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WHERE IS THE LINE BETWEEN EXCELLENT AND EXCESSIVE ADVOCACY? INDIANA SUPREME COURT KNOWS WHEN IT IS CROSSED, BUT DOES NOT EXACTLY TELL US WHERE IT IS

HAMMOND V. HERMAN & KITTLE PROPERTIES, INC., 119 N.E.3D 70 (2019)

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TABLE OF CONTENTS

I. INTRODUCTION

In *Hammond v. Herman & Kittle Properties, Inc.*, the Supreme Court of Indiana was given the opportunity to consider a case of special legislation.[1] The term "special legislation" refers to laws that only apply

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1. 119 N.E.3d 70, 73 (Ind. 2019).

to a specific class.[2] While special legislation is generally prohibited by two provisions of the Indiana State Constitution,[3] the Supreme Court of Indiana has recognized that there are some cases where special legislation is necessary[4] and therefore views the state constitution as "limiting" special legislation, as opposed to completely banning it.[5] Accordingly, if a proponent of special legislation can demonstrate why the "unique characteristics" of the targeted group justified that specific law, then the special legislation can stand as constitutional.[6] At issue in this case was a provision of Indiana Code section 36-1-20-5 that exempted two cities—Bloomington and West Lafayette—from a newly imposed restriction on municipal rental fees.[7]

So, was this special exemption a product of excellent representation and advocacy by the legislators from Bloomington and West Lafayette, who managed to identify and address unique attributes of their constituencies that warranted a special exception to the fee restriction imposed on all other municipalities in Indiana?[8] Or was this exemption the result of excessive advocacy, "precisely the type of law that [the framers of the special legislation amendment] sought to eliminate during the 1850–1851 Constitutional Convention"?[9] The Supreme Court of Indiana decided that it was the latter,[10] and this Comment will analyze that decision. This Comment will begin by providing a brief factual and procedural history of the case, as well as a brief synopsis of relevant state constitutional and statutory provisions. It will then discuss the court's analysis and conclusion that the special legislation violated the state constitution. Finally, this Comment will conclude that the Indiana Supreme Court correctly decided that this special legislation violated the

2. *Id.* at 73.

3. IND. CONST. art. IV, §§ 22–23. While section 22 bars special legislation by specific category—including, of relevance here, relating to "fees and salaries," except where it is necessary to adjust the salaries for officers based on population differences—section 23 extends the bar against special legislation to "all other cases where a general law can be made applicable." *Id.*

4. *Hammond*, 119 N.E.3d at 73.

5. *Id.* at 78.

6. *Id.* at 73.

7. *Id.* The Indiana Supreme Court called the provision capping registration fees the "Fee Restriction" and the provision exempting Bloomington and West Lafayette the "Fee Exemption," terms that this Comment will use as well. *Id.* Both are discussed *infra* Section III.B.

8. *See id.* at 75–77 (stating that representatives from Bloomington and West Lafayette were among the defenders of municipal rental fees when a ban on such fees was debated in the early legislative stages of what would later become the Fee Restriction).

9. *Id.* at 86.

10. *Id.*

state constitution and will briefly touch on the decision's impact on the court's influence on legislative public policy.

II. STATEMENT OF THE CASE

The City of Hammond, Indiana, is a community of about 75,000 people.[11] Under its power to protect the health, safety, and general welfare of its residents, the city maintains two programs to regulate rental properties—an inspection program, created in 1961, and a rental registration program, created in 2001.[12] The inspection program allowed city officials to inspect both rental and non-rental dwellings and charged hotels and rooming houses a fee of $5 per year.[13] The rental registration program required that rental property owners register their properties with the city, and also required a fee of $5 per year.[14] In 2010, however, Indiana voters approved a constitutional amendment permanently implementing a set of property tax caps, including a 1% cap for homes and a 2% cap for rental properties.[15] While the property tax caps may have benefited taxpayers, Hammond found itself looking at a severely strained budget, with millions of dollars in budget shortfalls.[16] As a result, and while already facing a declining population and shrinking tax base,[17] Hammond dramatically increased the rental registration fee—implemented in 2001 as $5—to $80 in 2010.[18] And Hammond was not the

11. *QuickFacts: Hammond City, Indiana*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/hammondcityindiana (last visited Feb. 7, 2020).

12. *Hammond*, 119 N.E.3d at 74. Hammond's inspection program was established at the height of its population boom, after it gained approximately 24,000 residents between 1950 and 1960 to reach almost 112,000 people, before starting a steady decline in the following decades. *Indiana City/Town Census Counts, 1900–2010*, STATS. IND., IND.'S PUB. DATA UTIL., https://www.stats.indiana.edu/population/PopTotals/historic_counts_cities.asp (last visited Mar. 12, 2020).

13. *Hammond*, 119 N.E.3d at 74.

14. *Id.* In 2004, the city increased the fee from $5 to $10. *Id.* at 75.

15. *Id.* at 75; *Indiana Voters OK Property Tax Cap Amendment*, INDIANAPOLIS BUS. J. (Nov. 3, 2010), https://www.ibj.com/articles/23227-indiana-voters-ok-property-tax-cap-amendment.

16. *See* Joseph S. Pete, *Hammond Approves $102 Million Budget that Cuts Costs, Jobs*, TIMES NWI (Dec. 26, 2019), https://www.nwitimes.com/news/local/hammond-approves-million-budget-that-cuts-costs-jobs/article_90d526dc-53c8-5d25-81b3-fae3ac2c23dc.html (stating that the town expected to lose $13 million due to the property tax cuts as recently as 2019 and was looking at a budget shortfall of $51.2 million).

17. *See Indiana City/Town Census Counts, 1900–2010*, *supra* note 12; *Hammond*, 119 N.E.3d at 75.

18. *Hammond*, 119 N.E.3d. at 74–75.

only city to respond to the tax cap amendment by raising rental fees.[19] Bloomington also raised rental fees after the tax caps became permanent, and other cities, such as Crown Point, Evansville, and Valparaiso, implemented rental fees as a response.[20] This trend, however, sparked concern in the Indiana Legislature that the increased rental fees were becoming too expensive, thus stymieing new rental development and negatively impacting the housing market overall.[21] Out of this concern, both the Fee Restriction and Fee Exemption were born.[22]

The legislative history of the Fee Restriction and Fee Exemption, as well as the history of Hammond's lawsuit, are complex and intertwined.[23] After several versions of the bill containing both the Fee Restriction and the Fee Exemption failed,[24] the legislature finally passed House Bill 1403, which forbade all municipalities in the state from imposing rental fees in excess of $5—the Fee Restriction—*unless* they had rental inspection programs that predated 1984—the Fee Exemption.[25] An analysis from the Legislative Services Agency stated that the only two municipalities that fell into the exemption category, however, were the cities of Bloomington and West Lafayette.[26] When Herman & Kittle Properties refused to pay Hammond rental fees that exceeded the new Fee Restriction, Hammond argued that it also fit the Fee Exemption criteria because it had an inspection program in place since 1961.[27] Curiously, though, while Hammond's lawsuit was pending, the legislature went back to the drawing board to further narrow the Fee Exemption in a way that would squeeze out Hammond, while leaving Bloomington and West Lafayette undisturbed.[28] Hammond then amended its complaint to challenge the statute as unconstitutional

19. *Id.* at 75.

20. *Id.* Indeed, several Indiana cities, such as East Chicago, Griffith, Munster, Nappanee, and Speedway implemented measures to increase rental fees *before* the tax caps even went into effect. *Id.*

21. *Id.*

22. *Id.* at 76–77.

23. *See id.* at 73–74.

24. *See id.* at 75 (discussing H.B. 1543, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011) and H.B. 1313, 118th Gen. Assemb., 1st Reg. Sess. (Ind. 2013)).

25. *Id.* at 76.

26. *Id.*

27. *Id.* Hammond's inspection program, which did not apply exclusively to rental properties, did charge a $5 fee for "hotels and rooming houses." *Id.* at 74. Rooming houses were defined as "any dwelling, or that part of any dwelling containing three or more rooming units, in which space is let by the owners or operator to persons who are not husband or wife, son or daughter, mother or father, or sister or brother of the owner or operator." *Id.* at 74 n.1.

28. *Id.* at 77.

special legislation, in violation of article 4, sections 22 and 23 of the Indiana Constitution.[29] Specifically, Hammond argued that the Fee Exemption unconstitutionally favored Bloomington and West Lafayette and could not be severed from the Fee Restriction, thus dooming the entire statute.[30] Herman & Kittle Properties, which first challenged Hammond's invocation of the Fee Exemption, defended the statute, and was joined in its defense by the State of Indiana.[31]

The trial court granted summary judgment to Herman & Kittle Properties and the State, holding that the special legislation was constitutional.[32] The Court of Appeals, however, reversed—holding that the special legislation violated article 4, sections 22 and 23 of the Indiana Constitution, and declared the entire statute unconstitutional.[33]

III. BACKGROUND

The question of whether the final version of the Fee Exemption was unconstitutional special legislation involved a deep look at both article 4, sections 22 and 23 of the Indiana Constitution[34] and the Fee Exemption itself.[35] Accordingly, a brief overview of these constitutional provisions will be provided, as well as a brief account of the Fee Exemption and its complicated legislative history.

A. State Constitutional Provisions

Both section 22 and section 23 of article 4 of the Indiana State Constitution place limits on special legislation, but from different angles: section 22 is direct and limits certain specific forms of special legislation,[36] while section 23 is general, sweeping up all special laws that were not enumerated in section 22 but could otherwise be made generally applicable.[37] Among the list of specific special laws prohibited by section

29. *Id.*
30. *Id.*
31. *Id.* at 74, 77.
32. *Id.* at 77.
33. *Id.*
34. *Id.* at 78–79.
35. *Id.* at 85. Both parties agreed that the Fee Exemption was special legislation, the only question was whether it could be justified or was in contravention of either sections 22 or 23, or both. *Id.*
36. IND. CONST. art. IV, § 22.
37. *Id.* § 23.

22 are those regulating "fees and salaries."[38] Section 22 states, in relevant part: "The General Assembly shall not pass local or special laws: . . . [r]elating to fees or salaries, except that the laws may be so made as to grade the compensation of officers in proportion to the population and the necessary services required."[39] By contrast, section 23 simply states that: "In all the cases enumerated in the preceding section, and in *all other cases where a general law can be made applicable*, all laws shall be general, and of uniform operation throughout the State."[40]

These provisions of the Indiana State Constitution were not original to the state's first constitution.[41] Rather, they were produced from a constitutional convention in 1850–51.[42] Called for by newly-elected Governor James Whitcomb, who cited the "growing evils of excessive legislation" in his inaugural address, the convention was approved by voters in 1849.[43] Governor Whitcomb explicitly targeted the increasingly specialized nature of legislation with his call for the convention, and indeed, approximately 91% of all legislation at that time was considered special legislation.[44] Indiana was not alone in this trend either: many states in the mid-nineteenth century were struggling to contain the amount of special legislation consuming their legislatures, and many also adopted constitutional provisions to limit them.[45] Governor Whitcomb's concerns did not go unheeded by the framers at the convention, and delegates expressed concerns regarding special legislation ranging from uniformity and notice to equality of rights and privileges among all citizens of the state.[46] The result was the passage of sections 22 and 23

38. *Id.* § 22.

39. *Id.*

40. *Id.* § 23 (emphasis added).

41. Hammond v. Herman & Kittle Props., Inc., 119 N.E.3d 70, 80 (2019).

42. *Id.*

43. *Id.* at 79–80. The first time the convention was placed on the ballot, it failed for somewhat technical reasons: article VIII required that it pass by a majority of votes, which at the time was interpreted to mean a majority of all votes cast in that election. *Id.* So, while a majority of voters *who voted on the convention question* voted to have a convention, many voters in that election did not vote on the convention question at all, and so it did not garner "a majority of all the votes" as it was interpreted at the time. *Id.*

44. *Id.*; Frank E. Horack, *Special Legislation: Another Twilight Zone*, 12 IND. L.J. 109, 115 (1936).

45. ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 278 & n.176 (2009) (comparing the ratio of special legislation in Indiana in 1850 to that in New Jersey in the 1870s, and stating that the abuse of special legislation in Pennsylvania spurred the state's convention of 1873).

46. *Hammond*, 119 N.E.3d at 80. Delegate John Petitt of Tippecanoe County stated that the legislature was tasked with relieving people of the "painful uncertainty as to whether [they were] living under the same system of laws" when crossing from one county

of article 4 of the state constitution.[47] While the language of section 23—the main focus of the court in *Hammond*—has not changed over the years, the judicial framework for applying section 23 has evolved over time.[48]

B. Fee Restriction and Fee Exemption: Indiana Code Section 36-1-20-5

Indiana Code section 36-1-20-5 contained both the Fee Restriction, which caps all municipal rental fees at $5, and the Fee Exemption, which effectively carves out an exception from the Fee Restriction for Bloomington and West Lafayette.[49] Section 36-1-20-5 reads, in relevant part: "A political subdivision may impose on an owner or landlord of a rental unit an annual registration fee of not more than five dollars ($5)."[50] The Code defines a "rental registration or inspection program" as "a program authorizing the registration or inspection of only rental housing. The term does not include a general housing registration or inspection program or a registration or inspection program that applies only to rooming houses and hotels."[51] The Code also states that "[t]his section does not apply to a political subdivision with a rental registration or inspection program created before July 1, 1984."[52]

The legislative history for section 36-1-20-5 is complex.[53] The origins of what would eventually become the Fee Restriction began in 2011 when chapter 36-1-20 was added to the Indiana State Code.[54] While a provision banning municipalities from collecting rental fees altogether did not make it into the final draft, chapter 36-1-20 addressed the rental fee issue by requiring that municipalities keep them in a special fund to reimburse the municipal expenses that justified the imposition of the fees in the first place.[55] The legislature, however, was still concerned about the

to another and explained another delegate's reasoning that "our object ought to be . . . that wherever a man treads the soil of Indiana, he shall have the same rights and privileges." *Id.* (quoting 2 H. FOWLER & A. H. BROWN, REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 1765–67 (Offset Process 1935) (1850)).

47. *Id.*

48. *Id.* The evolution of the judicial framework will be discussed *infra* Section IV.A.

49. *Hammond*, 119 N.E.3d at 73–74.

50. IND. CODE § 36-1-20-5(c) (2014), *invalidated by* Hammond v. Herman & Kittle Props., Inc., 119 N.E.3d 70 (2019).

51. IND. CODE § 36-1-20-1.2 (2015).

52. IND. CODE § 36-1-20-5(a) (2014).

53. *Hammond*, 119 N.E.3d at 74.

54. *Id.* at 75.

55. *Id.*

effects of rising municipal rental fees on housing affordability, and in 2013, another bill was introduced with a provision to bar the fees.[56] This provision, too, was removed and was substituted with a one-year moratorium on new rental fees.[57] The following year, the legislature again attempted to tackle the rising rental fees and proposed adding the Fee Restriction to chapter 36-1-20, capping all municipal rental fees at $5.[58] It passed, but included an amendment from a West Lafayette representative exempting towns with rental registration and inspection programs established before July 1984, despite the fact that the Legislative Services Agency had issued a statement before the final vote confirming that West Lafayette and Bloomington were the only cities or towns that would fit the new Fee Exemption.[59] Hammond later brought suit, arguing that its inspection program, which included rental properties such as hotels and rooming houses, dated to 1961 and thus fit the exemption requirements.[60]

Rather than concede that Hammond fit the Fee Exemption criteria or simply fight it out in court, the legislature decided to rework the Fee Exemption.[61] First, it proposed to tighten the applicability of the Fee Exemption by limiting it to only those towns that established rental programs before July 1984 *but after* July 1, 1977.[62] However, this formula would have excluded not only Hammond, but Bloomington as well, and it was discarded.[63] A second proposal targeted the definitions of the Fee Exemption rather than the time-frame and proposed to define "rental registration or inspection program[s]" as those applying only to rental dwellings, and excluding "rooming houses" from the definition of rental dwelling.[64] This narrow definition excluded Hammond because its inspection program applied both to non-rental properties and "rooming houses"—which *are* rental properties, as Hammond would argue—alike.[65] But the legislature tightened this definition too much, because Bloomington also included "rooming houses" in its definition of "rental dwelling."[66] Finally, on its third attempt to rework the Fee Exemption,

56. *Id.*
57. *Id.*
58. *Id.* at 76.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 76–77.
65. *Id.* at 77.
66. *Id.*

the legislature succeeded in drawing boundaries for the Fee Exemption that *included* both West Lafayette and Bloomington but *excluded* Hammond.[67] It defined "rental registration or inspection program" to include only those programs that applied exclusively to rental properties—as opposed to those that also included non-rental properties, like Hammond's—and excluded programs that applied only to hotels and rooming houses—as opposed to all forms of rental housing, which is exactly what Hammond's program did.[68] Needless to say, Hammond could no longer argue in court that it fit the Fee Exemption criteria, and thus Hammond amended its complaint to challenge the law as unconstitutional.[69]

IV. THE COURT'S ANALYSIS

The Supreme Court of Indiana, in a unanimous decision,[70] found that the Fee Exemption did in fact violate article 4 of the Indiana Constitution—specifically section 23—and reversed the trial court's decision.[71] The court also found that, because there was no evidence to rebut a statutory presumption in favor of severability, the Fee Exemption was severable from the Fee Restriction, thus leaving the $5 rental fee cap in place but eliminating the special protection for Bloomington and West Lafayette.[72]

The court focused its analysis on section 23, the more general of the two provisions.[73] In finding that the Fee Exemption violated section 23, the court first stated that it in fact had the power to review the legislature's contention that a law could not be made generally applicable

67. *Id.* Perhaps foreshadowing how she would eventually rule on the case, Chief Justice Loretta Rush once described this legislative history as a "tortured process." Dan Carden, *Fate of Hammond's Rental Registration Fee in Hands of Indiana Supreme Court Justices*, TIMES NWI (Sept. 13, 2018), https://www.nwitimes.com/news/local/govt-and-politics/fate-of-hammond-s-rental-registration-fee-in-hands-of/article_60f729b9-e9f6-5a42-90de-a78921f8be5b.html. She would later author the opinion declaring the Fee Exemption special legislation in violation of article 4, section 23. *See Hammond*, 119 N.E.3d at 73–74.

68. *Hammond*, 119 N.E.3d at 77 (quoting IND. CODE § 36-1-20-1.2 (2015)).

69. *Id.*

70. *Id.* at 89. Justice Geoffrey Slaughter did not take part in the decision because he previously represented Herman & Kittle Properties, one of the defendants, in the same case when it was before the trial court. Carden, *supra* note 67. He was later appointed to the Supreme Court in 2016. *Id.*

71. *Hammond*, 119 N.E.3d at 89.

72. *Id.*

73. *Id.* at 78 n.5.

across the state—a position that was not clear in the immediate aftermath following the 1850–51 convention.[74] In 1933, however, the court definitively staked its claim of judicial review to determine whether a law violated section 23 of article 4.[75] The court then traced the development of the judicial framework for analyzing laws against the backdrop of section 23, first discussing a string of special laws that were based on population criteria.[76] In those cases, the court had required a "rational relationship" between the special laws and the population classes that were targeted by the laws.[77] It then discussed further development of the caselaw and eventually applied that doctrine to the case at hand, declaring the Fee Exemption to be unconstitutional special legislation and severing the unconstitutional Fee Exemption while leaving the broader Fee Restriction in place.[78]

A. Judicial History of the Special Legislation Doctrine

The next big development in section 23 jurisprudence came in 1994, in the case of *Indiana Gaming Commission v. Moseley*.[79] In *Moseley*, the court added an important principle: even if a law is general in form, if it is special in application, then it may violate section 23.[80] In that case, a law had again included a population requirement that effectively applied only to Lake County.[81] It allowed some cities in Lake County to hold city-wide votes on riverboat gambling, while other regions had to vote in county-wide elections.[82] The court eventually upheld this law, reasoning that (1) the law could not be applied generally because not every county had bodies of water suitable for such a vote, and (2) the heavily populated coast on Lake County was a unique attribute of the county that justified the special legislation.[83]

74. *Id.* at 80–81.

75. *Id.* at 81 (citing Heckler v. Conter, 187 N.E. 878, 879 (Ind. 1933)). The *Heckler* court stated that "if the Legislature may arbitrarily decide that a general law cannot be made applicable, and its decision is final and cannot be questioned, it is not restrained or restricted in any sense, and the constitutional provision is, if not a nullity, at least a mere admonition." *Heckler*, 187 N.E. at 879.

76. *Hammond*, 119 N.E.3d at 81.

77. *Id.* at 80–81 (citing Perry Civ. Twp. v. Indianapolis Power & Light Co., 51 N.E.2d 371, 374 (1943)).

78. *Id.* at 81–89.

79. 643 N.E.2d 296 (Ind. 1994).

80. *Id.* at 301.

81. *Id.* at 298.

82. *Id.*

83. *See id.* at 301.

Following the *Moseley* decision, the modern framework began to come into view.[84] The court soon focused on the boundaries of constitutional special legislation in *State v. Hoovler*.[85] In *Hoovler*, the court held that a special law giving financial assistance to Tippecanoe County to help clean up a "Superfund" landfill site was constitutional because of the EPA's special designation of a "Superfund" site and the unique financial liability that accompanied that designation.[86] In *Williams v. State*, the court established a two-prong test for this framework: (1) is the law special or general, and (2) if it is general, is it applied generally throughout the state—or if it is special, is it constitutional nevertheless?[87] One last case, *Municipal City of South Bend v. Kimsey*,[88] completed the modern day framework by clarifying that the proponent of the special law has the burden of proving it constitutional.[89]

With that framework in mind, the court then reviewed a number of post-*Kimsey* cases.[90] The court looked first at two cases in which it had rejected article 4, section 23 challenges—*State v. Lake Superior Court*[91] and *State v. Buncich*.[92] In *Lake Superior Court*, the court confronted tax reassessment laws that applied only to Lake County but held that the special laws were constitutional because of the "long and tortured" tax history unique to Lake County.[93] In *Buncich*, the court confronted another law that applied only to Lake County—this one targeting small precincts for consolidation as a way to make elections less costly.[94] The *Hammond* court noted that *Buncich* presented a somewhat trickier question than *Lake Superior County* had, in that other counties had small precincts as well.[95] Acknowledging that *Buncich* presented a question of degree, the court nevertheless held that the law was constitutional due to the fact that Lake County had nearly twice as many small precincts as

84. Hammond v. Herman & Kittle Props., Inc., 119 N.E.3d 70, 81–82 (2019).
85. *Id.* at 82.
86. *State v. Hoovler*, 668 N.E.2d 1229, 1234–35 (Ind. 1996).
87. 724 N.E.2d 1070, 1085 (Ind. 2000).
88. 781 N.E.2d 683 (Ind. 2003).
89. *Hammond*, 119 N.E.3d at 83. Of the constitutionality analysis, the *Kimsey* court stated that "if the conditions the law addresses are found in at least a variety of places throughout the state, a general law can be made applicable and is required." *Id.* (quoting *Kimsey*, 781 N.E.2d at 692–93).
90. *Id.* at 83–84.
91. 820 N.E.2d 1240 (Ind. 2005).
92. 51 N.E.3d 136 (Ind. 2016).
93. *Lake Superior Ct.*, 820 N.E.2d at 1249.
94. *Buncich*, 51 N.E.3d at 139.
95. *Hammond*, 119 NE.3d at 83–84.

any other county in the state.[96] And while the court cautioned that "statistics 'may be pliable,'" it reasoned that the number of small precincts in Lake County, coupled with the presumption of constitutionality, was enough to save the law.[97]

Conversely, in *Alpha Psi Chapter of Pi Kappa Phi Fraternity, Inc. v. Auditor of Monroe County*, the court analyzed a law that granted more favorable property tax filing conditions to three fraternities at Indiana University.[98] Noting that there was nothing unique or distinguishable about those three fraternities in particular, the court struck down the law and declared that it was "precisely the sort of 'special law' that [the drafters of the amendment] sought to eliminate."[99]

From these three recent cases, the court pulled two additional considerations for analyzing *Hammond*: (1) there is an overarching presumption of constitutionality applied to special legislation challenges, and (2) the proponent of the law has the burden of showing that the law cannot be made generally applicable i.e. that the legislation is justified by the uniqueness of the class to which it applies.[100] The interplay of these two provisions—that a proponent must bear the burden even where a presumption of constitutionality exists—creates a relatively low bar for proponents of special legislation to clear.[101]

B. Judicial Application of the Special Legislation Doctrine

Applying all of these factors to *Hammond*, the court first looked at the first prong from the *Williams* test: is the law in question special legislation?[102] The answer to that question was easy: the court noted that both parties agreed that this was special legislation.[103] The court then turned to the second prong: whether the defendants could "demonstrat[e] a link between the class's unique characteristics and the legislative fix."[104] In an effort to do this, the defendants proffered three unique

96. *Id.* (citing *Buncich*, 51 N.E.3d at 141–43).
97. *Id.* at 84 (quoting *Buncich*, 51 N.E.3d at 143).
98. *Id.* (citing Alpha Psi Chapter of Pi Kappa Phi Fraternity, Inc. v. Auditor of Monroe Cnty., 849 N.E.2d 1131 (Ind. 2006)).
99. *Id.* (quoting *Alpha Psi*, 849 N.E.2d at 1138–39).
100. *Id.*
101. *Id.*
102. *Id.* at 82, 85.
103. *Id.* at 85. And to dispel any doubt, the court added for good measure that the defendants could not reasonably refute that the Fee Exemption was special legislation: "After all, it's clear that the Fee Exemption 'pertains to and affects' particular places, namely, Bloomington and West Lafayette." *Id.* at 78.
104. *Id.* at 82, 85.

attributes which, they alleged, justified the special legislation: (1) a higher than average percentage of renters; (2) a high percentage of young and unsophisticated renters; and (3) a history of programs that regulate landlords through inspection and registration.[105]

The court rejected each of these three justifications.[106] First, the court held that, while Bloomington and West Lafayette did have the highest percentage of rental units, 67% and 67.6% respectively, these numbers were only "moderately" higher than other towns, including "East Chicago at 58.5%, Speedway at 51.5%, Elkhart at 49.2%, Lafayette at 48.7%, Muncie at 48.6%, Gary at 47.3%, Valparaiso at 44.6%, Terre Haute at 44.5%, Indianapolis at 44.2%, and Evansville at 44%."[107] Acknowledging that this was again a question of degree, the court stated that these numbers did not justify the special treatment afforded by the Fee Exemption.[108] Second, the court reasoned that, similarly, Bloomington and West Lafayette were not the only towns that had large populations of young and unsophisticated student renters.[109] Other cities, such as Muncie, Indianapolis, and Terre Haute, were also home to universities, presumably with large populations of young, unsophisticated student renters.[110] And third, the court reasoned that the cities' long histories of regulating landlords through inspection and rental programs were likewise not unique, as other towns, namely Hammond itself, had programs dating back at least equally as far.[111]

In addition to finding that none of the three proffered justifications were unique, the court also reasoned that the latter two—the high number of unsophisticated renters and the long history of the rental programs—would not justify the special legislation even if they were unique classes.[112] The court stated that the defendants "failed to establish a link between those characteristics and the Fee Exemption's preferential treatment."[113] For example, in regard to the high numbers of young and unsophisticated renters, the court stated that "Herman &

105. *Id.* at 85.
106. *Id.* at 86.
107. *Id.* at 85.
108. *Id.*
109. *Id.*
110. *Id.* at 85–86.
111. *Id.* at 86. As a reminder, Hammond's inspection program dates back to 1961, earlier than West Lafayette's by fifteen years and at least as early as Bloomington's, although some uncertainty exists as to when Bloomington's inspection program began. *Id.* The court also noted that the City of Goshen had a program dating back more than twenty-five years. *Id.*
112. *Id.* at 86–87.
113. *Id.* at 87.

Kittle [gave] no reason why these types of renters are grounds to permit rental-registration fees over $5."[114]

The court did, however, indicate that the link provided for the first justification *might have* sufficed had the high percentage of rental units in Bloomington and West Lafayette actually been a unique characteristic.[115] That link was that the high percentage of rental housing in the two cities gave landlords unparalleled control over the housing market.[116] Presumably, then, the cities' ability to control rental fees would act as some sort of check on the landlords' power. Acknowledging that the defendants did "manage[] to link the characteristic to the legislative remedy," the court again pointed to Hammond's argument that the characteristic was not unique, and therefore the law could be made generally applicable.[117]

C. The Issue of Severability

After declaring that the Fee Exemption was special legislation *and* was in violation of article 4, section 23, the court faced a second question: did the unconstitutionality of the Fee Exemption doom the entirety of Indiana Code section 36-1-20-5, or was the Fee Exemption severable from the Fee Restriction?[118] The court reasoned that there are two questions for this issue, either of which could render a provision non-severable if answered in the negative: first, whether the statute could stand on its own without the severed provision, and second, whether the legislature intended for the rest of the statute to stand if the unconstitutional part were severed.[119]

Diverging sharply from the court of appeals, which relied on legislative history to conclude that the Fee Exemption was non-severable, the court found the Fee Exemption severable.[120] The court pointed to a statute, enacted after caselaw on which the court of appeals had relied, which created a presumption of severability—*unless* the statute included a non-severability clause or one of two conditions were met: either both provisions were essentially and inseparably connected or one was incapable of standing without the other.[121]

114. *Id.* at 85.
115. *See id.* at 86–87.
116. *Id.* at 85–86.
117. *Id.* at 87.
118. *Id.*
119. *Id.*
120. *Id.* at 87–89.
121. *Id.* at 87–88 (citing IND. CODE § 1-1-1-8 (2018)).

Given that the statute did not contain a non-severability clause, the presumption was that the legislature intended that the two provisions be severable.[122] Although Hammond pointed to the failure of several previous versions of the Fee Restriction that did not include a Fee Exemption for both Bloomington and West Lafayette, the court was persuaded by the defendants' argument that the legislature was primarily motivated to pass the Fee Restriction out of concern that rental fees were negatively affecting the housing market by making rental housing more expensive and stifling development.[123] This was because Hammond failed to show "that the legislature intended to revert back to a time when political subdivisions could charge any rental-registration-fee amount of their choosing."[124] Thus, Hammond failed to rebut the statutory presumption of severability.

V. ANALYSIS AND IMPLICATIONS

This case presents something of a double-edged sword for two different concerns regarding special legislation doctrine. On the one hand, it does little to illuminate the "Twilight Zone" in which most special legislation exists.[125] In other words, this case misses an opportunity to help clarify a somewhat confusing doctrine with ambiguous lines, leaving much uncertainty as to what kind of special laws the legislature may still pass and why. On the other hand, this case serves to somewhat counter concerns that state courts are giving less effect, or even no effect, to constitutional amendments limiting special legislation.[126] While the court's analysis is not totally satisfactory in its discussion of the boundaries of this case and what that means for special legislation as a whole, this Comment proposes that the court's decision to give meaning to its constitutional amendment limiting special legislation generally justifies the court's decision in this case.

122. *Id.* at 88.
123. *Id.* at 89.
124. *Id.*
125. *See generally* Horack, *supra* note 44. The title of Horack's article, which discusses the high amount of confusion and inconsistency in special legislation doctrine specifically in Indiana, is called "Special Legislation: Another Twilight Zone." *Id.*
126. *See* Justin R. Long, *State Constitutional Prohibitions on Special Laws*, 60 CLEV. ST. L. REV. 719, 731–33 (2012); *see generally* Anthony Schutz, *State Constitutional Restrictions on Special Legislation as Structural Restraints*, 40 J. LEGIS. 39 (2013).

A. The Court Did Not Clarify the Boundaries of the Special Legislation Doctrine

The court's decision in *Hammond* did little to clarify the constitutional boundaries of special legislation. Despite the court providing a long and very detailed history of special legislation jurisprudence,[127] as well as a brief history of the adoption of article 4, sections 22 and 23,[128] the actual boundaries of the doctrine remain fuzzy, and the test that the court offers is broad at best.[129] The framework appears to be this: first, start with two overarching principles that (1) the statute is presumed constitutional and (2) per *Kimsey*, the proponent of the alleged special law has the burden, albeit a low one, of proving that the law cannot be made general.[130] Next, move on to the two-prong test established in *Williams*: (1) is the law special or general, and (2) if the law is general, is it applied generally or specially—or if the law is special, is it constitutionally permitted?[131]

The latter part of the second prong of the *Williams* test lacks the most boundaries and seems to do most of the work in special legislation cases. While the court in *Hammond* made numerous references to a "link" between the unique characteristics of a targeted class and the "legislative fix,"[132] perhaps a more helpful definition appears in the court's initial summation of the caselaw on special legislation:

> In sum . . . the constitutionality of special legislation hinges on the uniqueness of the identified class and the relationship between that uniqueness and the law. More specifically, a special law complies with Article 4, Section 23 *when an affected class's unique characteristics justify the differential treatment the law provides to that class*.[133]

From this, we know that the court expects (1) uniqueness and (2) a link between that uniqueness and the law. But not just a link—the court will

127. *Hammond*, 119 N.E.3d at 80–84.
128. *Id.* at 79–80.
129. This issue, however, does not seem to be unique to Indiana courts. *See* Schutz, *supra* note 126, at 48–49 (stating that "[e]ven though the text of special-legislation provisions is strikingly similar in 31 states and similar in relevant part in others, and even though these provisions were all adopted in the same era of constitutional change, there is little agreement on what the terms 'special', 'local', and 'general' mean").
130. *Hammond*, 119 N.E.3d at 84.
131. *Id.* at 82.
132. *Id.* at 84–85, 87.
133. *Id.* at 84 (emphasis added).

also look for some threshold of justification as to *why* that link warrants special treatment. While this provides a good understanding of what the court is looking for in general, the contours are still uncertain.

On the one hand, we know that the court has found the following uniqueness-legislative fix links to be justifiable: Lake County's populous lakeside coast and a special law allowing for city-level riverboat gambling referendums as opposed to county-level;[134] Tippecanoe County's "Superfund" landfill—which was the only site in the state to have a certain designation from the EPA increasing liability for the county—and a special tax incentive program aimed at helping clean the site;[135] Lake County's unique characteristic of being a large county with a large docket, and a special law increasing the amount of magistrates there;[136] Lake County's "long and tortured history of property taxation" that was comparable with no other in the state and a special law targeting tax reassessment there;[137] and Lake County's unique feature of having more than double the amount of small precincts of any county, and a special law aimed at consolidating those small precincts.[138]

On the flip side, the court also declared a few uniqueness-legislative links to be unjustifiable: the population range of St. Joseph County was not unique enough to justify a special law lowering the threshold to defeat annexation from 65% to a simple majority,[139] and three fraternities at Indiana State University were not unique enough among fraternities to justify a special law extending their property tax filing deadlines.[140] And of course, here, the high percentages of rentals, large student renter populations, and long history of rental programs did not justify the Fee Exemption.[141]

The court held that none of the proffered unique characteristics were even "unique" in the sense needed to *justify* the special legislation.[142] This case seems to fall somewhere between *Buncich* and *Apha Psi*. On the one hand, this intuitively feels like the same kind of case as *Alpha Si*—an

134. *Id.* at 81–82 (citing Indiana Gaming Comm'n v. Moseley, 643 N.E.2d 296 (Ind. 1994)).

135. *Id.* at 82 (citing State v. Hoovler, 668 N.E.2d 1229 (Ind. 1996)).

136. *Id.* (citing Williams v. State, 724 N.E.2d 1070 (Ind. 2000)).

137. *Id.* at 83 (quoting State v. Lake Superior Ct., 820 N.E.2d 1240 (Ind. 2005)).

138. *Id.* at 83–84 (citing State v. Buncich, 51 N.E.3d 136 (Ind. 2016)).

139. *Id.* at 83 (discussing Mun. City of S. Bend v. Kimsey, 781 N.E.2d 683 (Ind. 2003)).

140. *Id.* at 84 (citing Alpha Psi Chapter of Pi Kappa Phi Fraternity, Inc. v. Auditor of Monroe Cnty., 849 N.E.2d 1131 (Ind. 2006)).

141. *Id.* at 85–87.

142. *Id.* at 86.

exemption from a general rule for a select group that does not necessarily exhibit any unique characteristics that warrant it. But that begs the question—what kind of uniqueness would warrant it? That is where *Buncich* provides some clarity, but not much. The court in *Buncich* held that uniqueness can turn on "a question of degree," and while statistics are not dispositive, a statistical difference of a certain degree can be unique.[143] In *Buncich*, that statistic was that Lake County had double the amount of small precincts compared to any other county.[144] *Hammond*'s statistic was that rentals accounted for at least 67% of the housing market in Bloomington and West Lafayette, while the next closest town was at 58.5%.[145] The court did not explain what number would have made the statistic unique. Did it need to be double that of the nearest town, as in *Buncich*? Would a 20% difference, as opposed to a 7.5% difference, suffice? This boundary remains unclear.[146]

Moreover, the court found that there were no justifiable links.[147] Interestingly, the court hinted that had the rental statistic been higher, and thus unique, perhaps *that* link would have been justifiable.[148] But the language the court used is far from certain—it stated that "Herman & Kittle *managed* to link the characteristic to the legislative remedy" but did not go out of its way to state that the link was a good justification for the Fee Exemption.[149] Going forward, this could be a very tenuous proposition to rely on in support of a similar legislative remedy, and so here too, the boundaries for a justifiable link remain unclear.[150]

143. *Id.* at 83–84 (quoting *Buncich*, 51 N.E.3d at 143).

144. *Id.* at 84 (citing *Buncich*, 51 N.E.3d at 143).

145. *Id.* at 85.

146. Other states have faced criticism for having flawed doctrines for analyzing special legislation in accordance with state constitutional provisions. *See, e.g.*, Dan Friedman, *Applying Federal Constitutional Theory to the Interpretation of State Constitutions: The Ban on Special Laws in Maryland*, 71 MD. L. REV. 411, 420–27 (2012). Friedman discusses how controlling judicial interpretation of Maryland's state constitutional ban on special legislation contains both procedural and substantive concerns, such as failing to adequately explain how the two steps in the test are related, eliminating a "reasonableness" test, failing to consider the presumption of constitutionality, and attaching too much consideration to legislative intent. *Id.* at 424–25. Rather, he suggests federal modalities of constitutional interpretation should apply. *Id.* at 411–12.

147. *Hammond*, 119 N.E.3d at 86.

148. *See id.* at 87.

149. *Id.* at 86–87 (emphasis added).

150. Interestingly, though, the court pointed to the lack of any evidence showing that the cities were facing a "fiscal issue that would justify" the Fee Exemption, perhaps indicating an openness to a financial hardship link. *Id.* at 86.

B. The Court's Decision Should Help Alleviate Concerns that State Courts Are Not Adequately Enforcing Special Legislation Prohibitions

Although the boundaries of the special legislation doctrine are still ambiguous, perhaps the real merit of this case is that the court gave meaning to Indiana's special legislation amendment simply by enforcing it. While this might not sound like anything to be excited about, several scholars have expressed growing concern that, despite the important function they serve, special legislation bans are becoming woefully underenforced.[151] State constitutional amendments prohibiting special legislation have their roots in a desire to protect the general population from the disproportionate effect of elite interests on the legislative process.[152] By focusing on the interests of private parties, especially the powerful and well-connected, special legislation not only distracted legislatures from acting mainly—let alone exclusively—for the public good, but also resulted in serious adverse economic consequences for the working class.[153] This level of control by economic elites over the legislature has been deemed a "threat to American democracy" by some scholars.[154] And even those scholars who view special legislation limits as coming from a structural point of view acknowledge that there is some element of unfairness inherent in excessive special legislation.[155]

Understandably, some scholars have expressed concern that state courts have fallen into a trend of underenforcing constitutional limits on special legislation—treating such provisions as "hortatory," and in some cases, equating them to the equal protection guarantee under the Fourteenth Amendment.[156] Such "lockstepping" essentially renders the state provision as lacking any independent meaning and affords a highly

151. *See, e.g.*, Long, *supra* note 126, at 731–32, 759–60.

152. *Id.* at 725–32.

153. *Id.* at 725–30 (explaining how early rationales for limiting special legislation focused on philosophical ideals such as limiting legislatures to act only in the public good, but how the dominant rationale changed by the 1830s to include more practical considerations like the high levels of state debt connected to special economic legislation, which ultimately fell back on state taxpayers).

154. *Id.* at 719.

155. Schutz, *supra* note 126, at 59 (stating that special legislation "can reflect poorly on the administration of justice" and create a sense of distrust between voters and the legislature).

156. Long, *supra* note 126, at 731–32. Indeed, New Jersey's own Supreme Court ascribed to the theory that the state constitutional prohibition on special legislation was "congruent with federal rational-basis equal protection" back in 1958. *Id.*

deferential form of review to state legislatures.[157] According to Professor Robert Williams, substituting federal standards for an independent review of state constitutional provisions implicates serious concerns, including an abrogation of a state's sovereign authority to make its own law.[158]

Amidst the very real concern that states are not "giv[ing] teeth to their special laws clauses,"[159] *Hammond v. Herman & Kittle* seems to pull in the other direction. While a more detailed discussion could have fleshed out how different—or not—the court's review of the Fee Exemption was from the federal rational-basis standard, the court demonstrated an understanding that the Indiana constitutional provision prohibiting special laws was not meant to be a dead-letter doctrine, and made no mention tying it to the Fourteenth Amendment's Equal Protection doctrine.[160] The court analyzed in great detail not only the passage of Indiana's special legislation constitutional provision, but also the development of the court's analysis of the provision.[161] The history of the amendment's passage reveals that it was, in part, the product of "a hard-fought battle to protect against the negative ramifications of special legislation," but one that also recognized that special legislation was sometimes necessary.[162] While this detailed historical account does not specifically invoke concern for economic elites or widespread corruption, it does explicitly reference the desire to combat the "growing evils of excessive legislation" and "that most injurious evil . . . known as local and special enactments."[163] Moreover, the court seemed to genuinely care about giving effect to these historical underpinnings, as it ultimately declared the Fee Exemption to be

157. *Id.* at 750–51.

158. *Id.* (discussing WILLIAMS, *supra* note 45).

159. *Id.* at 759.

160. Hammond v. Herman & Kittle Props., Inc., 119 N.E.3d 70, 79–80 (Ind. 2019). The court did, however, invoke the term "rational relationship," which some scholars have taken to be a sign that the court employs "extraordinary self-restraint" when dealing with special legislation cases, likening its analysis to rational basis review used for federal equal protection claims. *Id.* at 81; Long, *supra* note 126, at 734–35 & n.83.

161. *Hammond*, 119 N.E.3d at 79–84.

162. *Id.* at 78. For a comprehensive discussion on how special legislation has both costs and benefits, see generally Evan C. Zoldan, *Legislative Design and the Controllable Costs of Special Legislation*, 78 MD. L. REV. 415 (2019).

163. *Hammond*, 119 N.E.3d at 79–80 (first quoting William W. Thornton, *The Constitutional Convention of 1850*, *in* REPORT OF THE SIXTH ANNUAL MEETING OF THE STATE BAR ASSOCIATION OF INDIANA 152, 153 (1902), and then quoting 2 IND. CONST. CONVENTION, REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 2077 (William B. Burford Printing Co. 1935) (1850)).

"precisely the type of law our framers sought to eliminate."[164] At the very least, this indicates that the courts in Indiana view their state constitutional prohibition on special laws as more than merely hortatory and analyze it according to Indiana state doctrine, with careful attention to historical pedigree. It also avoids the kind of abrogation of sovereign governance that comes from "lockstepping" state special legislation prohibitions with Federal Equal Protection law.[165] This at least may be seen as a positive sign for anyone who cares about state sovereignty and views states as bastions of rights outside of the federal sphere.

VI. CONCLUSION

In deciding *Hammond v. Herman & Kittle*, the Indiana Supreme Court found that an exemption to a law capping municipal rental fees, which applied to only two cities, was a form of special legislation in violation of article 4, section 23 of the state's constitution. In doing so, the court took the opportunity to reexamine the historical circumstances that led to the constitutional prohibition against special legislation, as well as the current state and historical development of the state's special legislation doctrine. While the boundaries of this doctrine still remain somewhat unclear after this case, this is not unique to Indiana and can be viewed as an individual piece of a greater picture—one that features persistent indistinctness and inconsistency among special legislation doctrine in general. But perhaps more importantly, the court's approach to its special legislation analysis, focus on the actual history of the amendment, and active enforcement in this case are welcome signs amidst concerns that states are getting swept away in a trend of taking the teeth out of state special legislation prohibitions—whether by treating them as something less than binding or tying them to Federal Equal Protection standards.

164. *Id.* at 86.

165. Long, *supra* note 126, at 751. Again, however, this Comment does not attempt to discern whether Indiana's state review is *effectively* different from federal rational basis review. That is an issue that could, and likely should, be discussed another time.