STATE OF INDIANA	)	IN THE MONROE COUNTY CIRCUIT COURT
	) SS:	
COUNTY OF MONROE	)	CAUSE NOS. 53C06-2203-PL-000610 53C06-2203-PL-000611 53C06-2203-PL-000614 53C06-2203-PL-000615 53C06-2203-PL-000616
CITY OF BLOOMINGTON, Plaintiff v. CATHERINE SMITH, in her official capacity as Monroe County Auditor, Defendant, and STATE OF INDIANA, Intervenor.	)	

REPLY IN SUPPORT OF INTERVENOR'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

THEODORE E. ROKITA
Attorney General of Indiana
Attorney No. 18857-49

JAMES A. BARTA
Deputy Solicitor General
Attorney No. 31589-49

MELINDA R. HOLMES
Deputy Attorney General
Attorney No. 36851-79

Office of the Attorney General
IGC-South, Fifth Floor
Indianapolis, Indiana 46204
Tel: (317) 232-0709
Fax: (317) 232-7979
Email: James.Barta@atg.in.gov

TABLE OF CONTENTS

INTRODUCTION

The City originally brought seven actions involving the same parties in which it alleged that the 2019 Act violated the federal Contract Clause, the state Contract Clause, and "fairness." The City has now dismissed two of those actions with prejudice. That means it can no longer challenge the 2019 Act's validity. Under settled preclusion principles, a dismissal with prejudice operates as a "complete and categorical" bar to relitigation of the same claims between the same parties. *Miller v. Patel*, 212 N.E.3d 639, 646 (Ind. 2023). And even apart from preclusion principles, the City has effectively abandoned its federal Contract Clause and fairness claims. It offers no defense of them in opposing the State's cross-motion for summary judgment.

The only claim the City continues to defend is its state Contract Clause claim. Under the "settled law of the state," however, the City cannot invoke that provision of our Bill of Rights to challenge legislation releasing citizens from obligations owed to local governments. *Dep't of Pub. Welfare of Allen Cnty. v. Potthoff*, 220 Ind. 574, 44 N.E.2d 494, 497 (1942). This Court should reject the City's request to "replace[]" Indiana Supreme Court decisions with the City's preferred view. City Reply 3.

The 2019 Act does not violate the state Contract Clause regardless. The 2019 Act modifies only one aspect of the City's relationship with sewer customers, placing an expiration date on remonstrance waivers while leaving untouched obligations to pay established rates and follow established standards. That modification does not constitute a substantial impairment of the overall contractual relationship, especially

considering a contractual acknowledgement that the terms are subject to state law. The City's failure to demonstrate a substantial impairment requires dismissal.

The 2019 Act, moreover, is a necessary and reasonable measure for protecting landowners' reasonable expectations and preventing cities from abusing waivers by failing to act on them for decades. The City does not seriously dispute that landowners who executed waivers 65 years ago thought that they would be joining a different city than exists today. Its own witnesses admit the City's policies, priorities, and regulations have substantially changed. Again, the City emphasizes that waivers are useful. But utility is not the primary question. And the City's defense of waivers confuses the utility of sewer service to landowners with the utility of perpetual waivers. The Court should grant summary judgment to the State on Counts I, II, and III.

ARGUMENT

I. The Dismissal with Prejudice of Two Actions by the City Asserting Identical Constitutional Claims Requires Dismissal Here

The City's recent dismissal with prejudice of two of its actions challenging the 2019 Act's validity require dismissal of its remaining challenges to the 2019 Act's validity. Claim preclusion serves "as a complete and categorical 'bar to subsequent litigation on the same claim between identical parties.'" *Miller v. Patel*, 212 N.E.3d 639, 646 (Ind. 2023) (quoting *Edwards v. Edwards*, 132 N.E.3d 391, 396 (Ind. Ct. App. 2019)). It applies where (1) the former judgment was "rendered by a court of competent jurisdiction," (2) the former judgment was "rendered on the merits," (3), the "matter now in issue was, or could have been, determined in the prior action," and (4) the controversy adjudicated in the former action" was "between the parties to the present

suit or their privies." *Id.* (quoting *Afolabi v. Atl. Morg. & Inv. Corp.*, 849 N.E.3d 1170, 1173 (Ind. Ct. App. 2006)).

Each of those elements is satisfied here. Initially, in seven actions involving the same parties that were consolidated before this Court, the City asserted claims that the 2019 Act "unconstitutionally impair[s] contractual obligations" and offends "fairness." Compl. ¶¶ 53–71. Then, for strategic reasons, the City obtained an order that "dismissed with prejudice" two of its actions. Order Granting Motion to Dismiss Causes with Prejudice (Sept. 19, 2023); *see* Motion to Lift Stay and Reset Trial Date, *Papke v. Smith*, No. 53C06-2203-PL-000509 (Monroe Cnty. Cir.) (filed Sept. 21, 2023) (explaining the City dismissed the actions so that it could seek lifting of a stay). Even where "voluntary," a "dismissal with prejudice is a dismissal on the merits." *Ilagan v. McAbee*, 634 N.E.2d 827, 829 (Ind. Ct. App. 1994); *see Richter v. Asbestos Insulating & Roofing*, 790 N.E.2d 1000, 1002 (Ind. Ct. App. 2003). Thus, the dismissal is "res judicata as to any questions that might have been litigated," including the 2019 Act's constitutionality. *Richter*, 790 N.E.2d at 1003; *see Ilagan*, 634 N.E.2d at 829. That question was squarely presented and resolved on the merits against the City.

Issue preclusion forecloses relitigation of the 2019 Act's validity as well. That doctrine applies where there was "(1) a final judgment on the merits in a court of competent jurisdiction; (2) identity of the issues; and (3) the party to be estopped was a party or the privity of a party in the prior action." *Miller*, 212 N.E.3d at 646 (quoting *Nat'l Wine & Spirits, Inc. v. Ernst & Young, LLP*, 976 N.E.2d 699, 704 (Ind. 2012)). For the reasons above, each of those elements is met. And while "[i]ssue" (not claim)

preclusion is "less favored against a government agency responsible for administering a body of law that affects the general public," *Miller Brewing Co. v. Ind. Dep't of State Revenue*, 903 N.E.2d 64, 68 (Ind. 2009), the City argues that the litigation here concerns a "clear business exchange," City Mem. 41–42. Both claim and issue preclusion therefore require dismissal of Counts I, II, and III in the remaining actions.

II. The State Contract Clause Does Not Confer on the City, a Political Subdivision of the State, Any Rights Against the State

To the extent the Court reaches the City's Contract Clause claims, it should reject them. The City offers no response to binding precedent holding that "municipalities . . . cannot bring" federal Contract Clause "claims against their states." *Lake Ridge Sch. Corp. v. Holcomb*, 198 N.E.3d 715, 718–19 (Ind. Ct. App. 2022); *see* State Mem. 11–15. And although the City would like to see Indiana Supreme Court decisions establishing an equivalent rule for state Contract Clause claims "replaced," City Reply 3, the "settled law of the state" requires dismissal of state claims, *Dep't of Pub. Welfare of Allen Cnty. v. Potthoff*, 220 Ind. 574, 44 N.E.2d 494, 497 (1942).

A. Indiana Supreme Court precedent forecloses the City's claim

The City concedes that the Indiana Supreme Court has rejected state Contract Clause claims brought against the State by its political subdivisions at least six times, explaining that the State "may release liabilities created without the consent" of its "political subdivisions." City Reply 10; *see id.* at 6–10 & n.3. That concession should end this case. Lower courts "'are bound by the decisions of our supreme court'" unless and until our "'Supreme Court precedent . . . is changed either by that court or by

legislative enactment.'" *Horn v. Hendrickson*, 824 N.E.2d 690, 694 (Ind. Ct. App. 2005). Lower courts lack authority to "replace[]" controlling precedent. City Mem. 3.

Nor can the Indiana Supreme Court's decisions be confined (as the City suggests) to "Depression-era claims . . . for money damages." City Mem. 11. Years before the Depression, the Indiana Supreme Court rejected a Contract Clause claim by a municipality in a suit for "specific performance." *Cent. Union Tel. Co. v. Indianapolis Tel. Co.*, 189 Ind. 210, 126 N.E. 628, 630–31, 634 (1920); *see Lucas v. Bd. of Comm'rs of Tippecanoe Cnty.*, 44 Ind. 524, 530 (1873), *aff'd*, 93 U.S. 108 (1876) (rejecting a claim in a suit for injunctive relief). In the 1930s, the court adhered to its position that releasing obligations owed to municipalities "does not amount to the impairment of contracts as provided for in the federal and state Constitutions." *Bolivar Twp. Bd. of Fin. of Benton Cnty. v. Hawkins*, 207 Ind. 171, 191 N.E. 158, 165 (1934); *see Kassabaum v. Bd. of Fin. of Town of Lakeville, St. Joseph Cnty.*, 215 Ind. 491, 20 N.E.2d 642, 646 (1939); *State ex rel. Jackson v. Middleton*, 215 Ind. 219, 19 N.E.2d 470, 473 (1939). (What the City calls a "plurality" opinion in *Bolivar*, City Reply 7, the court itself regards as a "majority . . . opinion[]," *Taelman v. Bd. of Fin. of Sch. City of S. Bend*, 212 Ind. 26, 6 N.E.2d 557, 560 (1937), *overruled in part by State v. Laure's, Inc.*, 239 Ind. 56, 154 N.E.2d 708 (1958).) And after the Depression, in *Potthoff*, the Indiana Supreme Court reaffirmed its earlier decisions rejecting Contract Clause claims by political subdivisions as the "settled law of the state." 44 N.E.2d at 496–97.

In reaffirming its decisions, the Indiana Supreme Court made clear that those decisions rest on generally applicable principles of law—not the specific factual

context in which they happened to arise. "While the contract clause of the [Indiana] Constitution protects parties dealing with the state," the court explained, "it does not, of course, affect the validity of statutes releasing obligations due the state." *Potthoff*, 44 N.E.2d at 496. "There is, consequently, no question as to the impairment of the obligation of a contract" where the State releases obligations due it. *Id.* And under the "settled law of the state," a political subdivision enters contracts "pursuant to statutory authority" and as "the agent of the state." *Id.* at 497 (quoting *Bolivar*, 191 N.E. at 165). Thus, "by the great weight of authority," the Indiana Supreme Court held, the State may "release the liability created . . . without the consent [of] the agent," and this "does not amount to the impairment of contracts as provided for in the . . . state Constitution[]." *Id.* (quoting *Bolivar*, 191 N.E. at 165).

The City emphasizes one line from *Potthoff* in which the court stated that it had no need to "extend[] the rule declared" in earlier cases to resolve the dispute before it. 44 N.E.2d at 497; *see* City Reply 10. But seeing no need to extend a rule is not the same as "limit[ing]" it. City Reply 10. And "the rule" the Indiana Supreme Court reaffirmed was that the State may "release" a contractual liability to a political subdivisions "without [its] consent," and this "does not amount to the impairment of contracts as provided for in the . . . state Constitution[]." *Id.* (quoting *Bolivar*, 191 N.E. at 165); *see id.* at 586 (Roll, C.J., concurring) (conceding that *Bolivar*, *Jackson*, *Kassabaum*, and *Potthoff* stand "as authority for the general proposition that a civil township is a political subdivision of the state" and "acts as the agent of the state"). That is why *Potthoff* held that the State could discharge a pensioner from an

agreement that required him to reimburse Allen County for old age assistance. *See id.* at 495–97 (majority opinion). *Potthoff*'s holding forecloses the City's claim.

The City identifies no decision since *Potthoff* rejecting what the Indiana Supreme Court declared to be the "settled law of the state." It points to a general description of the state Contract Clause from *Clem v. Christole, Inc.*, 582 N.E.2d 780 (Ind. 1991). *See* City Reply 11. In *Clem*, however, the Indiana Supreme Court addressed a Contract Clause claim asserted by private parties. *See* 582 N.E.2d at 782. The court did not consider whether political subdivisions are protected by the Contract Clause, much less overrule decisions holding that they are not. To the contrary, *Clem* emphasized that the state Contract Clause is designed to protect "'*private* contracts'"—a design underscored by its placement in our Bill of Rights. *Id.* at 784 (emphasis added). It nowhere addressed contracts with local governments.

The City also points to cases in which political subdivisions challenged state statutes as unconstitutional special legislation under Article IV, Section 23. *See* City Reply 4. But none of those decisions addressed whether political subdivisions may invoke the state Contract Clause in Article I's Bill of Rights. Whatever municipalities' ability to challenge legislation on the ground that the legislature transgressed an Article IV constraint on its power, municipalities cannot invoke the Bill of Rights in opposition to state legislation. The Bill of Rights serves to protect Hoosiers' "personal freedoms" from encroachment by both state and local governments, not to entrench municipal governments' power. *Zoeller v. Sweeney*, 19 N.E.3d 749, 753 (2014) (quoting *Wittington v. State*, 669 N.E.2d 1363, 1369 n.6 (Ind. 1996)).

Regardless, the Indiana Supreme Court has never overruled *Potthoff*'s holding that legislation extinguishing obligations due local governments "does not amount to the impairment of contracts." *Potthoff*, 44 N.E.2d at 497 (quoting *Bolivar*, 191 N.E. at 165). So this Court is "bound" to follow that holding. *Horn*, 824 N.E.2d at 694; *see Dep't of Treasury v. City of Linton*, 223 Ind. 363, 60 N.E.2d 948 (1945) (rejecting the argument that an earlier decision was overruled "by implication").

B. This Court should reject the City's invitation to "replace[]" a rule adopted by the Indiana Supreme Court

Being bound by Indiana Supreme Court decisions foreclosing the City's claim, this Court need not tarry with the City's criticisms of those decisions. For the record, however, those criticisms are misplaced.

Citing a few out-of-state cases, the City argues that "modern" doctrine permits municipalities to bring Contract Clause claims against their States. City Reply 12–14. What the City means by "modern" is not clear. Federal law still bars "municipalities" from bringing federal "constitutional claims against their states." *Lake Ridge*, 198 N.E.3d at 718–19; *see* State Mem. 11–15. And as the Hawaii Court of Appeals observed in 2011, "[i]t appears that courts have uniformly held that municipalities cannot invoke the Contract Clause against the abrogation of contracts by state law." *In re Pub. Util. Comm'n*, 257 P.3d 223, 234–35 (Haw. Ct. App. 2011); *see, e.g.*, *Honors Acad., Inc. v. Tex. Educ. Agency*, 555 S.W.3d 54, 65–68 (Tex. 2018) ("'Municipal corporations do not acquire vested rights against the State'"); *Morial v. Smith & Wesson Corp.*, 785 So. 2d 1, 13 (La. 2001) (it is an "established principle that the Contract Clauses of the Federal and State Constitutions do not apply to protect municipalities

of the state"); *City of Plainfield v. Pub. Serv. Elec. & Gas Co.*, 412 A.2d 759, 765 (N.J. 1980) ("cases have uniformly recognized that a municipal corporation cannot invoke the protection of constitutional contract clauses against the abrogation of contracts by the state"); *Metro. Dev. & Hous. Agency v. S. Cent. Bell Tel. Co.*, 562 S.W.2d 438, 443 (Tenn. Ct. App. 1977) ("a city could not invoke the Contract Clause to prevent the state from impairing a contractual obligation owed the city").

The City's cases do not suggest otherwise. In *Pierce County v. State*, 148 P.3d 1002 (Wash. 2006) (en banc), the court ruled there was a Contract Clause violation because the challenged initiative impaired a contractual interest of "bondholders" by reducing revenues "pledged . . . as security for its bonds." *Id.* at 1006, 1013, 1015. The court never considered whether local governments independently hold protected contract rights. *Northern Tier Solid Waste Authority v. Commonwealth*, 825 A.2d 793 (Pa. Commw. Ct. 2003), is similar. It stated that "a claim for unconstitutional impairment of contracts might exist" where that a state action prevents solid waste authorities from passing on new taxes, thereby affecting "bondholders." *Id.* at 797–98. Again, however, the court never considered whether the authorities had constitutionally protected contract rights. Nor did it overrule precedent holding that "municipal corporations are not within the protection of" the Pennsylvania Contract Clause. *Vansciver v. Sharon Hill Borough*, 33 Pa. D. & C. 383, 386–87 (Pa. Com. Pl. 1938). In fact, the court later held that there was no contractual impairment. *See N. Tier Solid Waste Auth. v. Commonwealth*, 860 A.2d 1173, 1183 (Pa. Commw. Ct. 2004).

The City's other cases do not specifically address whether state Contract Clauses protect political subdivisions either. In *Board of Education of Unified School District No. 443 v. Kansas State Board of Education*, 966 P.2d 68 (Kan. 1998), the court addressed whether a school board had "standing" to assert a *federal* Contract Clause claim by virtue of the Kansas constitutional provision creating school boards. *Id.* at 77. And while the court ruled the board had standing, it held there was "no impairment of contract" without addressing whether municipalities may invoke the federal Contract Clause against their States. *Id.* at 79. Additionally, both *Clark v. City of Saint Paul*, 934 N.W.2d 334, 345 (Minn. 2019), and *Jennissen v. City of Bloomington*, 938 N.W.2d 808, 816 (Minn. 2020), rejected state constitutional claims, holding there was no contractual impairment. Neither decision thus needed to address whether municipalities are covered by state protections for private contracts.

The City also lodges complaints about supposed downstream impacts of the 2019 Act on "municipal taxpayers" and the City itself, arguing it should not be regarded as the State's agent. City Reply 8, 14, 16. Those objections are no different from arguments previously considered and rejected by the Indiana Supreme Court. *See Bolivar*, 191 N.E. at 171–73, 175 (Treanor, J., dissenting) (making similar points). That the City believes it provides more services than cities previously rendered provides no basis for reaching a different result. Nor is the City correct to compare the 2019 Act's impact on taxpayers to the *Pierce County* initiative's impact on bondholders. *See* City Mem. 14–15. As explained above, the *Pierce County* initiative impaired a contractual interest of "bondholders" by reducing revenues "pledged . . . as security

for [the] bonds." 148 P.3d at 1006, 1013, 1015. Here, there is no contract between the City and municipal taxpayers secured by waivers obtained from sewer customers.

Moreover, in complaining about alleged taxpayer burdens, the City overlooks that its Mayor disclaims that the "main benefit the City seeks to obtain through annexation" is "additional tax revenue." State Ex. 1, Hamilton Dep. 40:15–17. The City overlooks that it is under no obligation to let county residents use "municipal pools" or other facilities supported by City taxes. City Reply 17; *see* Hamilton Dep. 61:16–20, 63:4–8. The City overlooks that other jurisdictions provide "mutual aid" in exchange for the City offering them assistance. Hamilton Dep. 64:22–65:11. The City overlooks that nearby development provides services, jobs, customers, and other benefits to City businesses and residents. *See* State Mem. 20–21. And the City overlooks that development is still occurring, with the City having decided to extend sewer service to unincorporated areas multiple times since 2019. State Ex. 2, Kelson Dep. 52:16–53:9; State Ex. 13, Sewer Extension Applications Approved Since May 5, 2019.

Finally, the City argues that the "2019 Act operates against property owners by extinguishing existing sewer connection rights." City Reply 14. That is incorrect. By its terms, the 2019 Act applies to "remonstrance waiver[s]" only. Ind. Code § 36-4-3-11.7(b)–(d); *see id.* §§ 13-18-15-2(e)–(g), 36-9-22-2(i)–(k). Whatever a document's title, the 2019 Act does not affect any other contractual rights or obligations. The statute thus has no effect on "connection rights." *Contra* City Reply 14–15. Furthermore, even if the 2019 Act reached "connection rights," that impact at most would allow private citizens to argue that the 2019 Act cannot be validly applied to them. It

would not permit a declaration of facial unconstitutionality or prevent the 2019 Act's application to the City, which *Potthoff* expressly permits. *See Members of Med. Licensing Bd. of Ind. v. Planned Parenthood Great Nw., Haw., Alaska, Ind., Ky., Inc.*, 211 N.E.3d 957, 975 (Ind.), *reh'g denied*, 214 N.E.3d 348 (Ind. 2023).

III. The State Contract Clause Permits the State To Enact Reasonable Protections for Landowners

The 2019 Act passes muster under the state Contract Clause. The 2019 Act modifies only part of the City's contractual relationship with sewer customers and represents a necessary and reasonable exercise of the police power to prevent cities from sitting on remonstrance waivers for decades to the detriment of landowners.

A. The 2019 Act does not substantially impair county sewer customers' contractual relationships with the City

Under the Indiana Constitution, the "*first* inquiry in addressing a contract clause claim is 'whether, and to what extent, the state law operated as a substantial impairment of a contractual relationship.'" *Mainstreet Prop. Grp., LLC v. Pontones*, 97 N.E.3d 238, 244 (Ind. Ct. App. 2018) (quoting *Clem*, 582 N.E.2d at 783) (emphasis added). That inquiry is not merely one of many "factors" to consider. City Reply 20. Rather, if there is no substantial impairment of the contractual relationship, courts "need not delve further into [a party's] arguments." *Mainstreet*, 97 N.E.3d at 244.

In determining whether a substantial impairment exists, our Supreme Court has made clear that courts must not only consider a party's expectations but the "larger picture." *Girl Scouts of S. Ill. v. Vincennes Ind. Girls, Inc.*, 988 N.E.2d 250, 256 (Ind. 2013). Although the City faults the State for citing federal cases explaining

what factors are relevant to that larger picture, City Reply 19, our Supreme Court has stated that federal decisions provide "helpful guidance" here, *Clem*, 582 N.E.2d at 783 (discussing *Allied Structural Steel Co. Spoannaus*, 438 U.S. 234 (1978)). Considering "the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights" is thus entirely appropriate. *Sveen v. Melin*, 138 S. Ct. 1815, 1822 (2018) (summarizing the factors considered in *Allied Structural Steel*).

Each of those factors favors the State here. First, the 2019 Act modifies only one aspect of the City's contractual relationship with customers, placing a time limit on waivers while leaving untouched contractual terms related to rates, fees, and other conditions. State Mem. 19–20, 25. The City argues that rates, fees, and other terms are not part of sewer customers' contracts. City Reply 21. That ignores the express terms of the "Individual Customer Contract" and "Commercial Customer Contract" that sewer customers must sign. Each states: "I hereby contract with the City of Bloomington Utilities (CBU) for service and agree to pay CBU for such service in accordance with established rates. I also agree to conform to all CBU Rules, Regulations, and Standards . . . now in force or which may be hereafter be adopted." State Ex. 5, Individual Customer Contract at 2; State Ex. 6; Commercial Customer Contract. So remonstrance waivers constitute only part of the contractual relationship. Whatever their fate, the City will be fully reimbursed for providing sewer service.

The City's rationale for its assertion that waivers nonetheless constitute the "primary" contractual consideration, City Reply 21, is difficult to follow. In its initial

brief, the City argued that waivers were the primary consideration because residents of unincorporated areas use non-sewer services but "do not contribute to the tax base." City Mem. 30. Then, however, the City's own mayor denied that the "main benefit the City seeks to obtain through annexation" is "additional tax revenue." Hamilton Dep. 40:15–17. He admitted that the City provides sewer service to "hundreds" of properties for which the City "do[es] not have waivers." *Id.* at 33:3–25. He had no explanation for why the City waited until 2017 to first propose annexing properties covered by waivers executed as long ago as 1958, foregoing decades of tax revenue from those properties. *Id.* at 65:25–66:2. And he could not name any non-sewer service that the City must provide to non-residents. *See id.* at 61:16–20, 63:4–8.

Now, the City argues that waivers constitute the "primary" consideration because "waiver[s] grant[] access to the sewer system." City Reply 18, 21–22. That is an explanation of why landowners would execute waivers, not why waivers are supposedly more important to the City than receiving payment for sewer service. Waivers, moreover, are not the only prerequisite to obtaining "access to the sewer system." As the City's representative testified, prospective sewer customers must also "sign" a "contract" in which they "agree[] to pay the rates that the City charges" and conform to the Utilities Department's Rules, Regulations and Standards. Kelson Dep. 18:1–20:1; *see* State Ex. 5, Individual Customer Application and Contract; State Ex. 6, Commercial Contract. Landowners cannot "receive service from the City" without agreeing to those terms. Kelson Dep. 18:1–20:1. Thus, by the City's logic, contract

terms requiring payment and compliance with its rules should be considered as important as waivers. And none of those terms have been disturbed.

In modifying one aspect of the City-customer relationship, moreover, the 2019 Act simply sets a 15-year expiration date on waivers. State Mem. 19, 25–26. Cities can still use waivers by initiating an annexation within a reasonable time. In response, the City observes that about "80%" of its waivers are invalid under the 2019 Act. City Reply 22. But that observation does not show that, when the City and sewer customers contracted originally, the City considered no expiration date to be of utmost importance or that it reasonably expected waivers to be perpetually valid. It at most shows that, due to the City's extreme delinquency in acting on many waivers, the City's actions have since made relevant the duration of those waivers.

The City also reiterates arguments about the 2019 Act's "timing," speculating about potential legislative motives. City Reply 23. But the City does not explain how the *statute's* timing has any relevance to the "*contractual* bargain" under consideration. *Sveen*, 138 S. Ct. at 1822 (emphasis added). Nor (once again) does the City explain "how it would be in a different situation if the General Assembly had enacted the 2019 Act two years earlier (*i.e.*, before the 2017 Act and the litigation over it)." State Mem. 33. As the State pointed out previously, the City would still face a situation in which many of its waivers are invalid due to extended disuse. *Id.* At bottom, the City fails to show that the modest limitation the 2019 Act places on waivers' duration significantly impaired the City's overall relationship with sewer customers, who continue to pay agreed-upon rates and be bound by myriad contractual terms.

Second, the 2019 Act's impact on reasonable expectations is modest because the "parties are operating in a heavily regulated" space. *Energy Rsrvs. Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 413 (1983); *see* State Mem. 21–22. Indeed, the City does not deny that state law governs its operation of a sewage works, the terms on which waivers are entered, and every aspect of annexation. *See* State Mem. 21. Nor does the City deny that terms incorporated into its contracts with customers expressly acknowledge that "[n]umerous" state laws govern the City's operation of a municipal sewage works. State Ex. 7, CBU Rules, Regulations and Standards of Service (2008) at vii. That "express[]" recognition demonstrates the City "knew its contractual rights were subject to alteration by state . . . regulation" and that its "reasonable expectations have not been impaired." *Energy Rsrvs.*, 459 U.S. at 416.

The City argues that "wiping out" remonstrance waivers is not a "typical or foreseeable regulatory adjustment." City Reply 23. Again, however, the City overlooks that the 2019 Act essentially sets a 15-year expiration date on waivers. Courts have held that other, similar changes to contracts in heavily regulated industries constitute foreseeable modifications. *See, e.g.*, *Energy Rsrvs.*, 459 U.S. at 415 (upholding a state statute that retroactively capped the extent to which prices could escalate under a "indefinite escalator clause"). And the City's "express[]" recognition that its contractual relationship with sewer customers is subject to state laws confirms that the City "knew its contractual rights were subject to alteration by state . . . regulation" and that its "reasonable expectations have not been impaired." *Id.* at 416.

The City's only other response is to say the foreseeability of regulatory changes was "not dispositive" in *Wencke v. City of Indianapolis*, 429 N.E.2d 295 (Ind. Ct. App. 1981), and *Royer v. USAA Casualty Insurance Co.*, 781 F. Supp. 2d 767 (N.D. Ind. 2011). City Reply 24. As the State pointed out—and the City does not dispute—those decisions failed to consider whether there was a "substantial impairment" of the contractual relationship. State Mem. 28–29. *Wencke*, which predated *Clem*'s adoption of the substantial-impairment test, instead reasoned that the State "cannot exercise its power to change" a contractual relationship with itself to the "detriment" of private citizens. 429 N.E.2d at 298. And *Royer* assumed that *any* "retroactive" contractual modification is impermissible. 781 F. Supp. 2d at 774. As the City concedes, however, courts "must consider" whether there was a "substantial impairment." City Mem. 25.

Third, for waivers executed after July 1, 2003, the City's ability to safeguard its interests cuts against a finding of substantial impairment as well. State Mem. 23. Although the time may have passed for acting on some older waivers, City Reply 22, the City does not deny that timely action can prevent impairment of newer ones.

B. The 2019 Act is necessary for the general welfare and reasonable

The City falters at the second step of the Contract Clause analysis as well. Under this step, even statutes that impose a significant contractual impairment survive if they are "necessary for the general public and reasonable under the circumstances." *Clem*, 582 N.E.2d at 784. As the State explained, the 2019 Act both a "necessary" and "reasonable" measure for protecting landowners' original expectations and preventing unused waivers from clouding title. State Mem. 23–26, 29–31.

1. Contrary to the City's suggestion, City Reply 17, whether a statute survives under this second step does not require identifying some subset of police powers known as the "necessary police power." Rather, that phrase is shorthand for the proposition—which *Clem* borrowed from federal Contract Clause jurisprudence—that "[o]nly those statutes which are necessary for the general public and reasonable under the circumstances will withstand the contract clause." *Clem*, 582 N.E.2d at 784. As *Girl Scouts* explains, "[l]egislation that invades freedom of contract" may be sustained under that standard "if it both relates to the claimed objective and employs means which are both reasonable and reasonably appropriate to secure such objective." 988 N.E.2d at 257 (brackets removed) (quoting *Clem*, 582 N.E.2d at 783).

The City is thus wrong to suggest that protecting landowners' reasonable expectations or retroactively removing clouds on title can never satisfy the state Contract Clause, City Reply 25, as *Girl Scouts* makes particularly clear. In *Girl Scouts*, the court held that a state statute limiting reverters to 30 years was "unconstitutional *as applied*" to the deed at issue. 988 N.E.2d at 258 (emphasis added). But the court refused to hold the statute unconstitutional on its face. Recognizing that the statute could "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," the court stated that a "statutory 30-year cap" on some contractual terms "may well meet" the "'reasonable and reasonably appropriate' standard." *Id.* at 257–58.

The City's suggestion that every Contract Clause case requires mechanical application of a "multi-factor" test, City Reply 19–20, is misplaced for similar reasons.

As both *Girl Scouts* and *Clem* make clear, the standard is whether a statute "both relates to the [State's] claimed objective and employs means which are both reasonable and reasonably appropriate to secure such objective." *Girl Scouts*, 988 N.E.2d at 275 (quoting *Clem*, 582 N.E.2d at 783). Considerations of, say, whether there is a "broad problem" may be relevant in some cases. *Clem*, 582 N.E.2d at 784–85. But neither decision holds that consideration or others is always relevant or of equal weight. In fact, *Girl Scouts* did not discuss the problem's breadth. At bottom, the question is thus whether the 2019 Act "relates to the [State's] claimed objective and employs means which are both reasonable and reasonably appropriate to secure such objective." *Girl Scouts*, 988 N.E.2d at 257 (quoting *Clem*, 582 N.E.2d at 783).

2. There can be no serious question that the 2019 Act relates to state objectives in protecting landowners' reasonable expectations and preventing unused waivers from clouding title. State Mem. 23–26, 29–31. This case illustrates how the 2019 Act addresses those problems. As the City itself recognizes, City Reply 17, it holds waivers executed as back as 1958, which have sat unused for reasons the City cannot explain, State Mem. 7. Yet in that same time, the City, its problems, its priorities, and its regulations have changed "significantly"—so much so that landowners' original expectations about what kind of city they would be joining have been upended. Hamilton Dep. 9:19–10:11; *see* State Mem. 24–25, 29. The 2019 Act reasonably addresses that problem by placing an expiration date on waivers.

The City does not dispute that it has changed "significantly" since many of the waivers at issue were executed decades ago. Hamilton Dep. 9:19–10:11; *see* State

Mem. 24–25, 29. It tepidly observes that, for "three of the five annexation areas," "limits on things like keeping animals, open burning, and discharging firearms should not come as a surprise." City Reply 18. Even for those landowners, however, the City's extended inaction means that they built their lives on different sets of rules. And the City nowhere explains how these landowners could have anticipated other, significant transformations the City has undergone, such as its new focus on "climate change," its "significant" new business regulations, and its new comprehensive new zoning code. Hamilton Dep. 9:19–10:11, 48:15–49:12; *see* State Mem. 24–25, 29. The 2019 Act is necessary to protect landowners' reasonable expectations and prevent waivers from encumbering titles after conditions have materially changed.

The City suggests the General Assembly could have achieved its objective in other ways, such as by imposing a "*prospective* sunset date on waivers." City Reply 25. But the Contract Clause does not require the State to show that it used the only possible means of addressing a problem. The question is whether the chosen means "relates to" the legislature's objective and is "reasonable and reasonably appropriate." *Girl Scouts*, 988 N.E.2d at 257 (quoting *Clem*, 582 N.E.2d at 783). Nor is the City correct that a "prospective" remedy would solve the problem the legislature likely sought to address. A prospective remedy would do nothing to protect the reasonable expectations of landowners stymied through the City's decades of inaction.

Recording cannot protect landowners' reasonable expectations either. *Contra* City Reply 26. Even setting aside the City's admitted failure to timely record dozens of waivers, *see id.* at 18 n.8; State Mem. 7, recording only gives notice of waivers'

existence. Recording does not provide landowners with critical information about "when and under what circumstances" annexations will occur. *Doan v. City of Fort Wayne*, 253 Ind. 131, 252 N.E.2d 415, 417 (1969). The problem here is that landowners agreed to waive their remonstrance rights when the City looked far different than it does now. By placing a time limit on waivers, the 2019 Act ensures that cities do not sit on waivers for 25 or 50 years, exercising them only after a city, its character, and its regulations have changed beyond what landowners could have anticipated when asked to sign. It prevents unused waivers from encumbering titles in perpetuity and protects landowners' reasonable expectations of what they were agreeing to.

The City also objects that the "2019 Act did not address a broad, society-wide problem." City Reply 23. But the City's statement that "Newburgh, Valparaiso, and surely more jurisdictions" are also affected by the 2019 Act, *id.* at 17 n.9, shows that the problem is state-wide. And the City's admission that "more than 80%" of its waivers have sat unused for more than 15 years, *id.* at 17, underscores the problem's depth. Besides, as discussed above, the extent of a problem is only one consideration going to the legislation's overall reasonableness. *See* pp. 18–19, *supra*. By tailoring the 2019 Act to focus on the oldest waivers while allowing cities 15 years to act on them, the legislature adopted a reasonable solution to a widespread problem.

The City emphasizes the purported utility of waivers, arguing waivers help "promote development" and that the City "will no longer . . . even discuss a possible sewer extension." City Reply 26–27. There are multiple problems with the argument. First, it overstates the 2019 Act's impact. The City has continued to extend sewer

service outside its boundaries, resulting in continued development. *See* p. 13, *supra*. Second, the argument again confuses why landowners would agree to waivers with why they are supposedly important to the City. *See* pp. 13–14, *supra*. Third, the state Contract Clause focuses on how a regulation affects existing contractual arrangements—not how a regulation might affect negotiations over "*future* . . . contract[s]." *Clem*, 582 N.E.2d at 784; *see Texaco, Inc. v. Short*, 454 U.S. 516, 531 (1982).

In sum, the 2019 Act represents a necessary and reasonable exercise of the police power to protect landowners' reasonable expectations, prevent cities from abusing waivers, and clear unused title restrictions. The State's objectives, the evidence of the City's undue delay, and the context in which the 2019 Act operates all set this case apart from *Girl Scouts*. City Reply 25–26. *Girl Scouts* held that a statute was "unconstitutional" only "as applied" to a reverter that represented the challenger's "principal interest" in a property. 988 N.E.2d at 258. Here, by contrast, the 2019 Act modifies only one aspect of the City's relationship with sewer customers; it does not affect rates and fees that cover the City's full cost of providing sewer service. The 2019 Act, moreover, operates in areas—utility service and annexations—that are heavily regulated by state law. And the 2019 Act operates in favor of citizens against a state political subdivision, which "has no vested rights" under a contract "from . . . legislative control." *Potthoff*, 44 N.E.2d at 496. The 2019 Act is constitutional.

IV. The Court Should Reject the City's Unsupported—and Now Abandoned—Legal Theories

In all events, the Court should reject the City's unsupported theories that the 2019 Act violates the federal Contract Clause, that it offenses "fairness," and that it

is facially invalid. The City does not even attempt to address the problems with those theories. *See* State Mem. 17–26, 31–34. That silence speaks volumes. To the extent that the Cout does not deem the City's theories abandoned, it should reject them.

CONCLUSION

The Court should deny the City's motion for partial summary judgment, grant the State's motion for partial summary judgment, and enter judgment for the State on Counts I, II, and III of the complaints in these consolidated cases.

October 30, 2023

Respectfully submitted,

THEODORE E. ROKITA
Attorney General of Indiana
Attorney No. 18857-49

/s/ James A. Barta
JAMES A. BARTA
Deputy Solicitor General
Attorney No. 31589-49

MELINDA R. HOLMES
Deputy Attorney General
Attorney No. 36851-79

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
Telephone: (317) 232-0709
Facsimile: (317) 232-7979
James.Barta@atg.in.gov

Counsel for the State of Indiana

CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2023, I electronically filed the foregoing document using the Indiana E-filing System ("IEFS"). I also certify that on October 30, 2023, the foregoing document was served upon the following persons using the IEFS:

Beth Ellen Cate
Corporation Counsel
City of Bloomington
beth.cate@bloomington.in.gov

Andrew M. McNeil
Bose McKinnney & Evans LLP
City of Bloomington
amcneil@boselaw.com

Michael Rouker
City Attorney
City of Bloomington
roukerm@bloomington.in.gov

Stephen C. Unger
Bose McKinnney & Evans LLP
City of Bloomington
sunger@boselaw.com

Larry D. Allen
Assistant City Attorney
City of Bloomington
allenl@bloomington.in.gov

E. Jeff Cockerill
County Attorney
Cathine Smith
jcockerill@co.monroe.in.us

Heather Lacy
Assistant City Attorney
Heather.lacy@bloomington.in.gov

/s/ James A. Barta
James A. Barta
Deputy Solicitor General

Office of the Indiana Attorney General
Indiana Government Center South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204-2770
Telephone: (317) 232-0709
Facsimile: (317) 232-7979
James.Barta@atg.in.gov