STATE OF INDIANA	IN THE MONROE CIRCUIT COURT
COUNTY OF MONROE	CAUSE NO. 53C06-2203-PL-000610
CITY OF BLOOMINGTON, Plaintiff, vs. CATHERINE SMITH, in her official capacity as Monroe County Auditor Defendant, and STATE OF INDIANA Intervenor.	

REPLY IN SUPPORT OF PLAINTIFF'S PARTIAL MOTION FOR SUMMARY JUDGMENT/RESPONSE IN OPPOSITION TO INTERVENOR'S PARTIAL CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff City of Bloomington, by counsel, hereby submits this Reply in Support of Plaintiff's Partial Motion for Summary Judgment/Response in Opposition to Intervenor's Cross-Motion for Partial Summary Judgment.

I. INTRODUCTION

The Indiana Constitution prohibits laws "impairing the obligation of contracts." Ind. Cost. Art. 1 §24; *Girl Scouts of S. Ill. v. Vincennes Ind. Girls, Inc.*, 988 N.E.2d 250, 255 (Ind. 2013). Bloomington maintains that the 2019 Act impairs the obligation of contracts and thus violates the State Contracts Clause. The 2019 Act – the State's second legislative interference with Bloomington's 2017 annexation – does this by relieving thousands of County landowners of their half of a bargain in which the City extended them municipal sewer service in exchange for

their waiver of remonstrance against future annexation. The State suggests that no constitutional concern is raised here because local governments are mere agents of the State and the 2019 Act merely impairs local government, not private, interests. The State's agency approach to the Contracts Clause lacks sound legal and factual foundation. Its theory – that obligations running to local governments may be legislatively erased without constitutional concern – has breathtaking implications for local operations and finance, including bonding. And its public/private impairment distinction fails to acknowledge that impairment of "government" interests necessarily means impairment of private interests – in this case, (a) City taxpayers who will continue to shoulder a too-high tax burden for facilities and services used by County residents living on, and in some cases actually within, the City's boundaries, and (b) private developers and lot purchasers who will no longer be able to use voided sewer extension contracts to complete slow-moving residential and commercial development outside the City. The 2019 Act's retroactive voiding of remonstrance waivers is thus properly seen as rewarding certain private actors at the expense of other private actors.

The fact that Bloomington is challenging the 2019 Act's constitutionality under the state Contracts Clause is unremarkable. Political subdivisions have invoked the state Constitution countless times to challenge state legislation, and courts have fully adjudicated those claims. Contracts Clause claims should be treated no differently. The four Depression-era cases the State cites in an effort to close the courthouse door on Bloomington did not create the bright-line rule the State urges.[1] Their reach is far more modest: over an eight-year period during the Great Depression, they limited political subdivisions from bringing claims for monetary damages in

[1] *Bolivar Twp. Bd. of Fin. of Benton County v. Hawkins*, 191 N.E. 158 (Ind. 1934) (plurality opinion); *State ex rel. Jackson v. Middleton*, 19 N.E.2d 470 (Ind. 1939) (same); *Kassabaum v. Bd. of Fin. of Town of Lakeville, St. Joseph County*, 20 N.E.2d 642 (Ind. 1939); *Dep't of Pub. Welfare of Allen County v. Potthoff*, 44 N.E.2d 494 (Ind. 1942).

connection with bank failures and a public welfare program, when governments responding to that singular economic crisis had passed laws to grant relief from such payments. These cases have no relevance to Bloomington's present Contracts Clause challenge.

If the Court were inclined to read in broader terms the applicability of the cases the State cites, those cases are ripe for reconsideration and should be replaced with the much sounder analysis offered by their dissenters and in the modern approach of our sister states, which let political subdivisions bring Contracts Clause challenges to state laws and obtain rulings on the merits. Moreover, Indiana's modern Contracts Clause case law already protects the State's ability to impair contracts when necessary, without requiring any additional "gatekeeper" doctrine grounded in a highly artificial view of local government's role and powers.

The 2019 Act, however, cannot clear the bar set by Article I, Section 24 for retroactive contract impairments. Retroactively voiding a contract obligation is unconstitutional unless justified as an exercise of the State's "necessary police power." Because the 2019 Act voided the central consideration in over 80% of Bloomington's sewer contracts; neither addressed a broad societal problem nor resembled a typical and foreseeable regulation of the annexation process; and, according to the State, is intended to serve policy interests – de-clouding property titles and avoiding surprise to owners – that neither the facts nor the law support as sufficient to warrant retroactive contract impairment, the 2019 Act does not constitute an exercise of the necessary police power. Therefore it does not fall within the singular, narrow exception to Indiana's prohibition on retroactive impairment.

II. ARGUMENT

Bloomington remains entitled to summary judgment on Counts I, II, and III of its Complaint. Political subdivisions may invoke Indiana's Contract Clause to safeguard contracts

with third parties from retroactive legislative interference when the law in question is not an exercise of the state's necessary police power. The 2019 Act does not meet the high standard of a necessary police power action, and so is not justified under the state Contracts Clause. For similar reasons the 2019 Act should also be declared unconstitutional under the federal contracts clause.[2]

A. Political Subdivisions may invoke Indiana's Contract Clause to protect contracts negotiated with third parties from retroactive legislative interference.

1. The Intervenor's proposed Contracts Clause bar is misplaced; courts have routinely protected political subdivisions from unconstitutional state action under Indiana's constitution.

Political subdivisions have frequently and successfully claimed state constitutional protection against legislative enactments that restrict local government action. See, e.g., *Holcomb v. City of Bloomington*, 158 N.E.3d 1250 (Ind. 2020) (Bloomington successfully challenged constitutionality of statute terminating its annexation); *Alpha Psi Chapter of Pi Kappa Phi Fraternity, Inc. v. Auditor of Monroe County*, 849 N.E.2d 1131 (Ind. 2006) (Monroe County successfully challenged constitutionality of tax exemption filing deadlines); *Mun. City of S. Bend v. Kimsey*, 781 N.E.2d 683 (Ind. 2003) (South Bend successfully challenged constitutionality of annexation remonstrance percentages). Nonetheless, the State asks the Court to "bar the City from invoking the state Contracts Clause against the State." Intervenor Mem. 15.

Intervenor tried once before, without success, to close the courthouse door on Bloomington when the City challenged unconstitutional Statehouse intervention in Bloomington's annexation. In *Holcomb*, Intervenor argued that Bloomington could not invoke the Indiana Constitution's protection against special legislation under Article IV, Section 23. Intervenor characterized the statute terminating Bloomington's annexation as a legislative

[2] As discussed in more detail below, state and federal Contract Clause analysis differs importantly, and this reply brief focuses on responding to the Intervenor's state Contracts Clause arguments.

pronouncement on "the structure of local governments" which local governments may not challenge. *Holcomb*, at 1264. The Supreme Court was not persuaded: "Reading *Dortch* [*v. Lugar* 266 N.E.2d 25 (Ind. 1971), a 50-year old case involving Indianapolis' government structure] to control this case with a bright-line rule overextends its holding and overstates its position." *Id*. The Court rebuffed the State's attempt to avoid constitutional scrutiny and permitted Bloomington's constitutional challenge to proceed—and prevail.

Asking our courts to make certain the General Assembly is acting within constitutional bounds is unremarkable. This includes asking the courts to decide under Article I, Section 24 whether the Statehouse may retroactively void key contract terms that cities have bargained for on behalf of their residents. As in *Holcomb*, the court should decide the City's state constitutional claim on its merits.

2. *Bolivar* (1934), *Middleton* (1939), *Kassabaum* (1939), and *Potthoff* (1942) do not broadly constrain political subdivisions from raising state Contracts Clause claims

The case law that Intervenor cites to bar the courthouse door to Bloomington's state Contract Clause claims cannot bear that weight. The State directs the Court to four Contracts Clause cases decided between 1934 and 1942 that rejected local government claims for money damages against parties granted relief from such claims under Depression-era statutes dealing with bank failures and public assistance programs. Intervenor's Mem. 16-17. Three of the cases – *Bolivar Twp. Bd. of Fin. of Benton County v. Hawkins*, 191 N.E. 158 (Ind. 1934), *State ex rel. Jackson v. Middleton*, 19 N.E.2d 470 (Ind. 1939), and *Kassabaum v. Bd. of Fin. of Town of Lakeville, St. Joseph County*, 20 N.E.2d 642 (Ind. 1939) – held that the 1933 Relief Act and a 1937 extension of such relief for circuit court clerks could constitutionally relieve certain sureties of their liability for bonds given on public fund deposits in banks that failed. The fourth, *County Dept. of Public Welfare v. Potthoff*, 44 N.E.2d 494 (1942), upheld a state statute granting

repayment relief, including elimination of property liens, for recipients of old-age assistance payments. The 1941 state law at issue in *Potthoff* was part of the new federal-state-local web of social security protections. *Potthoff*, 44 N.E.2d at 496.

In *Bolivar,* a two-Justice plurality rejected a Contracts Clause claim by a township seeking payment from public bond sureties of $28,977 lost when the bank serving as the township's public depository failed. The plurality did use the broad language quoted by Intervenor, which characterized political subdivisions as agents of the state who did not need to consent to the state's release of liabilities purportedly running to the state as the real party in interest to local government contracts. Intervenor's Mem. 16. But the plurality's opinion does not support the stark conclusion apparently advanced by Intervenor, namely that the Indiana General Assembly may retroactively change or eliminate any terms in a City contract that run in favor of the City without offending the Contracts Clause – a conclusion that as noted above would wreak havoc on municipal operations, including bond financing, and gravely impact taxpayers.

In the Contracts Clause portion of its opinion, the *Bolivar* plurality relied mainly on cases involving similar relief for sureties asked to cover loss of general tax dollars resulting from bank failures.[3] In an earlier portion of the opinion addressing whether the 1933 Relief Act imposed unconstitutional classifications for relief – an issue that occupied much of the *Middleton*,

[3] The question posed in *Bolivar*–who is liable to whom following a bank failure–generated considerable disputes and jurisprudence surrounding the Great Depression. *See, e.g.*, 96 A.L.R. 295. The two non-surety cases cited by the *Bolivar* plurality in addressing this question, involved circumstances equally remote from the annexation remonstrance waivers at issue here. *See Lucas v. Board of Comm'rs*, 44 Ind. 524 (1873) (state law effectively transferring railroad company shares from county to the taxpayers whose funds were used to purchase them, does not violate state or federal Contracts Clause); *Central Union Tel. Co. v. Indianapolis Tel. Co.*, 189 Ind. 210 (1920) (state law shifting power to approve sale of utility provider from city to state Public Utility Commission, and taking effect before city agreed to such sale, did not violate federal Contracts Clause).

Kassabaum and *Potthoff* opinions too – the plurality described in stark terms the backdrop against which these laws were passed:

> The United States Congress and the Legislatures of every state in the Union have been confronted with relief and emergency measures growing out of the economic conditions of the country. We must take judicial notice of the fact that for the past few years our country, and for that matter the whole world, has been shaken to its very foundation by a devastating financial crisis. Emergencies of many kinds have had to be met in order to save the government itself and the people from a complete breakdown and ruin.

Bolivar, 191 N.E. at 165.

As discussed below, modern Contracts Clause jurisprudence preserves necessary police powers to deal with the kind of crisis posed by the Great Depression; no *per se* disqualification of municipal claims under that constitutional provision is needed or warranted to protect state interests. Before *Bolivar*, state law permitted such claims to be resolved on the merits. See *McClelland v. State ex rel. Speer*, 37 N.E. 1089 (Ind. 1894); *Johnson v. Bd. of Comm'rs of Randolph Cnty.*, 39 N.E. 311 (Ind. 1894). Justice Treanor, who heard *Bolivar* prior to his appointment to the Seventh Circuit, wrote a lengthy dissent in that case against departing from the prior approach. *Id.* 171-5. Justice Treanor highlighted the absurdity of considering local government units as "agents" of the state whose contract interests by definition cannot be constitutionally impaired:

> The fundamental fallacy of the nonimpairment argument is that its major premise does not exist in fact or in law. The major premise is that all counties, cities, towns, and townships are mere administrative agencies of the state as a governmental unit in the principal–agent sense. Whereas the present reality, factual and legal, is that the governmental functions of Indiana are performed partly by the state as a governmental unit and partly by the local municipal corporations as independent governmental units, and not as agents of the state . . . counties, cities, towns, and townships are treated as private corporations as respects the business and financial phases of local government.
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> . . . .
>
> The General Assembly doubtless has the power to abolish . . . municipal and political corporations and to create a centralized unitary state administration and

> to divide the state into administrative districts with administrative agents over each district. To supplement such an arrangement it could abolish local taxes and pay all expenses of government from a state tax. When that is done the nature of the state government will be such as to support the argument that local units are mere agents of the state government and that contracts with them are contracts with the state. But as long as the General Assembly creates municipal and political corporations, as agencies of government, with powers and attributes of private corporations we must give effect to these powers.

Bolivar at 172-3 (Treanor, dissenting).[4]

Justice Treanor was of course correct. Municipal corporations represent the interests of their residents. Indeed, since the *Bolivar* plurality handed down its opinion in 1934, the scope of the administrative state and the duties and responsibilities of municipal corporations have only grown.[5] Political subdivisions are vested with independent and increasingly complex corporate powers, and they have always acted as independent corporate entities, not as the State's agent. Article X, Section 6 of the Indiana Constitution acknowledges this by barring the General Assembly from assuming local government debts – a constitutional protection directly at odds with a basic rule all first year law students learn about principal-agent relationships: "A principal will be liable to third persons for all acts committed by the agent on his or her behalf." Ind. Law Encyc. Agency § 27.

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[4] The final two Justices did not participate in the *Bolivar* decision. Later in 1934 *Bolivar*'s two-Justice plurality decided another surety-relief challenge, in *Wise v. White*, 193 N.E. 85 (Ind. 1934). The Court again could not muster a majority for its Contracts Clause analysis, with Justice Treanor again dissenting and two Justices again declining to participate.

[5] Among other items, the City of Bloomington is responsible for animal care and control (Bloomington Mun. Code § 2.12.010, 7.01 et seq), protecting and maintaining the public's right-of-way (Ind. Code § 36-9-2-5), public safety (Ind. Code 36-8-3 et seq), supporting local arts (Bloomington Mun. Code §§ 2.12.020, 2.12.021), supporting local economic development (Bloomington Mun. Code 2.33), redeveloping blighted areas (Bloomington Mun. Code 2.18.000 et seq, Ind. Code 36-7-14), protecting the local environment (Bloomington Mun. Code § 2.12.050), enacting and enforcing an expansive zoning and subdivision ordinance (Bloomington Mun. Code 20.01.01 et seq, Ind. Code 36-7-4), operating a massive municipal utility (Bloomington Mun. Code § 2.24.000, Ind. Code 8-1.5), and of course much more.

As the dire conditions described in *Bolivar* continued, the state Supreme Court in 1939 took up two more cases on whether surety relief legislation could constitutionally prevent a political subdivision from obtaining money damages on an earlier bond. *Middleton*, 19 N.E.2d 470 (Ind. 1939); *Kassabaum*, 20 N.E.2d 642 (Ind. 1939). The first, *Middleton*, provided no independent analysis of the Contracts Clause issue and characterized *Bolivar*'s reach narrowly: "It appears to have been settled by this court *that the release of a public official from liability for funds lost on account of the failure of the bank in which such funds were deposited does not impair the obligation of contracts*." *Middleton* at 473 (emphasis added).

A few months later in *Kassabaum*, the Court likewise offered no independent Contracts Clause analysis in upholding the 1933 Relief Act against another money damages claim against sureties on a public depository bond. The Court noted simply that *Bolivar* had been cited in other cases, none of which themselves substantively engaged the Contracts Clause issue, and concluded that it was too late in the day to consider repudiating *Bolivar* because the 1932 repeal of certain depository and surety requirements meant virtually all claims challenging surety relief under the 1933 Relief Act had already been resolved:

> The 1933 act . . . only applied to situations which had been created prior to the passage of the act. It acted only retrospectively in so far as the class of those to be relieved was concerned. It is only fair to assume that in the intervening six years since the passage of said act, practically all of the claims which could possibly arise under said act have been finally settled and the sureties released . . . For this court at this late date to repudiate the decision in the Bolivar case and now hold the act unconstitutional would only add confusion to the situation.

Kassabaum, at 646. Far from setting out principles designed to broadly restrict future Contract Clause claims by political subdivisions, the *Kassabaum* Court made a pragmatic decision not to inject uncertainty into settled claims six years after the 1933 Relief Act's passage.

Finally, in *Potthoff*, the Indiana Supreme Court considered whether Allen County could collect money from the estate of David Trisch, who in 1940 had received old-age assistance payments after signing an application that obligated him to repay those benefits and placed a corresponding lien on his property. *Potthoff* at 495. Another Depression-relief statute, passed in 1941 and to be read "in connection with the [1935 federal] Social Security Act" – had eliminated such repayment obligations and liens, however. *Id*. at 496.

In addressing whether Contracts Clause principles required the estate to reimburse the County notwithstanding the 1941 welfare law, the majority opinion quoted *Bolivar* as "authority for the proposition that" political subdivisions act as agents of the state, and that the state serves as the real contracting party and may release liabilities created without the consent of the agent and without engaging in unconstitutional impairment of contract. *Id.* at 497. But the Court limited the reach of *Bolivar*, *Middleton* and *Kassabaum* to cases that, like surety and welfare relief, involve claims by political subdivisions for money damages:

> No good purpose would be served in re-examining the authorities which were so thoroughly considered in the Bolivar, Middleton, and Kassabaum cases. We think it may be said, *without extending the rule declared in those cases*, that counties are political subdivisions of the state and that as such they have no vested or contractual rights *in the disposition of funds derived from general taxation therein* which are superior to the public policy of the state as declared by the legislature.

Potthoff at 497 (emphasis added).[6]

[6] Chief Justice Roll, while "reluctantly" concurring, expressed deep skepticism that the two-Justice plurality in *Bolivar* had identified the correct rule:

> The majority opinion cites the case of *Bolivar* . . . as authority for the general proposition that a civil township is a political subdivision of the state, and a creature of the Legislature and acts as the agent of the state. The same principle was again announced in substance in . . . *Middleton* . . . and again in *Kassabaum* . . .
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> At the time the *Boliver [sic] Township* case . . . was decided I entertained serious doubts of the correctness of that opinion. After further study and consideration my doubts grew to a firm conviction that the decision in that case was wrong . . .

Bloomington's case is materially different from Depression-era claims by political subdivisions for money damages in the face of statutes designed to relieve debtors of such burdens as part of addressing massive bank failures and public welfare needs. Bloomington is seeking a declaratory judgment that remonstrance waiver provisions remain enforceable. In this context, neither *Potthoff* nor the three Surety Relief Act cases (*Bolivar*, *Middleton*, and *Kassabaum*) have any bearing.

Moreover, and critically, these four cases were decided nearly 60 years before the Indiana Supreme Court articulated the modern necessary police powers doctrine for state Contracts Clause claims and declared that "[o]nly those statutes which are necessary for the general public and reasonable under the circumstances will withstand the contract clause." *Clem v. Christole, Inc.*, 582 N.E.2d 780, 784 (Ind. 1991). Discussed in more detail below, the necessary police powers exception, while narrow, does protect certain state actions in spite of retroactive impairment: "[I]t has long been recognized that the prohibitions contained in the Indiana contract clause do not necessarily restrict the exercise of the State's power to protect the public health, safety, and general welfare." *Id*. at 782.

The necessary police powers exception likely would have accommodated the surety- and welfare-relief provisions at issue in *Bolivar*, *Middleton*, *Kassabaum*, and *Potthoff* as necessary and reasonable. Without this modern doctrine in place at the time, the Court – with division and some unease – sought an alternative means of allowing the statutes to survive. The State now advances these cases as a sweeping bar against Contracts Clause claims by political subdivisions, but they were handed down in a drastically different judicial era and should be applied, if at all, in a manner consistent with modern doctrine – not as a *per se* bar to Contracts Clause claims

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Potthoff at 498 (Roll, concurring).

based on an artificial concept of state agency, but as examples of situations in which the necessary police powers exception may be satisfied.

3. Rather than extending *Bolivar*'s limited ruling and flawed conception of local government to bar all Contracts Clause protections for cities, the Court should follow the balanced approach used in sister states.

In the modern judicial era, sister states allow political subdivisions to pursue state Contracts Clause claims on their merits. For example, in *Pierce County v. State*, 148 P.3d 1002, 1009 (Wash. 2006), the County filed a lawsuit challenging the constitutionality of a voter initiative limiting government-imposed charges on motor vehicles, arguing that the initiative violated Washington State's Contracts Clause and eliminated revenue that the County had pledged as security in pre-existing contracts with bondholders. *Id*. The Washington Supreme Court agreed that the claim could proceed and ultimately ruled for the County on the merits. *Id.* at 1022. The Court rejected the argument that allowing such a claim effectively surrenders the state's power to change tax policy or allows local government to "contract" itself out from state control:

> [Intevernor's] argument misperceives the nature of the restriction on state action imposed by the contract clause. As a creature of the state, a municipal corporation derives its power from the legislature. Once having granted certain powers to a municipal corporation, which in turn enters into binding contracts with third parties who have relied on the existence of those powers, the legislature . . . is not free to alter the corporation's ability to perform.

Id. at 1015 (internal quotations and citations omitted).

Other jurisdictions agree that political subdivisions are protected by state contracts clauses. In *Board of Education of Unified School District Number 443, Ford County v. Kansas State Board of Education*, 966 P.2d 68 (Kan. 1998), a school district sought a declaratory judgment that a state law extending an interlocal cooperation agreement unconstitutionally impaired the district's ability to unilaterally terminate the agreement. *Id* at 75. Like the State of

Indiana in this case, the defendants in *Ford County* argued that because the school district "is created by the legislature as a political subdivision of the State," it lacked standing to claim that state action impaired its contract. *Id* at 77.

The Kansas Supreme Court rejected this argument, pointing out that "although a school district's duties are not self-executing, but dependent upon statutory enactment of the legislature, this does not mean that the school district is stripped of the right to challenge the statute's constitutionality, nor is it removed from the protection of the constitution." *Id*. Ultimately, the Court found no unconstitutional contractual impairment, *id.* at 79, but it confirmed that the school district could pursue its state contract clause claim on the merits despite its status as a political subdivision.

Similarly, in *Northern Tier Solid Waste Authority v. Commonwealth*, 825 A.2d 793, 794 (Pa. Commw. Ct. 2003), three municipal solid waste authorities in Pennsylvania sought judicial relief from a new state-mandated waste disposal fee. The authorities argued that the fee would burden existing contracts in violation of the state Contracts Clause, because specific contractual provisions with various customers would prohibit pass-through of the new fee. *Id*. Over the State's objection, the court allowed the authorities' state Contracts Clause argument to proceed. *Id*. at 798 ("[The solid waste] [a]uthorities arguably state a claim for unconstitutional impairment of certain contracts.").[7]

The modern approach used in *Pierce County*, *Ford County*, and *Northern Tier* – like Indiana's necessary police powers exception – strikes the right balance in protecting the powers

[7] Additional examples exist of state-level contracts clause claims proceeding to final adjudication. Bloomington does not attempt to cite every one in this Response, but see, e.g., *Clark v. City of Saint Paul*, 934 N.W.2d 334 (Minn. 2019) (Saint Paul challenged a ballot initiative reorganizing waste collection services on state Contracts Clause); *Jennissen v. City of Bloomington*, 938 N.W.2d 808 (Minn. 2020) (Bloomington, Minnesota challenged a similar ballot initiative to establish organized waste collection).

of state and local governments and in serving Contracts Clause principles. In contrast, the State urges an absolute bar to political subdivisions invoking the Contracts Clause. This approach not only sweeps more broadly than the State's Depression-era citations allow; it also relies on an "agency" fiction that disregards actual municipal operations, and as discussed below, ignores harms to private citizens imposed by state interference with municipal sewer contracts. For these reasons, the court should reject the State's call to bar the courthouse door against Bloomington, and allow its state Contracts Clause claim to proceed and be decided on the merits.

4. The 2019 Act does not just harm "the City" – it harms private property owners with existing sewer connection rights and continues to harm existing taxpayers and prospective developers and property owners.

The State contends that the 2019 Act merely "operates against a political subdivision of the state, which cannot complain that the State has somehow impaired its rights." Intervenor's Mem. 28. This is not so. The 2019 Act operates against property owners by extinguishing existing sewer connection rights, and against municipal taxpayers by canceling instruments freely negotiated to protect them from free-riders on their urbanized but unincorporated doorstep. More broadly, the 2019 Act operates against the kind of stable contracting environment needed for growth and development. Unlike the surety and welfare relief laws at issue in the State's Depression-era cases, which just prevented collection of discrete money damages, the 2019 Act's impacts are expansive and complex, invalidating sewer contracts in different states of performance and wiping out consideration on both sides of the ledger.

Consider, for example, waiver 2360, which authorized the extension of sewer service to various lots in the Sterling Woods subdivision, just southeast of Bloomington's current boundary. Ex. A-1. Waiver 2360 is titled "Waiver of Annexation" *Id*. It was executed 24 years ago, on November 2, 1998, recorded two days later, and is the *only* legal instrument that guarantees

future residents of Sterling Woods access to sewer service from the City of Bloomington. *Id*. To that end, waiver 2360 reads:

> The undersigned . . . for and in consideration of the City of Bloomington, Indiana, granting to the undersigned the right to tap into and connect to the sewer system of the City of Bloomington . . . now release the right of the undersigned as owners of the described real estate and their successors in title to remonstrate against any pending or future annexation by the City of Bloomington, Indiana, of such described real estate.

Id.

The 2019 Act eliminated waiver 2360, and at least 965 similar legal instruments. By voiding waiver 2360, the 2019 Act wiped out the only contract future Sterling Woods residents could point to as a lawful basis for accessing Bloomington's sewage works. No other legal instrument guarantees sewer service to unbuilt lots in Sterling Woods. To say that the 2019 Act only "released private citizens from obligations owed to" the City is simply untrue. Intervenor's Mem. 11. The 2019 Act extinguished the *connection rights* documented in remonstrance waivers just as much as it extinguished the consents to annexation contained therein.[8]

The General Assembly granted Bloomington the power to enter into binding contracts with third parties and should not be utterly free to alter Bloomington's ability to perform. The Washington Supreme Court vindicated this principle in *Pierce County*, recognizing that the voter initiative eliminating a tax removed not just revenue for the political subdivision but also an important contractually-pledged security interest for municipal bond investors. *Id*. at 1008. As such, it violated the Contracts Clause:

> The purpose of the contract clause is to lend certainty to the reliability of contractual pledges. Such certainty is essential to the ability of state and local governments to obtain credit through the capital markets. We find that section 6

[8] Sterling Woods is not the only example of this type of impact from the 2019 Act. A cursory survey of Bloomington's (at least) 966 voided waivers reveals a significant number guaranteeing future sewer service to undeveloped or underdeveloped lots. See, e.g., waivers 1471, 1627, 2117, 2188, and 2258.

> reduced the Sound Transit bondholder's security. Accordingly, we hold that section 6 impermissibly impairs the contractual obligations between Sound Transit and the bondholders.

Id. at 1022. Moreover, the political subdivision itself – not just bondholders – could challenge this impairment. Likewise, whoever else may be able to sue for impairment of Bloomington's sewer extension contracts, Bloomington should certainly be able to do so.

And, the 2019 Act's impact reaches beyond the two parties that negotiated each remonstrance waiver. In a predictable and reasonable response to the elimination of more than 80% of its remonstrance waivers, Bloomington's Utilities Service Board has prohibited nearly all external sewer extensions. Ex. B-1. After all, what rational actor would execute a contract when significant, proven risk exists that the sovereign will unilaterally nullify the agreement?

For this reason, Contact Clause protections are vital. They promote stability and confidence in market transactions, including the extension of municipal sewer connections outside City boundaries. When this confidence is reduced and one party is no longer willing to come to the table and negotiate, development and growth are the victims. The 2019 Act's impact extends well beyond the harm suffered at *pending* developments like Sterling Woods. The 2019 Act has also closed off *future* development.

Yet Bloomington's current taxpayers are not spared – they still shoulder the burden of adjacent dense development, which inherently creates additional demand for municipal services. For example, residents of dense unincorporated areas drive more vehicles onto Bloomington's streets, pushing the capacity of older roads and requiring widening. This expensive endeavor involves right-of-way purchases, engineering designs, surface construction and maintenance, and project management. Unincorporated residents pay nothing toward these expenses.

Dense development on Bloomington's borders invariably crosses the border and swims into Bloomington's municipal pools, swings at municipal playgrounds and baseball fields, dials up Bloomington's dispatchers, and sometimes requires assistance from Bloomington's public safety officers. Additional development always demands additional infrastructure, and it accelerates the deterioration of existing infrastructure. All of this places an ever-increasing tax burden on municipal property owners. As such, the remonstrance waivers that Bloomington obtained in exchange for extending sewer service to unincorporated areas, are properly understood as promises made to current taxpayers to protect their interests in the continued delivery of high-quality municipal services. The 2019 Act wiped out more than 80% of those promises.[9]

B. The 2019 Act does not fall within the necessary police powers exception.

"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* at 257. The central inquiry in any Indiana Contracts Clause claim is whether the challenged legislation fits within the necessary police powers exception. And yet, the words "necessary police powers" do not appear even once in the State's filing. Rather, the State confusingly and incorrectly invites the Court to apply the federal Contracts Clause analysis to Bloomington's state Contracts Clause claim. This

[9] Not to mention similar promises in Newburgh, Valparaiso, and surely more jurisdictions. See Town of Newburgh Annexation Ordinance, Ordinance 2021-11; *Sturdy Rd. Prairie Ridge Prop. Owners' Ass'n, Inc. v. City of Valparaiso*, 211 N.E.3d 517 (Ind. Ct. App. 2023), transfer denied, 2023 WL 5960297 (Ind. Sept. 7, 2023) (primary issue before the trial court is whether the 2019 Act (Ind. Code 36-4-3-11.7(c)) invalidated the waiver that allowed the annexation; in that case, however, the County Auditor treated the City's waiver as valid and did not apply the 2019 Act). Basically, the 2019 Act affected every property owner in Indiana hoping that their neighboring sewer provider will still be willing to sign a sewer extension contract in an uncertain legal environment. See also South Bend's policy forbidding nearly all external sewer connections. (https://docs.southbendin.gov/WebLink/DocView.aspx?dbid=0&id=335103&page=1&cr=1)

avoidance is understandable, as the 2019 Act is unlikely to survive scrutiny under the necessary police powers doctrine and the factors applicable under that test.

First, the 2019 Act effected a severe impairment, completely nullifying most of Bloomington's remonstrance waivers – which, contrary to the State's assertion, represent the primary contractual arrangement between Bloomington and external sewer customers. Intervenor Mem. 27. Second, the State is wrong to suggest that retroactive voiding of waivers is just a another predictable, garden-variety chapter in the broader enterprise of regulating the annexation process; and of course, Bloomington seeks only to prevent the 2019 Act's retroactive impact, not any prospective changes to annexation in Indiana. *Id*.

Third, the interests cited by the State in support of the 2019 Act – that it protects property titles from being encumbered for too long and property owners from being forced to join a city whose policies and regulations may have changed since the original waivers attaching to their property were signed – neglects three things: that the waivers were recorded, so not only the original signatory to the waiver but all subsequent purchasers (and the property markets they operated in) were on notice of potential annexation[10]; that the property owners at issue live in populated areas on – and, for three of the five annexation areas, *completely within* – the City's present boundaries, so limits on things like keeping animals, open burning, and discharging firearms should not come as a surprise; and, that the state Supreme Court has clearly protected

[10] The State expresses concern that some remonstrance waivers may not have been timely recorded. Intervenor Mem. 7. The City recorded 56 waivers in February 2017 that were more than a decade old, out of the more than 1,000 waivers held by the City at the start of its annexation. Intervenor Mem. 7; City Ex. A-1; State Ex. 12. Given the scope of the pending annexation, it is unlikely that these few waivers could prove determinative for any annexation area. Moreover, adequate remedies exist for remonstrators and property owners to adjudicate the validity of individual waivers through other proceedings based on alleged individualized defects, and no property owner is ever guaranteed that the lack of a valid waiver (or any waiver) will prevent the annexation of their area, if sufficient other valid waivers permit the annexation.

property restrictions several decades old. The State also ignores the significant utility presented by remonstrance waivers, which warrants Contracts Clause protection.

1. Indiana Contracts Clause claims are analyzed under the necessary police powers test, which is separate and distinct from any analysis under the federal Contracts Clause.

Throughout its brief, the state confusingly blends the standards used in federal Contracts Clause claims with the test applicable to claims under Indiana's Contract Clause. U.S. Const. art. 1 §10; Ind. Const. art 1 §24.[11] Under the federal Contracts Clause, courts apply the following analysis: (1) did the law operate as a substantial impairment of a contractual relationship; and if so, (2) is the state law 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).

The Indiana Supreme Court has established a stricter framework under the state Contracts Clause – the necessary police powers exception. Under *Girl Scouts* and *Clem*, the state legislature may retroactively impair existing contracts in "much narrower" circumstances than it may regulate prospectively under its general police powers. *Girl Scouts* at 257; see also *Clem,* 582 N.E.2d at 784 ("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.").

The Court in *Clem* applied a multi-factor analysis to determine whether or not the legislation at issue was an exercise of the State's necessary police power:

[11] Bloomington does not re-argue its federal Contracts Clause claims in this Response-Reply. As regards Article I, Section 10 of the United States Constitution, Bloomington relies on the arguments present in its Motion for Partial Summary Judgment.

> When juxtaposed against the broad and explicit mandate of the contract clause in Article 1, Section 24 of the Indiana Constitution, we find that the legislative justification for Ind.Code § 16–13–21–14 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. Its effect is not temporary but permanent, irrevocable, and retroactive in altering the contractual relationships created in restrictive covenants. The provision imposes statutory regulation in a field not traditionally subject to legislation. In seeking to alter the enforceability of restrictive covenants, the statute represents a considerable impairment of contractual obligations.
>
> 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. Article 1, Section 1 expressly recognizes that government is instituted for the peace, safety, and well-being of the people. Article 1, Section 31 protects the right of citizens to assemble together in a peaceable manner to consult for their common good.
>
> *Application of these considerations leads us to conclude that the statute falls outside of the necessary police power exception* to the contract clause.

Clem at 784-5 (emphasis added). This lengthy passage, quoted in its entirety, identifies the factors relevant to judging whether a statute is an exercise of necessary police powers:

(1) Does the enactment address a broad problem general to society? ("[The enactment] does not address a broad problem, general to society" *Id*. 784).
(2) What is the degree of the contractual impairment? ("[The enactment's] effect is not temporary but permanent, irrevocable, and retroactive . . . the statute represents a considerable impairment." *Id*.)
(3) Does the enactment regulate a field traditionally subject to legislation? ("The provision imposes statutory regulation in a field not traditionally subject to legislation." *Id*.)
(4) What was the legislature's objective in passing the law, and what value did the impaired contract provide? ("Notwithstanding the social utility in providing homes for the developmentally disabled in ordinary residential areas and the resulting indirect societal benefits . . . 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." *Id*.)

In *Clem*, the Court examined these factors and concluded that a state statute voiding restrictive covenants against group homes for persons with developmental disabilities or mental illness, unconstitutionally impaired those covenants notwithstanding the law's social utility. *Id.* at 784. In *Girl Scouts*, a unanimous Court invoked *Clem* to find that a state law that retroactively terminated a 49-year land use restriction after 30 years, failed the necessary police powers test. *Girl Scouts* at 258. Applying these standards to the 2019 Act, that Act must likewise fall.

2. The 2019 Act imposed a permanent, irrevocable, and retroactive effect on and severely impaired the contracts between Bloomington and unincorporated residents seeking sewer access, by voiding most of remonstrance waivers at the heart of those contracts.

The 2019 Act severely impaired Bloomington's sewer extension contracts by voiding the heart of those contracts – the consent to annexation given in consideration for sewer hookups.

The State argues that the 2019 Act "does not affect customers' agreements with the City to pay connection fees and sewer rates, which cover the cost of providing sewer service" and that the Act made "a modest change to the rules governing one aspect of the City's relationship with sewer customers." Intervenor Mem. 17-18. This is simply not the case. As noted above, remonstrance waivers record an agreement to extend municipal sewer service to a property that is not otherwise entitled to sewer service, in exchange for a consent to future annexation. Ex. A-1.

All other terms and conditions are secondary to this primary connection right. As already noted, Bloomington's Utilities Department is not a for-profit enterprise. Intervenor Mem. 15. Other terms and conditions governing sewer connections, including rates and fees, are established by law, not by contract. See, e.g., Bloomington Mun. Code 9.08, 10.08, 10.08.045. Utility rates and fees are owed not because a contract requires them to be paid in exchange for service, but because the City Council and Indiana Utility Regulatory Commission legally set

them. Like other municipal fees and rates, utility rates are owed pursuant to law, not contract. The remonstrance waiver grants access to the sewer system and is a contract voluntarily entered into. The fact that other terms flow in through regulation once someone enters the system, is irrelevant.

The State also implies that the 2019 Act did not drastically impair waivers because "the 2019 Act does not invalidate all waivers." Intervenor Mem. 19. And later, the State argues that "The 2019 Act left open an avenue for the City to protect waivers executed after July 1, 2003, by acting on them within 15 years of their execution." Intervenor Mem. 27. First, this is not precisely correct. The 2019 Act retroactively nullified all waivers executed fifteen or more years earlier: "A waiver . . . expires not later than fifteen (15) years after the date the waiver is executed." Ind. Code § 36-4-3-11.7(c)(2). The 2019 Act retroactively eliminates 15-year-old waivers on a rolling basis. Given the timing of the 2019 Act's enactment, the Act's pronouncement that "a remonstrance waiver executed before July 1, 2003, is void" turns out to be redundant due to the second provision that wipes out all waivers after 15 years on a rolling basis.

Furthermore, the volume of waivers eliminated belies the State's assertion that the 2019 Act left plenty of waivers in place. For Bloomington, the 2019 Act eliminated more than 80% of waivers instantly. Ex. A-1. The 15-year period appears calculated to capture the requisite number of contracts. For example, had the General Assembly selected a 30-year expiration, mirroring the expiration period it selected in *Girl Scouts* related to possibilities of reverter, only 311 of Bloomington's remonstrance waivers would have been eradicated – likely too few to alter the outcome of Bloomington's pending annexations. *Girl Scouts* at 252; Ex. A-1.

The 2019 Act's timing further highlights the severity of its impairment. Bloomington began its annexations in February 2017. *Holcomb* at 1253; Ex. A-2; Ex. A-3. In accordance with the statutory annexation process, Bloomington's City Council introduced eight annexation ordinances on March 29, 2017 and scheduled a public hearing on the annexation for May 31, 2017. *Id*. at 1253-4. These verifiable steps very publicly signaled Bloomington's intent to capture the consideration recorded in remonstrance waivers. The 2019 Act was only taken up in the wake of Bloomington's public actions signaling its intent, and its win at the trial court in *Holcomb*, and the law wiped out with uncanny timing and precision the contracts on which Bloomington was imminently planning to rely.

3. The 2019 Act does not address a broad problem general to society or make prospective adjustments to the annexation process, but instead targets a narrow set of existing contracts for elimination in an effort to benefit a small number of property owners to the public's detriment.

The State dedicates a great deal of space to arguing that remonstrance waivers were negotiated "in a heavily regulated environment." Intervenor Mem. 27. This overstates the case; instantly wiping out all existing remonstrance waivers over 15 years old is hardly a typical or foreseeable regulatory adjustment to the annexation process. Contrast the 2019 Act with Senate Bill 330, titled "Annexation," from the General Assembly's 2015 session. Senate Bill 330 made comprehensive changes to annexation, including setting a *prospective* limit on all future remonstrance waivers: "a waiver of the right of remonstrance executed after June 30, 2015, expires not later than fifteen (15) years after the date the waiver was executed."[12]

To carry that contrast further, the 2019 Act did not address a broad, society-wide problem. Rather, it benefitted a subset of property owners at broader taxpayer expense. Notably,

[12] The cited provision appeared in multiple sections of State Code, including Indiana Code 36-4-3-11.7(a). The 2019 Act replaced this unobjectionable prospective provision with a retroactive 15-year expiration date, instantly invalidating waivers and giving rise to the present litigation. Ind. Code § 36-4-3-11.7.

the 2019 Act appeared within House Bill 1427, a 229-page Christmas tree bill largely addressing other targeted parties and concerns such as (1) extending a pilot program in Lake County concerning disposal of real property, (2) removing the Indianapolis' Mayor and Marion County's appointment authority for members of the Fort Harrison reuse authority, (3) changing the filing deadlines for property tax deductions applicable to certain mobile homes, (4) indicating that in the event of a city or town reorganization, the person performing the functions of clerk or fiscal officer must comply with certain training requirements. In this context, the 2019 Act appears less like a thoughtful addition to regulation of the annexation process as a targeted interference with particular sewer extension agreements.

Even if the 2019 Act could be said to impose an additional and foreseeable rule in an already-heavily regulated environment, this factor has not been dispositive in previous state Contracts Clause cases. Consider, for example, *Royer v. USAA Cas. Ins. Co.*, 781 F. Supp. 2d 767 (N.D. Ind. 2011). As noted in Bloomington's primary filing, *Royer* involved an intensely regulated field: insurance. *Id*; see, e.g., Ind. Code 27-1 et seq. The legislation at issue in *Royer* retroactively extended a one-year contractually established limitations period to two years. *Id*. 773-4. The Court held that this amounted to a retroactive impairment under Article I, Section 24, despite the extensive regulatory landscape for insurance. *Id*. at 774; see, e.g., Ind. Code 27-1, et. seq. Similarly, in *Wencke v. City of Indianapolis*, 429 N.E.2d 295 (Ind. Ct. App. 1981), the Indiana Court of Appeals prevented an enactment from altering the mandatory retirement age of a law enforcement officer under Indiana's Contracts Clause. As in *Royer*, officer physical fitness requirements and age limits have long been regulated. See, e.g., Ind. Code § 36-8-4-7. Yet the Court in *Wencke* nonetheless protected the underlying contract from retroactive impairment. So

far, existing in a heavily regulated sphere by itself has not prevented retroactively impaired contracts from claiming protection under the state Contracts Clause.

In any event, Bloomington is not broadly challenging the State's authority to change annexation procedures. Bloomington freely concedes that the General Assembly may *prospectively* limit the duration of remonstrance waivers, as it did in 2015. The relief the City seeks here is modest – restoring the enforceability of existing waivers over 15 years old.

4. The purported legitimate interests served by the 2019 Act do not justify retroactive impairment of remonstrance waivers, particularly given the utility of those waivers.

In an effort to justify the 2019 Act, the State points to the same justification the Indiana Supreme Court rejected in *Girl Scouts*, namely to uncloud property titles: "Requiring waivers to be used within 15 years is necessary to prevent unused waivers from clouding titles perpetually…." Intervenor Mem. 18; *Girl Scouts*, 257-8. This justification is insufficient under the necessary police powers test.

First, Bloomington concedes that a reasonable *prospective* sunset date on waivers would likely not run afoul of Indiana's Contracts Clause. Only the *retroactive* elimination of waivers that previously contained no expiration date is at issue. If the 2019 Act's actual goal was to uncloud titles, a prospective sunset date that gives cities a reasonable amount of time to act on old waivers would provide the desired effect without offending Indiana's Contracts Clause.

In any event, attempting to uncloud property titles does not bring the Act within the necessary police power, particularly when the restriction has substantial utility. As the Court explained in *Girl Scouts*:

> [W]e agree with the Attorney General that the Legislature's likely objective . . . 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 . . .

> [B]ecause [the possibility of reverter] imposes on GSSI a contract obligation that touches and concerns the land, it is closely akin to the restrictive covenants in *Clem*. Such restrictions 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. When a reverter or condition subsequent serves a function equivalent to a restrictive covenant, arbitrarily terminating it after 30 years is neither "reasonable" nor "reasonably appropriate," and therefore is not within the necessary police power.

Girl Scouts at 258 (internal quotations and citations omitted). This approach makes sense, and as both *Girl Scouts* and *Clem* indicate, long-lasting contractual obligations that touch the land are hardly remarkable.

The State also argues that the 2019 Act is justified because Bloomington "surprised" landowners with remonstrance waivers after conditions on the ground for landowners changed. Intervenor Mem. 18. But as noted earlier, when a waiver is recorded in a property's chain of title, as the vast majority of the waivers in this case were, the waiver provides notice to prospective buyers of potential annexation. *ABN AMRO Mortg. Grp., Inc. v. Am. Residential Servs., LLC*, 845 N.E.2d 209, 218 (Ind. Ct. App. 2006); see also 24 Ind. Law Encyc. Records § 3. The market accounts for such instruments as well and informs purchase negotiations.

Balanced against the State's purported interest in unclouding titles and preventing inattentive subsequent purchasers from surprise is the general public interest in the enforceability of contracts that provide parties with access to municipal services. As Bloomington noted in its primary filing, remonstrance waivers are an essential tool to promote development. Sewer extension contracts foster development, and sewer lines proliferate at developers' requests, not Bloomington's. But when the consideration contained in a sewer extension contract may be

instantly and retroactively eliminated, Bloomington will no longer answer calls to even discuss a possible sewer extension with a hopeful developer. Ex. B-1. Development requires certainty. Certainty is found when our Contracts Clause is vigilantly enforced.

Like the restrictive covenant in *Clem* and the possibility of reverter in *Girl Scouts*, remonstrance waivers are valuable tools. The State's purported motives for retroactively eliminating remonstrance waivers–to uncloud title and prevent surprise–do not come close to providing a justification for the 2019 Acts' survival. The 2019 Act falls outside the State's necessary police powers and therefore violates Article I, Section 24 of Indiana's Constitution.

V. CONCLUSION

The undisputed material facts continue to 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. 17-11, 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,

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CERTIFICATE OF SERVICE

The undersigned certifies that on October 10, 2023, a copy of the foregoing document has been sent via the Indiana E-Filing System to the following persons:

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