in interest. The Indiana Court of Appeals found that "[h]aving complied with the statutory requirements mandating such provisions as part of the consideration running to the City and having duly recorded the contracts, the right to remonstrate was validly waived by the predecessors in title of [the] individuals who had signed the remonstrance." *Id.* at 1096. When the landowners challenged the predecessor in interest's valid authority to enter into sewer contracts containing remonstrance waivers, the Court of Appeals correctly determined that

the predecessor's authority was irrelevant and held the property owners were estopped from challenging title given their longstanding use of City sewer systems and the City's contractual reliance interests:

> [Remonstrators] seek to challenge the title held by [a prior owner] at the time the sewer contracts were negotiated . . . [A]ssessment of the conduct of the parties gives rise to an estoppel operating in favor of the City. The property owners here who claim title through the [prior owner] are precluded from challenging that title, for to hold otherwise *may work the inequitable result of denying a benefit to the City which was provided in the contract, mandated by law, and which it has a valid, good faith right to expect . . . [W]here [remonstrators] have long accepted the use and benefit of sewage systems provided by the City of Fort Wayne through reliance on such contracts, they must be estopped from questioning the title of their predecessors in interest at this late date*.

Id. (emphasis added).[10]

The severity of a statute's impact on a pre-existing contract is a crucial guidepost to determine whether or not the General Assembly violated Article I, Section 24. The 2019 Act represents the most acute impairment of Bloomington's contracts and therefore cannot survive the Contracts Clause.

3. The 2019 Act does not address a broad problem, general to society, but rather serves the interests of a narrow class: unincorporated property owners already receiving municipal sewer service who executed sewer extension contracts at least fifteen years ago.

Another factor courts consider when determining whether or not a legislative enactment qualifies as an exercise of the Legislature's "necessary" police power is whether the law "was

[10] The present case, unlike *Fort Wayne*, does not involve a challenge to the authority of predecessors in interest to negotiate the sewer extension contracts with remonstrance waivers, so the estoppel issue in Fort Wayne is not presented here. Instead, Bloomington cites *Fort Wayne* to illustrate how our courts perceive that nullification of contractual waivers of remonstrance severely impairs legally protected municipal interests. Bloomington would be happy if landowners here were simply estopped from challenging the validity of their remonstrance waivers after benefitting for years from Bloomington's extension of sewer service. In this case, however, resolving the validity of the 2019 Act under the Contracts Clause seems unavoidable; Auditor Smith failed to credit the waivers based on her application of that Act, and her resulting signature counts left no procedural mechanism for Bloomington to raise an estoppel defense against the landowners with respect to all of the proposed annexation areas.

enacted to protect a broad societal interest rather than a narrow class." *Clem*, 582 N.E.2d at 784. In *Clem*, while the court acknowledged that promoting the mainstreaming of developmentally disabled persons was noble and worthwhile, it nonetheless concluded that nullifying the restrictive covenants at issue did not address a problem general to society, but instead served the interests of a small class:

> [T]he legislative justification . . . fails to fall within the necessary police power exception. Notwithstanding the social utility in providing homes for the developmentally disabled in ordinary residential areas and the resulting indirect societal benefits, several countervailing considerations compel our decision. The enactment is not reasonably necessary for the protection of the health, safety, and welfare of the general public. It does not address a broad problem general to society.

Id.

Similarly, in *Wencke* evidence was presented "concerning the physical attributes of 65 year old police officers and the potential effect their physical condition may have on their performance." *Wencke*, 429 N.E.2d at 298. This justification, however, was inadequate to shoehorn the legislation into the necessary police powers exception. Though society undoubtedly has a general interest in employing younger police officers who are physically fit, the evidence presented in *Wencke* was not compelling enough for the court to label officers' age and physical fitness as a general societal problem. The Court of Appeals therefore concluded that requiring an officer to retire at age 65, in contravention of an existing employment contract, violated the state (and federal) Contracts Clause.

The 2019 Act presents a far more extreme example of an enactment designed to serve the interests of a narrow subset of citizens. Specifically, the 2019 Act creates a permanent free-rider class of unincorporated property owners who have benefitted for years from municipalities extending and maintaining sewer infrastructure to serve them, expressly in exchange for consent to future annexation, and who now can ignore that contractual obligation. Without the General

Assembly's intervention, those property owners would be estopped from contesting annexation. *Fort Wayne*, 381 N.E.2d at 1096.

Conversely, the General Assembly's legislative override of existing sewer contracts harms (1) the already-incorporated city residents who are burdened with paying the costs of providing services to adjacent external property owners who use those services but do not contribute to the tax base; and (2) all those who would benefit, at this time of acute housing shortages in the city, county, and state, from further development outside the city but who cannot obtain a sewer extension contract due to the reasonable concern that having already nullified remonstrance waivers over 15 years old, the General Assembly will do the same to "younger" remonstrance waivers in future. The 2019 Act reflects classic rent-seeking behavior by a narrow group of landowners and thus the exact opposite of a law designed to address a broad problem, general to society.

4. Sewer extension contracts are essential to development.

Sewer extension contracts facilitate the health and development of successful municipalities. The designated evidence confirms that when cities and non-residents are able to confidently negotiate on specific terms for the extension of sewer infrastructure beyond a city's required service area, development and growth are possible. On the other hand, when parties cannot securely extend basic infrastructure to new developments on freely bargained terms, growth is stifled. The 2019 Act forces municipal utilities and non-residents to operate in an uncertain environment, where longstanding contractual commitments may be eliminated on the Legislature's whim. In Bloomington, the prospect of future legislative override of sewer extension contracts motivated Bloomington's Utility Service Board to prohibit the City from executing sewer

extension contracts except in very limited scenarios. Sewer extension contracts, once a useful tool for ensuring well-planned and orderly growth in Monroe County, may no longer be relied upon.

In analyzing whether the General Assembly is operating within the necessary police power exception, our Supreme Court has examined the underlying public policy utility of the impaired contract. For example, in *Girl Scouts*, the Court discussed the public benefit of reversionary interests:

> [Reversionary interests] have significant social utility. In a residential context, they can permit property owners to collectively provide or obtain protections significantly contributing to the peace, safety, and well-being of themselves and their families. . . . In the commercial context, they can promote the economic viability of a development and protect the investments made by landlords and tenants alike . . . And in this charitable context, the restriction not only maintained the camp's continued public and community use, which is a good in itself, but appears to have been the primary consideration for an otherwise-gratuitous conveyance.

Girl Scouts, 988 N.E.2d at 258 (internal citations omitted). Likewise, in *Clem* the Court noted the value of the restrictive covenants the General Assembly had nullified:

> Restrictive covenants permit property owners to collectively provide or obtain protections significantly contributing to the peace, safety, and well-being of themselves and their families. These purposes are consistent with values identified in our Indiana Constitution.

Clem, 582 N.E.2d at 784.

Sewer extension contracts are an essential tool to "promote the economic viability of a development." *Girl Scouts*, 988 N.E.2d at 258 (internal citations omitted). Without sewer infrastructure, development is stifled, and without a reliable extension contract that includes a consent to annexation, municipalities are reluctant to incur the substantial costs associated with extending their infrastructure. Exhibit B, ¶ 5-12; Exhibit B-1. While property owners outside the City typically benefit from many municipal services, it is access to sewer service that non-resident landowners are willing to pay for and that therefore gives the City its bargaining leverage to obtain

consent to future annexation when the developments on (and in this case, some developments actually within) the City's borders have achieved sufficient urbanization.

Notably, because of county zoning restrictions on developments served by septic, most of the development the City proposes to annex could only be built because the City entered into a contract to extend its sewer lines beyond its municipal boundary. Monroe County Zoning Ordinance 856-39, "Sewage Disposal System." Much of the development along Bloomington's boundaries would not exist had the 2019 Act predated that development. Since Bloomington's Utility Service Board stopped executing sewer extension contracts due to the 2019 Act, at least fourteen proposed development projects have been stalled for lack of an identified, viable wastewater solution. Exhibit B, ¶ 5-12.

What all this means is that the 2019 Act has frozen development near the City. The Act in effect creates a buffer area around the City that can never be annexed and prevents further future development.

Also, promoting sewer connections provides a public health and environmental benefit. For health and environmental reasons, the state has long encouraged property owners to connect their residences to sewer lines, rather than relying on septic tanks, cesspools, or similar structures that contaminate groundwater with waste. *See, e.g.*, Ind. Code 36-9-23-30(a) and Ind. Code 8-1-2-125(e). If sewer extension contracts may be voided at the General Assembly's whim, municipalities will be, and are, increasingly reluctant to execute them and more properties will be forced to come up with alternative, less sanitary wastewater solutions at the expense of public health.

A sometimes repeated criticism of Bloomington's annexations (and other annexations around the state) is that municipalities should instead pursue "voluntary" or "super-voluntary" annexations in which landowners petition for annexation under Indiana Code sections 36-4-3-5 or

-5.1. Setting aside the fact that a majority of these properties voluntarily signed a consent to be annexed, and also setting aside the fact that Bloomington forewent the ability to require voluntary annexation before extending sewer service in exchange for the contractual consent to future annexation, most undeveloped areas desiring utility service outside the City's boundaries were not, and are not, sufficiently contiguous to the City under state law for voluntary annexation. Ind. § 36-4-3-1.5(a). In other words, absent contiguity which is rarely present, voluntary annexation is not (and has not been) a viable option.

Both Bloomington and property owners have long relied on sewer extension contracts as an efficient mechanism for extending wastewater service to developing, unincorporated areas. However, if the Legislature may retroactively interfere with sewer extension contracts, municipalities, including Bloomington, will avoid using them, communities will struggle to grow outward, and developers and property owners will be unable to obtain sewer and other services. Sewer extension contracts serve a valuable purpose. Eliminating confidence in the long-term enforceability of pre-existing extension contracts is no mere triviality, and therefore this Court should carefully scrutinize legislative encroachments into these negotiated agreements. The 2019 Act is not an exercise of the state's necessary police power, but instead represents an impermissible contractual impairment.

C. The Retroactive Application of the 2019 Act Violates the Contract Clause of the United States Constitution

The 2019 Act also violates Article 1 Section 10 of the Constitution of the United States. While some Federal courts have followed *Lochner*-era dicta that municipalities cannot challenge laws of their parent states under the federal constitution, the U.S. Supreme Court has since held that state legislative control of municipalities is still subject to constitutional limitations. *See, e.g.*, *Gomillion v. Lightfoot*, 364 U.S. 339, 344-45 (1960) ("Legislative control of municipalities, no

less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution"). The present controversy involves the Legislature retroactively voiding actual agreements between Bloomington and surrounding landowners, distinguishing this case from past cases where cities attempted to sue the state directly without an explicit contract. This significant distinction means that (1) this Court should consider the constitutionality of the 2019 Act under the federal Contract Clause and (2) the 2019 Act is unconstitutional as applied to Bloomington. Even if the court were to find that Bloomington cannot raise a claim under the United States Constitution, a careful examination of federal Contract Clause jurisprudence is persuasive in showing why, under the Indiana Constitution, the 2019 Act is unconstitutional.

1. Article I Section 10 Standard of Review

The Contract Clause of the United States Constitution states in relevant part, "No State shall…pass any…Law impairing the Obligation of Contracts." U.S. Const., Art. I, § 10, cl. 1. Like the Indiana Constitution, Article 1 Section 10 of the federal Constitution limits the power of states to modify their own contracts as well as those between private parties. *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 17 (1977) (citing *Fletcher v. Peck*, 6 Cranch 87, 137-39 (1810); *Dartmouth College v. Woodward*, 4 Wheat. 518 (1819)). The United States Supreme Court has imposed a two-part test for judging when a state law violates the Federal Contract Clause: (1) the state law operated as a substantial impairment of a contractual relationship; and (2) the state law is not appropriately and reasonably drawn in a way that advances a "significant and legitimate public purpose." *Sveen v. Melin*, 138 S. Ct. 1815, 1821-22 (2018) (quoting *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411–12 (1983)); *Alarm Detection Sys., Inc. v. Vill. of Schaumburg*, 930 F.3d 812, 822 (7th Cir. 2019).

2. The 2019 Act unconstitutionally impaired Bloomington's explicit contractual relationship with landowners in violation of Article 1 Section 10 of the U.S. Constitution.

The 2019 Act substantially impaired a contractual relationship between the City and landowners. To evaluate substantial impairment, a Court considers the extent to which the law (1) undermines the contractual bargain, (2) interferes with a party's reasonable expectation, and (3) prevents the party from safeguarding or reinstating its rights. *Sveen*, 138 S.Ct. at 1822 (citations omitted). Impairment is substantial if the law alters the "central undertaking" of the agreement. *Elliott v. Bd. of Scho. Trustees of Madison Consol. Schs.*, 876 F.3d 926, 934 (7th Cir. 2017) ("[S]ubstantial impairment does not require a complete destruction of the contractual relationship…The issue is whether the impairment disrupts reasonable contractual expectations." (citations omitted)); *Anderson Federation of Teachers v. Rokita*, 546 F.Supp.3d 733 (S.D. Ind. 2021) (order granting, in part, preliminary injunction against the State enforcing Indiana S.E.A. 251, which changed the procedures for deducting union dues from teachers' paychecks, on the grounds that the unions met their burden of showing the likelihood that the law violated the Contracts and Free Speech Clauses of the U.S. Constitution).

Sewer extension contracts memorialize an exchange of municipal utility service for a consent to future annexation. When negotiating extension contracts, Bloomington must navigate the use of limited resources to determine how far it can reasonably extend utility services without degrading municipal services or overburdening current residents (Exhibit A, ¶4; A-1). A substantial factor in any extension is whether the external properties receiving utility services will eventually incorporate via annexation. Over its history Bloomington has followed more than 1,000 sewer extensions backed by annexation consent contracts with hundreds of annexations (Exhibit A-1; Exhibit A-5; Exhibit A ¶8). These extensions represent an enormous investment in growth that would not have occurred without reasonable assurances that annexation would be available to

support the additional strain on the City (Exhibit A, ¶¶6-7). Without reasonable – enforceable – assurances, many unincorporated areas contiguous to the City could not and would not have developed, and going forward, cannot and will not develop (Exhibit B, ¶4). Thus, a property owner's consent to annexation "substantially induces" the utility service extension, as part of planning sensible municipal growth and development. *See Elliott*, 876 F.3d at 934 (noting that a law may not impair a central undertaking of the bargain which substantially induced a party to enter the contract (citing *City of El Paso v. Simmons*, 379 U.S. 497, 514 (1965)). As the 2019 Act invalidated the City's ability, in the middle of its annexation process, to rely on consents to annexation over 15 years old, the Act disrupted a vital contractual expectation. *Id*. at 935 ("An impairment is even more substantial when it disrupts expectations 'in an area where the element of reliance was vital'" (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 246 (1978)).

When substantial impairment exists, as in the present case, courts consider whether or not the parties would have foreseen the new law at the time they negotiated their agreement. *Id*.; *Chrysler Corp. v. Kolosso Auto Sales*, 148 F.3d 892, 894 (7th Cir. 1998). In this case, neither the City nor landowners reasonably could have foreseen this change in the law at the time they negotiated their extension contract.

The Supreme Court has ruled that a change in law is foreseeable if there has been "extensive and intrusive" regulation in the affected industry. *See Energy Reserves*, 459 U.S. at 413-16 (natural gas supplier's reasonable expectations were not disrupted because the industry was heavily regulated and the supplier "knew its contractual rights were subject to alteration by state price regulation").

Just a few years ago, in *Elliot*, a party's reliance on a statutory scheme served as an indication that a change in the law was not foreseeable. *Elliot*, 876 F.3d at 936. *Elliot* addressed a

circumstance where the Indiana General Assembly amended the teacher tenure law to no longer grant tenured teachers favored status for retention during layoffs, and sought to apply this retroactively to teachers that had already obtained tenure prior to the amendment taking effect. *Elliott*, 876 F.3d at 929-30. Judge Hamilton, writing for a unanimous Seventh Circuit panel that included Judge Bauer and Judge Easterbrook, found that the change was unforeseeable and substantially impaired teachers' contractual tenure rights. *Id.* The Court noted that while "[o]ne can anticipate that any state law may change in the future, retroactive application to impair existing contract rights is another question." *Id. at* 936. In ruling that the change was unforeseeable, the Court emphasized that the state itself had created the binding obligation on which teachers had relied for decades, and from which the state had benefited: "When a State enters a binding commitment, the other party's reliance on that commitment is even more justified." *Id*. (citing *Energy Reserves*, 459 U.S. at 412-13).

As in *Elliot*, Bloomington's reliance on a state-directed provision renders the retroactive changes from the 2019 Act unforeseeable. Prior to its modification in 2015, Indiana Code § 36-9-22-2(c) required sewer extension contracts to include a provision through which the non-resident consented to annexation, to the extent a municipality chose to extend sewer service to non-residents at all. The City relied on this statutory commitment *for decades*. And the commitment was not a mere bureaucratic step in the process of extending sewer lines to non-residents, who were not entitled to sewer service – it was the critical piece of consideration in a freely negotiated contract. Indeed, even after 2015, when the state code no longer required the city to get an annexation consent as part of a sewer extension contract, Bloomington continued to require consent every time it extended service as a critical part of a freely-negotiated contract. Ind. Code § 36-9-22-2(d). In this case, just as the Seventh Circuit found in *Elliot*, the state could have limited

its legislation to apply only prospectively, but it declined to do so. *Id*. at 936. Instead, the state applied the change retroactively, rendering the change unforeseeable and substantially impairing the City's contractual rights and reasonable contractual expectations. *Id.*

Moreover, the 2019 Act was not reasonable and necessary to serve a legitimate public purpose. Even if a contract is substantially impaired, the impairment may survive a Contract Clause challenge if it is reasonable and necessary to advance a significant and legitimate public purpose. *Sveen,* 138 S.Ct. at 1822. While courts owe some deference to a legislative determination on reasonableness and necessity, the degree of deference depends on the severity of the impairment and the state's self-interest. *Allied Structural Steel,* 438 U.S. at 245; *U.S. Trust,* 431 U.S. at 25-26; *Elliot,* 876 F.3d at 936-37. Heightened scrutiny to the impairment should be applied where the state enters markets or makes an express commitment to private businesses or individuals, because in such circumstances reliance is highly justified. *Elliot,* 876 F.3d at 937. In this case, not only the City but its residents—taxpayers who effectively subsidize, until annexation occurs, the increased use of City services by non-residents along (and in some cases here, within) the City's urbanized borders—have justifiably relied on the earlier commitment that the City will be able to annex contiguous urbanized development and fairly share the costs of growth and City services. Moreover, the stifling of future growth and harm to public interests caused by the 2019 Act is discussed extensively in this Memorandum.

Accordingly, no substantial deference should be shown to the General Assembly's impairment of Bloomington's contractual rights. In 2017, the State unconstitutionally targeted and delayed Bloomington's annexation with special legislation. While Bloomington was in the midst of successfully challenging that legislation, the General Assembly passed the 2019 Act, arbitrarily terminating contractual rights and stopping Bloomington's annexation, regardless of the outcome

of the then-pending litigation. Far from being reasonable and necessary to serve an important public purpose, this retroactive impairment of Bloomington's sewer contracts caused needless harm and is unconstitutional under the Contract Clause of the U.S. Constitution. *United States Trust*, 431 U.S. at 31-32.

3. The modern construction of municipal constitutional rights applies to Bloomington's Contract Clause claim.

More than a century ago, in several *Lochner*-era decisions, the United States Supreme Court stated in sweeping dicta that cities generally may not sue their states alleging a violation of the federal Contract Clause, and vice versa. *Hunter v. City of Pittsburg*, 207 U.S. 161 (1907) ; *Williams v. Mayor & City Council of Baltimore*, 289 U.S. 36, 40 (1933); *Trenton v. New Jersey*, 262 U.S. 182, 188 (1923); *Pawhuska v. Pawhuska Oil & Gas Co.*, 250 U.S. 394, 398 (1919). Analysis of these cases from a bygone judicial era reveals that they exhibit fact patterns very different from sewer extension contracts. *Hunter* and its related line of cases largely dealt with *implied* contracts that were alleged between citizens and the locality and the prospective application of new state law, rather than the legislative undoing of express, written contracts. *See Hunter*, 207 U.S. at 177 (noting that there is no express contract between the then-existing city of Allegheny and its citizens regarding the use of their taxes that would prevent merger of Allegheny and Pittsburgh under state law); *Trenton*, 262 U.S. 182, 188-91 (rejecting argument that the city could bring a claim against the state of New Jersey for imposing a fee to divert water from streams and lakes after the city acquired a waterworks company that had previously drawn water under a state grant without any fee); *Pawhuska*, 250 U.S. at 396-99 (rejecting city's argument that it had implied contractual authority based on its prior regulation of gas rates such that the state could not prospectively curtail the city's authority over the rates). These cases also relied on municipalities bringing constitutional claims against their respective states that arose "solely as a result of their

relationship." *Gomillion*, 364 U.S. at 342. Here, the City negotiated express, written, *actual* contracts with residents in the form of sewer extension contracts, and Bloomington's claims are not based solely on its relationship with the State.

In *Hunter*, the City of Pittsburgh filed a petition with the court requesting permission to merge with and annex land incorporated into its neighbor, the city of Allegheny. *Hunter*, 207 U.S. at 163. Pennsylvania law allowed for the merger of neighboring cities in close proximity and decreed that the smaller city would be consolidated into the larger city, Pittsburgh. *Id.* at 161-63. Allegheny challenged the merger and alleged that the proposal violated several state and federal constitutional provisions. *Id*. at 176-77.

Allegheny claimed that the merger would violate the implied contract between the city and its taxpayers, because the citizens are taxed "only for the uses of" Allegheny—not a merger with Pittsburgh. *Id*. at 177. The Supreme Court brushed off this claim:

> It is not said that the city of Allegheny expressly made any such extraordinary contract, but only that the contract arises out of the relation of the parties to each other. It is difficult to deal with a proposition of this kind except by saying that it is not true. No authority or reason in support of it has been offered to us, and it is utterly inconsistent with the nature of municipal corporations, the purposes for which they are created, and the relation they bear to those who dwell and own property within their limits.

Id. The Court offered no citation or analysis in its rejection of the claim.

In addressing Allegheny's due process claim, the Court said that the state "may do as it will, unrestrained by any provision of the Constitution of the United States," and that such action could be done "conditionally or unconditionally, with or without the consent of the citizens, or even against their protest." *Id.* at 178-79. However, the Court recognized that some courts have made a distinction between property that cities hold in a private capacity—similar to private corporations and individuals. *Id.* at 179. Since *Hunter* did not involve a municipality holding property similar to a private actor, the Court offered no opinion on the question. *Cf. City of Trenton*,

262 U.S. at 192 (refusing to extend the doctrine in that case brought by a municipality against its state challenging a state-imposed license fee for water).

In the hundred-plus years that have elapsed since these *Lochner*-era cases, the Supreme Court has recognized in several circumstances that a municipality is not merely an instrument of the state and may sue on federal constitutional grounds. *See Romer v. Evans*, 517 U.S. 620, 623-65 (1996) (finding a Colorado constitutional provision violated the Equal Protection Clause in a suit brought, in part, by municipalities); *Washington v. Seattle School District No. 1*, 458 U.S. 457, 459-60 (1982) (holding in a suit brought by a school district against its parent state that state legislation violated federal Equal Protection Clause); *Gomillion v. Lightfoot*, 364 U.S. 339, 344-45 (1960). The Court in *Gomillion* emphasized the limited holding of *Hunter* and the cases that immediately followed. 364 U.S. at 342-43. The Court noted that *Hunter's* holding was limited to the following: (1) no implied contract existed between a city and its residents as to whether their taxes are spent solely for the benefit of that city, and (2) consolidation of two cities does not deprive a citizen of property without due process. *Id.* "[T]he Court has never acknowledged that the States have power to do as they will with municipal corporations regardless of consequences. Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution." *Id.* at 344-45. While state control over municipalities is extensive, that power "is met and overcome by the provision of the Constitution of the United States which forbids a state from passing any law impairing the obligation of contracts." *Id.* at 345 (quoting *Graham v. Folsom*, 200 U.S. 248, 253-54 (1906)).

Furthermore, important factual and legal differences distinguish Bloomington's case from *Hunter*. First, sewer extension contracts are explicit contracts. They vest a definite interest in both the landowner and the City that was not present in *Hunter* or its progeny. Second, in obtaining and

maintaining extension contracts, Bloomington is not behaving as a state actor. *See, e.g., City of Cleveland v. Industrial Com'n of Ohio*, 455 N.E.2d 1085, 1089-90 (Ohio App. 10th Dist. 1983) (holding that *Trenton* immunity is not applicable where the state's services are proprietary and are those of "any other Ohio employer"). The statutory scheme itself, which instructs cities to obtain waivers when extending utility service outside of its boundaries, reflects the private nature of the transaction. Ind. Code § 36-9-22-2(c). It is a clear business exchange: for the benefit of a municipal sewer extension to a landowner's property, the landowner agrees to become a full contributing member of the municipality in the future, rather than pursuing one of the many alternative wastewater options available in the marketplace. In this open forum, Bloomington bargains like any other rational private entity, and seeks a deliberate benefit as part of the deal.

And once an extension contract is executed, the rights it confers are vested rights for both the property owner and Bloomington. In other cases involving vested rights, such as zoning ordinance changes within a city, the ordinance cannot have retroactive effect and comply with constitutional rights. *Knutson v. State ex rel. Seberger*, 239 Ind. 656, 160 N.E.2d 200 (1959). To be clear, it is undisputed that the State could *prospectively* alter the rules governing municipal sewer extensions. However, this suit is limited to the 2019 Act's retroactive interference with existing and effective sewer extension contracts. It is not a broad challenge to the State's authority to change the overall annexation regime or even the *prospective* duration of annexation consent clauses.

The retroactive change inflicted by the 2019 Act, imposed *after* landowners and cities have relied upon the contracts formed and are still awaiting the benefit of their bargain, is blatantly unconstitutional and violates fundamental principles of constitutional governance and contractual rights. *Id.*

D. The Unique Circumstances of This Case Prevent the 2019 Act Being Applied to Bloomington's Annexation

The 2019 Act is unconstitutional on its face, as outlined above. And, the unique circumstances of this case amplify the basic legal and public policy problems with the state's retroactive nullification of contracts. The 2019 Act only affected Bloomington's 2017 annexation because the Legislature illegally delayed that annexation for more than three years. But for that earlier illegal conduct, Bloomington's annexation would have concluded long before 2019. Therefore, the rules applicable to Bloomington's pending annexation should be those rules that applied in April 2017, just before the Legislature unlawfully interrupted the process.

On its original schedule, and in accordance with the strict state statutory process for annexation, Bloomington's annexation would have come before the City Council for final consideration on or about June 30, 2017. *Holcomb*, 158 N.E.3d at 1254. On April 24, 2017, just over two months before the City Council's planned vote, the General Assembly passed the 2017 Act. *Id*. Bloomington challenged the constitutionality of that law and won at trial. Despite the unmistakably targeted nature of the 2017 Act, the state defended it until our Supreme Court affirmed it was unconstitutional special legislation aimed at Bloomington's annexation. The Court's order declaring the 2017 Act unconstitutional was certified on January 26, 2021, more than three and a half years after the General Assembly's original unlawful action. The prolonged litigation afforded the General Assembly time to further intervene in Bloomington's annexation via the 2019 Act, by eliminating most of Bloomington's sewer extension contracts and greatly reducing the probability that Bloomington would complete its pending annexation.

These truly unique factual circumstances underscore the problems the state faces in identifying a legitimate public purpose for retroactive nullification of remonstrance waivers. In

Bloomington's case, the retroactivity extends not only to the waivers themselves but to a longstanding annexation proceeding that the state earlier targeted for termination.

Accordingly, if the court does not strike down the 2019 Act as unconstitutional on its face, the court should employ a narrow remedy to require that the procedures and rules that governed municipal annexation prior to April 24, 2017 should apply to Bloomington's pending annexations. Even if the Court keeps the 2019 Act on the books, the Court should not allow the state to apply it to Bloomington's pending annexations.

VI. CONCLUSION

The undisputed material facts demonstrate that Plaintiff is entitled to summary judgment as a matter of law and is entitled to a judgment:

(1) Declaring that Indiana Code §§ 36-4-3-11.7(b)-(c), 13-18-15-2 (e)-(f), and 36-9-22-2(i)-(j) are unconstitutional on their face and as applied to Bloomington in violation of the Contracts Clause set forth in Article I, Section 24 of the Indiana Constitution;

(2) Declaring that Indiana Code §§ 36-4-3-11.7(b)-(c), 13-18-15-2 (e)-(f), and 36-9-22-2(i)-(j) are unconstitutional on their face and as applied to Bloomington in violation of the Contract Clause set forth in Article I, Section 10 of the United States Constitution;

(3) Declaring that Indiana Code §§ 36-4-3-11.7(b)-(c), 13-18-15-2 (e)-(f), and 36-9-22-2(i)-(j) may not be applied to Bloomington's 2017 annexation proposals because applying them to Bloomington's in-progress annexations would effectively allow the General Assembly to benefit from its earlier unconstitutional delay of Bloomington's annexations;

(4) Directing Auditor Smith to immediately recertify the February 23, 2022 annexation remonstrance results for Bloomington Ordinance Nos. 17-09, 17-10, 17-11, 17-12, 17-13,

17-14, and 17-15, treating as valid any remonstrance waiver and consent to annexation previously disregarded by the Auditor as a result of the 2019 Act; and

(5) Any and all other appropriate relief.

Respectfully Submitted,

/s/ Michael Rouker
Michael Rouker, Attorney No. 28422-53
City Attorney
City of Bloomington
401 N. Morton Street
Bloomington, IN 47404
roukerm@bloomington.in.gov
(812) 349-3426

/s/ Beth Cate
Beth Cate, Attorney No. 21218-49
Corporation Counsel

/s/ Larry Allen
Larry Allen, Attorney No. 30505-53
Assistant City Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that on February 27, 2023, a copy of the foregoing document has been sent via the Indiana E-Filing System to the following persons:

Edward J. Cockerill
Monroe County Attorney
jcockerill@co.monroe.in.us

James A. Barta
Deputy Solicitor General
James.Barta@atg.in.gov

Thomas M. Fisher
Solicitor General
Tom.Fisher@atg.in.gov

Melinda R. Holmes
Deputy Attorney General
Melinda.Holmes@atg.in.gov

/s/

/s/ Michael Rouker
Michael Rouker
City of Bloomington
401 N. Morton Street
Bloomington, IN 47404
roukerm@bloomington.in.gov
(812) 349-3426