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Monroe Circuit Court 6
Monroe County, Indiana

STATE OF INDIANA	)	IN THE MONROE CIRCUIT COURT
	) SS:	
COUNTY OF MONROE	)	CONSOLIDATED CAUSE NO. 53C06-2203-PL-000610

CITY OF BLOOMINGTON,	)
	)
Plaintiff,	)
	)
v.	)
	)
CATHERINE SMITH, in her official capacity as Monroe County Auditor,	)
	)
Defendant,	)
	)
and	)
	)
STATE OF INDIANA,	)
	)
Intervenor.	)

MOTION FOR LEAVE TO FILE SUR REPLY

Plaintiff, the City of Bloomington ("City" or "Bloomington"), by counsel, for its *Motion for Leave to File Sur Reply*, and in support, states as follows:

1. The State raises new arguments in its *Reply in Support of Intervenor's Cross-Motion for Partial Summary Judgment*, claiming that Bloomington is precluded by res judicata and collateral estoppel from challenging the constitutionality of the 2019 Act.

2. Bloomington respectfully requests leave to file a short sur reply brief to address the new arguments raised by the State, a copy of which is attached as **Exhibit A**.

3. The parties' cross motions for summary judgment are set for hearing on February 8, 2024; as such, the Court and the State have ample time before the hearing to consider the arguments set forth in the proposed sur reply.

WHEREFORE, Plaintiff, the City of Bloomington, respectfully requests that the Court enter an order granting its *Motion for Leave to File Sur Reply*, and ordering that the attached **Exhibit A** is deemed admitted as of the date of the publication of the order.

Respectfully submitted,

/s/ Andrew M. McNeil
Stephen C. Unger, Atty. No. 25844-49
Andrew M. McNeil, Atty. No. 19140-49
BOSE McKINNEY & EVANS LLP
111 Monument Circle, Suite 2700
Indianapolis, IN 46204
(317) 684-5000 (Phone)
(317) 684-5173 (Fax)
sunger@boselaw.com
amcneil@boselaw.com

Beth Cate, Attorney No. 21218-49
Larry Allen, Attorney No. 30505-53
City of Bloomington
401 N. Morton St, Ste. 220
Bloomington, IN 47401
(812) 349-3557
beth.cate@bloomington.in.gov
allenl@bloomington.in.gov

Attorneys for City of Bloomington

4685929

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 3rd day of January, 2024, I electronically filed the foregoing with the Clerk of the Court using the Indiana E-Filing System ("IEFS"), and a copy of the foregoing was served upon the follow counsel of record via IEFS:

E. Jeff Cockerill jcockerill@co.monroe.in.us
James A. Barta James.Barta@atg.in.gov
Melinda R. Holmes Melinda.Holmes@atg.in.gov

/s/ Stephen C. Unger
Stephen C. Unger

Exhibit A

STATE OF INDIANA	)	IN THE MONROE CIRCUIT COURT
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	)
Intervenor.	)

SUR REPLY BRIEF IN OPPOSITION OF INTERVENOR'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff, the City of Bloomington ("City" or "Bloomington"), by counsel, hereby submits this *Sur Reply Brief in Opposition of Intervenor's Cross-Motion for Partial Summary Judgment*, and in support, states as follows:

INTRODUCTION

The State raises new arguments in its *Reply in Support of Intervenor's Cross-Motion for Partial Summary Judgment*, claiming that Bloomington is altogether precluded from challenging the constitutionality of the 2019 Act[1] because it voluntarily dismissed two (and only two) pending actions specific to Annexation Area 1A and Annexation Area 1B. However, the City's remaining challenges in this consolidated case were expressly not dismissed by the Court and deal with

[1] Capitalized terms not defined in this Sur Reply refer to their definitions in Bloomington's principal brief.

entirely different annexations areas that were approved by separate ordinances passed by the Bloomington Common Council. Bloomington is not barred, either under claim prelusion or issue preclusion, from asserting constitutional challenges to the 2019 Act from any of the remaining annexation areas at issue in this consolidated case.

Recall how this case reached this point. Bloomington started its annexation of several contiguous urbanized territories in 2017, only to be thwarted by unconstitutional special legislation passed by the Indiana General Assembly and signed by the Governor. *See Holcomb v. City of Bloomington*, 158 N.E.3d 1250 (Ind. 2020). While Bloomington's annexation efforts were unlawfully delayed, the State passed another law targeting annexations, including Bloomington's, when it purported to invalidate contracts through which a municipality agreed to provide sewer service in exchange for a landowner's promise to consent to annexation. *See* HB 1427, codified in relevant part at Ind. Code § 36-4-3-11.7 ("the 2019 Act").

Once Bloomington secured relief from the Indiana Supreme Court in December 2020 in the *Holcomb* litigation, it resumed its annexation efforts in 2021 by adopting the annexation ordinances, which triggered the statutory remonstrance period. Thousands of landowners whose land was subject to annexation waivers remonstrated against the annexation. After the Monroe County auditor accepted those remonstrances under the 2019 Act, only two of Bloomington's seven annexation ordinances survived, and those ordinances were subjected to the remonstrance trial proceedings in the Indiana Code. Absent the 2019 Act, five of the annexations would have passed without a remonstrance trial and two would have been judicially reviewable.

The below table, which was originally included in Bloomington's opening summary judgment memorandum, demonstrates the unambiguous impact of the 2019 Act:

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

The remonstrance petition results of those areas shaded red exceeded the 65% statutory threshold to automatically void an annexation; the petition results of those areas shaded blue are between the 51% and 65% statutory threshold for remonstrators to appeal the annexation through court; and the petition results of those areas shaded green are insufficient to challenge the annexation, which means that the annexation would have already taken effect. *See* Ind. Code § 36-4-3-11.3. As the Auditor's data show, the 2019 Act has materially altered the contractual arrangements for all seven annexation areas.

Bloomington filed its lawsuits in this Court on March 29, 2022, to challenge the constitutionality of the 2019 Act as an unlawful retroactive impairment of contracts. Two weeks earlier, landowners in Annexation Areas 1A and 1B filed their petition for judicial review of the annexation ordinances for those territories. *See Papke, et al., v. Smith, et al.*, 5306-2203-PL-000509 ("Remonstrance Action"). Shortly before the November 2023 trial date in the Remonstrance Action, on September 5, 2023, the trial court granted the remonstrators' motion to stay. In its stay order, the trial court wrote:

> IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the current proceedings are hereby stayed until the lawsuits involving the same parties in this matter filed by the City of Bloomington against the Monroe County Auditor have been fully and finally determined.

The trial court later clarified that the referenced lawsuits were those "lawsuits pending under cause numbers: 5306-2203-PL-000608 and 5306-2203-PL-000609 between the City of Bloomington and the Monroe County Auditor." (Remonstrance Action, Docket Entry dated Sept. 11, 2023.) Cases 608 and 609 related to Annexation Areas 1A and 1B.

This order left Bloomington with a Hobson's choice. It could either dismiss the 608 and 609 cases with prejudice and comply with the requirements to lift the stay in the Remonstrance Action or it could litigate the 608 and 609 cases to a final, non-appealable judgment, which in the *Holcomb* case took nearly four years. With five other cases challenging the Constitutionality of the 2019 Act pending before this Court, Bloomington chose the horse by the door.[2] With the agreement of Counsel for the Defendant, the City moved to voluntarily dismiss the 608 and 609 cases only while retaining and re-consolidate the remaining five cases. And in granting the City's request, the Court explicitly ordered that the "remaining five causes . . . are not dismissed." *Order Granting Motion to Dismiss Causes With Prejudice and To Reconsolidate Remaining Causes* at ¶3. (Sept. 19, 2023) The State now ignores that Order and seeks to capitalize on the City's forced choice through a misapplication of res judicata and collateral estoppel concepts. Its request should be rejected.

ARGUMENT

I. Bloomington is not precluded from asserting a constitutional challenge of the 2019 Act specific to annexation areas unrelated to the voluntarily dismissed cases.

On Reply, the State asserts that by dismissing its two actions specific to Annexation Areas 1A and 1B, and despite the Order maintaining the remining cases, Bloomington is now altogether precluded from challenging the 2019 Act. Res judicata and collateral estoppel exist "to relieve

[2] https://en.wikipedia.org/wiki/Hobson%27s_choice

parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Miller v. Patel*, 212 N.E.3d 639, 646 (Ind. 2023). None of those principles is served through the State's perfunctory argument for immediate dismissal. Indeed, this Court was tasked with resolving the constitutional challenge to the 2019 Act with or without the 608 or the 609 cases on its docket, just as the trial court in the Remonstrance Action is now tasked with resolving the remonstrators' appeal from Bloomington's annexation of Areas 1A and 1B, regardless of whether the 2019 Act is constitutional. By dismissing the 608 and 609 actions (and relatedly notifying the trial court in the Remonstrance Action that it would not be challenging the constitutionality of the 2019 Act in that case), Bloomington surrendered its constitutionality argument to the requirements for resolving the stay entered in the Remonstrance Action. The impact of the dismissal of the 608 and 609 cases is no broader than that. Neither claim preclusion nor issue preclusion bar Bloomington's remaining constitutional challenges.[3]

This is particularly true given that doctrines of preclusion are "less favored against a government agency responsible for administering a body of law that affects the general public[.]" *See Miller Brewing Co. v. Ind. Dep't of State Revenue*, 903 N.E.2d 64, 68 (Ind. 2009). Moreover, preclusion principles are "more narrowly applied against government entities" to avoid interference with the public's interest or the performance of government functions. *Id.* at 69.[4] Here,

[3] Of course, if the 2019 Act did not exist or is unconstitutional, Areas 1A and 1B would already be a part of municipal Bloomington and the Remonstrance Action, at least to those annexation areas, would not exist.

[4] In *Miller Brewing Co.*, the Indiana Supreme Court also explained that "[m]ore recently, federal courts require affirmative misconduct by the government for issue preclusion to apply." *Id.* at 69 (citing *City of New York v. Shalala*, 34 F.3d 1161, 1168 (2d Cir. 1994). There has been no allegation in this case whatsoever that Bloomington has engaged in any kind of misconduct.

Bloomington's annexation efforts clearly affect the public interest and necessarily implicate Bloomington's performance of its government functions. *Keene v. Michigan City*, 210 N.E.2d 52, 53 (Ind. Ct. App. 1965) ("We deem public interest to be involved where a municipality has sought to annex territory.")

Claim preclusion, or res judicata, 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, 446 (Ind. 2023). Underlying claim preclusion, or res judicata, are four requirements that must be satisfied: (1) the former judgment must have been rendered by a court of competent jurisdiction; (2) the former judgment must have been 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 must have been between the parties to the present suit or their privies. *Id.*

The State's res judicata arguments fail because the 608 and 609 cases dealt with entirely different proposed annexation areas than the ones remaining at issue in this consolidated case. This means those annexation areas were authorized by different ordinances concerning completely different parcels of land with entirely different and unique property owners and remonstrators with their own set of remonstrance waivers. For example, Annexation Area 1A, the subject of the 608 case, was authorized by Ordinance No. 17-09. *See* Exhibit H.[5] For Annexation Area 1A, the Monroe County Auditor determined there were 1,449 unique owners in the annexation area with 1,040 unique owners with verified remonstrance petitions (before counting waivers), and with 157 unique owners disqualified due to waivers that the auditor deemed valid (i.e., not including the waivers retroactively deemed void by the 2019 Act). *Id.* Annexation Area 1B (the subject of the

[5] Exhibit references refer to Bloomington's designation of evidence for *Plaintiff's Memorandum in Support of Motion for Partial Summary Judgment*, filed on February 27, 2023.

609 case) was authorized by Ordinance No. 17-10, which area was determined to have 2,080 unique owners in the annexation area with 1226 unique owners with verified remonstrance petitions (before waivers), and 30 unique owners disqualified due to waivers that the auditor determined valid (again, not including waivers retroactively deemed void by the 2019 Act). *Id.*

The remaining annexation areas at issue in this case, including Area 1C (Ordinance 17-11), Area 2 (Ordinance 17-12), Area 3 (Ordinance 17-13), Area 4 (Ordinance 17-14), and Area 5 (Ordinance 17-15), all deal with entirely different parcels of land with different property owners, different remonstrators, different remonstrance waivers, and all annexation areas were authorized by separate ordinances from Annexation Areas 1A and 1B. *See* Exhibit G; Exhibit H. Bloomington agrees it would be precluded from relitigating the constitutionality of the 2019 Act with regard to Ordinances 17-09 and 17-10, because it dismissed 608 and 609 with prejudice. However, those are not the claims pending before this Court. Rather, Bloomington's current claims pending before this Court were not at issue in either the 608 case or the 609 case, and therefore, were not and could not have been determined in those actions, which were concurrently pending at the same time as Bloomington's remaining constitutional challenges. Indeed, the trial court in the Remonstrance Action singled out the 608 and 609 cases as distinct, and this Court similarly ordered that the remaining cases were not dismissed and instead continued under a reconsolidated cause. Bloomington is therefore not barred by claim preclusion from asserting its pending constitutional claims because the matters now in issue were not and could not have been determined in the 608 case or 609 case.

The State also claims that the City's pending claims are foreclosed by issue preclusion. (*See* State's Reply Br., pp. 3-4). "Issue preclusion, or collateral estoppel, bars the subsequent litigation of a fact or issue that was necessarily adjudicated in a former lawsuit if the same fact or

issue is presented in the subsequent lawsuit." *Afolabi v. Atlantic Mortg. & Investment Corp.*, 849 N.E.2d 1170, 1175 (Ind. Ct. App. 2006). "Issue preclusion is less favored against a government agency responsible for administering a body of law that affects the general public[.]" *Miller Brewing Co.*, 903 N.E.2d at 68. Issue preclusion "does not extend to matters that were not expressly adjudicated and can be inferred only by argument." *Afolabi*, 849 N.E.2 at 1175. In deciding whether issue preclusion is appropriate, courts consider: (1) whether the party in the prior action had a full and fair opportunity to litigate the issue and (2) whether it is otherwise unfair to apply collateral estoppel given the facts of the particular case. *Id.* at 1175-1176.

Both factors weigh against issue preclusion and in favor of permitting Bloomington to proceed with its remaining constitutional challenges. As discussed above, Bloomington has not had a fair opportunity to litigate the issue of the 2019 Act's constitutionality regarding Annexation Area 1C, Area 2, Area 3, Area 4, and Area 5, as they were never at issue in the 608 case and 609 case, nor was the substance of the constitutionality of the 2019 Act fully litigated or resolved in the 608 or 609 cases. Additionally, it would otherwise be unfair to apply collateral estoppel given the circumstances underlying this case, where the General Assembly previously adopted unconstitutional special legislation that stalled Bloomington's proposed annexations for ***years***. *See Holcomb v. City of Bloomington*, 158 N.E.3d 1250 (Ind. 2020). Had Bloomington not been unconstitutionally interfered with in 2017, *id*. at 1253-54, it would have completed its annexation prior to 2019 and five of the seven areas would already be annexed by Bloomington without the need for a remonstrance trial. That is, but for the General Assembly's unconstitutional special legislation, Bloomington's annexations would have been adopted before the legislature passed the 2019 Act. *See id.* at 1254.

Finally, Bloomington's pending constitutional claims present substantial constitutional questions that should not be precluded based on contrived technicalities. Cases should be decided on the merits whenever possible, particularly in cases like the present one, which substantial involve questions of great public interest such as those where the health, safety, and general welfare of the public may be affected. *See Costanzi v. Ryan,* 368 N.E.2d 12, 15 (Ind. Ct. App. 1977); *see also Keene v. Michigan City*, 210 N.E.2d 52, 53 (Ind. Ct. App. 1965) ("We deem public interest to be involved where a municipality has sought to annex territory.") Moreover, it would be otherwise unfair to apply preclusive principles under the circumstances. *See Afolabi*, 849 N.E.2 at 1175-1176. Therefore, neither claim preclusion nor issue preclusion preclude Bloomington from proceeding with its pending constitutional challenges to the 2019 Act.

CONCLUSION

For the foregoing reasons, Bloomington is not barred under either claim prelusion or issue preclusion from asserting its pending constitutional challenges of the 2019 Act. Additionally, for the reasons set forth in Bloomington's summary judgment briefings, the undisputed material facts demonstrate that Bloomington is entitled to judgment as a matter of law.

Respectfully submitted,

/s/ Andrew M. McNeil
Stephen C. Unger, Atty. No. 25844-49
Andrew M. McNeil, Atty. No. 19140-49
BOSE McKINNEY & EVANS LLP
111 Monument Circle, Suite 2700
Indianapolis, IN 46204
(317) 684-5000 (Phone)
(317) 684-5173 (Fax)
sunger@boselaw.com
amcneil@boselaw.com

Beth Cate, Attorney No. 21218-49
Larry Allen, Attorney No. 30505-53
City of Bloomington

401 N. Morton St, Ste. 220
Bloomington, IN 47401
(812) 349-3557
beth.cate@bloomington.in.gov
allenl@bloomington.in.gov

Attorneys for City of Bloomington

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The undersigned hereby certifies that on this 3rd day of January, 2024, I electronically filed the foregoing with the Clerk of the Court using the Indiana E-Filing System ("IEFS"), and a copy of the foregoing was served upon the follow counsel of record via IEFS:

E. Jeff Cockerill jcockerill@co.monroe.in.us
James A. Barta James.Barta@atg.in.gov
Melinda R. Holmes Melinda.Holmes@atg.in.gov

/s/ Stephen C. Unger
Stephen C. Unger

4683811