APPENDIX TABLE OF CONTENTS

ORDER OF THE SUPREME COURT OF ALABAMA IN BRENDA DICKERSON CASE (OCTOBER 13, 2017)

IN THE SUPREME COURT OF ALABAMA

BRENDA DICKERSON ET AL.,

v.

WILLIAM BELL, in His Official Capacity as the Mayor of Birmingham, ET AL.,

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No. 1160366
(Appeal from Jefferson Circuit Court: CV-16-902336)

Before: SELLERS, J., STUART, C.J., and PARKER, SHAW, and WISE, JJ.

IT IS ORDERED that the above-styled case is dismissed.

Stuart, C.J., and Parker, Shaw, and Wise, JJ., Concur

/s/ Julia Jordan Weller
Clerk, Supreme Court of Alabama

ORDER OF THE SUPREME COURT OF ALABAMA IN VALERIE ABBOTT CASE (OCTOBER 13, 2017)

THE SUPREME COURT
STATE OF ALABAMA—JUDICIAL DEPARTMENT

VALERIE ABBOTT,
In Her Official Capacity as Council Member
of the Birmingham City Council, ET AL.,

v.

WILLIAM BELL, In Her Official Capacity as
Mayor of the Birmingham, ET AL.

No. 1160360
(Appeal from Jefferson Circuit Court: CV-16-902336)

Before: SELLERS, J., STUART, C.J., and
PARKER, SHAW, and WISE, J.J.

SELLERS, Justice.

AFFIRMED. NO OPINION.

See Rule 53(a)(1) and (a)(2)(F), Ala. R. App. P.

Stuart, C.J., and Parker, Shaw, and Wise, J.J., Concur.

ORDER OF THE CIRCUIT COURT OF JEFFERSON COUNTY (JANUARY 26, 2017)

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
BIRMINGHAM DIVISION

WATER WORKS BOARD OF THE CITY OF BIRMINGHAM, JONATHAN AUSTIN CITY COUNCIL MEMBERS, STEVEN HOYT BIRMINGHAM CITY COUNCIL, SHELIA TYSON BIRMINGHAM CITY COUNCIL, ET AL.,

Plaintiffs,

v.

CITY OF BIRMINGHAM, ALABAMA, WILLIAM A. BELL, SR., BIRMINGHAM CITY COUNCIL, JEFFERSON COUNTY MAYORS ASSOCIATION, ET AL.,

Defendants.

Case No: CV-2016-902336.00

Before: Robert S. VANCE, Circuit Judge.

Pending is Plaintiff's Motion to Alter, Amend or Vacate Judgment and for Interim Stay of Effect of Order of December 19, 2016 (hereafter "Rule 59 motion"), filed by the Water Works Board of the City of Birmingham. As recognized in the Order of January

17, 2017, the newly-added, intervening plaintiffs and those members of the Birmingham City Council who were re-aligned as plaintiffs have joined in, adopted and incorporated this Rule 59 motion.

The court recognizes that the Water Works Board of the City of Birmingham has subsequently moved to withdraw its Rule 59 motion. The motion to withdraw is granted, and the court does not regard the BWWB as so moving any longer.

Adjudication of the Rule 59 motion is needed, however, given that the other plaintiffs have joined in and adopted the motion. Accordingly, the Plaintiff's Motion to Alter, Amend or Vacate Judgment and for Interim Stay of Effect of Order of December 19, 2016, is DENIED. The court declines to amend or vacate the summary judgment previously entered herein, and further declines to stay the effect of that judgment.

The court declines to address other pending motions, leaving such matters for more proper resolution in the context of any appeal that may be filed herein.

DONE this 26th day of January, 2017.

/s/ Robert S. Vance
Circuit Judge

SUMMARY JUDGMENT OF THE CIRCUIT COURT OF JEFFERSON COUNTY (DECEMBER 19, 2016)

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
BIRMINGHAM DIVISION

WATER WORKS BOARD OF THE
CITY OF BIRMINGHAM,

Plaintiff,

v.

CITY OF BIRMINGHAM, ALABAMA,
WILLIAM A. BELL, SR., BIRMINGHAM CITY COUNCIL, JEFFERSON COUNTY MAYORS ASSOCIATION, ET AL.,

Defendants.

Case No. CV-2016-902336.00

Before: Robert S. VANCE, Circuit Judge.

This matter is before the court on cross motions for summary judgment, filed by the plaintiff, The Water Works Board of the City of Birmingham (hereafter "BWWB"), and by several defendants. In filing these motions, the parties agree that the material facts are not in dispute. The issues raised are purely legal in nature and require this court to determine whether recent legislation runs afoul of the Alabama Constitution.

The plaintiff's Amended Complaint for Declaratory Judgment and Injunctive Relief, filed on October 3, 2016, frames the dispute as follows:

> This is a suit in equity by Plaintiff, seeking a declaratory judgment that Act No. 2015-164 (which was introduced and passed in the 2015 Regular Session of the Alabama Legislature as SB89) (the "2015 Act"), and Act No. 2016-276 (which was introduced and passed in the 2016 Regular Session of the Alabama Legislature as HB399) (the "2016 Act") . . . violate Sections 106, 104, 110, 22, and 95 of the Alabama Constitution of 1901; and Article I, Section 10, Clause 1 of the United States Constitution. The Acts, which purport to reorganize the structure of the Board of the BWWB, are invalid and void for a number of constitutional deficits, any one of which would be fatal. In addition to declaratory relief, Plaintiff seeks a preliminary and permanent injunction, barring enforcement of the Acts in any form.

(Amended Complaint, at ¶ 1).

Before turning to these issues, one procedural point must be made explicit. The plaintiff duly provided notice of this action, which challenges state legislation, to the Office of the Alabama Attorney General. For whatever reason, the Attorney General's office has remained oddly silent, neither appearing to defend the legislation nor filing a waiver of further service of pleadings. In any event, the court determines that the plaintiff has done all it is obliged to do in this regard.

Findings of Fact

As mentioned above, the material facts are undisputed. They are as follows:

BWWB was incorporated in 1950 by several citizens of the City of Birmingham, Alabama under the predecessor laws of Ala. Code §§ 11-50-230, *et seq.*, for the purpose of operating a water system. In accordance with the law, the members of the BWWB Board were selected by the Birmingham City Commission, which was at that time the governing body of the City of Birmingham.

At several times since 1950, the city of Birmingham has transferred its water infrastructure assets to the BWWB. In 1994, for example, the City of Birmingham conveyed to BWWB assets that the City previously acquired from the Industrial Water Works Board of the City of Birmingham. The instrument evidencing this conveyance, entitled Deed, Bill of Sale, and Assignment, is dated January 24, 1994.

In 1999, the City of Birmingham and the BWWB agreed to approve an Amended and Restated Articles of Incorporation, under which the City of Birmingham enjoyed the right to appoint all five members of the BWWB Board, in accordance with Ala. Code § 11-50-234(a). Specifically, under Section 6.02 of the Amended and Restated Articles of Incorporation, "[t]he directors of the board shall be elected by the governing body of the City [of Birmingham] and shall consist of five members."

Act No. 2015-164 was introduced and passed in the 2015 Regular Session of the Alabama Legislature as S.B. 89. Before its introduction, no notice regarding the legislation was published in any newspaper of general circulation in any of the counties served by the BWWB, and no evidence of publication of notice was placed into the legislative journals. The 2015 Act would, *inter alia*, re-organize the Board of the BWWB by expanding the number of directors, with additional appointments to be made by political bodies other than "the governing body of the City of Birmingham."

Act No. 2016-276 was introduced and passed in the 2016 Regular Session of the Alabama Legislature as H.B. 399. Again, no notice was provided by publication to any of the affected counties before its introduction, and no evidence of publication of notice was placed into the legislative journals. The 2016 Act serves to amend the 2015 Act primarily by splitting the six appointments granted under the 2015 Act to the authorizing municipality, with the Birmingham City Council having the right to appoint four slots and the Mayor of Birmingham having the right to appoint two.

BWWB is the only waterworks corporation or board in Alabama that, as of January 1, 2015, served customers or had assets in four or more counties other than Jefferson County, where the BWWB is principally located. That fact remains true today. The BWWB is the only entity to which the 2015 and 2016 Acts currently apply.

Conclusions of Law

Before tackling the substance of the plaintiff's contentions, the court must first address a defense raised by defendants Shelby County and Shelby County

Commission that the plaintiff lacks standing to bring this action. While this defense raises a jurisdictional issue, it may be swiftly dealt with. The plaintiff has standing to seek a declaration with regard to who may properly be seated as a member of its Board.

The plaintiff's primary contentions are all premised on its interpretation of the 2015 & 2016 Acts as something other than general laws under Section 110 of the Alabama Constitution. That Section provides the following:

> A general law is a law which in its terms and effect applies either to the whole state, or to one or more municipalities of the state less than the whole in a class. A general law applicable to such a class of municipalities shall define the class on the basis of criteria reasonably related to the purpose of the law, provided that the legislature may also enact and change from time to time a general schedule of not more than eight classes of municipalities based on population according to any designated federal decennial census, and general laws for any purpose may thereafter be enacted for any such class. Any law heretofore enacted which complies with the provisions of this section shall be considered a general law.
>
> No general law which at the time of its enactment applies to only one municipality of the state shall be enacted, unless notice of the intention to apply therefor shall have been given and shown as provided in Section 106 of this Constitution for special, private or local laws; provided, that such notice shall

> not be deemed to constitute such law a local law.
>
> A special or private law is one which applies to an individual, association or corporation. A local law is a law which is not a general law or a special or private law.
>
> Act No. 79-263 (House Bill No. 68) entitled "An Act to establish eight classes of municipalities, by population, based on the 1970 Federal decennial census" approved June 28, 1979, and each and every Act of the legislature thereafter enacted referred or relating to a class of municipalities as established in said Act No. 79-263 are hereby in all things ratified, approved, validated and confirmed as of the date of their enactment, any provision or provisions of the Constitution of Alabama, as amended, to the contrary notwithstanding.

Ala. Const. V, § 110. This Section, in its current form, results from constitutional amendments in 1978 and 1980, in response to *Peddycoart v. City of Birmingham*, 354 So.2d 808 (Ala. 1978), a case on which the plaintiff greatly relies in contending that the 2015 & 2016 Acts are unconstitutional.

Unfortunately, Section 110 is not particularly clear in defining general, special and local laws. That Section, as amended, appears to focus on validating so-called "bracket bills," *i.e.*, legislation designed to apply to only certain population-based classes of municipalities. That is not what is at issue here.

This court must therefore distinguish among the various kinds of law, and the consequences are significant because the Alabama Constitution has imposed a number of requirements that apply to only non-general laws. Section 104 of the Alabama Constitution, for example, prohibits any special, private or local law that would pertain to certain issues specified therein. Section 105 prohibits a special, private or local law that would deal with a subject matter already provided for by a general law. Section 106 imposes special notice requirements as a prerequisite to the passage of any special, private or local law.

The plaintiff's first three causes of action in its Amended Complaint contend that the 2015 & 2016 Acts violate each of these provisions. The defendants' response is straightforward: the plaintiff's first three claims are due to be dismissed because the 2015 & 2016 Acts are general laws, so that these provisions of the Alabama Constitution are inapplicable.

In grappling with this issue, this court first notes the following rules, as recognized by the Alabama Supreme Court in *Crosslin v. City of Muscle Shoals*, 436 So.2d 862, 863 (Ala. 1983):

> There are a number of well-established principles of law relevant to this issue:
>
> (1) It is the duty of courts to sustain the constitutionality of a legislative act unless it is clear beyond a reasonable doubt that it is in violation of the fundamental law. *Brittain v. Weatherly*, 281 Ala. 683, 685, 207 So.2d 667, 668, 669 (1968).
>
> (2) A court is duty bound not to construe the act as a local one when it is so framed as to be reasonably susceptible of interpretation as a general law. *State ex rel. Montgomery v.*

Merrill, 218 Ala. 149, 152-155, 117 So. 473, 476 (1928).

(3) A statute that has a "bona fide application to the entire state in some of its chief features" is a general law, though it does not apply in every detail throughout the entire state. *State ex rel. Collman v. Pitts*, 160 Ala. 133, 134, 49 So. 441, 442 (1909).

(4) Whether a statute is general and valid, or local and invalid, must be determined from the statute as a whole. The legislative mind is to be read from an act as a whole. *Dillon v. Hamilton*, 230 Ala. 310, 160 So. 708 (1935).

In arguing that the 2015 & 2016 Acts are non-general laws, the plaintiff relies on the *Peddycoart* decision and the undisputed fact that at the time these statutes were enacted, the BWWB was the only entity in the State of Alabama to which they applied. The plaintiff argues that the proper approach is to take a "snapshot" at the time of legislative enactment, to ascertain whether the legislation "in its terms and effect applies either to the whole state, or to one or more municipalities of the state less than the whole in a class," to quote the language of Section 110. Under this approach, whether the legislation could conceivably apply to other entities at some future time is irrelevant. To the defendants, by contrast, this future possibility is of paramount importance.

Reference to specific language in the 2015 Act highlights these differing views. Section 1 provides the following:

> Notwithstanding any other provisions of law, this act shall apply to any municipal water

> works board authorized to be incorporated by a municipality which, on January 1, 2015, either served water customers or has assets in four or more counties other than the county where the authorizing municipality is principally located, or after January 1, 2015, either serves water customers or has assets in four or more counties other than the county where the authorizing municipality is located, and the organization and operation of the board, shall be subject to this act.

(Emphasis added).

The plaintiff would have a most forceful argument if only the first half of this Section (preceding the above-italicized "or") had been enacted. If the 2015 Act expressly applied to only "any municipal water works board authorized to be incorporated by a municipality which, on January 1, 2015, either served water customers or has assets in four or more counties other than the county where the authorizing municipality is principally located," it would be easy to view the 2015 Act as something other than a general law since it would apply to only BWWB with no possibility of its application elsewhere.

The focus thus turns to the latter part of this Section, which provides that "[n]otwithstanding any other provisions of law, this act shall apply to any municipal water works board authorized to be incorporated by a municipality which . . . after January 1, 2015, either serves water customers or has assets in four or more counties other than the county where the authorizing municipality is located, and the organization and operation of the board, shall be subject to this act" (emphasis added). This language opens the possibility of the Act's application to other water works entities in the future.

The defendants' interpretation of the Acts is bolstered by Opinion of the Justices, 373 So.2d 1051 (Ala. 1979). There, the Alabama House of Representatives presented a question to the Alabama Supreme Court, seeking guidance on whether a bill proposing to change the manner of selecting members of those water works boards that operate in three or more counties would be non-general legislation, thereby requiring the special notice specified by Section 106 of the Alabama Constitution. The Justices of the Supreme Court concluded that "the bill, by its terms and effect, would apply to every waterworks board in the whole state which serves, operates or does business in three or more counties, and is therefore a general bill under § 110 [of the Alabama Constitution], as amended. The provisions of House Bill 164 apply with equal force and effect throughout the whole state wherever there may be waterworks boards which fall within its stated provisions." *Id.* at 1053.

The plaintiff argues that Opinion of the Justices, 373 So.2d 1051, is readily distinguished because it is an advisory opinion without the benefit of any evidentiary record or arguments of opposing parties. That's true, but it does not undercut the rationale behind the Justices' conclusion, quoted above. Their conclusion was based on scrutiny of the language in the proposed legislation, which is the task of this court. The principles of *Crosslin*, discussed above, provide clear guidance on how to undertake this task, and while those principles do not mandate a conclusion that the 2015 & 2016 Acts are general laws, they weigh heavily on that side of the scales.

The opinion in *Horgan v. Dauphin Island Water & Sewer Auth.*, 409 So.2d 1359, 1361 (Ala. 1982), is also in keeping with this view. The plaintiff in *Horgan* brought a class action against the Dauphin Island Water & Sewer Authority, Inc. (hereafter "DIWSA"). His suit challenged the authority of DIWSA to assess the costs of sanitary sewer improvements against property owners in defined resort areas. DIWSA filed a counterclaim, seeking a declaratory judgment that the law under which it proposed to construct sewer improvements on Dauphin Island was a general law. These claims required analysis regarding Articles 1 and 2 of Title 11, Chapter 88, of the Alabama Code, which pertains to "Water, Sewer and Fire Protection Authorities."

Article I, codified at Ala. Code §§ 11-88-1 through-21, provided for the general establishment of fire, sewer and water systems, and the parties in *Horgan* agreed that this Article was enacted as a general law. In 1973, the Alabama Legislature amended this law by enacting Act No. 826, which added Article 2, codified at Ala. Code §§ 11-88-40 through -111.

The plaintiff in *Horgan* challenged Act No. 826, arguing that it was a local law passed without the requisite notice mandated by Section 106 of the Alabama Constitution. In making this challenge, the plaintiff pointed to the following, as found in Ala. Code § 11-88-41: "The Legislature hereby finds, determines, and declares that it is necessary and desirable that authorities whose service area includes a resort area be authorized to exercise the powers granted by this article, after proper action by a governing body or bodies, since the predominant use of improvements in such resort areas is seasonal and service use charges may not provide an adequate and feasible basis for financing such improvements." A "resort area" is defined in Article 2 as "[a]n area located outside the corporate limits of any municipality in which the primary use of the majority of the real property is for recreational pursuits or those associated with relaxation, avocation, or pleasure, including vacation homes and facilities and commercial amusement or recreational establishments providing such facilities or goods or services with respect thereto." Ala. Code § 11-88-40.

Even though the powers provided under Article 2 are limited to certain geographical areas, the Supreme Court found Act No. 826 to be a general law, so that special notice was not required. It reasoned as follows:

> An act relating to sewer service in resort areas no more partakes of the nature of a local act than does an act relating to the production of oil and gas. Not every county has, or may ever have, a resort area; nor is it reasonably contemplated that every county will ever have an oil or gas well. These circumstances, nevertheless, do not make either act a local law.
>
> On the other hand, an act that, by its terms, applies to less than the whole State, or whose application is necessarily restricted to a given territory less than the whole, cannot be spared Section 106's proscription. For example, an act regulating fishing gear in the streams lying within the watershed of Elk River is necessarily restricted in its application to less than the whole State and cannot be treated as a general law. *See*

> *Opinion of the Justices*, 278 Ala. 98, 176 So.2d 29 (1965), and *State v. Lash*, 350 So.2d 748 (Ala.Cr.App.1977).

Id. at 1362 (emphasis added).

Based on *Opinion of the Justices*, 373 So.2d 1051, and *Horgan*, 409 So.2d 1359, and mindful of the principles set forth in *Crosslin*, *supra*, this court concludes that the 2015 & 2016 Acts are general laws. They are because they might apply to other water works entities in the future.

Attention thus turns to the plaintiff's fourth cause of action, which alleges that the 2015 & 2016 Acts, being at odds with the BWWB's Articles of Incorporation, as amended, impair BWWB's contractual rights arising from its relationship with the City of Birmingham. The contract at issue is described by the plaintiff as follows:

> The consent to and authorization of Birmingham of the BWWB Articles of Incorporation makes the Articles an agreement or contract by and between Birmingham and BWWB. The authorizing municipality—Birmingham—transferred the assets which capitalize the BWWB and, in exchange, received its assurances and limitations on how those assets were to be operated, as well as its control of Board appointments. These are embodied in provisions of the BWWB's Restated Articles of Incorporation.

(Plaintiff's summary judgment motion, at p. 27). The court agrees that a contractual relationship exists based on *Water Works Bd. of City of Leeds v. Huffstutler*, 292 Ala. 669, 299 So.2d 268 (1974), and *Water*

Works & Sewer Bd. of City of Wetumpka v. City of Wetumpka, 773 So.2d 466 (Ala. 2000).

In the *Huffstutler* case, the City of Leeds passed a resolution that purported to unilaterally increase the number of directors of the Leeds water works board from three to five, with a second resolution mandating the transfer of water system assets from the board to a newly-created entity under a plan that would have diverted a portion of the revenues from the water works board to the city of Leeds. On appeal from the circuit court's order holding the ordinances unlawful, the Supreme Court saw the issue as follows:

> The challenge to Ordinance No. 378 presents the question of whether the governing body of the City can, in violation of the Board's Charter, unilaterally increase the number of directors of the Board for the purpose of immediately gaining a majority of directors who will be responsive to the will of said governing body. The appellants contend that § 397 of the Water Board Statute gives the governing body of the City the right so to increase the number of directors of the Board. The appellees contend that the Water Board Statute, considered as a whole, does not empower the governing body of the City to increase the number of directors in disregard of the Board's charter or to amend the charter to provide for such an increase without following the statutory procedure under which amendments to the charter are first proposed by the board of directors of the Board and then approved by the governing body of the City.

292 Ala. at 673–74, 299 So.2d at 272. The statute referenced there provided that a city's governing body may increase a water works' board of directors from three to five members, and the City of Leeds argued that this provision provided it with the absolute right to do so at its option.

The Supreme Court disagreed, first emphasizing that the water works board stood separate and apart from the city:

> The cases considered establish that it is the law of this State that a public corporation organized under the Water Board Statute, such as the Board in this case, is an entity separate and independent from the city which it serves and that the city can lawfully exercise only such power over such corporations as is conferred on the city by the charter of such corporation and the general laws of the State under which it is organized.

292 Ala. at 677, 299 So.2d at 275–76. Citing prior decisions, the Court interpreted the legislation as permissive rather than mandatory. A city council may seek to increase the board of the local water works system, but <u>only</u> by working with the water works system to duly amend its charter:

> The governing body of respondent City of Leeds has ignored the amendatory procedure provided by Section 395 on the grounds that this section does not apply to an increase in the number of directors of the Board. Under what law does said governing body then claim the power to amend the Board's Charter? It has only such powers over the Board

> as are given it by the Water Board Statute and the Board's Charter, and the amendatory procedure provided in that statute confers on the City only the power to approve or disapprove amendments initiated by the directors of the Board.

292 Ala. at 681, 299 So.2d at 279.

To like effect is *City of Wetumpka*, 773 So.2d 466. The local water works board there petitioned the circuit court for a writ of *quo warranto* after the city of Wetumpka named a city council-member as a member of the water works board. The certificate of incorporation of the water works board, adopted in 1949, prohibited officers of the city from serving as members of the board. When the certificate was adopted, state law provided that an officer of the governing municipality may not serve on the water works board. That law was subsequently amended to remove that prohibition. Notwithstanding that change in the law, the water works' certificate of incorporation was never amended to confirm with that change.

On appeal, the City argued that it was automatically entitled to appoint a city councilman as a director. Relying on the *Huffstutler* decision, the Supreme Court rejected that contention, holding that the city was without authority to do so absent an amendment to the water works' certificate of incorporation.

The *Huffstutler* and *City of Wetumpka* cases are authority confirming that there exists a contractual relationship between a municipality and that municipality's water works board, based on the process used to create the board established under Ala. Code §§ 11-50-

230, *et seq*. The material terms of that contract may not be unilaterally changed by the municipality in contravention of the water works' charter.

A totally separate question is whether the Alabama Legislature may enact legislation that conflicts with a previously-adopted charter. The *Huffstutler* and *City of Wetumpka* cases do not speak to this point. This court instead turns to *Alabama Water Co. v. City of Attalla*, 211 Ala. 301, 100 So. 490 (1924), in which the dispute was described as follows:

> The primary question is: Did the trial court commit error in enjoining appellant from changing the rates for water supplied the inhabitants of the city of Attalla, and charging the rates fixed by the Alabama Public Service Commission? The contract between the city and the water company is of date September 30, 1916. The order of the Alabama Public Service Commission is of date October 1, 1921, and was sought to be made by authority of the act of October 1, 1920 (Gen. and Local Acts Sp. Sess. 1920, p. 38).

211 Ala. at 303, 100 So. at 491. (At that time, the Public Service Commission had general regulatory authority over water works boards' rates and service). Extended quotation of the Supreme Court's opinion is helpful as it appears to be right on point:

> It is contended by counsel for appellee that the lease contract in question fixing the rates for water to be supplied by the company to the inhabitants of Attalla is protected by the contract clauses of the state and federal Con-

> stitutions. Const. Alabama, § 22; Const. United States, art. 1, § 10 (page 157, vol. 1, Code 1907) . . . .
>
> . . . [H]ad the city of Attalla the power of inviolable contract as to the rates for water supplied the inhabitants thereof? That is to say, was the power granted the city, such as indicated in the lease contract, broad enough to suspend the power of the state (acting by its Public Service Commission) to revise, increase, or decrease said "contract rates"? The power which was granted was no doubt sufficient to authorize the parties to the contract to contract as to such rates as could not be revised or annulled by either of the said parties, within the time specified, without the consent of the other. *M. L. & T. Co. v. Avant*, 202 Ala. 404, 80 South. 497, 3 A. L. R. 384. Under such a contract, one of the parties, without the consent of the other, could not revise or annul the contract rates, as was shown to have been attempted in the case of *Mobile Electric Co. v. City of Mobile*, 201 Ala. 607, 79 South. 39, L. R. A. 1918F, 667. In the second appeal of that case, however (203 Ala. 577, 84 South. 816), it is declared that the state had the power to revise the contract rates, or substitute new reasonable rates therefor, although at that time the more enlarged powers given expression by the act of October 1, 1920 (Gen. and Local Acts Sp. Sess. 1920, p. 38 *et seq.*), had not been conferred on the Public Service Commission.

211 Ala. at 306-307, 100 So. at 495.

> The police power of the state cannot be abridged or suspended by contract between citizens of the state, or between the municipality (a mere agency of the state) and a citizen thereof. It follows that the increase of the contract rates for water supplied to the inhabitants of the city of Attalla by the Alabama Public Service Commission was not in violation of the contract clause of either the state or federal Constitution, the increased and substituted rates not being unreasonable. *Union Dry Goods Co. v. Georgia Public Service Corp.*, 248 U.S. 372, 39 Sup.Ct. 117, 63 L.Ed. 309, 9 A. L. R. 1423, note; *City of Mobile v. Mobile Electric Co.*, 203 Ala. 574, 84 South. 816; *Salt Lake City v. Utah Light & Traction Co.*, 52 Utah, 210, 173 Pac. 556, 3 A. L. R. 715, and notes, pages 730, 731, 738, 744.

211 Ala. at 308, 100 So. at 496–97.

Cited in the *Alabama Water Co.* case is *Union Dry Goods Co. v. Georgia Public Service Corp.*, 248 U.S. 372, 39 S.Ct. 117, 63 L.Ed. 309 (1919), which involved very similar facts. The plaintiff sued, alleging that its contractual right to receive electrical power at a specified rate was impaired by a subsequent change in rates authorized by the Georgia Railroad Commission, which was apparently Georgia's regulatory authority at that time. The U.S. Supreme Court rejected plaintiff's challenge, opining that "the law with respect to [plaintiff's claim] would be regarded as so settled as not to merit further discussion." 248 U.S. at 375, 39 S.Ct. at 118. After recognizing a number of its prior decisions on point, the Supreme Court concluded that "the right of private contract must yield to the exigencies of the public welfare when determined in an appropriate manner by the authority of the state, and the judgment of the Supreme Court of Georgia must be Affirmed." 248 U.S. at 377, 39 S.Ct. at 119. *See also City of Pawhuska v. Pawhuska Oil & Gas Co.*, 250 U.S. 394, 39 S.Ct. 526, 63 L.Ed. 1054 (1919) (city may not rely on contract clause to restrict State's authority to regulate rates for natural gas that differed from a prior rate schedule between the city and gas company).

This principle appears to be a corollary to the view that municipalities are not separate and independent governmental entities; rather, their existence and powers necessarily come from the State:

> Judge Dillon, in his Treatise on Municipal Corporations (5th Ed.) § 98, p. 154, says: "Independently of any constitutional guarantee an inherent right of local self-government which is beyond legislative control has been asserted to defeat legislation depriving or tending to deprive the corporation of the control of some part of its affairs. The occasion for the assertion of the right has usually been the enactment of a statute depriving a city or other public corporation of the power to appoint an officer or board exercising local functions, and conferring the power of appointment on the executive, or mandatory legislation for a local improvement, for the incurring of debt, the issue of bonds, or the payment of a claim, or a statutory enactment prescribing the terms and conditions of contracts by the municipality. Such legislation

has frequently caused the courts to consider the abstract question whether a municipality has any inherent right of local self-government which is beyond legislative interference, and much has been said in support of or against the existence of the right, which should be construed as having reference only to the question before the court on the facts of the particular case, although couched in language so sweeping as to give it general application. It must now be conceded that the great weight of authority denies in *toto* the existence, in the absence of special constitutional provisions, of any inherent right of local self-government which is beyond legislative control. The Supreme Court of United States has declared that a municipal corporation in the exercise of all its duties, including those most strictly local or internal, is but a department of the State. The legislature may give it all the powers such a being is capable of receiving, making it a miniature State within its locality; or it may strip it of every power, leaving it a corporation in name only; and it may create and recreate these changes as often as it chooses, or it may itself exercise directly within the locality any or all the powers usually committed to a municipality."

In 19 R.C.L. p. 730, § 35, we find the following statement of the rule under consideration: "The power to create a municipal corporation, which is vested in the legislature, implies the power to create it with such lim-

> itations as the legislature may *see* fit to impose, and to impose such limitations at any stage of its existence."
>
> We are in full accord with the statement of Judge Dillon in his statement of the law as above set out, and are at the conclusion that it was within legislative competence to enact the law in question; that it violated no inherent rights of the people of the municipalities affected.

Yeilding v. State ex rel. Wilkinson, 232 Ala. 292, 296-97, 167 So. 580, 583-84 (1936). With both the BWWB and the City of Birmingham dependent on the Alabama Legislature for their existence and powers, they may not hide behind the contract between them—which itself is a creature arising from legislation—as a means of avoiding subsequent legislative directives.

Conclusion

Based on the above, this court concludes that the 2015 & 2016 Acts are general laws duly passed by the Alabama Legislature. While those Acts significantly revise the process of selecting members of the BWWB, moreover, they do not contravene constitutional provisions that prohibit laws impairing contractual obligations, and their application violates no due process rights.

The plaintiff's summary judgment motion is denied, while the motions of the defendants are granted. Summary judgment is entered in favor of the defendants, with the 2015 & 2016 Acts deemed valid and enforceable. This is the final order in this action, with costs taxed as paid.

DONE this 19th day of December, 2016.

/s/ Robert S. Vance
Circuit Judge

RELEVANT STATUTORY PROVISIONS

ARTICLE 8 WATERWORKS AND SEWER BOARDS.

Division 1—General Provisions

Section 11-50-231—Application for Authority to Form Corporation for Operation of Waterworks and Sanitary Sewer Systems; Adoption of Resolution by Municipal Governing Body Authorizing Incorporation

Whenever any number of natural persons, not less than three, shall file with the governing body of any municipality in this state an application in writing for authority to incorporate a public corporation for the purpose of operating a waterworks plant and system and a sanitary sewer system or either of such systems, and if it shall be made to appear to such governing body that each of said persons is a duly qualified elector of and owner of property in said municipality and if the governing body of said municipality shall adopt a resolution, which shall be duly entered upon the minutes of such governing body, wherein it shall be declared that it is wise, expedient, and necessary that such a corporation be formed and that the persons filing said application shall be authorized to proceed to form such corporation, then said persons shall proceed to organize such a corporation by executing and filing for record a certificate of incorporation as provided in Sections 11-50-232 and 11-50-233. No corporation shall be formed under this division unless the application provided for in this section shall be made and unless the resolution provided for in this section shall be adopted.

(Acts 1936-37, Ex. Sess., No. 228, p. 274; Code 1940, T. 37, § 394; Acts 1949, No. 686, p. 1057, § 1.)

Section 11-50-232—Certificate of Incorporation Contents; Amendment

(a) The certificate of incorporation of any corporation organized under this article shall state:

(1) The name of the corporation, which shall be a name indicating the system or systems for operation of which the corporation is organized (e.g., "The Waterworks and Sewer Board of the City (or Town) of —");

(2) The location of its principal office and the post office address thereof;

(3) The period for the duration of the corporation (if the duration is to be perpetual, this fact should be stated); and

(4) The objects for which the corporation is organized.

The certificate of incorporation may also contain any provisions not contrary to law which the incorporators may choose to insert for the regulation and conduct of the affairs of the corporation.

(b) Any corporation organized under this article may at any time amend its certificate of incorporation so as to provide for the operation of a system in addition to the system for the operation of which the corporation was originally organized, and shall at the same time make any change in the name of the corporation which may be made appropriate by reason of any amendment respecting the objects for which the corporation is organized. Any such amendment may be effected in the following manner: The board of directors of the corporation shall adopt a resolution setting forth the proposed amendment, which shall include any proposed change in the name of such corporation. If the governing body of the municipality which authorized the incorporation of the corporation shall, by resolution of its governing body, consent to such proposed amendment, the chairman of the board of directors, or other chief executive officer of the corporation, and the secretary of the corporation shall then file in the office of the judge of probate of the county in which the certificate of incorporation of the corporation is filed a certificate, in the name of and in behalf of the corporation and under its seal, reciting the adoption of the said respective resolutions by the board of directors and by the said governing body and setting forth the said proposed amendment. The proposed amendment shall become effective upon the filing of such certificate in the said office.

(Acts 1936-37, Ex. Sess., No. 228, p. 274; Code 1940, T. 37, § 395; Acts 1949, No. 686, p. 1057, § 2.)

§ 11-50-234. Board of directors; generally.

(a) Each corporation formed under this division shall have a board of directors which shall constitute the governing body of the corporation, which board shall consist of at least three members. All members of the board of directors shall be reimbursed for actual expenses incurred in and about the performance of their duties under this division, and the chairman of said board may, at the discretion of the board of directors, be paid a director's fee in an amount not exceeding $15.00 each month, and each member of the board of directors other than the chairman may be paid a director's fee in an amount not exceeding $10.00 each month. Any officer of the municipality shall be eligible for appointment and may serve as a member of the board of directors but shall not receive a fee for his services; provided, that at no time shall the board consist of more than two officers of the municipality. The directors of the corporation shall be elected by the governing body of the municipality, and they shall be so elected that they shall hold office for staggered terms. The first term of office of one director shall be two years, of another director shall be four years and of the third director shall be six years as shall be designated at the time of their election, and thereafter the term of office of each director shall be six years. The governing body of any municipality which has heretofore or hereafter authorized the creation of a corporation as provided in this division may, at its option, increase the board of directors from three to five members to serve according to all the conditions and terms set forth in this division. In the event the governing body elects to increase such board of directors from three to five members, one member added to the board shall be appointed for a term of four years and the remaining member for a term of six years, and thereafter the term of each such director shall be six years; provided, that at no time shall such board consist of more than three officers of the municipality.(b) The governing body of any municipality which has a population of less than 5,000 according to the most recent federal census and which has heretofore or hereafter authorized the creation of a corporation as provided in this division may, at its option, increase the board of directors from five to seven members to serve according to all the conditions and terms set forth in this division. In the event the governing body elects to increase such board of directors from five to seven members, one member added to the board shall be appointed for a term of four years and the remaining member for a term of six years, and thereafter the term of each such director shall be six years; provided, that at no time shall such board consist of more than three officers of the municipality. Code of Ala. § 11-50-234

Section 11-50-235—Powers of Corporation Generally; Provisions in Mortgages, Deeds of Trust, or Pledge Agreements Executed by Corporation as to Rights of Parties Thereto, Etc.; Exemption from Taxation of Property and Income of Corporation

(a) Each corporation formed under this division shall have the following powers together with all powers incidental thereto or necessary to the discharge thereof in corporate form:

(1) To have succession by its corporate name for the duration of time (which may be in perpetuity) specified in its certificate of incorporation or until dissolved as provided in this division;

(2) To sue and be sued and to defend civil actions against it;

(3) To make use of a corporate seal and to alter the same at pleasure;

(4) To acquire, purchase, construct, operate, maintain, enlarge, extend, and improve any sys-

tem or systems, the operation of which is provided for in the certificate of incorporation of such corporation (whether or not such system or systems were in existence or whether or not such system or systems were privately owned prior to acquisition by such corporation) and to receive, acquire, take, and hold, whether by purchase, gift, lease, devise, or otherwise, real, personal, and mixed property of any nature whatsoever that its board of directors may deem a necessary or convenient part of such system or systems;

(5) To borrow money and to issue in evidence of the borrowing interest-bearing bonds payable solely from the revenues derived from the operation of either or both of its systems (although the money so borrowed may be used for the benefit of or with respect to only one of its systems);

(6) To pledge for payment of its bonds any revenues from which such bonds are made payable and to mortgage, pledge, or otherwise convey the system or systems the revenues from which are so pledged;

(7) To sell at wholesale all or any part of its water supply to any other corporation organized under the provisions of this division or to any municipality for distribution to the inhabitants thereof and the surrounding territory;

(8) To sell water and to furnish sewer services and other services from any system, the operation of which is provided for in its certificate of incorporation and to establish and collect

and alter charges for water, sewer services, and all services of any kind sold or furnished by it; provided, that charges for services from any sewer system shall be established in such manner that there shall be no charge with respect to any portion of such sewer system that may have been paid for wholly or in part by assessments against the property specially benefited thereby, but any person whose property is served in part by a portion of a sewer system so paid for and in part by a portion of a sewer system not so paid for may be charged an appropriate rate for the service rendered such property by a sewer disposal plant, a sewage treatment plant, or any other portion of a sewer system which has not to any extent been paid for by such assessments;

(9) To operate its sewer system and its water system as one consolidated and unified system, keeping the books and records thereof as one unit;

(10) To lease, exchange, sell, convey, and otherwise dispose of its real, personal, and mixed property by any form of legal conveyance or transfer;

(11) To exercise all powers of eminent domain now or hereafter conferred on municipalities in this state;

(12) To appoint and employ such officers and agents, including attorneys, as its business may require; and

(13) To provide for such insurance as its board of directors may deem advisable.

(b) Any mortgage, deed of trust, or pledge agreement made by such corporation may contain such agreements as the board of directors may deem advisable respecting the operation and maintenance of the property and the use of the revenues subject to such mortgage, deed of trust or pledge agreement and respecting the rights or duties of the parties to such instrument or the parties for the benefit of whom such instrument is made; provided, that no such mortgage or deed of trust shall be subject to foreclosure.

(c) The property and income of such corporation shall be exempt from all taxation in the State of Alabama.

(Acts 1936-37, Ex. Sess., No. 228, p. 274; Acts 1939, No. 493, p. 713; Code 1940, T. 37, § 398; Acts 1949, No. 686, p. 1057, § 3.)

Division 4
Water Works Board Serving Counties Other Than Where Organized

Section 11-50-300—Applicability

Notwithstanding any other provisions of law, this division shall apply to any municipal water works board authorized to be incorporated by a municipality which, on January 1, 2015, either served water customers or has assets in four or more counties other than the county where the authorizing municipality is principally located, or after January 1, 2015, either serves water customers or has assets in four or more counties other than the county where the authorizing municipality is located, and the organization and operation of the board, shall be subject to this division.

(Act 2015-164, § 1.)

Section 11-50-301—Reorganization and Composition

(a) Effective January 1, 2017, the water works board shall be reorganized and composed of the following members:

(1) Two of the members shall be appointed by the mayor of the authorizing municipality and four of the members shall be appointed by the municipal governing body of the authorizing municipality. All of these members shall be residents of the authorizing municipality and water customers of the board.

(2) One additional board member shall be appointed by the association of mayors in the county where the authorizing municipality is located if there is an organized incorporated countywide association of mayors or by the mayors of the county acting jointly if not. This member shall hereafter be referred to as the board member appointed by the association of mayors. The board member shall reside outside of the corporate limits of the authorizing municipality and shall be a resident of the county where the authorizing municipality is principally located and be a water customer of the board. Notwithstanding any other provision of this division, the person appointed as a board

member by the association of mayors may only serve one full term on the board.

(3) One additional board member shall be appointed by the county commission of each county other than the county where the authorizing municipality is principally located where more than 5,000 water customers are served by the board or where the board owns a major reservoir located entirely within the county. Each board member shall be a resident of the county making the appointment.

(Act 2015-164, § 2; Act 2016-276, § 1.)

Section 11-50-302—Terms of Board Members

(1) Except as otherwise provided in this division, after May 14, 2015, the term of members of the board shall be four years.

(2) A person appointed to fill a vacancy on the board shall serve the remainder of the term of the vacant seat.

(3) Except as provided herein, a member of the board may not be appointed to more than two full terms, including, as provided herein, any board member serving when this division becomes applicable to the board. A board member who has been appointed to two full terms on the board prior to this division becoming applicable to the board may not be appointed to an additional term and a board member who has been appointed to one full term prior to this division becoming applicable to the board may be appointed to one additional term on the board. All board members shall continue to serve until a successor is appointed and qualified.

(Act 2015-164, § 3.)

Section 11-50-303—Compensation; Ethics Requirements; Rate Increases; Open Meetings

(a) Notwithstanding any other provision of law, including Section 11-50-234.1, no member of the board may receive any compensation that exceeds one thousand dollars ($1,000) per month. In addition, the members shall be entitled to any additional personal expenses for the member only or expense allowance for personal travel or other personal expenses for the member related to the duties of their office upon approval by a roll call vote of a majority of the board members in an open meeting of the board. No member of the board may be reimbursed for any expenditure for alcoholic beverages or entertainment. Records relating to each expense voucher shall be itemized as to any expense and shall be a public record and placed on the website of the board.

(b)

(1) All members of the board and employees of the board shall be subject to the State Ethics Law, Chapter 25 of Title 36. No consultant or party contracting with or doing business with the board may expend any funds on entertainment of a board member.

(2) No member of the board shall be an elected official.

(c) No increase in rates for water may be adopted by the board unless notice of the meeting at which the rate increase is to be considered is given at least 30 days prior to the meeting in the same manner as provided in the Alabama Open Meeting Act and a public hearing is held at the meeting prior to any vote on the rate increase. Notice of the meeting shall also be given by posting a notice of the meeting on the website of the board at least 30 days in advance of the board meeting.

(d) The board shall otherwise be subject to Chapter 25A of Title 36, the Alabama Open Meetings Act.

(Act 2015-164, § 4.)

Section 11-50-304—Exceptions

This division shall not apply to a municipal utilities board which operates a water works system and an electric distribution system and does not apply to an entity which only serves wholesale water customers.

(Act 2015-164, § 5.)

CORRECTED SUPPLEMENTAL BRIEF OF APPELLANT'S (JUNE 2, 2017)

IN THE SUPREME COURT OF ALABAMA

VALERIE ABBOTT, in Her Official Capacity as City Councilor, ET AL.,

v.

CITY OF BIRMINGHAM, ALABAMA, ET AL.

No. 1160360
(Appeal from Jefferson Circuit Court: CV-16-902336)

BRENDA DICKERSON, ET AL.,

v.

CITY OF BIRMINGHAM, ET AL.

No. 1160366
(Appeal from Jefferson Circuit Court: CV-16-902336)

Appeals from the Circuit Court of
Jefferson County, Alabama CV 2016-90233600

I. Summary of the Argument

This Reply to Appellees' and Appellees' Amicus Briefs, is submitted on behalf of Appellants by undersigned counsel of Brenda Dickerson, Ronald Mims, William Muhammad, and George Munchus, in their capacity as members of the board of the Birmingham Water Works Board, whose fiduciary duties under the Board's Articles of Incorporation were terminated when Act 2015-164, as amended by Act 2016-276 (the "Act") mandatorily reorganized the Birmingham waterworks in violation of its charter. This Charter constituted a contractual obligation to the City of Birmingham. This Reply adopts and supplements the Appellants' Reply Brief filed May 31, 2017, by Bainbridge, Mims, Rogers and Smith, LLP., and replaces and corrects the Supplemental Appellants' Reply Brief filed by undersigned counsel on May 31.

This Reply discusses certain violations of constitutional rights of The Waterworks and Sewer Board of the City of Birmingham's (Official Name, *see* Clerk's Record pp. 354-355, hereinafter "Birmingham Waterworks")[1]. The constitutional violations include both the due process and equal protection clauses of the Fourteenth Amendment, violation of Alabama Constitution Section 229, and violation of Federal and State constitutional prohibitions against impairment of contracts.

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[1] The Clerk's Record in this case is in 5 volumes of 200 pages each (except last). Pages in the Clerk's Record are referred to by "C ___ [page number]. The Volume number is determined by the page numbers, to wit: pages 1-200, are volume 1, 200-400 are volume two, 400-600 are volume 3, 600-800 are volume 4, and over 800, volume 5. Reference to page 501, for example, is in volume 3. Volume numbers are not referenced.

The same nine different "classifications[2] [3]" which exclude from applicability of the Act all non-profit municipal utilities incorporated by citizens in the State of Alabama save one—Birmingham Waterworks—so that the Act is not a general law under § 106, also result in one waterworks being singled out for disparate treatment in violation of the Fourteenth Amendments' equal protection and due process laws. These classifications evidence, as well, impairment of contract since only one entity in the State of Alabama has had its Articles and charter's contractual obligations repealed. If as stated on page one of the Brief of Amicus Curiae, Attorney General Steven T. Marshall, the rationale for the Act is "to ensure that persons served by a public utility should have a voice in the management of that utility," or any similar rationale, then the exclusion of all other public utilities in the State from operation of the Act by these classifications is a per se denial of Birmingham Waterworks' rights of equal protection under the law.

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2 *See*, Appellants' Supplemental Brief filed 3/31/2017 pages 7-8.

3 *See, e.g. Salmon v. Birmingham Parking Authority*, SC 1123, Supreme Court of Alabama, 294 Ala. 226; 314 So.2d 687; 1975 Ala. LEXIS 1176, May 22, 1975 ("double classification"); *Smith v. Lancaster*, No. 7 Div. 448, Supreme Court of Alabama, 269 Ala. 579; 114 So.2d 568; 1959 Ala. LEXIS 556, September 17, 1959 ("double classification"); *Reynolds v. Collier*, 204 Ala. 38, 40 (Ala. 1920) ("classification run mad.")

II. Argument

A. Essential Facts and Procedural History for This Reply Brief

The Complaint for Declaratory and Injunctive Relief, filed June 24, 2016, alleges in part as follows:

> 16. On or about May 7, 2015, the Alabama Legislature passed (and the Governor signed into law) the 2015 Act, which purports to be a general law, but which applies only to a water system authority which (a) owns a reservoir in another County or (b) serves customers or owns assets in four or more other counties. In truth, the 2015 Act applies only to the BWWB, because there is no other water system in Alabama containing those characteristics. And if there were any doubt, Section 5 of the 2015 Act contains an additional provision making the 2015 Act applicable solely to the BWWB, and to no other entity in Alabama, by excluding from its purview "a municipal utilities board which operates a water works system and an electric distribution system," and further excludes "an entity which only serves wholesale water customers." A copy of the 2015 Act is attached as Exhibit 2.
>
> 17. The 2015 Act violates the Charter by, among other aspects, mandating the appointment of multiple new BWWB Board Members, to be appointed by the JCMA, the Blount County Commission, and the Shelby County Commission; and changing the total number

> of BWWB Board Members to nine, without staggered terms.
>
> 18. Moreover, because Birmingham had the sole power of appointment over BWWB Board members prior to passage of the 2015 Act, and because the BWWB is the only water board in the State to which the 2015 Act applies, the 2015 Act is also applicable to one municipality in the State, and one only: Birmingham. (Doc. 2, "Complaint" C 34-35).

On December 19, 2016, the Circuit court issued its Summary Judgment which recites the following undisputed facts:

> BWWB is the only waterworks corporation or board in Alabama that, as of January 1, 2015, served customers or had assets in four or more counties other than Jefferson County, where the BWWB is principally located. That fact remains true today. The BWWB is the only entity to which the 2015 and 2016 Acts currently apply. (Doc. 160, C 690)

It is also undisputed that Birmingham waterworks is an eleemosynary or non-profit corporation created under the Alabama Corporation code. (Doc. 2, C 104; Doc. 97, C 354)

B. The Issue of Whether Act 2015-164 as Amended by Act 2016-276 (the "Act") Violates the Fourteenth Amendment of the U.S. Constitution and Comparable Provisions of the Alabama Constitution Has Been Preserved for Appellate Review

> If a party makes a constitutional argument to the trial court before a decision in the case is rendered, the constitutional issue is preserved for appellate review. *See Alabama Power Co. v. Capps*, 519 So.2d 1328, 1330 (Ala. 1988) (holding that if a party raises a constitutional issue 'at the pleading stage, during the taking of the evidence, or even during the instructions to the jury, the trial court [is] presented with the constitutional arguments . . . , and if it had accepted the argument, could have saved the time and expense of trial under the allegedly unconstitutional statute]').

Moore v. Ala. Judicial Inquiry Comm'n, 2017 Ala. LEXIS 36, 55-56 (Ala. Apr. 19, 2017)

The Fourteenth Amendment provides:

> Sec. 1. [Citizens of the United States.]
>
> * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Non-profit corporations like Birmingham Waterworks are "persons" for the 14th Amendment. *Montgomery v. Greene*, 180 Ala. 322, 329-330 (Ala. Jan. 23, 1913. Under the Fourteenth Amendment, an Act which has no rational classifications that apply to any entity other than the BWW violate due process and equal protection.

On July 27, 2016, the City and the City Council filled a Motion to Realign providing in relevant part as follows:

> 2. The City and the City Council admit the allegations of BWWB's Complaint, and agree that the relief requested would be appropriate under the circumstances. In particular, but without limitation, the Acts violate the Alabama and United States Constitutional prohibitions against legislation impacting the City, and impairment of contract, by purporting to amend the agreements that the City has with BWWB in its Certificate of Incorporation, which may be amended only with the approval of the City; <u>violate the equal protection clause of the United States Constitution and equal protection guaranteed by various provisions of the Alabama Constitution</u>; violate Ala. Code § 11-50-312 requiring consent of the City Council by resolution to amend the Certificate of Incorporation, because the Acts contain no amendatory provisions; and are unlawful attempts to dilute the voting power of the City Council and amend the Certificate of Incorporation approved by the City Council, which provides that any changes

> regarding the operations of the BWWB, the election of the board of directors, the number of board members, terms of the board members, and amount of compensation for board members must be recommended by the BWWB Board of Directors and approved by the City Council. (Emphasis added) (Doc. 51, "Motion to Realign", C 186-187).

On October 3, 2016, then Plaintiff BWW, now represented by City of Birmingham appointed board members only, filed their Motion for Summary Judgment which provides in relevant part:

> The Legislature's Takeover of BWWB a Taking without Due Process
>
> As stated in New Orleans Gas, the State's transfer of the City's property rights to operate under prior State law, which includes the selection of a board to control its property, <u>is also an unlawful taking under the 14th Amendment of the U.S. Constitution.</u> If the State wants to appropriate the property of a municipal corporation, it must pay the reasonable fair value and this value can be used for the benefit of the Citizens and Taxpayers of Birmingham. No one owns public property. The right to vote on the authorizing board is how control of the City's publicly-owned water assets are determined. (Emphasis supplied) (Doc. 95, C 315).

Birmingham Waterworks filed its Response to JCMA, Blount, and Shelby Counties Motion for Summary Judgment which stated:

> There is no law or statute that says a non-profit becomes a governmental agency because it operates, by contractual agreement in its charter, a municipal water system:
>
> In Opinion of the Justices No. 222, *supra*, it was said: "In the context of Title 10, section 168, [now Code 1975, § 10-4-190 (1975)] we equate 'members' with 'stockholders,' and we assume, without deciding, that the rights which members exercise and enjoy in the management of the corporation are 'property rights' within the meaning of the fourteenth amendment." Opinion of the Justices No. 262,373 So.2d 293, 296 (Ala. 1979). The Board Members are the "members" of BWWB with management rights, which are property rights, which have clearly been taken away and impaired by the Acts. (Emphasis supplied) (Doc 154, C 679)

Judge Vance's order addresses Dickerson Plaintiffs' constitutional arguments as follows:

> "While those Acts significantly revise the process of selecting members of the BWWB, moreover, they do not contravene constitutional provisions that prohibit laws impairing contractual obligations, and their application violates no due process rights."

The equal protection and due process violations were argued extensively at the hearing on the Motion to reconsider the summary judgment motion, without a court reporter, and was preserved in the record, and ruled on in cryptic, summary fashion by the circuit court, lumping all fourteenth amendment claims under "due process." Accordingly, these fundamental issues are preserved for appeal.

C. There Is No Rational Basis for Any of the Nine Separate Classifications That Exempt All Other Waterworks Non-Profit Corporations in the State of Alabama from the Operation of the Act in Violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment and Similarly Construed Alabama Constitutional Provisions

The trial court cited no authority for its opinion that the Act did not violate the due process requirements of the Fourteenth Amendment to the U.S. Constitution, or Alabama Constitution or make any distinction between the due process and equal protection as outlined in the 14th Amendment. However, the rights of the citizens who incorporated the Birmingham Waterworks to make a contract with the City of Birmingham, as contained in its Articles of Incorporation, for the acquisition of, and to own and manage, the water utility assets entrusted to Birmingham Waterworks, under the terms of its Articles of Incorporation, is just as sacred and protected and the right of any other corporation or individual to contract for the acquisition of property. In a free society, the principle of the contract right to own private property free from governmental taking or impairment or arbitrary or unequal application of laws is fundamental and vital. As stated in *Cotting v. Kansas City Stock Yards Co.*, 183 U.S. 79, 107-113 (U.S. Nov. 25, 1901)

> We have no hesitation in saying that if this statute had, without defect as to title, clearly and in express terms amended corporate

> charters, retaining the section classifying corporations to which it was applicable by the number of men in their employ, it would be obnoxious to the Fourteenth Amendment to the Constitution of the United States."
>
> * * * Why should not the nine employees who work for one corporation be equally protected with the eleven engaged in the same line of employment for another corporation? * * * A classification of the kind attempted makes a distinction between corporations identically alike in organization, capital and all other powers and privileges conferred by law. It is arbitrary and wanting in reason."

Applying the logic of *Cotting* to this case, the Act exempts all similarly situated non-profit utilities except the Birmingham Waterworks with no rational basis none of whom meet any one of the following classifications or determinations applicable only to Birmingham Waterworks:

1. [the board] either served water customers or [<u>why is a Board that serves sewer customers, or electrical customers or natural gas customers not covered by the Act</u>?]
2. [the board] has assets [<u>what if a board provides water, sewer, electric or natural gas utility management services (billing, employees, operations, bond issuance etc) in four or more counties but allows the municipality to continue to own the assets</u>?]
3. in four or more counties [<u>what is the rationale for not applying the Act to boards</u>

operating inn three or more Counties, or two or more, for example?]

4. other than the county where the authorizing municipality is principally located (2015 Act, § 1)

5. [one of the four counties has] more than 5,000 water customers [that]are served by the board [what if a municipal utility serves more than 5,000 customers within the county where it is located, or more than 4,000 customers?]

6. [in one of the four counties] the board owns a major reservoir [why is a utility exempt from operation of the Act that owns a major power plant in an adjoin county exempt or one that owns a reservoir within the County where it is located]

7. located entirely within the county. (2015 Act, § 2) The "on January 1, 2015" Sub-classification exclusions:

8. This act shall not apply to a municipal utilities board which operates a water works system and an electric distribution system [what is the rationale for exempting a utility that owns both a waterworks system and an electric distribution system, everything else being equal?]

9. This act shall not apply to an entity which only serves wholesale water customers [what is the rationale for exempting a utility that owns both a waterworks system and an

> electric distribution system, everything else being equal.]

(2015 Act, § 5)

The purpose of the due process and equal protection clauses is to rest the rights of all persons upon the same rule under similar circumstances. *Louisville Gas Co. v. Coleman*, 277 U.S. 32, 37. The U.S. Supreme Court has several times decided that a corporation is as much entitled to the equal protection of the laws as an individual. *Quaker City Cab Co. v. Penna.*, 277 U.S. 389, 400; *Kentucky Corp'n v. Paramount Exchange*, 262 U.S. 544, 550; *Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U.S. 150, 154. The terms of Act 164 creates nine different classifications which arbitrarily favor every other non-profit utility corporation by excepting them from the Act thereby denying equal protection to Birmingham Waterworks. A classification, to be valid, "'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415; *Air-way Corp. v. Day*, 266 U.S. 71, 85; *Schlesinger v. Wisconsin*, 270 U.S. 230, 240. That is to say, mere difference is not enough: the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the Act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' *Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U.S. 150, 155." *Louisville Gas Co. v. Coleman*, *supra*, p. 37.

A state statute which restricts the rights of citizens must apply with equal effect to all persons similarly situated to meet the equal protection mandates of the constitution of the State of Alabama and of the United States. *Rinaldi v. Yeager*, 384 U.S. 305, 86 S.Ct. 1497, 16 L.Ed.2d 577 (1966); *Birmingham-Tuscaloosa Ry. & Utilities Co. v. Carpenter*, 194 Ala. 141, 29 So. 626 (1915); Title 36, Sec. 95, Code Of Alabama 1940; When a state statute establishes a classification of citizen incorporated non-profits, for providing public utility services, for deprivation of rights, the criterion of the class established must not be arbitrary and must bear a reasonable relationship to some legitimate object of the legislation. *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971); *Rinaldi v. Yeager*, 384 U.S. 305, 86 S.Ct. 1497, 16 L.Ed.2d 577 (1966), *supra*; *Glona v. American Guarantee Co.*, 391 U.S. 73, 88 S.Ct. 1515, 20 L.Ed.2d 441 (1968); The Act's classification scheme, is invalid on its face in violates the equal protection provisions of the constitution of Alabama and of the United States because such classifications are so restrictive they could never be applied equally to all citizen incorporated non-profit providers of municipal utility services.

Given the fact that not a single group supporting the Act has cited a rationale for intentional exclusion of every other non-profit municipal utility in the State of Alabama, it can only be concluded the State legislature has some unstated animus for the City of Birmingham and Birmingham Waterworks. The Constitution's guarantee of equality "must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot" justify disparate treatment of that group. *United States v. Windsor*, 133 S.Ct. 2675, 2693 (U.S. June 26, 2013). In determining whether a law is motivated by an improper animus or purpose, "'[d]iscriminations of an unusual character'" especially require careful consideration." The case of *Louisville Gas v Coleman* is instructive. There the Supreme Court stated:

> The equal protection clause, like the due process of law clause, is not susceptible of exact delimitation. No definite rule in respect of either, which automatically will solve the question in specific instances, can be formulated. Certain general principles, however, have been established in the light of which the cases as they arise are to be considered. In the first place, it may be said generally that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances, and that it applies to the exercise of all the powers of the state which can affect the individual or his property, including the power of taxation. It does not, however, forbid classification; and the power of the state to classify for purposes of taxation is of wide range and flexibility, provided always, that the classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." That is to say, mere difference is not enough: the attempted classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such

> basis." *Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U.S. 150, 155. Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision. Compare (internal Citations omitted)

Louisville Gas & Electric Co. v. Coleman, 277 U.S. 32, 37-38 (U.S. Apr. 30, 1928)

D. The Act Wrongfully Impairs the Contract Created by the Birmingham Waterworks' Articles of Incorporation

The Circuit Court summary judgment opinion and adversarial briefs cite regulatory utility rate cases under the State's police power like *Alabama Water Co. v. City of Attalla*, 211 Ala. 301, 100 So. 490 (1924), and cases like *New Orleans v. New Orleans Water Works Co.*, 142 U.S. 79, 89 (U.S. Dec. 14, 1891) where New Orleans is a municipal corporation and the New Orleans Water Works Co. was incorporated by the State legislature and owned entirely by the State[4]. The *New Orleans* case involved a contract between two state governmental entities, one municipal and one legislatively incorporated, whose charters may be modified at will by the State legislature. Neither line of cases is applicable here. The eleemosynary Bir-

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[4] The Court noted: "the legislature in 1877 incorporated the New Orleans Water Works Company for the purpose of furnishing the inhabitants of the city with an adequate supply of pure water, granting it the exclusive privilege of furnishing water to the city and its inhabitants, by means of pipes and conduits, for fifty years from the passage of the act."

New Orleans v. New Orleans Water Works Co., 142 U.S. 79 (U.S. Dec. 14, 1891) mingham Waterworks Board has complete private non-profit ownership of the City's water utility assets donated by the City of Birmingham to be held in trust pursuant to the contractual terms of the non-Profit's Articles of Incorporation. none of these assets are governmentally owned.

The U.S. Supreme Court clearly makes the distinction between "corporations for public government and those for private charity" as follows:

> . . . the city being a municipal corporation and the creature of the state legislature, does not stand in a position to claim the benefit of the constitutional provision in question, since its charter can be amended, changed or even abolished at the will of the legislature. In The *Dartmouth College* Case, 4 Wheat. 518, 660, 661, in which the inviolability of private charters was first asserted by this court, a distinction is taken, in the opinion of Mr. Justice Washington, between corporations for public government and those for private charity; and it is said that the first being for public advantage, are to be governed according to the law of the land; and that such a corporation may be controlled, and its constitution altered and amended by the government, in such manner as the public interest may require. "<u>Such legislative interferences cannot be said to impair the contract by which the corporation was formed, because there is in reality but one party to it</u>, the trustees or governors of the corporation being merely the trustees for the public, the cestui que trust of the founda-

> tion." Mr. Justice Story was also of opinion, page 694, that, "corporations for mere public government, such as towns, cities and counties, may in many respects be subject to legislative control." *New Orleans v. New Orleans Water Works Co.*, 142 U.S. 79, 89 (U.S. Dec. 14, 1891)

Here, the Birmingham Waterworks is separate from the City that donated the water assets. Every corporation is a creature of state law. However, corporations whose contracts are constitutionally protected are created voluntarily under permissive state law and own their assets privately for profit, if stock corporations, or for public benefit, if none of the assets inure to private ownership. The trial court simply lumped the City of Birmingham and the Birmingham Waterworks together as if Birmingham Waterworks was a governmental entity [which it is not] incorporated by the State legislature as in the *New Orleans* case. Judge Vance stated:

> This principle appears to be a corollary to the view that municipalities are not separate and independent governmental entities; rather, their existence and powers necessarily come from the State * * *
>
> With both the BWWB and the City of Birmingham dependent on the Alabama Legislature for their existence and powers, they may not hide behind the contract between them—which itself is a creature arising from legislation—as a means of avoiding subsequent legislative directives. (C 700)

The Circuit Court holding is in error because the Birmingham Waterworks is not a "independent governmental entity." Birmingham Waterworks is a private non-profit whose employees are not governmental employees and whose board of trustees has a fiduciary duty to protect and follow its Articles of Incorporation, which cannot be changed without following the provisions set forth therein. The term "public purpose corporation" can be either a municipal corporation or a non-profit or for profit public benefit corporation. This is evident from Ala Constitutional Section 235 under which "Municipal and other corporations and individuals [may be] invested with the privilege of taking property for public use, [provided they] shall make just compensation." The fact that Birmingham Waterworks has the power of eminent domain for a public purpose and may issue tax free bonds is because it is a private non-profit formed for the public purpose of providing water and sewer services and not because it is a governmental entity like New Orleans Waterworks described above. As the U.S. Supreme Court stated in *Treigle v. Acme Homestead Asso.*, 297 U.S. 189, 197 (U.S. Feb. 3, 1936)

> But laws touching building and loan associations, like those affecting banks or utility companies, must be confined to purposes reasonably connected with the public interest as distinguished from purely private rights. The legislature has no greater power to interfere with the private contracts of such corporations, or the vested rights of their stockholders as such, under the pretext of public necessity, than it would have to attempt the same ends in the case of a

> private corporation. Though the obligations of contracts must yield to a proper exercise of the police power, and vested rights cannot inhibit the proper exertion of the power, it must be exercised for an end which is in fact public and the means adopted must be reasonably adapted to the accomplishment of that end and must not be arbitrary or oppressive.

The case law is absolutely clear that a State legislature <u>cannot</u> impair a municipal corporation's contract rights but any legislation that modifies, alters or amends a non-profit corporation's charter created by the donor is an unconstitutional impairment. This distinction was well stated by the Supreme Court of Missouri in *State ex rel. Pittman v. Adams*, 44 Mo. 570, 588-589 (Mo. 1869)

> The limitations upon the power of the Legislature over a corporation like the St. Charles College, as elucidated in the able and elaborate opinions in the great *Dartmouth College* case, leave little to be said except in their application. That such corporations are private as opposed to municipal, or such as are owned entirely by the State; that they are strictly eleemosynary, contributing to our higher wants, and generally furnishing, to the comparatively poor, opportunities otherwise beyond their reach; * * * and that any statute making a substantial change in the charter, as by the addition of new trustees, or by a material change in the manner of choosing them, in the mode of expending the funds, or in the objects of the charity, impairs

> the obligation of the contract, and is forbidden by the constitution of the United States, are propositions recognized or established in that case and substantially followed in all others. * * *

State ex rel. Pittman v. Adams, 44 Mo. 570, 576-577 (Mo. 1869)

The Missouri Court also held that existing Board Members may not be displaced by legislative act and only upon cause and judicial intervention under due process standards:

> All we can know is that relators were wrongfully turned out, and that defendants hold their places. * * *
>
> We hold, then: first, that the act of February 6, 1847, amending the original act of February 3, 1837, incorporating St. Charles College, inasmuch as it materially changed the mode of choosing curators, and in a manner to endanger the principles of the foundation, was a violation of the contract embraced in the charter, and could not be validated by the subsequent consent of the curators; second, * * * the relators regularly holding their places under claim of right, could not be removed except by judgment at law, or by a proceeding of a judicial nature before the board of curators, according to the charter, with notice and opportunity of defense; *State ex rel. Pittman v. Adams*, 44 Mo. 570, 588-589 (Mo. 1869)

Pittman has been explained by the U.S. Supreme Court in *Bryan v. Board of Education,* 151 U.S. 639, 655-656 (U.S. Feb. 5, 1894), noting that the charter is a contract, as follows:

> One of the questions in the case was whether this amendment was not void as impairing the obligation of the contract created by the original charter. * * * The amendment in the charter, * * * essentially impairs the contract under which he advanced it." For these reasons, the amendment was held to be a violation of the contract embraced in the charter.

E. The Act Is a Special Law "Conferring" Corporate Powers and Not a General Law Under Which Birmingham Waterworks "May Be Organized" and "Corporate Powers Obtained" in Violation of Ala. Constitution, Article Private Corporations, § 229. the Act Mandatorily Reorganizes the Birmingham Waterworks and Makes Corporate Powers non-Elective

Amendment 27 to Ala. Const § 229 provides:

> Special laws conferring corporate powers prohibited; general law as to grant or amendment of corporate charters; corporation franchise taxes to be paid; exemption of benevolent, educational or religious corporations and federal building and loan associations from franchise taxes.
>
> The legislature shall pass no special act conferring corporate powers, but it shall pass general laws under which corporations may be organized and corporate powers obtained,

> subject, nevertheless, to repeal at the will of the legislature; and shall pass general laws under which charters may be altered or amended. The legislature shall, by general laws, provide for the payment to the state of Alabama of a franchise tax by corporations organized under the laws of this state which shall be in proportion to the amount of capital stock; but strictly benevolent, educational or religious corporations or federal building and loan associations organized pursuant to an act of congress known as the Home Owners' Loan Act of 1933, as amended, and as the same may hereafter be amended, or building and loan associations organized under or authorized to do business by the laws of Alabama shall not be required to pay such a tax on their withdrawable or repurchasable shares. The charter of any corporation shall be subject to amendment, alteration, or repeal under general laws. Exemption of the shares of building and loan associations from franchise taxes heretofore provided by statute is ratified.

Prior to its amendment in 1935, Section 229 provided as follows:

> SECTION 229
>
> Special laws conferring corporate powers prohibited; general law as to grant or amendment of corporate charters; corporation franchise taxes to be paid; exemption of benevolent, educational or religious corporations from franchise taxes.

> The legislature shall pass no special act conferring corporate powers, but it shall pass general laws under which corporations may be organized and corporate powers obtained, subject, nevertheless, to repeal at the will of the legislature; and shall pass general laws under which charters may be altered or amended. The legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by corporations organized under the laws of this state, which shall be in proportion to the amount of capital stock; but strictly benevolent, educational, or religious corporations shall not be required to pay such a tax. <u>The charter of any corporation shall be subject to amendment, alteration, or repeal under general laws</u>. (Emphasis added)

Amendment 27 eliminated the last sentence of the old § 229 which read "The charter of any corporation <u>shall be</u> subject to amendment, alteration, or repeal under general laws," leaving only the authority of the legislature to "pass general laws under which charters <u>may be</u> altered or amended." It is clear then that laws under which charters may be altered or amended are permissive only. § 229 bars enforcement of the Act both negatively and positively. As a negative limitation, it prohibits the legislature form conferring or mandating corporate powers in a special law applicable to a single corporation. As a positive limitation, the words "may be organized and corporate powers obtained" are permissive in nature only. The proper construction of § 229 therefore negates the power of the State legislature to mandate or confer corporate powers in reorganizing the Birmingham Waterworks Board. As this Court stated in *Water Works Board v. Huffstutler*, 292 Ala. 669, 679-682 (Ala. 1974)

> "The Court believes that its denial of the special right claimed be respondent City of Leeds to increase the number of directors of the Board is mandated by the case of *Buffalow v. State ex rel. Inabinett*, 281 Ala. 132, 199 So.2d 672 (1967), * * *
>
> "The holding of the lower court was as follows:
>
> "'It is the opinion of the Court that the general statutes of the State permitting members of the City governing bodys [sic] to serve as Directors of such Water Works and Sewer Boards is permissive only and is not directive or mandatory that they must serve on such boards, and the articles of incorporation of this particular boards not having been amended to permit such serving by the members of the governing body, "The Supreme Court stated * * * :
>
> "'A careful reading of the statutes involved will clearly indicate that the legislature carefully avoided any implication that the new statutes [Act No. 175 and the 1956 amendments to Section 397 and Section 402(17)] adopted from time to time were mandatory on the municipalities involved. The new statutes defined the outside limits of the authority of the corporations formed under their provisions. It never indicated that the

> corporation was required to exercise all of the authority which the legislature permitted it to exercise.
>
> * * *
>
> The effect of such a holding is to leave no way for said 1956 amendments to be implemented except by an amendment to the Board's Charter in conformity with a statutory procedure, and the only such procedure in the Water Board Statute is Section 395 which the respondents have failed to follow."
>
> We also affirm the decree of the Circuit Court holding Ordinance No. 379 invalid on the grounds that the express conditions thereof do not conform to the requirements of Tit. 37, § 402(33), Code of Alabama 1940 (Recomp. 1958), and <u>that this ordinance will, if implemented in accordance with its terms under readily foreseeable circumstances, constitute an unconstitutional infringement of the contractual rights of the present bondholders of the Board</u>. *Water Works Board v. Huffstutler*, 292 Ala. 669, 679-682 (Ala. 1974) (Emphasis supplied)

Using the same rules of construction as enunciated by this Court in *Water Works Board v. Huffstutler*, § 229 prohibits the Act's conferring of a reorganization of the Birmingham Waterworks by the legislature and allows only general laws which the give the Board permission to change or amend the charter of the Birmingham Waterworks electively. Therefore, the mandatory amendments of the Birmingham Waterworks charter, foisted upon prior board members appointed by the City of Birmingham by the legislature under the Act, are unconstitutional under § 229.

III. Conclusion

The Court is obligated to give the Legislature the benefit of the doubt that their pronouncements are constitutional. Here there is no rational basis for the classifications that expressly exempt every other utility in Alabama from the operation of the Act, both now and in the future, in denial of equal protection of the laws. Any future utility would have to be an exact clone of Birmingham Waterworks to be covered by the Act. There is no basis for the legislative taking of the duties of the existing trustees who are obligated to defend the articles of incorporation under which the property rights relating to valuable water assets were transferred into their care. The usurpation of their rights to manage the estate entrusted to them is a denial of due process. The Alabama Constitution makes it clear that general laws changing a corporate charter must be permissive only. The Act's reorganization cannot be "conferred" under § 229. And finally, the non-profit public benefit corporation has rights of contract and ownership of private property like any other corporation or individual. Accordingly, for these reasons, and the reasons stated in Appellants' principal Reply Brief and Appellants' Opening Briefs, the Act is unconstitutional.

RESPECTFULLY SUBMITTED this the 2nd day of June 2017.

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CERTIFICATE OF AMENDMENT AND RESTATEMENT OF CERTIFICATE OF INCORPORATION OF THE WATER WORKS AND SEWER BOARD OF THE CITY OF BIRMINGHAM (JUNE 15, 1999)

STATE OF ALABAMA
COUNTY OF JEFFERSON

WHEREAS, on November 21, 1950, pursuant to the authority as originally provided by § 394 of Title 37 of the Code of Alabama, as amended by Act of the Legislature of Alabama Number 686 approved September 19, 1949 (Acts 1949 p. 1057) and as now currently codified at Alabama Code § 11-50-230, *et. seq.* (1975), the Certificate of Incorporation of The Water Works Board of the City of Birmingham, (the "Board") was filed for record with the Judge of Probate for Jefferson County, Alabama in Volume 84 of Incorporation Records at page 274, *et. seq.*; and,

WHEREAS, subsequent to the incorporation of the Board, there have been numerous amendments made to the Board's Certificate of Incorporation; to-wit: amendments found in Real Volume 1142 at page 839 *et. seq.*, Real Volume 1183 at page 382 *et. seq.*, Real Volume 2782 at page 298 *et. seq.*, Real Volume 2928 at page 898 *et. seq.*, Real Volume 3000 at page 17 *et. seq.*, Real Volume 3046 at page 938 *et. seq.*, Real Volume 3268 at page 013 *et. seq.*, Real Volume 3677 at page 321 *et. seq.*, Real Volume 3716 at page 916 *et. seq.*, Real Volume 3881 at page 279 *et. seq.*, Real Volume 3891 at 607 et. *seq.*, Real Volume 4232 at page 274 *et. seq.*, Real

Volume 4292 at page 810, *et. seq.*, and Real Volume 9406 at page 9369, *et. Seq.*; and,

WHEREAS, specifically on December 12, 1986, the Board amended its Certificate of Incorporation to change its name to The Water Works and Sewer Board of the City of Birmingham and to add to the Board's authority all powers necessary to operate a sewer system in addition to a water system; and,

WHEREAS, effective December 31, 1993, the Board acquired from the City of Birmingham (the "City") all of the assets, rights, obligations, and liabilities of the former Industrial Water Board of the City of Birmingham, Alabama; and,

WHEREAS, subsequent to the Board's initial incorporation, the legislature of Alabama has amended Alabama Code § 11-50-230, *et. seq.* (1975); and,

WHEREAS, the board of directors of the Board hereby declare that it is wise, expedient and necessary that the Board amend, ratify, and restate its Certificate of Incorporation as originally filed and as amended thereto from time to time; and,

WHEREAS, on June 1, 1999, the board of directors of the Board did adopt Resolution Number 3012 setting forth this proposed amendment to its Certificate of Incorporation; and,

WHEREAS, the City Council of the City, adopted Resolution Number 1713-99 at a regular meeting thereof on June 8, 1999, and in said Resolution consented to this proposed amendment to the Board's Certificate of Incorporation and ratified any and all actions taken by said City Council or the Board since the Board's initial incorporation; and, WHEREAS, Resolution Number 3012 authorized and instructed the Board's chairman and secretary, subsequent to the consent and approval of the City Council of the City, to execute this Certificate of Amendment and Restatement of Certificate of Incorporation of the Board and to cause same to be filed with the Judge of Probate of Jefferson County, Alabama.

NOW THEREFORE, in consideration of the premises and for the purposes of amending, restating and ratifying the formation of a public corporation pursuant to Alabama Code § 11-50-230, *et. seq.* (1975), this Certificate of Incorporation of the Board is hereby amended as follows:

Article I.

1.01 The name of the corporation shall be The Water Works and Sewer Board of the City of Birmingham.

Article II.

2.01 The location of the Board's principal office and post office address shall be 3600 First Avenue North, City of Birmingham, County of Jefferson, State of Alabama.

Article III

3.01 The period for the duration of the Board shall be perpetual, unless dissolved or terminated in accordance with law.

Article IV

The objects for which the Board is organized are:

4.01 To construct, establish, purchase, extend, combine, operate, manage and maintain a domestic and industrial water system and sewer system, or systems, for the service of the public in the City and adjacent territories in Jefferson County, Shelby County, St. Clair County, Talladega County, Tuscaloosa County, Blount County, Walker County and Cullman County, Alabama and, to that end, to acquire by purchase, lease, contract, condemnation, or otherwise all lands or easements therein, improvements and structures, pipelines, reservoirs, dams, impounding areas, water rights, machinery, plants or other facilities, properties or assets deemed by the Board to be necessary or incidental to the construction, establishment, enlargement, extension, operation, management of, and maintenance of such domestic and industrial water system or sewer system, or systems.

4.02 To do and perform all acts and things and enter into all contracts and undertakings deemed by the Board to be necessary, incidental, accessorial, or related to the construction, establishment, acquisition, management, operation and maintenance of such domestic and industrial water system, sewer system, or systems, including but not limited to the corporate acts and transactions heretofore taken.

4.03 To acquire and operate all lands, mineral or other rights, properties, and to mine, recover, purchase, manufacture, process or otherwise acquire all raw and finished materials deemed by the Board necessary or proper to the construction, operation, extension, management, or maintenance of such domestic and industrial water system, sewer system, or systems.

4.04 To enter into contracts with any person, firm, corporation, or other legal entity, including, but not limited to any county, municipality or other public corporation, for the following purposes: (a) the rendition of services for the construction, operation, extension, management, or maintenance of any domestic and industrial water system, sewer system or systems; or (b) such other services deemed by the Board to be necessary or proper in connection with the functions, powers and objects herein stated.

Article V

The Board shall have the powers to do all things incidental thereto or necessary to the discharge thereof of its corporate form as now authorized by Alabama Code § 11-50-230 *et. seq* (1975), as amended, as well as all other things which may in the future be authorized by Act of the Legislature of Alabama, includeing, but not limited to the following:

5.01 To have succession by its corporate name for the duration of time or until dissolved as provided by law.

5.02 To sue and be sued and to defend civil actions against it.

5.03 To make use of a corporate seal and to alter the same at pleasure.

5.04 To acquire, purchase, or otherwise obtain ownership of, to combine, consolidate, or merge with, to construct or establish, to own, operate, manage, maintain, enlarge, extend and improve a domestic and industrial water system, sewer system or systems (whether or not such domestic and industrial water system, sewer system or systems were in existence, or whether or not such systems were privately owned prior to acquisition by the Board), and to receive, acquire, take and hold, whether by purchase, gift, lease, devise or otherwise, real, personal and mixed property of any nature whatsoever that the Board's board of directors may deem a necessary or convenient part of such domestic and industrial water system, sewer system or systems. In so doing, the Board shall have the authority to provide service to its customers in the territories as more fully set forth and described on Exhibit "A," which is attached hereto and incorporated herein as if fully set forth.

5.05 To borrow money and to issue in evidence of the borrowing interest-bearing bonds payable solely from the revenues derived from the operation of either or both of its systems although the money so borrowed may be used for the benefit of or with respect to only one of its systems).

5.06 To pledge for payment of its bonds any revenues from which such bonds are made payable, and to mortgage, pledge or otherwise convey the domestic and industrial water system, sewer system or systems the revenues from which are so pledged.

5.07 To sell, at wholesale, all or any part of its water supply to any other corporation organized under the provisions of Alabama Code § 11-50-230, *et. seq.* (1975) or to any county, municipality or other public corporation for the distribution to the inhabitants thereof and the surrounding territory.

5.08 To sell domestic and industrial water and to furnish sewer services and other services from any system, the operation of which is provided for in this Certificate of Amendment and Restatement of Certificate of Incorporation, and to establish and collect and alter charges for water, sewer services and all services of any kind sold or furnished by it; provided that charges for services from any sewer system shall be established in such manner that there shall be no charge with respect to any portion of such sewer system that may have been paid for wholly or in part for assessments against the property specifically benefited thereby, but any person whose property is served in part by a portion of a sewer system so paid for and in part by a portion of a sewer system not so paid for may be charged an appropriate rate for the service rendered such property by sewer disposal plant, sewage treatment plant or any other portion of a sewer system which has not to any extent been paid for by such assessments.

5.09 To operate its sewer system and its water system as one consolidated and unified system, keeping the books and records thereof as one unit.

5.10 To lease, exchange, sell, convey and otherwise dispose of all its real, personal and mixed property by any form of legal conveyance or transfer.

5.11 To exercise all powers of eminent domain now or hereinafter conferred on municipalities in this state.

5.12 To appoint and employ such officers and agents, including attorneys, as its business may require.

5.13 To provide for such insurance as its board of directors may deem advisable.

5.14 To enter into contracts binding itself as to the application of money borrowed, as to operations, as to the imposition and collection of reasonable rates, adoption of reasonable regulations, disposition of gross revenues and otherwise as may not be inconsistent with the provisions of law applicable to the Board.

5.15 To acquire all or any of the good will, rights, property and business of any person, firm, corporation or other legal entity, and to hold, utilize, enjoy and in any manner dispose of the whole or any of the rights, property and business so acquired, where not prohibited by law and may assume in connection therewith any liabilities of any such persons, firms, corporations or other legal entities.

5.16 To apply for, purchase or otherwise acquire any patents, copyrights, licenses, trademarks, trade names, rights, processes, formulae and the like, which may seem capable of being used for any of the purposes of the Board, and to use, exercise, develop, grant licenses in respect of, sell and otherwise turn to account, the same.

5.17 To the extent not otherwise prohibited by law, to assume or guarantee the obligation of any person, firm, corporation, or other legal entity and to, when deemed necessary in connection with its objects and purposes, lend its aide or credit to any person, firm, corporation or legal entity.

5.18 To take over, continue, establish and maintain or contribute to such pension and retirement or employee compensation systems and other benefit plans as it may deem necessary or proper.

5.19 To enter into such contracts as the Board may deem advisable with any county, municipality or public corporation with respect to the operation or maintenance of any domestic and industrial water system, sewer system or the collection of charges for the use thereof or for the supply of water for fire or other purposes.

5.20 To, subject to the terms and provisions of any mortgage or deed of trust which may be created to secure bonds issued or to be issued by the Board, enter into such agreements with municipal corporations served by the domestic and industrial water system, sewer system, or systems as it may approve with respect to rates, extension of service within such municipal corporations or allowances to be made in lieu of licenses or taxes, or otherwise with reference to the operation of said systems within such municipal corporations; provided that any agreement with any municipal corporation other than the City for payments from or participation in revenues of the Board from operations shall be subject to approval by the governing body of the City.

5.21 To, subject to the provisions or requirements of any mortgage, deed of trust, or indenture securing bonds or obligations of or assumed by the Board, or other lawful agreement with respect thereto, fix and direct and determine, from time to time, the accumulation, reserve, allegation, use and disposition of any revenues and funds of such domestic and industrial water system, sewer system or systems owned, managed or operated by the Board and determine rates, regulations, service, extensions and all other matters relating to the ownership, management or operation of such domestic and industrial water system, sewer system or systems by the Board.

Article VI

The following provisions for the regulation and conduct of the affairs of the Board are hereby adopted, as authorized by Alabama Code § 11-50-230 et. *seq.* (1975), as amended:

6.01 The management and all operations and policies of the Board shall be subject to determination and control by the board of directors, which shall elect a chairman of the board (who shall be the chief executive officer of the corporation in the absence of the designation by the Board of another as chief executive officer) and a secretary and such other officers as the Board may determine. The chairman of the Board must be a director, but other officers need not be. All officers and employees shall hold office or employment subject to termination by the Board, except as may be otherwise provided by contract authorized or approved by the Board. The duties of all officers and the duties and compensation of all employees, where not fixed by law or contract, shall be determined by the Board by resolution or by-law.

6.02 The directors of the board shall be elected by the governing body of the City and shall consist of five members. Any officer of the City shall, as provided by law, be eligible for appointment and may serve as a member of the board of directors. The directors of the Board shall hold office for staggered terms. All members of the board of directors shall be reimbursed for actual expenses incurred in and about the performance of their duties. All members of the board of directors may be paid a director's fee and a reasonable meeting expense allowance in the manner and in an amount as provided by law, as amended from time to time.

6.03 Any officer or employee elected or appointed by the board of directors may be removed at any time by the affirmative vote of a majority of the whole board of directors. Any other officer or employee may be removed at any time by the affirmative vote of a majority of the board of directors or by any superior officer to whom authority in the premises may have been delegated by the by-laws, by resolution of the directors, or as may be provided by any contract in effect.

6.04 The board of directors shall be authorized to act by vote of a majority and may by by-law adopt such provisions as may not be prohibited by law for the functioning of the Board.

6.05 The Board shall indemnify and hold harmless each director now or hereafter serving the Board from and against any and all claims and liabilities to which he or she may become subject by reason of his or her now or hereafter being or having heretofore been a director or by reason of his or her alleged acts or omissions as a director and shall reimburse each director for all legal and other expenses reasonably incurred by him or her in connection with any such claims or liabilities, provided however, that no director shall be indemnified against or be reimbursed for any expenses incurred in connection with any claim or liability arising out of his or her own willful misconduct. Nothing herein contained shall restrict the rights of the Board to indemnify any officer, director or employee in any proper case, even though not specifically provided for herein.

6.06 Any director may resign by filing written notice of such resignation with the Board or with the city clerk of the City, stating the effective date thereof. In the event of any resignation prior to expiration of the term of office of the director resigning, the City shall be authorized to fill the same by resolution. The director so elected is to hold office for the term for which the director so resigning was elected. Directors whose terms shall expire shall nevertheless serve until the election of their respective successors.

6.07 Any mortgage, deed of trust or pledge agreements securing bonds issued by the Board may contain provisions for the operation, management, maintenance and disposition of its properties, for the custody, allocation, use and disposition of revenues of the Board and with respect to the incurring of obligations by it and may restrict and impose limitations upon exercise by the board of directors of its powers with respect to such matters and any other provisions not inconsistent with law.

6.08 All debts created and bonds issued by the Board shall be solely and exclusively the obligation of the Board and shall not constitute an obligation or debt of the City.

6.09 No provision of this Certificate of Amendment and Restatement of Certificate of Incorporation shall be construed as requiring or authorizing any election or referendum as a condition to the construction, acquisition or establishment of the domestic and industrial water system, sewer system or systems contemplated hereby or as to the issue of bonds to be secured by mortgage in connection therewith or as required by the approval of the Alabama Public Service Commission of the acquisition of such domestic and industrial water system, sewer system or systems or of the rates and regulations of the Board.

6.10 In the event that a court of competent jurisdiction should determine that any provision of this Certificate of Amendment and Restatement of Certificate of Incorporation is contrary to law, such a determination shall not affect any other provisions of this Certificate of Amendment and Restatement of Certificate of Incorporation or of the original Certificate of Incorporation, as same has been amended, which shall continue in effect without said invalid provisions.

IN WITNESS WHEREOF, the undersigned chairman of the board of directors and the undersigned Secretary have caused this Certificate of Amendment and Restatement of Certificate of Incorporation to be executed in the name of, and on behalf of the Board under its corporate seal on this the 15th day of June, 1999.

The Water Works and Sewer Board of the City of Birmingham

By: /s/ Anthony L. Barnes
Its Chairman

By: /s/ not legible
Its Secretary and Treasurer