IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
No. 25-ICA-334

FOUNTAIN PLACE, LLC,

***Petitioner*,**

v.

Appeal from Circuit Court of Logan County
Civil Action No. 23-C-106

CITY OF LOGAN DEVELOPMENT AUTHORITY,
CITY OF LOGAN, WEST VIRGINIA,

***Respondents*.**

RESPONDENTS' BRIEF

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STATEMENT OF THE CASE

I. Introduction

Appellant Fountain Place, LLC ("Fountain Place") seeks to have this Court determine that solely as a result of its predecessor participating in annexation in 1997 of property used to develop a mall, Fountain Place is entitled to receive for thirty years a percentage of the general tax revenue of the City of Logan ("Logan") assessed and collected by elected officials for the good of the citizens of Logan, despite the fact Fountain Place has sold off the subject property, openly admits it has no duty to maintain any property in Logan, openly admits that it has no performance obligation of any kind involving the contract it seeks to enforce, and openly admits it has used/intends to use the general revenue from the taxes paid by the citizens of Logan for the private benefit of Fountain Place outside of Logan's city limits. This illegal and unconstitutional divestiture of public funds and taking advantage of the citizens of Logan cannot stand.

The circuit court correctly dismissed Fountain Place's claims seeking enforcement of a 1997 "Development Agreement" ("the Contract") under which the City remitted substantial portions of municipal B&O taxes collected from private businesses operating within the annexed mall property against both Logan and the now-dissolved Logan Development Authority ("LDA"). The circuit court correctly held that the underlying Contract executed in 1997 between Logan, the LDA, and Fountain Place's predecessor was void ab initio because it violated Article X, Section 8 of the West Virginia Constitution, which prohibits municipalities from incurring indebtedness or pledging future revenues without voter approval. The circuit court also correctly held that Logan cannot be held liable for debts or obligations of the LDA based upon the West Virginia Code and that equitable doctrines such as estoppel could not revive a void contract or expand Logan's governmental authority.

Fountain Place now appeals, asking this Court to reinstate an arrangement that, by its very design, pledged future municipal general tax revenues for private benefit outside of the city limits of Logan without voter consent. The circuit court's decision was correct in all aspects and should be affirmed.

II. Statement of Facts

In 1997, Logan, the LDA, and Monterra Development Group, LLC ("Monterra"), the predecessor-in-interest to Fountain Place, executed the Contract related to the annexation and commercial development of property known as Fountain Place Mall. [JA0011.] Under the Contract, Logan annexed the property and agreed to remit 57 percent of all Business and Occupation ("B&O") taxes generated from business activities within the Fountain Place development area to the LDA, which in turn was to distribute those funds to Monterra, then to Fountain Place. [JA0012.] Logan retained 43 percent of B&O tax revenues. [JA0012.]. Although minimized by Fountain Place during this litigation, the Contract also exempted Fountain Place and its predecessor from paying any B&O or other taxes to the City related to the development and construction of the Mall, the receipt of lease payments from businesses operating within the Mall property, or any other business activity of Fountain Place or its predecessor. Also, it not disputed that neither Fountain Place nor or its predecessor, did not pay or contribute any B&O taxes to Logan from the time in which the Mall property was annexed in 1997 to the present.

The stated purpose of the Contract was to promote economic development within Logan through the annexation of the Fountain Place area. [JA0072.] The LDA, a public corporation created pursuant to West Virginia Code Section 7-12-1, *et seq.*, served as the vehicle for implementing Logan's developmental incentives. [JA0490.] The Contract was to remain in effect for twenty years, with an optional renewal term of an additional ten years. [JA0081.] Fountain

Place's counsel stated that Monterra originally wanted a contract term of thirty years, Logan and the LDA refused that request, and the original contract term was twenty years. [JA0488.] Fountain Place, as Monterra's predecessor, renewed the Contract for an additional ten years without any additional consideration. [JA0004.] While the circuit court did not reach the issue of consideration and unconscionability in dismissing Fountain Place's claims against Logan and the LDA, the fact remains that these were briefed, argued, and provide additional basis for upholding dismissal of Fountain Place's claims. [JA0031–JA0042.]

Being unsatisfied with the unlawful taking of twenty years of the citizens of Logan's tax payments and Logan's general tax revenue, Fountain Place elected to utilize a "renewal term," buried in the miscellaneous provisions portion of the Contract. [JA0028.] This ten-year renewal term had no consideration to support it. [JA0030.] Any argument raised by Fountain Place related to its ability to convey a right to annex the area in which Fountain Place Mall is located is legally baseless, as annexation is an exclusive right of cities controlled by the West Virginia Code. W. Va. Code § 8-7-1, *et seq.*

Despite the stated purpose of the Contract, Fountain Place admits that it has sold parcels of the subject property to third parties over the last twenty-six years. [JA0004.] Fountain Place claims it is under no obligation to maintain the property or perform other tasks in exchange for the payment of B&O taxes it demands. [JA0006.] Fountain Place no longer owns the Fountain Place Mall. [JA0432.]

Over time, Logan and the LDA collected and remitted B&O taxes consistent with the Contract. [JA0004.] However, in 2013, the LDA dissolved because it did not have any activity; a dissolution of which Fountain Place was aware. [JA0539.] Despite the dissolution, Logan continued to remit payments directly to Fountain Place for several more years. [JA0004.] In 2021, Logan reviewed the legality of the Contract and determined that the general tax revenue-sharing provision violated, among other things, the West Virginia Constitution, which prohibits municipalities from incurring indebtedness or pledging future revenues without voter approval. [JA0005.] Logan then ceased all payments under the Contract. [JA0005.]

In August 2023, Fountain Place filed suit in the Circuit Court of Logan County against Logan and the LDA (among others), asserting claims for breach of contract and equitable estoppel. [JA0001–0018.] Logan and the LDA moved to dismiss, arguing (1) the Contract was void ab initio under Article X, Section 8 of the West Virginia Constitution [JA0201–0202, 0230–0233]; (2) Logan was statutorily immune from debts or obligations under the LDA pursuant to West Virginia Code Section 7-12-8 [JA0041–0042, 0178, 0199–0201, 0228–0229]; (3) any obligations of the LDA did not transfer to Logan upon dissolution of the LDA pursuant to Code Section 7-12-13 [JA0228–0229]; and (4) the doctrines of estoppel or detrimental reliance could not operate to enforce an unconstitutional contract or any ultra vires act performed in furtherance thereof [JA0204–0205, 0235–0236].

Over multiple pages of their Brief (pages 6–7), Petitioner claims that it was ambushed by constitutional arguments. This is factually incorrect and contradicted by the record. Logan and the LDA raised constitutional issues in their original motion to dismiss by arguing that the Contract improperly bound succeeding governing bodies of Logan. [JA0024.] Furthermore, Logan and the LDA directly raised and cited portions of the West Virginia Constitution in their Reply in support of their motion to dismiss by April 9, 2024. [JA0174–0176.] Petitioner would have this Court believe that constitutional issues were not raised until July. This is clearly false. In addition to exhaustive and extraordinary written briefing, at the very first hearing on the motion to dismiss in June 2024, Logan and the LDA repeatedly made constitutional arguments. [JA0475.] This matter has been thoroughly briefed and argued across multiple hearings. Petitioner was in no way ambushed by the defenses before the Court. There has been robust and lengthy briefing before the circuit court argued by all parties to this appeal. Fountain Place had ample opportunity to brief and argue this issue, including, but not limited to, responding to Logan and LDA's motion to dismiss [JA0125], a first oral argument [JA0468], supplemental briefing specifically on constitutional issues [JA0216], responding to supplemental briefing specifically on constitutional issues [JA0241], a second oral argument [JA0526], and its proposed order addressing the constitutional issues. To the extent Fountain Place suggests it was in any way surprised or ambushed by constitutional arguments, the Appendix demonstrates this is incorrect.

By Order entered July 18, 2025, the circuit court correctly granted the motion to dismiss and dismissed all claims against Logan and the LDA with prejudice. [JA0422–JA0453.] The circuit court found: (1) the Contract's requirement that Logan remit a portion of future B&O tax revenues constituted a pledge of future revenues, creating an unconstitutional municipal indebtedness under Article X, Section 8 [JA0427–0431]; (2) Code Section 7-12-8 expressly provides no indebtedness of a municipal development authority may constitute a debt or charge against the creating municipality [JA0431–0435]; (3) upon the LDA's dissolution, Code Section 7-12-13 transferred only assets—not liabilities—to Logan [JA0431–0435]; (4) the Contract's special allocation fund did not create a segregated special fund that would exempt it from the Constitutional debt limitation [JA0429–0430]; and (5) equitable doctrines such as promissory estoppel and detrimental reliance would not compel a municipality such as Logan to continue payments on an unconstitutional and ultra vires obligation, nor could Logan's past payments revive a contract that was void ab initio [JA0435–0438].

The circuit court therefore concluded that Logan acted lawfully in ceasing payments, as continued performance would violate the West Virginia Constitution and the West Virginia Code. [JA0439.] Fountain Place now appeals that Order, arguing that the circuit court misapplied the Constitution, misconstrued development authority statutes, and failed to give effect to equitable principles.

The record, however, confirms that the circuit court correctly applied West Virginia Constitutional and statutory law, and that dismissal was the only legally permissible outcome.

SUMMARY OF ARGUMENT

The circuit court correctly dismissed Fountain Place's claims because the alleged Contract is void, unenforceable, and contrary to West Virginia law. The Contract purports to obligate Logan and the LDA to remit public tax revenues to a private entity for decades after completion of a development project, without any continuing public obligation or benefit. Such an arrangement exceeds the lawful authority of municipal entities, violates the constitutional prohibition on incurring debt without voter approval, and contravenes the public policy requiring public funds to be used for public purposes.

First, a municipality may act only within the scope of authority granted by law. When a contract is ultra vires, it is void ab initio and cannot be enforced directly or indirectly. *Burgess v. City of Cameron*, 113 W. Va. 127, 132, 166 S.E. 113, 115 (1932); *Martin v. Pugh*, 175 W. Va. 495, 505, 334 S.E.2d 633, 641 (1985) (quoting *County of York v. King's Villa, Inc.*, 226 Va. 447, 452, 309 S.E.2d 332, 335 (1983)). To the extent Logan promised to remit 57% of its future B&O tax revenues, such a promise exceeds its statutory authority and is therefore void.

Second, municipalities cannot be estopped to perform acts beyond their legal power or contrary to law. *Martin v. Pugh*, 175 W. Va. at 503, 334 S.E.2d at 641. Annexation and taxation are core governmental functions, not proprietary endeavors. *McFillan v. Berkeley Cty. Planning Comm'n*, 190 W. Va. 458, 465, 438 S.E.2d 801, 808 (1993). Because Logan acted in a governmental capacity, the doctrine of equitable estoppel does not apply.

Third, public policy requires affirming dismissal. Article X, § 8 of the West Virginia Constitution prohibits municipalities from incurring debt or pledging future revenues without voter approval. The Contract—under Fountain Place's interpretation—already unlawfully diverted millions of public tax dollars to a private for-profit entity providing no ongoing public service. Such a contract not only violates statutory and constitutional mandates but also binds future public officials, depriving them of the discretion necessary to govern. *Rogers v. South Charleston*, 163 W. Va. 285, 293, 256 S.E.2d 557, 562 (1979). A contract that undermines the "business prosperity and economic welfare" of a municipality, W. Va. Code § 7-12-2, is void as contrary to public policy.

For these reasons, the circuit court's dismissal enforces long-established constitutional and statutory limits on municipal authority and preserves the integrity of public funds.

STATEMENT REGARDING ORAL ARGUMENT

Logan and the LDA assert under Rule 20 of the West Virginia Rules of Appellate Procedure that oral argument is appropriate because the issues in this case are of significant materiality and novelty.

ARGUMENT

I. Standard

This Court's review of the circuit court's order is *de novo*. Syl. Pt. 4, in part, *Ewing v. Bd. of Educ. of Cty. of Summers*, 202 W. Va. 228, 503 S.E.2d 541 (1998) ("When a party . . . assigns as error a circuit court's denial of a motion to dismiss, the circuit court's disposition of the motion to dismiss will be reviewed de novo."). "Constitutional challenges relating to a statute are reviewed pursuant to a *de novo* standard of review." *Morris v. Crown Equip, Corp.*, 219 W. Va. 347, 352, 633 S.E.2d 292, 297 (2006).

II. Discussion

A. The circuit court correctly held that the Contract created an unconstitutional municipal debt.

Article X, Section 8 of the West Virginia Constitution prohibits any obligation pledging future municipal revenues without voter approval. As public entities, Logan and the LDA may not exercise powers in excess of those granted by the Legislature.

Pursuant to Dillon's Rule "a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation-not simply convenient, but indispensable; fourth, any fair doubt as to the existence of a power is resolved by the courts against the corporation-against the existence of the power." 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS §§ 237-39 (5th ed. 1911). Dillon's Rule has long been adopted in West Virginia. *Brackman's, Inc. v. City of Huntington*, 126 W. Va. 21, 24, 27 S.E.2d 71, 73 (1943). "Municipalities have no inherent power with regard to the exercise of the functions of their government. Such power depends solely upon grants of power by Acts of the Legislature, and the Legislature may at any time modify, change or withdraw any power so granted by general law in conformance with the provisions of the Constitution, Article VI, Section 39(a)." Syl Pt. 1, *State ex rel. Plymale v. Huntington*, 147 W. Va. 728, 131 S.E.2d 160 (1963).

Article X, § 8 of the West Virginia Constitution provides that "No county, city, school district, or municipal corporation . . . shall hereafter be allowed to become indebted, in any manner, or for any purpose to an amount, including existing indebtedness, in the aggregate, exceeding five per centum of the value of the taxable property therein . . . unless all questions connected with the same, shall have been first submitted to a vote of the people, and have received three fifths of all the votes cast for and against the same." W. Va. Const. Art. X, § 8. This provision serves one of the Constitution's central purposes: to protect taxpayers from being bound to long-term municipal financial obligations without their consent.

Under well-settled precedent, the test for whether an agreement creates "indebtedness" is not the form of the transaction, but its practical effect. If a contract binds a municipality to pledge and divert future general tax revenues or otherwise obligates it beyond the current fiscal year, it falls within the constitutional prohibition: "*Any* attempt of a municipality to obligate itself to pay a debt from indirect taxes to be collected in future years is in violation of Constitution, Article X, Section 8." Syl. Pt. 1, *Warden v. Grafton*, 115 W. Va. 438, 176 S.E. 706 (1934) (emphasis added).[1] "Pledging of the general revenues of the city or any part thereof on the city's promise to pay clearly constitutes a debt." *Id.* 115 W. Va. at 441.

The Contract required Logan to remit 57 percent of all future business-and-occupation ("B&O") tax revenues generated within the Fountain Place development area for up to 30 years. Such a continuing obligation unmistakably pledges future general tax revenues of Logan and constitutes a general obligation debt in violation of West Virginia law.

As the circuit court correctly recognized, *Warden* squarely governs: a city's promise to dedicate tax revenues not yet collected is an unconstitutional debt because it extends beyond the fiscal authority of the sitting council. The form of the obligation—a general tax "revenue-sharing" arrangement rather than a loan—does not alter its effect.

[1] In *Warden*, the city proposed to issue bonds and use the proceeds thereof for the construction of a hospital. *See id.* Because a portion of the bonds were to be repaid on an annual basis by the City from its general tax revenue, not from a lawfully authorized direct levy, the Court found that such a present pledge of future general revenues constituted a public debt in violation of Article X, Section 8.

Fountain Place's argument that the payments were "variable" is unavailing. West Virginia authority treats as indebtedness any enforceable commitment to pay in the future, even when the precise yearly amount depends on receipts. *Spilman v. Parkersburg*, 35 W. Va. 605, 615, 14 S.E. 279, 282 (1891), defines indebtedness broadly to include "every kind of indebtedness" such as obligations payable "in the present or at some future time," whether fixed or periodic. Likewise, the Court in *Council of Charleston v. Hall*, 190 W. Va. 665, 441 S.E.2d 386 (1994), recognized that contingent or long-term commitments must be scrutinized to avoid opening a constitutional loophole for municipalities to escape Article X, § 8 by labeling obligations "contingent." In *Hall*, it was only because the City of Charleston decided whether to buy back improvements, that the agreement did not violate Article X, § 8 of our Constitution. *Id.* 190 W. Va. at 671. Indeed, the parties to the contract in *Hall* deleted provisions *requiring* the City of Charleston to buy back improvements because of judicial reservations about the constitutionality of said requirements because of "the threat of a debt which exceeds constitutional and statutory limits." *Id.* at 670, n.5. The Contract's formulaic percentage merely defines the amount; it does not eliminate the enduring pledge of future municipal revenue while impermissibly binding future elected city officials.

Fountain Place attempts to recast the payments as payable from a "Special Allocation Fund." That characterization fails as a matter of law because the special-fund doctrine applies only where payments are limited to self-liquidating, project-specific revenues (e.g., tolls, rents, or fees), not ordinary municipal taxes. The line of cases the circuit court relied upon accepts special-fund exceptions only where the fund is truly independent of general taxation. In *Brewer v. City of Point Pleasant,* 114 W. Va. 572, 172 S.E.2d 717 (1934), the Supreme Court of Appeals examined a sewer project wherein the bonds contained a "statement on their face that the municipality shall not be obligated to pay the same or the interest thereon except from the special fund provided from the net revenues of the work." *Id.* 114 W. Va. at 576. In *Casto v. Ripley,* 114 W. Va. 668, 173 S.E. 886 (1934), the Supreme Court of Appeals examined a water system financed by bonds to be paid out of a "restricted special fund." *Id.* 114 W. Va. at 670.

Here the B&O tax is an ordinary municipal levy collected into Logan's general revenues; segregating an account by agreement cannot erase the constitutional bar. The result in *County Comm'n v. Cooke*, 197 W. Va. 391, 475 S.E.2d 483 (1996), reinforces that using increased assessed value or ordinary tax levies to secure long-term obligations fails the constitutional test for a "direct annual tax" and special-fund protection. *Id.* at Syl. Pt. 2, 197 W. Va. at 402.

Routing the payments through the LDA does not alter the constitutional analysis. The Contract required Logan's tax receipts to be the source of payments; the LDA was only the conduit. As the circuit court found and as common law instructs, courts look to substance over form—municipalities may not accomplish indirectly what Article X, § 8 forbids directly. Further, the Development Authority statutes (Section 7-12-1, *et seq.*) do not empower an authority to bind municipal taxing power in a way that undermines constitutional debt limits.

Most recently, in 2018, the West Virginia Attorney General has reiterated that continuing, pre-committed annual funding obligations purportedly binding cities or counties that are not funded with a permissible special revenue source and do not provide a city/county with the ability to end the commitment on an annual basis are constitutionally infirm. (Atty. Gen. Op. 060618). In Attorney General Opinion 060618, our Attorney General found that the underlying purpose of Article X, Section 8, is to "protect the fiscal integrity of the State (and City's) by prohibiting creation of any present indebtedness that would obligate subsequent legislatures to make appropriations." 2018 W. Va. AG LEXIS 6, 2018 W. Va. AG LEXIS 6 (quoting *State ex rel. Clarksburg Mun. Bldg Com v. Spelsberg*, 191 W. Va. 553 (1994)). Further, "debt" is created wherever "payment is postponed to future dates" for "services performed or to be performed, including for projects or municipal improvement." *Id.* at *6–7.

In this Opinion, the Attorney General addressed the binding nature of agreements concerning 192 flood dams and channels across West Virginia. *Id.* at *2. The federal Natural Resources Conservation Service worked with local governments to provide the majority of upfront funding for these facilities and local governments agreed to operate these facilities and provide annual, ongoing funding for their upkeep. *Id.* at *1–2. The costs to repair and maintain the facilities grew over time. *Id.* at *2. One of the questions presented to the Attorney General was whether these sponsorship agreements were enforceable against local governments. *Id.* at *3.

As the Attorney General concluded, and even with regard to agreements with a federal agency for the benefit of the public, any agreement that involves predetermined, ongoing obligations, annual funding commitments, with no ability to cancel or alter the amount owed in any given fiscal year at the discretion of future elected bodies, and no designated special revenue source (which cannot be merely general revenue tax funds) from where obligations are paid, is void as an unlawful debt in violation of Article X, Section 8. *Id.* at (finding that unless "…the five-percent debt limit is satisfied and the procedural requirements for debts under this amount (public vote, imposition of a special levy, and maximum thirty-four-year debt term) are followed at the time the contract is made", the agreement would violate Article X, Section 8, and is void and unenforceable.)

Statutes governing municipal powers (e.g., W. Va. Code § 8-12-1(4); § 8-13-5(f)) and the development-authority framework demonstrate that the Legislature has circumscribed long-term commitments of tax revenues and provided limited methods—subject to constitutional requirements—by which municipalities may finance public improvements. When the Legislature intends multi-year obligations to be enforceable it provides specific mechanisms; none are present here. By way of example, Code Section 8-12-1(4) states a municipality has authority "To take, purchase, hold and lease as lessee (*on an annual fiscal year basis* where tax revenues are to be used to make the rental payments required under any such lease, with or without an option to renew such lease each year for another such period)." (Emphasis added).

The Attorney General's analysis (Op. 060618) and the Supreme Court's concern in *Hall* about opening a backdoor to indebtedness underscore the prudence of treating the Contract as void.

Fountain Place's reliance upon foreign case law is at times inapplicable, at times cuts against its own argument, and most importantly, ignores binding precedent and the Constitution of this state. Fountain Place points to *Connors v. Mulvehill*, 679 F. Supp 1071 (N.D. Ala. 1988); *City of Perry v. Johnson*, 106 Okl. 32, 33, 233 P. 679, 680 (1925); *Foshee v. General Telephone Company of the Southeast*, 295 Ala. 70, 322 So.2d 715 (1975); *McCrea v. First National Bank of Austin*, 162 Minn. 455, 203 N.W. 220 (1925); *West Florida Grocery Co. v. Teutonia Fire Insurance Co.*, 74 Fla. 220, 77 So. 209 (1918); *Deputy v. DuPont*, 308 U.S. 488 (1940); and *C.L. Downey Co. v. Commissioner*, 172 F.2d 810 (8th Cir. 1949).

Indeed, many of the cases cited by Fountain Place do not even support its position. In *Mulvehill*, an Alabama memorandum decision, the court held the essence of debt "is that a defendant be obligated to pay the obligee a then knowable sum of money."679 F.Supp at 1078. The Renewal Contract upon which Fountain Place sues sets forth a knowable sum of money.

In *Johnson*, the Oklahoma court held "'indebtedness' applies only to an obligation arising from contracts, express or implied, and this sense it is defined to be a sum of money due by certain and express agreement . . . it is not less an indebtedness that such sum is uncertain." 106 Okl. at 34. The *Johnson* court held sums set by contract, even if the sum is uncertain, are an indebtedness.

Id. In *Foshee*, the Alabama court held "the essence of the cause of action for debt is that facts can be proved which shows the defendant is obligated to pay the complaint a liquidated sum of money." 295 Ala. at 72. Fountain Place claims it can prove facts that Respondents owe it a sum of money; however, Fountain Place cannot prove damages upon which to base this suit.

In *McCrea*, the Minnesota court held "'Indebtedness' means a state of being indebted or a sum owed. A 'debt' is that which is due from one person or another—a liability of one to another." Syl. Pt. 1, 162 Minn. 455. Again, if Fountain Place seeks to argue that Respondents do not owe Fountain Place any sum, then it is admitting it has no cause of action against Respondents. The issue in *McCrea* was whether collateral of $13,000 was a debt held by a bank or by another for whom the collateral was posted; the issue was not whether the $13,000 was a debt at all. *Id.* 162 Minn. at 457.

Teutonia examined a Florida statute which refers to debts due or to become absolutely due without any contingency. 74 Fla. At 227. West Virginia has no such statute, and Teutonia dealt with wage garnishment, not public-private contracting. *Id.* at 228. West Virginia further has a Constitutional prohibition against such debts.

DuPont was a tax opinion. 308 U.S. 488. The Court also held that indebtedness is an obligation, but an obligation is not necessarily an indebtedness under Section 23(b) of the IRC. *Id.* at 497. *Downey*, another tax case out of the Eight Circuit, holds a note and deed of trust "represented an obligation of the petitioner [but] did not represent an 'indebtedness' *within the meaning of the Revenue Act*, because the obligation was contingent upon the failure of the petitioner to pay out in salaries and wages at is factory." *Id.* at 812. Furthermore, in *C.L. Downey*, while analyzing tax law, the Eighth Circuit was quick to point out that "the contingency did not occur, and the obligation was cancelled." *Id.*

Because the Contract binds future B&O tax receipts and thus pledges municipal revenues for decades without voter approval, it constitutes an unconstitutional municipal debt under Article X, § 8. The Contract's variability, accounting labels, or routing through an LDA do not alter that conclusion. The circuit court correctly dismissed Fountain Place's claims, and its judgment should be affirmed.

B. The circuit court correctly held that Logan had no liability for debts held by the LDA.

The circuit court properly held that, independent of Article X, § 8, Logan cannot be held liable for the obligations of the dissolved LDA because West Virginia Code § 7-12-8 expressly provides that: "No indebtedness of any nature of the authority shall constitute an indebtedness of the governing body of the municipality or county commission of the municipality or county in which the commission is intended to operate or any municipality situated therein, or a charge against any property of said county commission, municipalities, or other appointing agencies." The Legislature established a complete firewall between municipalities and the development authorities they create.

The Contract itself reinforces this separation. It required Logan to remit a portion of B&O tax revenues to the LDA, not to Fountain Place. [JA0146.] Nothing in the Contract obligates Logan to make payments directly to Fountain Place. [JA0141–0151.] To the extent Fountain Place argues that the contract should be interpreted to require Logan to make or continue to make payments to Fountain Place, such an obligation is in violation of the West Virginia Constitution and is void and unenforceable.

Section 7-12-8's language is categorical: "The rights of creditors of the authority shall be solely against the authority as a corporate body and shall be satisfied only out of property held by it in its corporate capacity." This statutory protection cannot be waived or nullified by implication or conduct. Fountain Place's argument that Logan "assumed" the LDA's obligations by continuing payments ignores the Legislature's express directive and the stated purpose of the Act—promoting "the economic welfare of the municipality or county, its citizens and its industrial complex," not private profit. W. Va. Code § 7-12-15. Fountain Place's attempt to redirect public revenues for its own gain would invert that purpose.

Logan's temporary continuation of payments after the LDA's dissolution did not create liability.[2] Voluntary payments do not override statutory immunity, nor do they establish estoppel or ratification. As this Court held in *Burgess v. City of Cameron*, "The mere fact that the municipality has received the benefits of the contract … does not make the municipality liable … on the theory of ratification, estoppel, or implied contract." 113 W. Va. 127, 132, 166 S.E. 113, 115 (1932). The *Burgess* Court emphasized an entity contracting with a municipality acts at their own peril because the law exists to protect the taxpaying public over all others. *Id*.

The circuit court also correctly applied West Virginia Code § 7-12-13, which governs dissolution of a development authority. That statute provides that upon a development authority's dissolution "all of its assets and property shall revert to and become the property of the county or municipality." The Legislature specified *assets and property*, not debts or liabilities. By contrast, Section 7-12-8 explicitly addresses indebtedness and forbids municipal liability. Reading Section 7-12-13 to include obligations would contradict Section 7-12-8 and nullify its protective purpose.

The two provisions operate in harmony: Section 7-12-8 insulates municipalities from an authority's debts during its existence, and Section 7-12-13 transfers only its remaining assets at

[2] Logan continued making payments in part due to the then attorney for Fountain Place providing written notice of the renewal term of the Contract and a mistaken belief by Logan officials that Logan was legally required to continue making payments to Fountain Place from Logan's general tax revenue. [JA0004.] Mr. Partain also provided legal advice to Logan officials during this time period, and Logan continued to comply with payments based on the letter provided by Mr. Partain. [JA0439; JA0537.]

dissolution. Fountain Place's argument that Logan took the LDA's liabilities conflates ownership of assets with assumption of debts: an implication the statute does not permit; and which these two Code Section, read *in pari materia*, expressly disallow. W. Va. Code §§ 7-12-8 & 7-12-13. As the circuit court correctly pointed out during oral argument, assets and property, *not liabilities*, pass to a municipality upon dissolution of an economic development authority. [JA0535.]

As further explained in a separate 2018 Attorney General Opinion, economic development authorities created by a municipality may only serve to promote and advance business prosperity and economic welfare of the jurisdiction in which they are created. *See* 2018 W. Va. AG LEXIS 8 (July 31, 2018). Here, Fountain Place readily admits that it is under no obligation to maintain the property or perform tasks in exchange for Logan's taxpayers' money [JA0006] and also admits that it has used, and intends to use, this stream of Logan's taxpayers' revenue to "finance development projects and other business endeavors *elsewhere*" [JA0004]. Fountain Place admits that it is divesting Logan of money for its own economic prosperity without benefit to Logan or its citizens, making the Contract illegal.

Finally, Fountain Place's "successor liability" theory asks the judiciary to rewrite this clear statutory scheme. Both Article X, § 8 of our Constitution and Chapters 7 and 8 of our Code reflect the Legislature's exclusive authority to define the fiscal exposure of local governments. Imposing liability by judicial invention would subvert that design and discourage the creation of development authorities statewide. The circuit court properly rejected that argument and applied the statute's plain text.

C. Fountain Place's Due Process claims fail because no vested rights exist in a void contract.

Fountain Place's due-process and "vested rights" claims fail at the outset because the Contract—being unconstitutional and ultra vires—was void ab initio and created no enforceable property interest. West Virginia law has long held that a municipality's contract made without legal authority is void and cannot be validated by either ratification, estoppel, or performance. *State ex rel South Charleston v. Partlow*, 133 W. Va. 139, 170, 55 S.E.2d 401, 416 (1949); *Herald v Board of Educ.*, 65 W. Va. 765, 772, 65 S.E. 102, 105 (1909). That rule applies squarely where, as here, a municipality attempts to pledge future revenues in violation of Article X, § 8.

The circuit court correctly found that the Contract purported to pledge future B&O tax receipts, rendering it an unconstitutional debt from inception. Because the Contract never had legal existence, Fountain Place acquired no legitimate claim of entitlement to future payments. A void contract cannot create property rights or expectations that due process would protect.

Fountain Place's reliance on *Wampler Foods, Inc. v. Workers' Comp. Div.*, 216 W. Va. 129, 602 S.E.2d 805 (2004), and *State ex rel. Blankenship v. Richardson*, 196 W. Va. 726, 474 S.E.2d 906 (1996), is misplaced. Those cases concerned retroactive divestiture of statutory workers' compensation benefits, not Constitutional municipal law. Even in that context, the Supreme Court of Appeals held that a "vested right must be something more than a mere expectation based upon an anticipated continuance of existing law." *Wampler*, 216 W. Va. at 145 (internal citations and quotations omitted). To qualify as a vested right, the individual must have a legitimate claim of entitlement under existing rules or understandings. *Id.* Fountain Place has none—its claim rests solely on an unconstitutional agreement that pledged future payments of general revenue.

More directly, *State ex rel. Tuck v. Cole*, holds that a property interest requires "more than a unilateral expectation"; it must stem from a legitimate entitlement under law. 182 W. Va. 178, 180, 386 S.E.2d 835, 837 (1989), quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972). Where the government lacks authority to make a promise, no such entitlement exists. Fountain Place's alleged "property interest" would invert the purpose of Article X, § 8 by binding taxpayers to illegal debts the Constitution was designed to prevent.

As the Supreme Court of Appeals has repeatedly held, state actors are "not bound by the legally unauthorized acts of its officers and all persons must take note of the legal limitations upon their power and authority." *Martin v. Pugh*, 175 W. Va. 495, 504, 334 S.E.2d 633, 642 (1985); Syl. Pt. 1, *W. Va. Pub. Emps. Ins. Bd. v. Blue Cross Hosp. Serv.*, 174 W. Va. 605, 328 S.E.2d 356 (1985); *Cunningham v. County Court of Wood County,* 148 W. Va. 303, 310, 134 S.E.2d 725, 729 (1964).

The same rule prevails elsewhere; due Process claims arising from the termination of void or illegal contracts are routinely rejected. "An ultra vires contract is wholly void and no recovery may be had against the municipality thereon." *Williams v. City of Fargo*, 63 N.D. 183, 203, 247 N.W. 46, 53 (1933); see also *City of Baldwin v. Woodard & Curran, Inc.*, 293 Ga. 19, 26, 743 S.E.2d 381, 387 (2013); *Genesis Health Club, Inc. v. City of Wichita*, 285 Kan. 1021, 1043, 181 P.3d 549, 563-64 (2008); *Richard L. Deal & Assocs., Inc. v. Commonwealth*, 224 Va. 618, 299 S.E.2d 346 (1983). The rationale is simple: one cannot be deprived of property one never lawfully possessed.

Accordingly, Logan's cessation of payments did not "deprive" Fountain Place of property—it merely ceased an unconstitutional practice. Due process does not compel a municipality to continue violating the Constitution. The circuit court correctly recognized that terminating payments under a void contract was an act of legal compliance, not deprivation.

In sum, the Contract's invalidity forecloses any claim of vested rights or property interest. Fountain Place's due-process theories rest on a legal nullity, and the circuit court's dismissal of those claims should be affirmed.

D. Logan's continuation of payments does not create estoppel or ratification.

Fountain Place's reliance on equitable estoppel collapses under well-settled constitutional and municipal law. Estoppel cannot be invoked to enforce a contract that a public body lacked legal authority to make. When a municipal action is ultra vires—beyond the scope of lawful power—or void ab initio under the Constitution, no amount of reliance, performance, or perceived fairness can give it legal life.

The circuit court correctly held that the Contract violated Article X, § 8 of the West Virginia Constitution because it pledged future municipal revenues without voter approval. That Constitutional provision is an express limitation on municipal power, not a mere procedural rule. A contract made in violation of Article X, § 8 is void ab initio, not merely voidable, and thus legally nonexistent from its inception. Estoppel cannot make valid what the Constitution forbids.

Logan's payments during the Initial Term and the early Renewal Term were therefore ultra vires expenditures—mistaken acts of law, not admissions of liability. Once the constitutional defect was recognized, Logan's duty was not to persist in illegality but to correct it. (See e.g., footnote 2). Continuing payments under a void contract would itself have been unconstitutional. The circuit court rightly treated Logan's cessation of payments as a lawful correction, not as bad faith or repudiation.

West Virginia law has long established that municipalities "have only the powers granted to [them] by the legislature, and any such power it possesses must be expressly granted or necessarily or fairly implied or essential and indispensable. If any such reasonable doubt exists as to whether a municipal corporation has a power, that power must be denied." Syl. Pt. 2, *State ex rel. City of Charleston v. Hutchinson*, 154 W. Va. 585, 176 S.E.2d 691 (1970). Nowhere in the West Virginia Code exists authority for a municipality to assume or guarantee the debts of a separate legal entity such as a development authority. To the contrary, the Legislature has explicitly prohibited such liability: "No municipality shall be liable for the debts or obligations of a development authority." W. Va. Code § 7-12-8.

That statutory command forecloses any argument that Logan could "step into the shoes" of the LDA. Even if city officials subjectively intended to assume those obligations, or even if Logan continued to make payments for years, such conduct cannot create authority where none exists. Municipal power cannot arise by implication, ratification, or course of dealing.

This rule prevents precisely what Fountain Place now seeks: transforming an ultra vires course of performance into a lawful obligation. Were the Court to accept that position, every statutory and constitutional limitation on municipal borrowing could be evaded simply through continued payment—rendering Article X, § 8 of our Constitution and Code Section 7-12-8 meaningless.

Fountain Place's reliance on Logan's conduct amounts to an attempt to use estoppel to enlarge governmental power—a result this Court has consistently rejected. Estoppel operates only within the bounds of existing authority; it cannot create new powers or validate unconstitutional acts. See *Martinsburg v. Miles*, 95 W. Va. 391, 395, 121 S.E. 285, 286 (1924) (holding that a city's ultra vires act does not lead to any validation). Likewise, in *State ex rel. South Charleston v. Partlow*, 133 W. Va. 139, 169, 55 S.E.2d 401, 416 (1949), the Court emphasized that "no rights or interest, cognizable or enforceable, at law or in equity, arise, or can arise, in favor of the board against the town, from the honest but *ultra vires* and invalid acts of both."

Earlier, the Supreme Court in *Burgess v. City of Cameron* confirmed that a municipality cannot be bound by estoppel even when it receives the benefit of an unlawful contract: "The mere fact that the municipality has received the benefits of the contract which has been performed by the other party, does not make the municipality liable, either on the theory of ratification, estoppel, or implied contract." 113 W. Va. 127, 132, 166 S.E. 113, 115 (1932). In *Burgess*, a contractor completed resurfacing and was paid for a portion of the work. 113 W. Va. at 128. The contractor sought payment for the balance of his invoice. *Id.* While the city had paid a portion of the contract, the contractor was barred from recovering the remainder of the contract because the city had not complied with city charter requirements requiring advertising for bids and reading the authorization for work at two consecutive council meetings. *Id.* at 128–29. The contractor argued that the city had continued to use the street, had paid a part of the contract price, had received benefits of the work, and had ratified the contract, thereby estopping the city from denying liability for unpaid balances. *Id.* at 129. "One contracting, as in the case at bar, with a municipality is charged with a knowledge of the limitations imposed on it by a charter." *Id.* at 132. The fact that the contractor fully complied with the contract and substantial benefits were conferred upon the city did not alter the rule that a municipality may not be held liable through theories of ratification, estoppel, or implied contract. *Id.* at 132–33.

Those precedents control here. A private party's reliance cannot transform an unconstitutional act into a lawful municipal obligation. Logan's cessation of payments was not a breach of duty—it was a required act of constitutional compliance. Once Logan recognized that the Contract violated both Article X, § 8 and Section 7-12-8, it was legally obligated to stop making payments.

Fountain Place's claim of inequity therefore fails as a matter of law. The greater inequity would be to compel taxpayers to fund an unconstitutional promise indefinitely. The debt limitation in Article X, § 8 exists to prevent municipalities from burdening future taxpayers with unapproved obligations. Upholding that limitation reflects fidelity to constitutional governance, not unfairness. Upholding this limitation is about protecting the public. These are public taxpayer dollars that

Fountain Place seeks to continue to divert for its own private use and benefit. The citizens of Logan elect officials. The citizens of Logan cannot be held hostage by Fountain Place, or by the altravirus actions of prior elected officials. Fountain Place seeks to eliminate the entire purpose of electing officials to represent the will of the people by seeking to bind the citizens of Logan with the decisions of city officials made almost three decades ago. To hold otherwise would be to end the entire point of elections as future elected officials would have no flexibility. This public trust underlies the basis of requiring debt expenditures to be approved on a fiscal year basis.

Finally, affirming the circuit court's decision protects the integrity of public finance. Were municipalities punished for ceasing unconstitutional payments, officials would face perverse incentives to continue unlawful spending rather than correct it. The circuit court's ruling thus vindicates both the letter and the spirit of West Virginia's constitutional debt restraints.

In sum, Logan had no authority—statutory or constitutional—to assume the LDA's obligations under the Contract. Its officials' actions could not enlarge that power, and Fountain Place cannot invoke estoppel to achieve what the Constitution and the Legislature expressly forbid. The circuit court's rejection of Fountain Place's estoppel theory should therefore be affirmed.

E. Logan acted in a governmental, not proprietary, capacity.

The doctrine of equitable estoppel has no application where a municipality acts in its governmental rather than proprietary capacity. Decisions involving annexation, taxation, or the allocation of public revenues are quintessential governmental functions—expressions of municipal sovereignty that cannot give rise to estoppel or private contractual liability.

West Virginia law is explicit on this point. In *Martin v. Pugh*, the Supreme Court of Appeals held, "municipality acting in a governmental, rather than a proprietary, capacity is not subject to the law of equitable estoppel and that, therefore, estoppel cannot be based on unauthorized acts of municipal authorities acting in a governmental capacity." 175 W. Va. 495, 503, 334 S.E.2d 633, 641 (1985). The Court explained that to allow estoppel "on the basis of mistake or ill advised action by a former municipal authority would hinder and hamper governmental functions; and may be contrary to the public interest." *Id.* 175 W. Va. at 504 (internal quotations and citations omitted)

The same principle was echoed in *County of York v. King's Villa, Inc.*, where the Supreme Court of Virginia—quoted approvingly in *Pugh*—held that when "a contract executed by an agent of the government is *ultra vires* it is void *ab initio* and of no legal effect; thus no performance by either party thereto can give the unlawful contract validity or serve as the basis of any right of action upon it and the doctrine of estoppel has no application." 226 Va. 447, 452, 309 S.E.2d 332, 335 (1983); *Pugh*, 175 W. Va. at 505.

To determine whether a city acts in a governmental or proprietary capacity, the "basic test" is whether the act "is for the common benefit of the public or is for the special benefit or profit of the [city]." *McFillan v. Berkeley Cnty. Planning Comm'n*, 190 W. Va. 458, 465, 438 S.E.2d 801, 808 (1993); *see also Shaffer v. Monongalia Gen. Hosp.*, 135 W. Va. 163, 169–70, 62 S.E.2d 795, 798 (1950).

Applying that test, Logan's annexation of the Fountain Place property and its collection of B&O taxes fall squarely within the sphere of governmental authority. Annexation is a statutory process that determines territorial jurisdiction. See W. Va. Code §§ 8-6-1 *et seq*. Likewise, the imposition and collection of B&O taxes are exercises of Logan's sovereign taxing power. These are not commercial or profit-seeking activities; they exist solely to serve the public at large.

Nor did Logan engage in a proprietary enterprise akin to those recognized in *Ashworth v. Clarksburg*, 118 W. Va. 476, 190 S.E. 763 (1937) (city as park proprietor), or *Ward v. Cty. Court*, 141 W. Va. 730, 93 S.E.2d 44 (1956) (county operating a lake). Logan derived no profit or rent from the Fountain Place development. Its objectives—expanding municipal boundaries, improving infrastructure, and encouraging economic development—served collective, not private, ends, while engaged in conduct only the government can perform: taxation and annexation.

Because Logan acted in a governmental capacity, its conduct cannot give rise to estoppel. As *Burgess* and *Pugh* make clear, even full performance and receipt of benefits cannot validate an unauthorized contract when a municipality acts beyond its lawful power. To hold otherwise would expose public finances to private claims based on inherently public decisions, undermining both Article X, § 8 and the statutory framework governing municipal powers.

In sum, Logan's actions in annexation, taxation, and economic development were undertaken for the common benefit of the public and within the governmental sphere. Under settled law, municipalities are not subject to equitable estoppel for acts performed in that capacity. The circuit court correctly recognized this principle in rejecting Fountain Place's estoppel claim.

F. Established public policy mandates affirming the circuit court.

Affirmance of the circuit court's dismissal is necessary to preserve the constitutional and statutory safeguards that prevent municipalities from incurring unlawful debt. Article X, § 8 of the West Virginia Constitution reflects a deliberate policy choice that municipal indebtedness must be approved by voters and supported by specific revenue sources—not disguised through "rebate" or "revenue-sharing" schemes pledging future tax receipts. Upholding the circuit court's ruling enforces that principle and prevents the erosion of public oversight.

Fountain Place admits that it has no ongoing obligations under the Contract, has not maintained the Fountain Place property, and has sold portions of it. (Compl. ¶¶ 24–25, 32.) Moreover, Fountain Place is unambiguous in its position that the only consideration required to trigger payment for 30 years of 57 percent of the general B&O tax revenue collected by Logan involving Mall property is the agreement in 1997 by Fountain Places predecessor to participate in/not object to annexation of the Mall property. Fountain Place thus seeks to continue receiving more than half of the B&O tax revenue generated at the site while providing no services or benefits of any kind to Logan or its taxpayers. This is the opposite of promoting the "business prosperity and economic welfare of the municipality" envisioned by Code Section 7-12-2. Fountain Place's position would result in the continuation of the unlawful divestiture of Logan's general tax revenue collected for the benefit of the citizens of Logan so that Fountain Place can continue to use that "stream of revenue" for its personal gain and for private use outside of Logan's boundaries for the benefit of Fountain Place.

Fountain Place's arguments further seek to end the public trust held in elected officials. Nearly three decades ago when elected officials entered into the Contract, the will of the people and of its elected officials was as it was at that point in time. Since that time, new elections have occurred and new city officials have been appointed. One of the fundamental purposes of requiring municipal debts to be approved on an annual fiscal year basis is that the will of the people and the corresponding acts of its elected officials may change. To allow Fountain Place to continue to divest the citizens of Logan of their tax dollars while Fountain Place utilizes their public money on other projects in other jurisdictions would erode any public trust in elected officials, who would be left powerless to change what previous citizens and elected officials agreed upon.

Fountain Place's public-policy argument ignores the Constitutional and statutory frameworks designed to regulate long-term municipal financing. As the circuit court correctly recognized, such public-private funding arrangements must occur through lawful bonding mechanisms subject to voter approval—not through contractual promises of continuing tax rebates. The West Virginia Municipal Bond Commission exists precisely to ensure such public accountability.

Even under Fountain Place's own allegations, the Contract is substantively unconscionable. Fountain Place contends that Logan must continue paying 57 percent of all B&O taxes for up to thirty years after completion of the mall, despite Fountain Place's having no continuing obligations. Such an arrangement is "one-sided" and imposes "overly harsh effect[s] on the disadvantaged party," rendering it substantively unconscionable under *Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250 (2011) (overruled on other grounds related to arbitration agreements) (quoting *Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 997 (9th Cir. 2010)); *State ex rel. Richmond Am. Homes of W. Va., Inc. v. Sanders*, 228 W. Va. 125, 137, 717 S.E.2d 909, 921 (2011). Logan's funds—taxpayer dollars—would continue to flow to a private entity for decades, long after the public purpose had ended.

Public policy also forbids a municipality from binding future officials in ways that deprive them of discretion over public revenues. Under *Rogers v. South Charleston*, 163 W. Va. 285, 293, 256 S.E.2d 557, 562 (1979) (quoting *Plant Food Co. v. City of Charlotte*, 214 N.C. 518, 520, 199 S.E. 712, 714 (1938)), contracts are invalid when they remove a "discretion which public policy demands should be left unimpaired." Fountain Place's reading of the Contract —requiring payment of 57 percent of B&O taxes for up to thirty years—would strip successive elected officials of the discretion to allocate millions in public revenue for the public good.

That deprivation is "injurious to the interests of the public" and contravenes an "established interest of society." *Atl. Diving Supply, Inc. v. Basnight*, 2022 U.S. Dist. LEXIS 186020, at *18 n.8 (E.D. Va. Sept. 21, 2022) (quoting *Hartford Fire Ins. Co. v. Chicago, M & St. P. Ry. Co.*, 175 U.S. 91, 106 (1899)). Tax revenues exist "for the purpose of raising revenue for a general governmental purpose." *Wetzel Cty. Solid Waste Auth. v. West Virginia Div. of Natural Resources*, 195 W. Va. 1, 6, 462 S.E.2d 349, 354 (1995) (quoting *Radio Common Carriers v. State*, 158 Misc.2d 695, 601

N.Y.S. 2d 513, 515 (N.Y. Sup. Ct. 1993)). Diverting a majority of those revenues to a private entity that performs no public function undermines that core governmental purpose.

The Legislature has expressly stated that development authorities must act to "promote, develop and advance the business prosperity and economic welfare" of their municipalities. W. Va. Code § 7-12-2. A contractual term that diverts millions of dollars of public tax revenue to a private entity with no public duties hinders and prohibits that Legislative purpose and is therefore void as contrary to public policy.

Ultimately, the Contract is in violation of the Constitution, statutory law, and fundamental public policy. It unlawfully diverts public funds for private use, binds future officials, and frustrates the public's right to have tax revenues used for collective benefit. Courts cannot rewrite constitutional fiscal limits "in the name of fairness." The proper remedy for any perceived inequity lies with the Legislature, not the judiciary. Upholding the circuit court's dismissal preserves the separation of powers and affirms that equitable hardship cannot override constitutional command.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court affirm the circuit court's order dismissing Fountain Place's complaint in its entirety and upholding the constitutional and statutory limitations on municipal indebtedness.

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
No. 25-ICA-334

FOUNTAIN PLACE, LLC,

***Petitioner*,**

Appeal from Circuit Court of Logan County
v. Civil Action No. 23-C-106

CITY OF LOGAN DEVELOPMENT AUTHORITY,
CITY OF LOGAN, WEST VIRGINIA,

***Respondents*.**

CERTIFICATE OF SERVICE

The below listed counsel does hereby certify that on January 12, 2026, a true and exact copy of ***Respondents' Brief*** was served upon counsel of record electronically via File and Serve Express to the following counsel of record:

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