

STATE OF INDIANA)
)
COUNTY OF MONROE) IN THE MONROE CIRCUIT COURT
)
) CAUSE NO. 53C06-2203-PL-509

COUNTY RESIDENTS AGAINST ANNEXATION, INC.,
an Indiana not for profit corporation,
Representative of Those in the Territories Sought to be
Annexed; DON CREEK, HARRY FERRIS,
WILLIAM MANWARING, DAN DOYLE, CATHERINE
DENSFORD, SCOTT S. LOMAN, ETHEL ANN SATLER,
MARILYN J. DANIELSON, DEAN E. HOKE, BERT F.
PHILLIPS, SUNNY SLATER, HOLLY HILL, DEBORAH
REED for REED QUARRIES, INC., THOMAS W. McGHIE,
RICKY FERGUSON, THOMAS E. OSBORN, JIMMIE JOHNSON,
RICHARD PEACH, KAREN LAUCELLA, BARBARA
LEININGER, CINDI LIVINGSTON, RHONDA GRAY,
ARLLYS PAPKE, JOANNA HAHN; and OTHER TERRITORY
1A AND 1B OWNERS OF LAND,
 Remonstrators/Appellants/Petitioners,

vs.

THE COMMON COUNCIL of the City of Bloomington,
Monroe County, Indiana,
CITY OF BLOOMINGTON, Monroe County, Indiana,
JOHN HAMILTON in his official capacity as
Mayor of Bloomington, Monroe County, Indiana, and
CATHERINE SMITH in her official capacity as Auditor
of Monroe County, Indiana,
 Respondents.

PETITIONERS' RESPONSE TO CITY OF BLOOMINGTON'S
MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS AND
MOTION FOR PARTIAL SUMMARY JUDGMENT

COME NOW the Petitioners, by counsel, and for their Response to City of Bloomington's
(the "City") Motion for Partial Judgment on the Pleadings and Motion for Partial Summary
Judgment¹, state as follows:

¹ Indiana Trial Rule 12(C) provides that, on a motion for judgment on the pleadings, if matters outside the pleadings are presented and not excluded by the Court, the motion shall be treated as a

I. INTRODUCTION

The City's actions of moving forward with annexation near the height of the COVID-19 pandemic were unfair and unjust and require relief from the Court. Despite the statewide emergency declared on March 6, 2020 by Indiana Governor Eric J. Holcomb as a result of the COVID-19 pandemic, the City actively pursued annexation which required residents to make a choice: avoid human-to-human interaction to preserve their health or risk infection to preserve their substantial right to remonstrate against annexation. Fortunately, longstanding Indiana law provides the Court with the authority to remedy unjust situations such as this by enlarging the remonstrance period.

In its Motion for Partial Judgment on the Pleadings, the City argues there is no legal authority for the Court to enlarge the time period for the execution of remonstrance petitions in Areas 1A and 1B that are the subject of the Petitioners' suit. To the contrary, Indiana law requires that, when an emergency has been declared as a result of events such as a global pandemic, the Court exclude the period of time during which the emergency exists from any time limitation fixed by law. For this reason, the City's Motion for Partial Judgment on the Pleadings should be denied.

Moreover, the designated evidence establishes that the Petitioners are entitled to judgment as a matter of law on Count II of their Petition. There is no dispute a declared state of emergency existed in Indiana during the remonstrance period (October 8, 2021 to January 6, 2022) and that this emergency (COVID-19) prevented residents from executing remonstrance petitions. Under

motion for summary judgment. Indiana Trial Rule 56(B) provides, "When any party has moved for summary judgment, the court may grant summary judgment for any other party upon the issues raised by the motion although no motion for summary judgment is filed by such party." Because issues outside the pleadings have been raised in response to the City's motion for partial judgment on the pleadings, this motion should be treated by the Court as one for summary judgment. As such, the Petitioners now move for summary judgment in their favor on Count II of their Petition.

Indiana Code § 34-7-6-3, the Court is required to exclude this period of time from the computation of the time within which the remonstrance petitions were to be executed. Therefore, now that the state of emergency has ended in Indiana, the Court should order a ninety (90) day period for execution of remonstrance petitions in Areas 1A and 1B.

It is critical that the Court rule on this issue at this juncture as it may mean that the annexation ordinance as a whole would be invalid if at least sixty-five percent (65%) of the owners of land in the annexed territory execute a remonstrance petition.

II. FACTS AND PROCEDURAL HISTORY

The Petitioners filed their Petition for Appeal of Annexation, for Declaratory Judgment and for Damages (the “Petition”) on March 16, 2022. Count II of the Petition requests that “the Court enter an Order extending the period of time for Remonstrance against the Annexation Ordinances” and grant the Petitioners an extension of time of not less than ninety (90) days in which property owners within Areas 1A and 1B may execute and submit Remonstrance Petitions. Petitioners’ request arises out of the extraordinary circumstances presented by the COVID-19 pandemic in the country, state, county, and city. On May 6, 2022, the City filed its Motion for Partial Judgment on the Pleadings pursuant to Indiana Trial Rule 12(C).

On March 6, 2020, Indiana Governor Holcomb issued Executive Order 20-02 which, among other things, declared “that a public health disaster emergency exists in Indiana attributable to COVID-19.” Shortly thereafter, the World Health Organization declared COVID-19 to be a global pandemic. *See Indiana Executive Order 22-01*. Then, President Donald J. Trump issued Proclamation 9994 on March 13, 2020 which declared a national emergency concerning the COVID-19 outbreak. Governor Holcomb renewed the emergency declaration twenty-three (23) times since its original declaration. *See Indiana Executive Order 22-01*. On February 18, 2022,

President Joseph R. Biden, Jr. issued a Notice on the Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID-19) Pandemic which continued the national emergency previously declared by President Trump beyond March 1, 2022.

During this national emergency, the City elected to move forward with its plan to annex certain areas surrounding the city. The Common Council of the City adopted Ordinance 17-09 on September 15, 2021, and Ordinance 17-10 on September 22, 2021. The City published and mailed notice of its adoption of the annexation ordinances on October 8, 2021, thereby triggering a ninety (90) day remonstrance period. *See Petition ¶¶ 12- 13.*

The remonstrance period coincided with a rise of COVID-19 infections attributed to the Omicron variant in the United States and Monroe County. We now know the Omicron COVID-19 variant was responsible for the largest number of COVID-19 cases in the United States, with 70,880 average cases being reported on October 26, 2021 and 608,842 averages cases reported on January 6, 2022. NEW YORK TIMES, *Coronavirus in the U.S.: Latest Map and Case Count*, (last updated May 26, 2022), [Covid in the U.S.: Latest Maps, Case and Death Counts - The New York Times \(nytimes.com\)](https://www.nytimes.com/interactive/2022/05/26/us/coronavirus-cases-map.html). Without question, the COVID-19 pandemic emergency was raging during the remonstrance period from October 8, 2021 to January 6, 2022.

During the remonstrance period, City Mayor John Hamilton (“Mayor Hamilton”) continued to provide regular information and updates on the state of the COVID-19 emergency in the City and Monroe County, including Areas 1A and 1B. During these frequent updates, Mayor Hamilton repeatedly warned the community – including residents of Areas 1A and 1B and those volunteers who opposed annexation - of the dire conditions presented by COVID-19 including rising deaths due to COVID-19, increased hospitalizations, and strain on the local healthcare system was under, before and during the remonstrance period.

On September 20, 2021, at about the same time the Common Council was passing the annexation ordinances, Mayor Hamilton said the following in his COVID-19 update:

We're in a holding pattern. The numbers continue to be very high, relatively, in our state and in our county for hospitalizations, cases, and even deaths. We're still seeing very concerning numbers. I want to thank all of you who are continuing to mask up and protect each other and yourselves and your family by taking those protocols to try to keep tamping down the Delta variant raging. It is in a holding pattern. We're hopeful that there will be some indications soon that it's going down. We're watching that very closely. But in the meantime, there's a lot of this disease that's hitting a lot of people. In fact, it's taking some people from us. So please keep doing the protective steps of masking, in particular, social distancing, all the hand washing. Don't come to work if you're sick or, or go out with folks. If you feel symptoms get checked out quickly.

COVID-19 Update to Community on September 20, 2021, <https://bloomington.in.gov/mayor/speeches/2021/09/20/4967>. He ended his update with the recommendation to “stay safe, keep masking, keep distancing.” *Id.*

On October 5, 2021 Mayor Hamilton stated, “This has been a rough week, a rough month. In September, we had 18 positive cases among our employees. That's the second-highest month ever since the start of the pandemic. It's the highest number this year, all calendar year, indicating that we still have a real problem with the pandemic and particularly the Delta variant.” COVID-19 Community Update on October 5, 2021, <https://bloomington.in.gov/mayor/speeches/2021/10/04/4978>. He continued by reminding citizens of the danger the virus posed: “But again, it's just a reminder that the disease is still here. About 30 Hoosiers are dying every day of this infection, and younger ones are dying than used to be affected.” *Id.*

Significantly for this case, Mayor Hamilton addressed the seriousness and danger of the virus in the same paragraph in which he announced the passing of the annexation ordinance:

This is still a very serious disease, hospitalizations, people on ventilators, again, losing friends and neighbors every day in the state. So thanks for all you're doing

in that regard. Two big things have happened separate from the pandemic. I'll just quickly highlight. We passed annexation ordinances through the City Council last week. Not everything, but virtually the vast majority of what we sought for annexation has been approved by the City Council. It now goes into some next stages with possible remonstrance. But we'll see how that turns out.

Id.

On October 12, 2021, after the remonstrance period had commenced and in the face of decreasing cases, Mayor Hamilton continued to reiterate the importance of avoiding the “unnecessary sharing of air, that’s how we have this variant exchange.” COVID-19 Community Update on October 12, 2021, <https://bloomington.in.gov/mayor/speeches/2021/10/12/4982>. He underscored the risk the virus posed stating, “We still have people dying every day in the state. We still have a lot of people in the hospital, kids going to school at risk.” *Id.*

On October 18, 2021, again during the remonstrance period, Mayor Hamilton warned of the danger the virus could pose during the winter: “We're still worried about the winter, what that might do. You'll recall last winter we had a huge surge, of course, that was pre vaccines, but we still have many, many people who have not been vaccinated. And that means we're not sure how this will go. So keep being wary, but don't get weary of what we're doing.” COVID-19 Community Update on October 18, 2021, <https://bloomington.in.gov/mayor/speeches/2021/10/18/4986>.

About one month into the remonstrance period, Mayor Hamilton noted that the number of cases of COVID-19 were still concerning. COVID-19 Community Update on November 9, 2021, <https://bloomington.in.gov/mayor/speeches/2021/11/09/5012>. Mayor Hamilton noted that the virus was still present and, “It is still spreading. It is still taking lives. It is still sending people to the hospital, so please continue to be wary and be careful as you go forward.” *Id.*

On November 22, 2021, Mayor Hamilton reported, “Locally in Monroe County, we've had a death a day on average, over the last 10 or 12 days. We have not had a period like that locally since January 11 months ago.” COVID-19 Community Update on November 22, 2021,

<https://bloomington.in.gov/mayor/speeches/2021/11/22/5023>. He went on to say, “We're really seeing some concerns and we're losing people of different ages. So this is still serious. We're worried about the winter ahead. I wish I didn't have to say this and bring this message to you, but we are concerned.” *Id.*

One week later, more or less at the midpoint of the remonstrance period, Mayor Hamilton again expressed concern with the increasing cases in Monroe County:

So we continue to be very concerned as I talked about last week right before Thanksgiving that some indicators are really going in the wrong direction. It's very concerning as we head into the winter that our case numbers are up, our hospitalizations are up. We've seen death rates that we hadn't seen locally frankly for almost a year in terms of we had a two-week period of a death a day on average in Monroe County, which we hadn't seen since last winter. All this is continuing to concern us as we get into the colder months and more indoor time, knowing that the variants and the pandemic are still really among us and rising. Then, of course, we learned about the new variant, Omicron, that has emerged just in the last few days and is of serious concern. President Biden indicated it's a genuine concern, not a reason to panic, but it is a reason to be very concerned. We were very much worried about a new strain, a variant coming. This may be from the less vaccinated parts of the world, but can come back to the more vaccinated parts. May be highly transmissible, there's a lot of science still to be done and more to learn about it, but it is a new variant of concern. We know what Delta did when that hit, it really transformed our trajectory last summer and fall. We hope that this may not do the same, but it's possible.

COVID-19 Community Update on November 29, 2021, <https://bloomington.in.gov/mayor/speeches/2021/11/29/5032>. Mayor Hamilton reported an increase in the number of cases in Monroe County and again urged that precautionary measures be observed: “While we got our numbers down to 80 or so cases per hundred thousand, they're now back up to 180 per hundred thousand, so there's more infection happening locally. The masking is important. Distancing, continue to be careful. We're not out of the woods.” *Id.*

On December 6, 2021, Mayor Hamilton stated the following: “Here we are in month 22, since the pandemic was declared a world pandemic. We still see rising cases, rising

hospitalizations. Of course, there's concern about Omicron. This new variant that we know is in the United States. It's likely in Indiana and may well be in our community. We just don't know it yet, but we have significant concerns about that.” COVID-19 Community Update on December 6, 2021, <https://bloomington.in.gov/mayor/speeches/2021/12/06/5040>. Mayor Hamilton reported that there continued to be cases inside city government. *Id.*

Then, on December 20, 2021, Mayor Hamilton announced the presence of the Omicron COVID-19 variant:

We still face serious challenges in this pandemic, I'm sure you're aware of that. We continue to see very high case numbers, both inside government we've had the highest two weeks of our case positive cases, and of course around the state very serious numbers as we continue to face real challenges. Our hospital system, IU Health across the state, has its highest number of inpatients ever from this pandemic. And in fact, IU Health South Central Region President Brian Shockney said, ‘We didn’t think one year after the vaccine became available, we would see our highest COVID-19 numbers.’ And of course we have real challenges ahead. Omicron, the new variant that seems to be extremely contagious and spreadable, is now in Indiana officially, we expected it would be here. It was confirmed yesterday that it's been in the state since December 9th, anyway. That means this variant is very likely to spread all over Indiana, including in our community. So that's of great concern.

COVID-19 Community Update on December 20, 2021, <https://bloomington.in.gov/mayor/speeches/2021/12/20/5055>.

On December 27, 2021, Mayor Hamilton said, “This is a public health emergency, public health expertise and science can get us out of it.” COVID-19 Community Update on December 20, 2021, <https://bloomington.in.gov/mayor/speeches/2021/12/27/5060>. He also noted that the Delta COVID-19 variant had “really exploded across the country, across the world in Indiana and in Bloomington and caused a major setback in terms of disease and death and hospitalization.” *Id.*

Finally, days before the conclusion of the remonstrance period, Mayor Hamilton stated the following:

As you no doubt know, Omicron is coming ablaze into Indiana and our community, our country, the world. This new variant has exploded in numbers. Our county numbers are up in the mid-200s now, cases per 100,000 for the week. That used to be as low as 50 or 60 several weeks ago, and has been climbing, but that was a big jump in the last week. Omicron clearly is here, and it's much more transmissible and we're seeing a lot more cases. Hospitalizations are also up. This is a very concerning time.

COVID-19 Community Update on January 4, 2022,

<https://bloomington.in.gov/mayor/speeches/2022/01/04/5064>.

On March 3, 2022, Governor Holcomb issued Executive Order 22-09 which rescinded the declaration of a public health emergency. *See Indiana Executive Order 22-09*.

III. LAW

A. *Indiana Trial Rules*

The City has moved for partial judgment on the pleadings pursuant to Indiana Trial Rule 12(C). “A Rule 12(C) motion for judgment on the pleadings is to be granted ‘only where it is clear from the face of the complaint that under no circumstances could relief be granted.’” *Consol. Ins. Co. v. Nat'l Water Servs., LLC*, 994 N.E.2d 1192, 1196 (Ind. Ct. App. 2013). The Court is to accept as true, the well-pleaded material facts alleged in the complaint. *Id.*

Pursuant to Indiana Trial Rule 12(C), if matters outside the pleadings are raised, the motion is to be treated as a motion for summary judgment. Indiana Trial Rule 56(C) governs motions for summary judgment and provides that summary judgment shall be rendered if the designated evidence establishes that there are no genuine issues of material fact and that that the moving party is entitled to judgment as a matter of law. Indiana Trial Rule 56(B) permits, when a party moves for summary judgment “the Court may grant summary judgment for any other party upon issues raised by the motion although no motion for summary judgment is filed by such party.”

B. Indiana Annexation Law

“Generally, the annexation process formally begins when a municipality adopts an ordinance annexing territory pursuant to either [Indiana Code Section] 36–4–3–3 or [Indiana Code Section] 36–4–3–4.” *Fight Against Brownsburg Annexation v. Town of Brownsburg*, 32 N.E.3d 798, 801 (Ind. Ct. App. 2015). “The legislative adoption of the ordinance is followed by an opportunity for remonstrance by affected landowners and judicial review.” *Id.*

Indiana Code § 36-4-3-11.1 provides the procedures the municipality must follow to provide notice of adoption of the annexation ordinance and trigger the remonstrance period. Importantly for this motion and case, Indiana Code § 36-4-3-11.1(d)(1)(A) requires the municipality to state in its notice “that remonstrance petitions must be filed not later than ninety (90) days after the date that notice of the adoption of the annexation ordinance was published.” Indiana Code § 36-4-3-11.2 sets forth three (3) requirements a remonstrance petitions must satisfy:

- (1) Each signature on a remonstrance petition must be dated, and the date of the signature may not be earlier than the date on which the remonstrance forms may be issued by the county auditor;
- (2) Each person who signs a remonstrance petition must indicate the address of the real property owned by the person in the area to be annexed.
- (3) A remonstrance petition must be verified

C. Bases for Denial of the City’s Present Motion

Indiana law provides the Court with two (2) specific grounds on which to base its denial of the City’s Motion for Partial Judgment on the Pleadings.

1. Indiana Emergency Powers Statute

Indiana Code § 34-7-6-1 *et. seq.* sets forth the circumstances under which an extension of time shall be granted during an emergency. Indiana Code § 34-7-6-1 states that the chapter applies to proceedings,

- “(1) pending before a court, a body, or an official, that exists under the constitution or laws of Indiana;
(2) in which certain limitations of time are or may be fixed by law or rule for doing any acts in the proceeding; and
(3) if an emergency exists or arises by reason of:
 (A) war;
 (B) insurrection;
 (C) pestilence²; or
 (D) act of God;

which prevents the performance of an act that is essential to conserve substantial rights.”

When an emergency exists, “In computing the time within which the act is required to be done under the limitations fixed by law or rule, the time during which such emergency existed shall be excluded and shall not be considered.” Ind. Code § 34-7-6-3.

2. Equitable Tolling Doctrine

Indiana Courts have also recognized the doctrine of equitable tolling which permits the tolling to statutes of limitations. *See In re Adoption of K.M.*, 31 N.E.3d 533, 538 (Ind. Ct. App. 2015). *See also Estate of Decker v. Farm Credit Servs. of Mid-Am., ACA*, 684 N.E.2d 1137, 1139 (Ind. 1997). This doctrine permits the court to toll a limitation deadline. *See Schriber v. Anonymous*, 848 N.E.2d 1061, 1064 (Ind. 2006).³ In *Schriber*, the Indiana Supreme Court

² “Pestilence” is defined as “a contagious or infectious epidemic disease that is virulent and devastating.” <https://www.merriam-webster.com/dictionary/pestilence> ; Accessed May 19, 2022.

³ Indiana Courts have noted that equity will prevent a party from asserting a statute of limitations defense when the party “by fraud or other misconduct has prevented a party from commencing his action or induced him to delay the bringing of his action beyond the time allowed by law.” *Donnella v. Crady*, 185 N.E.2d 623, 625 (Ind. Ct. App. 1962). This holding stands for the principle that when one party engages in conduct adverse to the rights of another, it may not then assert a statute of limitations defense. This principle is easily applied in this case: as evidenced by Mayor Hamilton’s regular warning against contact that may exposes residents of Areas 1A and 1B to COVID-19, the City knew of the danger presented by the virus yet moved forward with annexation

addressed a situation in which a nursing home provider had not displayed its license in public view and had not filed an assumed name for its business designation. *Id.* at 1064. The Plaintiff, after being informed that the nursing home provider was not an entity covered by the Indiana Medical Malpractice Act, filed its claim against the nursing home in the trial court instead of with the Indiana Department of Insurance as is required by the Medical Malpractice Act if a provider is covered by the act. *Id.* at 1062-1063. The nursing home moved to dismiss the claim, stating that it was a covered provider and that, because the limitations period for the plaintiff to file its suit against the nursing home provider with the IDOI had passed, the plaintiff's claims were barred. *Id.* at 1062. The Court of Appeals found that, due to the errors of the nursing home, it would not be considered a provider covered by the Medical Malpractice Act. *Id.* at 1063. The Indiana Supreme Court opted to take a middle ground approach and ruled that instead of disqualifying the nursing home provider from the protections afforded by the Medical Malpractice Act, that the more reasonable remedy would be to equitably toll the deadline for the plaintiff to properly comply with the statute by filing a proposed complaint with the IDOI. *Id.* 1064.

The United States Supreme Court has also recognized the ability of court to equitably toll the statute of limitations in lawsuits. *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990). The Supreme Court has determined that, "A [plaintiff] is entitled to equitable tolling if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way and prevented timely filing." *Holland v. Florida*, 560 U.S. 631 (2010).

proceedings anyway. It is fundamentally unfair for the City to now take the position that COVID-19 did not present a risk to would-be remonstrators and did not prevent citizens from exercising their substantive right to remonstrate. This is the very type of fundamental unfairness the Court is permitted to remedy with the equitable tolling doctrine.

IV. ANALYSIS

A. The City is Not Entitled to Partial Judgment On the Pleadings

The City is not entitled to partial judgment on the pleadings because, as shown above, this Court has the authority, and perhaps the duty, to grant the relief requested in Count II of the Petition. To prevail on its motion for partial judgment on the pleadings, the City must show that under no circumstances can the relief requested in the Petition be granted. The City has failed to carry its burden.

The crux of the City’s argument is “there is no mechanism under Indiana Code Chapter § 36-4-3 for an extension of the remonstrance period under any circumstances.” *Motion for Partial Judgment on the Pleadings*, ¶ 9. What the City does not address is Indiana Code § 34-7-6-1 *et. seq.* and its requirement that deadlines be tolled in times of pestilence such as COVID-19. Indiana Code § 34-7-6-1 and § 34-7-6-3, read together, require the Court to exclude from the remonstrance period the time during which an emergency existed in Indiana.⁴ These statutes are precisely the mechanism that permits and requires this Court to extend the time for submission of remonstrance petitions by ninety (90) days.

The City may argue that Indiana Code § 34-7-6-1 and § 34-7-6-3 are in conflict with the procedures set forth in the annexation statutes. There is, however, no conflict between these statutes. One (the annexation statute) is silent on the issue of whether a court may enlarge the period for remonstrance petitions to be completed. The other two, (Indiana Code § 34-7-6-1 and § 34-7-6-3) expressly task courts with excluding from proceedings deadlines the period of time during which an emergency existed. What is most telling is that the annexation statutes do not

⁴ There is no doubt COVID-19 qualifies as a “pestilence” given its viral nature, high degree of transmissibility, and status as a pandemic that has claimed millions of lives worldwide, all as described by Mayor Hamilton and many others.

specifically preclude remonstrance petitions from being executed *after* the remonstrance period. Thus, there is no statutory prohibit against extending the time for submission of remonstrance petitions under Indiana Code § 34-7-3 and the equitable tolling doctrine.

Critically, Indiana Code § 36-4-3-11.2(c) outlines three (3) requirements for a valid remonstrance petition. The remonstrance petition must be dated not earlier than the date on which the remonstrance forms were issued by the county auditor, the address of the person signing the remonstrance petition must be provided, and the remonstrance petition must be verified. The City argues, “Indiana Code § 6-4-3-11.1⁵ (sic) provides the procedure for notice for a period of annexation following the passage of annexation ordinances, and limits the period in which remonstrance petitions may be accepted to 90 days.” *See Motion for Judgment on Pleadings* ¶ 7. The plain language of Indiana Code § 36-4-3-11.1 does not “limit[] the period in which remonstrance petitions may be accepted to 90 days” as the City argues. *See Motion for Judgment on Pleadings* ¶ 7. In fact, the words “limit” and “accept” do not appear anywhere in Indiana Code § 36-4-3-11.1. This statute imposes an obligation on the municipality to provide information to the citizens. It cannot be read as invalidating remonstrance petitions executed outside the remonstrance period or precluding the court from enlarging said period. Furthermore, Indiana Code § 36-4-3-11.1 does not preclude the trial court from enlarging the period within which remonstrance petitions may be completed. Nor does the statute invalidate remonstrance petitions that are executed outside the remonstrance period. Therefore, the City’s statement that reopening and extending the remonstrance period would be expressly contrary to “Indiana Code § 6-4-3-11.1” (sic) is simply incorrect. The statute’s silence leaves a clear opening for a trial court to enlarge the

⁵ The City appears to have cited to the wrong statute. Indiana Code § 36-4-3-11.1 outlines the procedures for providing “Proper Notice” after the adoption of an annexation ordinance.

period for a remonstrance petition to be executed, as long as such enlargement is consistent with Indiana law. The Court should resist the City's invitation to vary the plan language of the statute by adding words that would give it an alternative meaning.

The City relies on the *Herdt* case for the proposition that the annexation law does not include a mechanism for adding signatures to a remonstrance petition after the 90-day period has concluded. *Herdt* is inapplicable because it does not address the specific question of whether the Court is vested with the authority to extend the remonstrance period during an emergency such as COVID-19. Rather, *Herdt* addresses the insular question of whether a trial court had subject matter jurisdiction when the remonstrance petition was not timely filed. In this case, there is no question the Petition was timely filed and that the Court has subject matter jurisdiction over this case.

Also in its Motion, the City likened the ninety (90) day remonstrance period to a statute of limitations. *See Motion for Partial Judgment on Pleadings* ¶ 8. A statute of limitations may be enlarged by a court pursuant to the doctrine of equitable tolling. This is yet another mechanism the Court may use to enlarge the remonstrance period and provide the Petitioners the relief requested in Count II.

In its Motion for Partial Judgment on the Pleadings, the City argues that the issue of an extension of the deadline for remonstrance was never raised. In fact, the issue was not ripe until March 3, 2022, when Governor Holcomb issued his Executive Order terminating the state of emergency in Indiana, including in areas 1A and 1B. On March 16, 2022, within two (2) weeks of the emergency being terminated, the Petitioners filed their Petition requesting an enlargement of time for remonstrance based on the emergency presented by the COVID-19 pandemic. Therefore, the City's argument that this issue was not timely raised should fail.

The City makes the peculiar argument that “even if there were some legal authority for relief Remonstrators seek in Count II, there are no factual allegations supporting granting it.” *Motion for Partial Judgment on the Pleadings*, ¶ 11. The Petitioners alleged that the annexation ordinances were adopted during the COVID-19 pandemic. *Petition, Count II*, ¶ 1. Because the COVID-19 pandemic was a declared emergency in Indiana as shown above, the Petitioners did not have to specially plead that an emergency existed to avail themselves of the relief provided by Indiana Code § 34-7-6-3 or the equitable tolling doctrine. *See Ind. T. R. 8(F)* (stating “All pleadings shall be so construed as to do substantial justice, lead to the disposition on the merits, and avoid litigation on procedural points.”) The City’s argument that there are no factual allegations supporting the relief requested should also fail.

1. Conclusion- Motion for Partial Judgment on the Pleadings

Overall, Indiana Code § 34-7-6-1 and § 34-7-6-3 and the doctrine of equitable tolling provide the Court with the legal authority, perhaps mandate under the extraordinary conditions presented by COVID-19, to grant the Petitioners the relief requested in Count II of their Petition. The City has not shown that enlarging the remonstrance period is prohibited by the annexation statutes. At best, the City has pointed out that the annexation statutes are silent on the Court’s ability to enlarge the remonstrance period in the face of a national emergency. However, that statutory silence is filled loudly and clearly by Indiana Code § 34-7-6-1 and § 34-7-6-3 and the equitable tolling doctrine which provides the bases for granting the enlargement of the remonstrance petition period in the face of a national emergency. For these reasons, the City’s Motion for Partial Judgment on the Pleadings should be denied.

B. The Petitioners are Entitled to Partial Summary Judgment on Count II of Their Petition

While the City is not entitled to judgment on the pleadings on Count II of the Petition, the Court should enter partial summary judgment on Count II, granting Petitioners a ninety (90) day period of time for remonstrance petitions to be executed.

Indiana Code § 34-7-6-1 *et. seq.* requires Courts to toll applicable deadlines when an emergency has been declared as a result of, among other reasons, pestilence. For that statute to apply, Petitioners must merely show there is (1) a proceeding⁶ (2) pending before a court, body or official, (3) in which deadlines may be fixed by law or rule for doing any acts in the proceeding, and (4) war, insurrection, pestilence, or an act of God (5) prevents the performance of an act that is essential to conserve substantial rights. Because these conditions are satisfied, pursuant to Indiana Code § 34-7-6-3, the period during which a declared emergency existed is excluded from the deadline.

1. Application of Indiana Code § 34-7-6-1 Et. Seq.

First, the annexation process is obviously a “proceeding” – it is a particular manner of action whereby the City has attempted to include additional property within its boundaries without request by affected property owners. *See Petercheff v. City of Indianapolis*, 179 N.E.2d 866, 866 (Ind. 1962) (using the phrase “annexation proceedings”).⁷

⁶ “Proceeding” is defined as “a particular action or course or manner of action. <https://www.dictionary.com/browse/proceeding>.”

⁷ Indiana Code § 36-4-3-11.1(c) references the “procedures” a municipality must complete to provide notice to landowners. The statutes use of the word “procedures” weighs heavily in favor of concluding that the annexation proceeding is a type of proceeding contemplated by Indiana Code § 34-7-6-1.

Second, the annexation proceedings were pending before a body – the Common Council of the City and the Monroe County Auditor pursuant to Indiana law and are now pending before this Court.

Third, the City has taken the position that the annexation laws of Indiana establish certain deadlines within which remonstrators may execute their remonstrance petitions. Thus, there is no debate that there are deadlines affixed by law at issue.

Fourth, COVID-19 is plainly a pestilence due to its viral nature and status as a pandemic. The evidence designated by the Petitioners establishes that Governor Holcomb declared an emergency on March 6, 2020, as a result of the COVID-19 pandemic. *See Executive Order 20-02*. This emergency was not terminated until March 3, 2022. *See Indiana Executive Order 22-09*. The remonstrance period occurred from October 8, 2021 to January 6, 2022. Thus, there can no dispute that an emergency existed during the remonstrance period.

During the remonstrance period, Mayor Hamilton regularly stressed the danger that COVID-19 posed to the community, including the residents in Areas 1A and 1B. He reiterated the need to avoid “sharing air” with others and the need to take additional safety precautions. As cases increased in Monroe County during the late fall and early winter of 2021, his warnings grew more dire. The statements made by Mayor Hamilton clearly evince that COVID-19 posed a serious risk to the residents of Areas 1A and 1B, as well as volunteers who would have gathered more remonstrance petitions. Indeed, the City’s own office building remained effectively closed to members of the public well after the filing of this suit. *See Affidavit of Margret Clements*.

Fifth, the affidavits submitted by the Petitioners establish that the COVID-19 pandemic prevented the performance of an act that was essential to conserve substantial rights, namely the right of landowners in Areas 1A and 1B to execute and submit their remonstrance petitions. Russell

Nunn attested that he did not sign a remonstrance petition and that COVID-19 prevented him from doing so. *See Affidavit of Russell Nunn*, ¶ 4-12. Similarly, Joyce Martin was prevented from exercising her right to remonstrate because of COVID-19. *See Affidavit of Joyce Martin*, ¶ 4-11. Mr. Nunn and Ms. Martin remain opposed to annexation. *See Affidavit of Russell Nunn*, ¶ 11-12. *See Affidavit of Joyce Martin*, ¶ 10-11. There is no dispute, based on the designated evidence, that some individuals in Areas 1A and 1B were prevented from exercising and/or conserving their substantial right to remonstrate by COVID-19. Ms. Martin and Mr. Nunn are prime examples of why the Court must grant the Petitioners a ninety (90) day period for execution of remonstrance petitions.

COVID-19 also impacted the ability of remonstrance petition signature collectors to meet with residents of Areas 1A and 1B to collect signed remonstrance petitions. *See Affidavit of Rhonda Gray*, ¶4-10. *See Affidavit of Larry Skirvin*, ¶ 4-10. There were instances when signature collectors were turned away by residents who were afraid of contracting COVID-19 due to the human-to-human interaction Mayor Hamilton warned against. *See Affidavit of Barbara Leininger*, ¶ 4-9. COVID-19 even caused the City to abruptly change the August 4, 2021 meeting on the then proposed annexation, depriving some of their right to voice their opposition to the then proposed ordinance. *See Affidavit of Richard Peach*, ¶4-11. *See also Affidavit of Thomas McGhie*, ¶ 4-10.

It is difficult to imagine the City of the Common argue, in light of Mayor Hamilton's many dire warnings, that residents of Area 1A and 1B were not prevented by COVID-19 from conserving or exercising their substantial right to remonstrate against annexation. The designated evidence establishes that COVID-19 did prevent residents of Areas 1A and 1B from exercising their substantive right to remonstrate against annexation.

The concept of tolling a deadline established by law is not foreign to Indiana law. The doctrine of equitable tolling permits the tolling of a deadline. *See Schriber v. Anonymous*, 848 N.E.2d 1061, 1064 (Ind. 2006). This Court is vested with the inherent authority to do what is fair and just, including tolling deadlines when such a remedy is equitable. The Indiana Supreme Court has adopted such a remedy in the context of a medical malpractice case, one which, like annexation proceedings, is governed by strict statutes setting forth deadlines for actions and filings. The Court should look to *Schriber*, as mentioned before, and balance the rights of the parties as dictated by the COVID-19 emergency that existed in the State, including Areas 1A and 1B, during the entirety of the remonstrance period.

The City forced this annexation proceeding forward during the COVID-19 pandemic. It did so as the Omicron surge was “ablaze” in Monroe County, including in Areas 1A and 1B, and has caused a “caused a major setback in terms of disease and death and hospitalization” according to Mayor Hamilton. The City provided no relief to the remonstrators due to the pandemic despite regular dire warnings of the danger presented by the virus. Parties who oppose annexation were faced with an impossible choice between their own safety and exercising their right to remonstrate. By forging ahead with its attempt to annex, the City forced human to human interaction, at the height of an “explosion of cases that resulted in increased death and hospitalizations.

The scenario created by the City’s annexation efforts is facially unfair. On the one hand, Mayor Hamilton issued repeated warnings regarding the danger presented by COVID-19, even going so far as to warn citizens of the danger of “sharing air” and scheduling a public meeting at 3:00 p.m. on the first day of school in the fall semester of 2021. On the other, would be remonstrators were faced with leaving the safe confines of their home to go to the two (2) public locations the City was required to provide for execution of remonstrance petitions by Indiana law,

risking exposure to the very virus Mayor Hamilton warned them against. *See Ind. Code § 36-4-3-11.1(e)*. Indiana law required that someone be present at all times at these locations to witness the execution of a remonstrance petition, thereby requiring human to human interaction. *See Ind. Code § 36-4-3-11.1(f)*. Whether by design or not, the City, by forging ahead with its annexation proceeding during the height of the COVID-19 pandemic, mandated that citizens of Area 1A and 1B not heed its warning and instead expose themselves to human-to-human interactions in order to exercise their right to remonstrate.⁸ It is this type of unfairness that the Court is permitted to remedy with the doctrine of equitable tolling.

It is far more appropriate for the remonstrance period to occur now because the state of emergency in Indiana has been terminated. The Court is permitted under the principle of equitable tolling to extend the remonstrance period. Further, Indiana Code § 34-7-6-1 *et. seq.* requires the Court exclude from the remonstrance period the time during which an emergency existed due to COVID-19. This means that, because the remonstrance period took place entirely during the state of emergency in Indiana, the remonstrators are entitled to a ninety (90) day remonstrance period. As shown above, Indiana law also does not invalidate remonstrance petitions executed outside the initial remonstrance period and it does not prohibit the enlargement or tolling of the remonstrance period. It is only fair and just that the petitioners be afforded this remedy due to the nature of the emergency they faced during the initial remonstrance period.

V. CONCLUSION

⁸ While COVID-19 undoubtedly presented the greatest and most dangerous condition remonstrators and residents faced, the City also created an additional barrier for public participation in the annexation proceeding by holding a public comment meeting at 3:00 on August 3, 2021, the first day of school for the largest school corporation in Monroe County (Monroe County Community School Corporation).

For the forgoing reasons, the Petitioners respectfully request that the Court deny the City of Bloomington's Motion for Partial Judgment on the Pleadings, that the Court entry summary judgment on Count II of the Petitioner's petition, that the Court order the commencement of a ninety (90) days period of remonstrations against annexation for the residents of Areas 1A and 1B, and for all other just and proper relief in the premises.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing document using the Indiana E-filing System (IEFS) and that the foregoing document was served upon the following person(s) using the service contact entered in the IEFS via IEFS on June 6, 2022:

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I further certify that the foregoing document was served upon the following via first class mail, postage prepaid on June 6, 2022:

Hon. Nathan G. Nikirk, Special Judge
Lawrence Circuit Court
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