IN THE MISSOURI SUPREME COURT

No. SC95368

CITY OF KANSAS CITY, MISSOURI,

Respondent,

v.

KANSAS CITY BOARD OF ELECTION COMMISSIONERS, ET AL.,

Defendants,

REV. SAMUEL E. MANN, ET AL.,

Appellants.

Appeal from the Circuit Court of Jackson County
Hon. Justine E. Del Muro

BRIEF OF AMICUS CURIAE MUNICIPAL AND LABOR LAW SCHOLARS, NATIONAL EMPLOYMENT LAW PROJECT, AND MISSOURI JOBS WITH JUSTICE

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JURISDICTIONAL STATEMENT

The issue before this Court is whether the Circuit Court properly granted Plaintiff's Petition for Removal of a Ballot Question. Among other things, this action involves the validity and constitutionality of two state statutes, Section 67.1571, RSMo., and Section 285.055, RSMo. The trial court relied on both in finding that the Initiative Petition in question conflicts with state law, notwithstanding arguments by Intervenors that these laws were unconstitutionally enacted in violation of Missouri's single subject, clear title, and original purpose provisions. Accordingly, this Court has jurisdiction under Article V, Section 3, of the Missouri Constitution because this case involves "the validity... of a statute... of this state."

STATEMENT OF FACTS

Amici adopt the Statement of Facts in the Brief of Intervenors/Appellants filed in this Court.

PURPOSE AND INTEREST OF *AMICI CURIAE*

Amici Municipal and Labor Law Scholars are professors at various law schools in Missouri.[1] They have long been engaged in the study and teaching of

[1] Amici Municipal and Labor Law Scholars are Matt Bodie (St. Louis University School of Law) ("SLU"), Miriam A. Cherry (SLU), Marion Crain (Washington University Law), Susan A. FitzGibbon (SLU), Daniel R. Mandelker (Washington

municipal or labor law. All of them have studied issues surrounding the legal viability of local employment and minimum wage laws, and some have published on the power of charter cities.[2] Their interest here derives from their responsibilities as law professors. They teach their students to carefully read constitutional provisions and statutes with attention to their text, history, and purpose. They also caution students that it is not the duty of judges to decide policy, but the job of the people. They believe that following these standards leads to only one conclusion in this case—that local governments in Missouri have the power to enact local minimum wage requirements and that such requirements do not conflict with state law.

The National Employment Law Project ("NELP") is a national research and policy organization known for its expertise on workforce issues. NELP has

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University Law), Marcia L. McCormick (SLU), Peter W. Salsich Jr. (SLU), Peggie R. Smith (Washington University Law), and Karen L. Tokarz (Washington University Law). Institutional affiliations are listed for identification purposes only.

[2] *See, e.g.*, Peter Salish & Dennis Tuchler, *Missouri Local Government: A Criticism of a Critique*, 14 St. Louis U.L.J. 207 (1969); Daniel Mandelker, et al., *State and Local Government in a Federal System* (8th ed. 2014).

assisted efforts by advocacy groups, local elected officials, and workers in cities across the country, including the City of Kansas City, to enact local minimum wage legislation; and, it has extensive background in issues surrounding the power and authority of cities to enact local minimum wage requirements. Their interest here is in advancing and protecting the ability of cities and citizens to pass local minimum wage laws to address issues of local concern and lift wages for low-income workers for whom the value of wages has declined for years.

Missouri Jobs with Justice ("JwJ") is a coalition of community, labor, student, and religious groups. It is committed to fighting for economic justice and improving the lives of working people. It has supported efforts by citizens and council people in Kansas City and other municipalities to enact local minimum wage requirements; and, it counts as members low wage workers in the City of Kansas City who would receive a raise under the Initiative Petition at issue. By joining this Brief, JwJ seeks to advance the interests of citizens and low wage workers.[3]

[3] Both Plaintiff/Respondent and Intervenors/Appellants have consented to Amici filing this brief.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN GRANTING JUDGMENT FOR PLAINTIFF/RESPONDENT BECAUSE IT FAILED TO PROPERLY CONSIDER THE POWER OF CHARTER CITIES TO REGULATE WAGES IN THAT ARTICLE VI, SECTION 19(A) OF THE MISSOURI CONSTITUTION IS MEANT TO BE A BROAD GRANT OF AUTHORITY AND CHARTER CITIES DO NOT LOSE POWER UNDER THAT PROVISION UNLESS THE GENERAL ASSEMBLY EXPRESSES A CLEAR INTENT TO TAKE IT AWAY.

Mo. Const. art. VI, § 19(a)

Cape Motor Lodge, Inc. v. City of Cape Girardeau, 706 S.W.2d 208 (Mo. banc 1986)

City of Kansas City v. Carlson, 292 S.W.3d 368 (Mo. App. W.D. 2009)

II. THE TRIAL COURT ERRED IN GRANTING JUDGMENT FOR PLAINTIFF/RESPONDENT BECAUSE THE INITIATIVE PETITION IS AUTHORIZED BY ARTICLE VI, SECTION 19(A) IN THAT IT DOES NOT CONFLICT WITH MISSOURI'S MINIMUM WAGE LAW OR ANY OTHER STATE LAW.

Vest v. Kansas City, 194 S.W.2d 38 (Mo. 1946)

City of Kansas City v. La Rose, 524 S.W.2d 112 (Mo. banc 1975)

City of Kansas City v. Carlson, 292 S.W.3d 368 (Mo. App. W.D. 2009)

Krug v. Mary Ridge, 271 S.W.2d 867 (Mo. App. 1954)

ARGUMENT

Introduction

This case involves significant questions surrounding the right of citizens to advance their interests and to address matters of local concern by initiative petition. Intervenors and *Amici* maintain that the Initiative Petition does not conflict with state law including Missouri's Minimum Wage Law, §§ 290.500, *et seq*., RSMo. ("Minimum Wage Law"). Charter cities, including the City of Kansas City, have the power to establish local minimum wage and enforcement standards under Article VI, Section 19(a) of the Missouri Constitution, and the Minimum Wage Law does not deny them that power.

The trial court found in its September 22, 2015 Order that the Initiative Petition conflicts with Section 67.1571, RSMo., and Section 285.055, RSMo. (hereinafter "HB 722"). (Judgment/Order at 1–2; L.F. at 62–63.) The City also argued, in its response to Intervenors' Motion for a New Trial/To Reconsider Judgment, that the Initiative Petition is preempted by the Minimum Wage Law. (Pl.'s Suggs in Oppo. at 6; L.F. at 82.) While the trial court did not mention this claim in its Order denying Intervenors' Motion, (L.F. at 102), *Amici* think it important that they address the issue since the City may raise it again. *See Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 664 (Mo. banc 2010) (stating that the Court may affirm the trial court's judgment under "any appropriate theory"

supported by the record). A growing number of cities across the country, including cities in Missouri, are using minimum wage ordinances to address problems of poverty, health, and income inequality in their communities. The claim that a state minimum wage law bars cities from taking such action, despite the request of citizens to raise the minimum wage locally, deserves serious scrutiny.[4]

In any case involving a purported conflict between a proposed ordinance and a state law, the Court must begin with the Missouri Constitution. An important change occurred in 1971 when the people adopted Article VI, Section 19(a). Prior to the enactment of the provision, cities needed statutory authorization to exercise basic powers. But now, a charter city like Kansas City has "all powers which the general assembly of the state of Missouri has authority to confer upon any city, provided such powers . . . are not limited or denied . . . by statute." Mo. Const. art. VI, § 19(a). Reflective of this change, the burden of showing that an ordinance

[4] Another case pending before this Court— *Cooperative Home Care, Inc. v. City of St. Louis*, Case No. 1522-CC10607 (22nd Cir. Oct. 14, 2015), *appeal filed*, SC95401 (Mo. Dec. 4, 2015) —raises many of the same issues as this case. Notably, the City of St. Louis has argued that its minimum wage ordinance is valid and does *not* conflict with the Minimum Wage Law. Unfortunately, and somewhat surprisingly, the City of Kansas City has taken the opposite position.

conflicts with state law is high. The powers of charter cities may only be limited by a state law enacted with a *clear intent* to do so:

> Since constitutional charter cities would no longer need statutory authorization to exercise a wide range of powers, such cities could elect to establish their own procedures and limitation unless the statute in question was *so comprehensive and detailed as to indicate a clear intent that it should operate as both authorization and limitation*.

Cape Motor Lodge, Inc. v. City of Cape Girardeau, 706 S.W.2d 208, 212 (Mo. banc 1986) (citation omitted) (emphasis added).

Here, the trial court erred in finding that Section 67.1571, RSMo., and HB722 prohibit the City, by initiative petition, from establishing a local minimum wage. While both statutes express an intent on the part of the General Assembly to limit a city's power to enact a minimum wage ordinance, *Amici* agree with Intervenors that Section 67.1571 was unconstitutionally enacted in violation of Missouri's single subject, clear title, and original purpose requirements, and encourage this Court to closely examine the constitutionality of HB 722 for the reasons articulated by Intervenors in their Brief to this Court).[5]

[5] *Amici* recognize that Intervenors must claim that HB722 was unconstitutionally enacted and does not bar their Initiative Petition because HB 722 went into effect *before* their Petition could be voted on. The situation is different with respect to

In addition, despite the City's arguments to the contrary, (L.F. at 82–83), the Minimum Wage Law does not limit a city's power to enact a local minimum wage ordinance. Any fair reading of the Minimum Wage Law shows that it sets a floor. It prohibits employers from paying employees below a certain minimum wage rate. Under Article VI, Section 19(a) and long-established Missouri case law, cities may supplement laws of prohibition. In other words, they may go further than state law allows and set a higher standard by ordinance that prohibits more of the same type of conduct. This is confirmed by a reference to local minimum wage ordinances in Missouri's Employment Security Law, incorporation of federal regulations

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St. Louis' minimum wage ordinance because the General Assembly did not pass HB 722 over the Governor's veto until *after* the City of St. Louis enacted its ordinance on August 28, 2015. *See Cooperative Home Care, Inc., supra*. Regardless, *Amici*'s central argument remains the same—the Minimum Wage Law does not prohibit cities from establishing minimum wage standards. In addition, *Amici*'s argument is not dependent on language in HB 722 recognizing local minimum wage ordinance requirements in effect on August 28, 2015. While that language is further evidence that the Minimum Wage Law does not prohibit local minimum wage ordinances (as explained below), *Amici* submit that cities had the power to enact minimum wage requirements before the General Assembly sought to enact HB 722 and have always had that power under section 19(a).

interpreting the Fair Labor Standards Act ("FLSA") into the Minimum Wage Law, and multiple efforts by the General Assembly to expressly deny cities the power to enact minimum wage requirements. It is also the view of a majority of courts in other states that have considered this issue. Accordingly, under the principles set forth in *Cape Motor Lodge*, the General Assembly has not expressed clear intent by the Minimum Wage Law to bar cities from establishing minimum wage standards, and this Court should find that the Initiative Petition does not conflict with state law.

Standard of Review

The trial court decided this matter on the pleadings. On appeal, this Court determines whether the facts pleaded in Plaintiff's Petition are insufficient as a matter of law. *State ex rel. Nixon v. American Tobacco Co*., 34 S.W.3d 122, 134 (Mo. banc 2000). In this posture, Plaintiff "admits, for purposes of the motion, the truth of all well pleaded facts in the opposing party's pleadings." *Id*. (internal quotations and citations omitted).

The dispositive issue is whether the proposed ordinance conflicts with state law and therefore violates the Missouri Constitution. This is a legal question subject to *de novo* review. *Kansas City v. Chastain*, 420 S.W.3d 550, 554 (Mo. banc 2014).

Missouri law authorizes courts to conduct pre-election review of the facial constitutionality of an initiative petition. *See Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 828 (Mo. banc 1990). That being said, this Court should "consider only those threshold issues that affect the integrity of the election itself, and that are so clear as to constitute a matter of form." *United Gamefowl Breeders' Ass'n of Missouri v. Nixon*, 19 S.W.3d 137, 139 (Mo. banc 2000). It should "not address matters of substantive interpretation prior to the election." *State ex rel. Trotter v. Cirtin*, 941 S.W.2d 498, 500 (Mo. banc 1997) (refusing to hear pre-election claim that initiative petition on zoning conflicts with more specific provisions in city charter regarding zoning and is preempted by provisions of Chapter 89 of state law on zoning); *Craighead v. City of Jefferson*, 898 S.W2d 543, 547 (Mo. banc 1995) (where issues of law raised by city were "not so clear or settled as to constitute matters of form," including the issue of whether a vote on initiative petition was preempted by state law, the Court would not "rush to review the possible legal effect of such matters so prematurely").

I. THE TRIAL COURT ERRED IN GRANTING JUDGMENT FOR PLAINTIFF/RESPONDENT BECAUSE IT FAILED TO PROPERLY CONSIDER THE POWER OF CHARTER CITIES TO REGULATE WAGES IN THAT ARTICLE VI, SECTION 19(A) OF THE MISSOURI CONSTITUTION IS MEANT TO BE A BROAD GRANT OF AUTHORITY AND CHARTER CITIES DO NOT LOSE POWER UNDER THAT PROVISION UNLESS THE GENERAL ASSEMBLY EXPRESSES A CLEAR INTENT TO TAKE IT AWAY.

Under Article VI, Section 19(a) of the Missouri Constitution, the City of Kansas City has "all powers which the general assembly of the state of Missouri has authority to confer upon any city, provided such powers are consistent with the constitution . . . and are not limited or denied either by the charter . . . or by statute." Mo. Const. art. VI, § 19(a). When a party challenges a constitutional charter city's power to pass an ordinance under Section 19(a), the dispositive question for the Court "[is] *not* whether the City had authority for its ordinance, but whether its authority to enact the [ordinance] was denied by other law." *City of Kansas City v. Carlson*, 292 S.W.3d 368, 371 (Mo. App. W.D. 2009) (emphasis added). "[T]he emphasis no longer is whether a home rule city has the authority to exercise the power involved; the emphasis is whether the exercise of that power conflicts with the Missouri Constitution, state statutes or the charter itself." *Cape*

Motor Lodge, 706 S.W.2d at 211.

The change in 1971, when the people of this state adopted Article VI, Section 19(a), was significant. In enshrining this provision in the Missouri Constitution, the state adopted the "legislative" model of local governance, giving regulatory powers to cities as broad as those belonging to the General Assembly. Darin M. Dalmat, *Bringing Economic Justice Closer to Home: The Legal Viability of Local Minimum Wage Laws Under Home Rule*, 39 Colum. J.L. & Soc. Probs. 93, 104–06, 139 (2005) (noting that Missouri follows the legislative model of home rule powers proposed by the American Municipal Association ("AMA") and drafted by Jefferson Fordham); *see also* Thomas N. Sterchi, *State-Local Conflicts under the New Missouri Home Rule Amendment*, 37 Mo. L. Rev. 677, 681 (1972) (explaining that Article VI, Section 19(a) is based on the AMA's model constitutional provision for home rule) (available at http://scholarship.law.missouri.edu/mlr/vol37/iss4/6); Kenneth Vanlandingham, *Constitutional Home Rule Since the AMA (NLC) Model*, 17 Wm. & Mary L. Rev. 1, 4 (1975) (noting Missouri's adoption of the AMA model provision) (available at http://scholarship.law.wm.edu/wmlr/vol17/iss1/2).

In the past, in the event of a conflict between a statute and an ordinance, the statute prevailed if the court labeled the question "of statewide concern" or "of general concern," while the ordinance prevailed if the activity was "purely

municipal." Sterchi, *supra*, at 679, 681. This test caused great difficulty due to its vagueness and to what, in fact, constitutes a matter of state concern. *Id*. at 679–80. Moreover, results under the test were prone to change over time, since what may once be a municipal issue "may be as readily labeled a state concern at a later juncture." Dalmat, *supra*, at 106 & n.67 (internal quotations omitted) (citing Jefferson Fordham, *AMA's Model Constitutional Provisions for Municipal Home Rule* (1953)).

The change ensuing from the adoption of the "legislative" model was simple. Rather than have courts assess whether an activity is of statewide or local concern and thus proper for local regulation, Article VI, Section 19(a) grants cities the entire range of legislative power, except where limited or denied by statute. *See* Sterchi, *supra*, at 681 (new home rule provision eliminates the struggle of courts with the determination of whether a given function is of statewide or local concern). This model carries a presumption that cities have the power to regulate all types of activities. A court should only find that cities lack the authority to exercise a power where it determines that the legislature has specifically taken that authority away, either by express denial (where state statute expressly denies cities the power to act) or by direct conflict (where it is impossible to comply simultaneously with both state law and a local ordinance). *See Dalmat, supra*, at 106-107; Sterchi, *supra*, at 692 (courts should create a "presumption against

preemption" and "make every attempt possible to harmonize a statute and ordinance so they can stand together").

The Missouri Supreme Court recognized Section 19(a)'s broad grant of authority to cities in *Cape Motor Lodge*. The plaintiffs in that case argued that the City of Cape Girardeau lacked the authority to enter into an agreement with Southeast Missouri State to manage a community center because, in part, the enabling statute, Section 70.220, RSMo., did not name educational institutions as a type of entity with which the City could contract and cooperate. *Id*. at 210. The Missouri Supreme Court flatly disagreed. Citing *Frech v. City of Columbia,* 693 S.W.2d 813 (Mo. banc 1985), this Court noted that, just because the subject matter of an ordinance is not included in a statute, it does not mean that a city has exercised power limited by statute and that an ordinance violates Article VI, Section 19(a). *Cape Motor Lodge*, 706 S.W.2d at 211. Rather, the test for determining whether a conflict exists is "whether the ordinance 'permits what the statute prohibits' or 'prohibits what the statute permits.'" *Id*. (citation omitted). The language of applicable provisions must be "expressly inconsistent" or in "irreconcilable conflict." *Id*. at 212.

The Court in *Cape Motor Lodge* cautioned against interpreting a statute to deny a local power. Since Section 19(a) gives cities all the powers of the General Assembly, a court should not deny them authority to enact local regulations unless

the "statute in question was so comprehensive and detailed as to indicate a clear intent that it should operate as both authorization and limitation." *Id.* at 212. While the Court was in *Cape* this instance speaking of statutes granting powers to non-home rule cities, the same principles hold for general statutes. Given the intent of Section 19(a), silence on the part of the General Assembly is not enough to find that a state law curbs local powers. If the legislature intends to preempt an area or affirmatively grant or deny a power, it should state so. *Id*. Otherwise, cities are allowed to determine for themselves the most "practical and economic" methods to better their communities. *Id*.

Missouri courts continue to follow *Cape Motor Lodge*. A recent example is *City of Kansas City v. Carlson*, 292 S.W.3d 368 (Mo. App. W.D. 2009). There, this City defended its authority to regulate smoking in bars. The plaintiff, a bar owner, claimed that the city's ordinance conflicted with Missouri's Indoor Clear Air Act ("ICAA"). The Court of Appeals disagreed. The fact that the ICAA excluded bars from its definition of a "public place" and did not seek to regulate them did not mean that the city was prohibited from regulating them. The court noted that "[h]ad the Missouri legislature intended to grant affirmative authority to those places to allow smoking, it could have so stated." *Id*. at 373 (citing *Cape Motor Lodge*, 706 S.W.2d at 212). Consequently, the court found no conflict between the ordinance and state law. *See also Miller v. City of Town & Country*,

62 S.W.3d 431, 438 (Mo. App. E.D. 2001) ("If a statute does not specifically grant a right, but is silent on the question, then it may be permissible for the local government to establish prohibitions in that area.").[6]

Ultimately, the very purpose of Article VI, Section 19(a) is to give cities like Kansas City, and their citizens, the power to address problems like low wages within the city's boundaries. Intervenors, and voters who support the Initiative Petition, believe that a higher minimum wage will "promote the public welfare, health, safety, and prosperity by ensuring that citizens can better support and care for their families through their own efforts." (Init. Pet. at § 38-203.B; L.F. at 18.) The question is not whether income inequality or the regulation of wages is a matter of statewide concern versus a municipal matter. Rather, under the

[6] The Missouri Attorney General also takes an expansive view of the power of local government to address pressing social issues. In a 2009 letter, he opined that a local ordinance making the sale of products containing pseudoephedrine by prescription only did not conflict with a state law that similarly limits a person's access to such drugs. The ordinance and law had the same purpose—combating the manufacture of methamphetamine—and the ordinance merely enlarged on state law. Missouri Att'y Gen., Opinion No. 194-2009, at 2 (Oct. 23, 2009) (citing *City of Town & County*, 62 S.W.3d at 438) (available at http://www.oregondec.org/MO/AG-Opinion.pdf).

"legislative" model and Section 19(a), the question is whether the legislature has expressed a "clear intent" to deny cities the power to establish local wage standards either expressly or by an irreconcilable conflict between the Initiative Petition and state law. This is a matter of statutory construction; and, a review of the Minimum Wage Law shows no such intent and no conflict.

II. THE TRIAL COURT ERRED IN GRANTING JUDGMENT FOR PLAINTIFF/RESPONDENT BECAUSE THE INITIATIVE PETITION IS AUTHORIZED BY ARTICLE VI, SECTION 19(A) IN THAT IT DOES NOT CONFLICT WITH MISSOURI'S MINIMUM WAGE LAW OR ANY OTHER STATE LAW.

The Initiative Petition should be placed before voters because it is authorized by the state's Constitution for the reasons stated in Part I and does not conflict with state law. While Intervenors address in detail the City's claim that the Initiative Petition conflicts with Section 67.1571 and HB 722 (and the constitutionality of those laws), *Amici* submit this Brief to offer additional support for the contention that the Initiative Petition does not conflict with the Minimum Wage Law. (Per Section 19(a) and *Cape Motor Lodge,* the City cannot show the requisite clear intent by the General Assembly to deny cities the power to establish minimum

wage standards through an "irreconcilable conflict" between the proposed ordinance and state law).[7]

First, Missouri's Minimum Wage Law is a law of prohibition and only requires employers to pay workers no less than the state minimum wage. It leaves unregulated anything higher.

Second, consistent with Article VI, Section 19(a) and Missouri case law, the Initiative Petition does not conflict with state law or prohibit what state law permits. Rather, the proposed ordinance permissibly supplements state law.

Third, the General Assembly has long recognized the power of cities to establish minimum wage standards. Missouri's Employment Security Law acknowledges that a local government may set a minimum wage greater than the state's minimum wage. § 288.062.6(3), RSMo. The Minimum Wage Law also acknowledges the possibility of local minimum wage laws in its incorporation of FLSA regulations. Moreover, the General Assembly has twice sought to expressly deny municipalities the authority to establish local minimum wage requirements—

[7] The City has not argued that the Initiative Petition is *expressly* preempted by the Minimum Wage Law. It only suggests that there is a direct conflict between the two. In this regard, no provision of the Minimum Wage Law could be read as expressly prohibiting a city from enacting a local minimum wage ordinance in the way that Section 67.1571 and HB 722 attempt to do so.

by Section 67.1571 in 1998 and then by HB 722 in 2015. For these acts to have meaning, the General Assembly must have believed that cities possessed the power to enact local minimum wage ordinances at the time.

Fourth, the majority of courts around the country that have considered this issue have held that local minimum wage ordinances do not conflict with statewide minimum wage laws, and Missouri courts follow the same principles cited in these cases. In addition, local minimum wage requirements are an important tool for cities to address the special problems they face.

A. The Minimum Wage Law Is a Law of Prohibition and Can Only Be Read as Requiring Employers to Pay Workers *No Less* Than the State Minimum Wage.

Enacted in 1990, the purpose of the state's minimum wage law is to "protect the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others." *Tolentino v. Starwood Hotels & Resorts Worldwide Inc.*, 437 S.W.3d 754, 761 (Mo. banc 2014) (internal quotations and citation omitted). Section 290.502 of the Minimum Wage Law requires employers to pay a minimum wage as follows:

> 1. Except as may be otherwise provided pursuant to sections 290.500 to 290.530, effective January 1, 2007, every employer shall pay to each employee wages at the rate of $6.50 per hour, or wages at the

same rate or rates set under the provisions of federal law as the prevailing federal minimum wage applicable to those covered jobs in interstate commerce, whichever rate per hour is higher.

2. The minimum wage shall be increased or decreased on January 1, 2008, and on January 1 of successive years, by the increase or decrease in the cost of living. On September 30, 2007, and on each September 30 of each successive year, the director shall measure the increase or decrease in the cost of living by the percentage increase or decrease as of the preceding July over the level as of July of the immediately preceding year of the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W) or successor index as published by the U.S. Department of Labor or its successor agency, with the amount of the minimum wage increase or decrease rounded to the nearest five cents.

§ 290.502, RSMo.

Read literally, this section requires Missouri employers to pay *all* employees $6.50 per hour (adjusted for inflation) or at the federal rate. But this is absurd. The legislature obviously did not intend every employer to pay every employee the exact same wage rate. Rather, consistent with its policy objectives, the Minimum

Wage Law requires employers to pay *no less* than the state minimum wage rate. It sets a floor, not a ceiling, and leaves anything above that amount unregulated.

The purpose of statutory construction is "to determine the intent of the legislature" and "[i]n arriving at that intention, the objectives of the act are to be considered, and the construction must be reasonable and logical and give meaning to the statute []." *Patty Sue, Inc. v. City of Springfield*, 381 S.W.3d 360, 365 (Mo. App. W.D. 2012) (internal quotations and citation omitted). To avoid an absurd literal requirement, one must read the section as a prohibition, requiring employers to pay *no less* than the minimum wage. Any other reading would also run counter to the law's purpose as made clear in the original bill enacting it: "AN ACT to establish minimum wages of employees in this state, with penalty provisions." EMPLOYEES—MINIMUM WAGES, 1990 Mo. Legis. Serv. H.B. 1881 (Vernon). By definition, the term "minimum" means just that—"the lowest number or amount that is possible or allowed." Merriam-Webster.com, "Minimum," http://www.merriam-webster.com/dictionary/minimum (last visited March 17, 2016). The term does not speak to any higher amount.

In addition, the Missouri Department of Labor and Industrial Relations' regulations expressly read section 290.502(1) as a prohibitive statute. Section 30-4.020 of the regulations states that "[s]ubject to the requirements of sections 290.500 to 290.530, RSMo., *at least* the minimum wage shall be paid for all hours

worked, regardless of the frequency of payment and regardless of whether the wage is paid on an hourly, salaried, commissioned, or any other basis." 8 CSR 30-4.020 (emphasis added). State regulations "have the force and effect of law and are therefore binding on courts." *Pollock v. Wetterau Food Distribution Grp*., 11 S.W.3d 754, 766 (Mo. App. E.D. 1999); *see also Page W., Inc. v. Cmty. Fire Prot. Dist. of St. Louis Cty.*, 636 S.W.2d 65, 67 (Mo. banc 1982) ("Rules duly promulgated pursuant to properly delegated authority have the force and effect of law."). Thus, section 30-4.020 is binding on this Court and requires that section 290.502(1) be read as a prohibitive statute setting a floor for wages in the state.

B. The Minimum Wage Law Does Not Express a Clear Intent to Deny Cities the Power to Establish Minimum Wage Standards to Supplement State Law.

1. The Initiative Petition constitutes a permissible supplementation of the Minimum Wage Law.

Missouri courts have long made clear that municipal ordinances may supplement state law. An ordinance that "enlarges upon the provision of a statute by requiring more than the statute requires creates no conflict therewith, unless the statute limits the requirements for all cases to its own prescriptions." *Page W., Inc..*, 636 S.W.2d at 68 (internal quotations and citations omitted); *see also Vest v. Kansas City*, 194 S.W.2d 38, 39 (Mo. 1946) (same) (internal quotations and

citation omitted). In other words, an ordinance may supplement state law as long as it is not in "inconsistent or irreconcilable conflict with the state law." *Patty Sue, Inc.*, 381 S.W.3d at 365.

As noted above, the test for determining whether a statute conflicts with state law is "whether the ordinance permits what the statute prohibits or prohibits what the statute permits." *Page W.*, 636 S.W.2d at 67 (internal quotations and citation omitted); *see also Patty Sue, Inc.*, 381 S.W.3d at 365 ("In determining whether a city ordinance conflicts with statutory authority we turn to statutory construction to determine 'whether the ordinance prohibits what the statute permits or permits what the statute prohibits.'") (citation omitted). "(W)here both an ordinance and a statute are prohibitory, and the only difference between them is that the ordinance goes further in its prohibition but not counter to the prohibition under the statute, and the municipality does not attempt to authorize by the ordinance what the legislature has forbidden or forbid what the legislature has expressly licensed, authorized, or required, there is nothing contradictory between the provisions of the statute and the ordinance because of which they cannot coexist and be effective." *City of Kansas City v. La Rose*, 524 S.W.2d 112, 117 (Mo. banc 1975).

In *Carlson*, as noted above, the Court of Appeals upheld Kansas City's smoking ban, finding that the ordinance in question did not conflict with the ICAA.

In particular, the Court found that the ICAA was a prohibitory statute because it banned certain activity. *Carlson*, 292 S.W.3d at 374. It then noted that an exemption from a statutory prohibition, in that case for bars, is not an "authorization." *Id*. The lack of regulation is not permission for bars to allow smoking. Thus, the City could, by ordinance, go further than state law and prohibit more of the same type of conduct without creating a conflict between the two. *Id; see also Patty Sue, Inc.*, 381 S.W.3d at 366 (holding ICAA was not enacted "to permit smoking or to protect the rights of smokers" and city could go further by ordinance and expand the state law prohibition).

The same reasoning applies in this case. Like the ICAA, the Minimum Wage Law is a prohibitory statute. It requires that employers pay no less than a certain rate. The fact that the Minimum Wage Law exempts certain businesses from paying the minimum wage and does not prohibit or regulate businesses from paying more than the minimum wage should not be read as "an authorization." *See Carlson,* 292 S.W.3d at 374. The Minimum Wage Law was not enacted to expressly permit employers to pay employees anything above the minimum wage or to protect the rights of employers. Such a reading of the law would turn on its head its purpose of protecting employees and the "rights of those who toil." *Tolentino*, 437 S.W.3d at 761 (internal quotations and citation omitted). At the least, the language in the Minimum Wage Law does not meet the "clear intent"

standard required by Article VI, Section 19(a). It is not "so comprehensive and detailed as to indicate a clear intent that it should operate" both to affirmatively authorize employers to pay any wage and to limit the power of cities to regulate wages. *See Cape Motor Lodge*, 706 S.W.2d at 212. Accordingly, the City is free to build upon the floor set by state law and establish higher minimum wage standards. *See also* Dalmat, *supra,* at 108 ("[M]any courts do not find a conflict between an ordinance and a statute when the ordinance pursues the same policies as the statute but demands higher standards, as many statutory standards impose merely a 'floor rather than a ceiling.'") (citation omitted).

Other Missouri cases support this position. For example, in *Vest v. Kansas City*, this Court held that an ordinance, which required barbers to be examined "at least once every six months," permissibly supplemented a state law that required the same barber to submit to a physical exam "at least once per year," because it did "not attempt to impose a new or different standard" and "d[id] not permit what the statute prohibits, nor d[id] it prohibit what the statute permits." *Vest*, 194 S.W.2d at 39; *see also Kansas City v. Troutner*, 544 S.W.2d 295, 298 (Mo. App. 1976) (holding that ordinance did not conflict with state law when the ordinance prohibited the operation and physical control of a motor vehicle by an intoxicated person and the state law prohibited only the "operation" of the vehicle by such a person, explaining that the ordinance "merely extend[ed] the prohibition" in the

state law); *Krug v. Mary Ridge*, 271 S.W.2d 867, 871 (Mo. App. 1954) (ordinance requiring iron fire escapes on hotels in excess of two stories does not conflict with state law that applies requirement to hotels more than three stories in height; ordinance "is merely supplementary" to state law).

Likewise, in *City of Kansas City v. La Rose*, this Court held that no conflict existed between an ordinance and state statute that both prohibited resistance to police actions, even though the ordinance did not require the resistance to be knowing and willful while the statute did. *LaRose*, 524 S.W.2d at 117–18. The Court explained that "any violation of the statute would also be a violation of the ordinance" and that that ordinance "ha[d] simply gone further and prohibited interference in cases where willfulness is not shown." *Id.* at 117. Notably, the Court cited a local minimum wage ordinance case, *City Council of Baltimore v. Sitnick*, 255 A.2d 376 (1969), in support of this rule, explaining that in *Sitnick*, "an ordinance was held valid which established a higher minimum wage than the state law." *Id*. at 117–18. At least implicitly, this Court recognized that a local minimum wage rate does not conflict with a state minimum wage rate.

Like the ordinances in *Vest*, *Troutner*, *Krug*, and *LaRose*, the Initiative Petition supplements the Minimum Wage Law by going beyond the minimum state requirement. It does not prohibit what the state law permits; it only prohibits more. An employer can easily comply with both. An employer complies with state law

by paying the rate required by the proposed ordinance; and any violation of the state law is also a violation of the proposed ordinance.[8] Thus, no irreconcilable conflict exists with the Minimum Wage Law that could invalidate the Initiative Petition.

2. The Minimum Wage Law does not occupy the field.

Besides a direct conflict, some Missouri courts have recognized implied preemption, where a state law occupies an area, as another form of preemption. In those cases, courts ask whether the state has "created a comprehensive scheme on a

[8] An employer that violates the proposed ordinance may be prosecuted by the City attorney and subject to a fine. (Sec. 38-206; L.F. at 19.) Employers are also required to post a notice about the Initiative Petition's minimum wage rate. (Sec. 38-209; L.F. at 20.) These enforcement mechanisms go beyond the Minimum Wage Law; but they do not make for a conflict. Ordinances naturally include separate enforcement mechanisms and penalties, and courts do not find a conflict on such grounds. *See, e.g., Frech*, 693 S.W.2d at 816 (holding ordinance giving municipal judge power to issue search warrants does not conflict with state criminal law); *Brotherhood of Stationary Engineers v. City of St. Louis*, 212 S.W.2d 454, 460 (Mo. App. 1948) (holding ordinance that established separate fee and that empowered city agency to adopt rules did not conflict with state law).

particular area of the law, leaving no room for local control." *Borron v. Farrenkopf*, 5 S.W.3d 618, 624 (Mo. App. W.D. 1999).

The City has not argued implied preemption in this case. But, even if this Court considers the question, the Minimum Wage Law does not create a comprehensive scheme that would invalidate the Petition. First, as noted, the Law requires employers to pay employees *no less* than the state minimum wage; it does not regulate wages above that rate. Second, the Missouri Department of Labor and Industrial Relations' authority to enforce the Law is limited. Section 290.523 gives the Department the power to adopt rules "necessary to the enforcement and administration of sections 290.500 to 290.530." By its terms, that authority is limited to the state minimum wage.[9] The Law does not give the Department the power to set a comprehensive scheme for wages or to regulate higher rates. Third, nothing in the Law explicitly directs the actions of local governments or bars cities from setting a higher minimum wage based on the needs of their citizens.

[9] In fact, the Department does not enforce remedies for violations of the Minimum Wage Law. It can investigate complaints, but it does not collect unpaid wages for employees. 8 CSR 30-4.060. The Law is enforced by private rights of actions by individual workers, § 290.527, RSMo., and through criminal proceedings brought by prosecutors, § 290.525, RSMo.

Cases finding implied preemption typically involve utility or environmental regulation. By comparison, the Minimum Wage Law in no way gives the Department of Labor the type of "sweeping" authority over wages given to the Public Service Commission over electrical power and rates. *Cf. Union Electric Co. v. Crestwood*, 499 S.W.2d 480, 482 (Mo. 1973). Rather, the Law grants the Department only specific powers and does not regulate protections beyond those granted in state law. Thus, it leaves room for local control.

C. State Law Recognizes that Cities May Enact Local Minimum Wage Ordinances.

Not only is the Minimum Wage Law silent as to higher minimum wages, state law already recognizes that cities may enact local minimum wage ordinances. This further confirms that the Minimum Wage Law and the Initiative Petition do not conflict.

First, the Missouri Employment Security Law acknowledges that localities have the power to enact local minimum wage laws. It states that extended unemployment benefits shall not be denied under the following condition (among others):

> If the remuneration for the work offered is less than the minimum wage provided by Section 6(a)(1) of the Fair Labor Standards Act of

1938, as amended, without regard to any exemption or any applicable state or *local minimum wage*, whichever is the greater.

§ 288.062.6(3), RSMo. (emphasis added)

The legislature has amended section 288.062 numerous times and at least four times since 1990, the year that the Minimum Wage Law was enacted. The most recent amendment occurred in 2011. *See* L.1993, H.B. No. 492, § A; L.2009, H.B. No. 1075, § A; L.2010, H.B. No. 1544, § A; L.2011, H.B. No. 163, § A. Had the legislature intended for the Minimum Wage Law to preempt or otherwise prohibit local minimum wage laws, it could have easily amended section 288.062.6(3) to reflect that view.

In addition, a state regulation incorporates into the Missouri Minimum Wage Law all of the regulations established by the U.S. Department of Labor pertaining to the Fair Labor Standards Act as last amended on December 16, 2004. *See* 8 CSR 30-4.010. Notably, the FLSA, our federal minimum wage law, expressly envisions localities adopting a higher minimum wage rate than the federal rate. 29 U.S.C. § 218 ("No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law *or municipal ordinance* establishing a minimum wage higher than the minimum wage established under this chapter . . .") (emphasis added). FLSA regulations likewise recognize that cities may enact a higher minimum wage law than that required under federal law. *See* 29 C.F.R. §

525.20 (adopted in 1989 and stating that "[n]o provision of these regulations, or of any special minimum wage certificate issued thereunder, shall excuse noncompliance with any other Federal or State law *or municipal ordinance* establishing higher standards.") (emphasis added). In incorporating this federal regulation into the Minimum Wage Law, Missouri has expressed an intent to allow cities to require compliance with local minimum wage ordinances. This Court should not construe the Minimum Wage Law to undermine federal policy allowing localities to supplement federal minimum wage requirements.

Furthermore, it is impossible to ignore the fact that the legislature has now twice attempted to enact legislation that expressly preempts a municipality's authority to enact a local minimum wage. These efforts weigh strongly in favor of finding that the legislature did not intend the Minimum Wage Law to preempt or otherwise prohibit local minimum wage laws.

Section 67.1571 was the General Assembly's first attempt. As Intervenors have argued, it failed because the law was unconstitutionally enacted in violation of Missouri's clear title, single subject, and original purpose requirements, and is void. Section 67.1571 was enacted as a late amendment to the Community Improvement Districts ("CIDs") Act, HB 1636 of 1998, which originally related to the establishment, proper governance, and operation of CIDs. *Compare* House Bill No. 1636 [Introduced], Second Reg. Session, 89th General Assembly (Jan. 29,

1998) *with* House Journal, Second Reg. Session, 89th General Assembly, p. 812 (House Amendment No. 6 to HS HCS HB 1636) (Mar. 31, 1998)).[10] Its prohibition on local minimum wages fell outside the bill's core subject, had no natural connection with CIDs, and was not an incident or means to accomplish CIDs. *See Rizzo v. State*, 189 S.W.3d 576, 579 (Mo. banc 2006) (provision that related to candidacy for statewide elective office was found to be beyond the core subject of the bill, which was titled "relating to political subdivisions"); *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 101 (Mo. banc 1994). In addition, Section 67.1571 went far beyond the Act's original purpose. Under no reasonable reading are local minimum wage requirements connected or germane to the operation of CIDs, including requirements that apply outside CIDs. *Missouri Ass'n of Club Execs., Inc. v. State*, 208 S.W.3d 885, 888 (Mo. banc 2006) (provisions regulating adult entertainment that were added late in the legislative process "were not remotely within the original purpose of the bill, but rather constitute[ed] a textbook example of the legislative log-rolling that section 21 is intended to prevent").

[10] The Court may take judicial notice of the various versions of a bill and portions of the journals of the House and Senate relating to it. *Brown v. Morris*, 290 S.W.2d 160, 167–68 (Mo. banc 1956).

The General Assembly's second, more recent attempt is HB 722, which expressly preempts "local minimum wage ordinance requirements" that were not in effect on August 28, 2015. § 285.055, RSMo. Intervenors argue that HB 722 was also unconstitutionally enacted. Moreover, by its plain language, the General Assembly recognized through HB 722 that state law, including Missouri's Minimum Wage Law, does not prohibit municipalities from enacting a local minimum wage law. To interpret HB 722 otherwise would render the inclusion of the August 28, 2015 deadline meaningless. And, when interpreting state law, this Court is guided by the fundamental principle that "the legislature is not presumed to have intended a meaningless act." *Murray v. Missouri Highway and Transp. Com'n*, 37 S.W.3d 228, 233 (Mo. banc 2001); *City of Willow Springs v. Missouri State Librarian*, 596 S.W.2d 441, 445 (Mo. banc 1980) (citation omitted) (courts are to construe statutes on the "theory that the legislature intended to accomplish something by the amendment" and presume that a statute has "some substantive effect such that it will not be found to be a meaningless act of housekeeping."); *see also Clair v. Whittaker*, 557 S.W.2d 236, 240 (Mo. banc 1977) (same).[11]

[11] Interestingly, this term, Representative Dan Shaul, the sponsor of HB722, introduced a third bill that would prohibit municipalities from establishing, mandating, or otherwise requiring a minimum wage that exceeds the state

The simple fact that the General Assembly continues to attempt to pass "preemption" bills, even unsuccessfully, is evidence that the legislature did not intend for the Minimum Wage Law to conflict with or otherwise prohibit local minimum wage laws. Cities have always had this power under Article VI, Section 19(a), and will continue to have it unless and until the General Assembly successfully denies or limits it.

D. The Majority of Courts that Have Considered Whether Local Minimum Wage Laws Conflict with State Law Have Found No Conflict and Recognize the Need of Cities to Address Issues in their Communities.

To date, New Mexico, Maryland, and Wisconsin courts have held that the state minimum wage is a floor, not a ceiling, and found no implied legislative intent barring local minimum wage laws imposing a higher minimum wage. *See New Mexicans for Free Enterprise v. City of Santa Fe*, 126 P.3d 1149 (N. Mex. Ct. App. 2005); *City Council of Baltimore v. Sitnick*, 255 A.2d 376 (Md. Ct. App. 1969); *Main Street Coalition for Economic Growth v. City of Madison*, No. 04-CV-3853, slip op. (Dane County Cir. Ct., Branch 2, Apr. 21, 2005) (available at http://nelp.3cdn.net/05f29b8cfe475d32d2_wkm6bl8hl.pdf). As stated in *Sitnick*, a

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minimum wage. HB 2431, 98th Gen. Assembly, Second Regular Session. The bill was withdrawn on February 3, 2016.

case cited by this Court in *LaRose*, "unless a general public law contains an express denial of the right to act by local authority, the State's prohibition of certain activity in a field does not impliedly guarantee that all other activity shall be free from local regulation and in such a situation the same field may thus be opened to supplemental local regulation." *Sitnick*, 255 A.2d at 382.[12]

In addition, Kentucky's Court of Appeals recently affirmed a lower court decision holding that a Louisville, Kentucky minimum wage ordinance did not

[12] The few cases making contrary findings are distinguishable. For example, the New York Court of Appeals interpreted its state minimum wage law as evidencing an intent by the legislature to preempt higher local minimum wages. *Wholesale Laundry Board of Trade v. City of New Yor*k, 12 N.Y.2d 998 (1963), *aff'g*, 17 A.D.2d 327 (1962). However, New York's home rule law expressly prohibits any law that "supersedes any provision of the [New York] Labor Law," which contains the state's minimum wage law. *Id.* at 330. And, in adopting New York's minimum wage law, the legislature expressly outlined how to address the need for higher local minimum wages. *Id.* ("The provisions for amendment of the wage fixed formulate an elaborate machinery for the determination of an adequate wage in any occupation and in any locality, including the City of New York.") Missouri's Minimum Wage Law includes none of the features that led the New York court to strike down the local law at issue.

conflict with the state's minimum wage law. It explained that "[a] city may pass legislation on a subject that has been addressed by the General Assembly so long as it does not prevent local governments from establishing additional legislation and there is no conflict between the enactments." *Kentucky Restaurant Association, Inc. v. Louisville/Jefferson County Metro Government*, No. 2015-CA-000996 (Ky. Ct. App. June 30, 2015) at 10 (attached). The Kentucky Court found that the General Assembly had set a "floor for wages" in the state's minimum wage law and that "localities may increase the minimum wage when they conclude that it serves the public interest in doing so." *Id.*[13] Notably, Kentucky statutes include a home rule provision like Missouri's, and Kentucky applies that same type of test to determine whether an ordinance and state law conflict. *Dannheiser v. City of Henderson*, 4 S.W.3d 542, 549 (Ky. 1999) ("[T]he fact that the state has enacted legislation does not prevent local governments from establishing additional legislation or acting as long as there is no conflict between them.").[14]

[13] An appeal of the appellate court's decision is now before the Kentucky Supreme Court.

[14] Kentucky law authorizes cities of the first class to "govern themselves to the full extent required by local government and not in conflict with the Constitution or laws of [Kentucky] or by the United States." KRS § 83.410(1). Similar to Missouri law, *see* § 71.010, RSMo, Kentucky law prohibits cities from enacting

A decision by this Court upholding the Initiative Petition would reflect the growing consensus among courts that state minimum wage laws set a floor and allow localities to supplement with higher minimum wages. *See also Filo Foods, LLC v. City of SeaTac*, 357 P.3 1040 (Wash. banc 2015) (finding that city minimum wage ordinance does not conflict with state statute on airports); *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1150 (9th Cir. 2004) (noting that cities have the power to regulate wages and employment conditions). Moreover, it would confirm the autonomy which cities require, consistent with the intent of Section 19(a), to fully respond to the special needs of their communities. The problems faced by Kansas City, St. Louis, and Columbia are not the same as those in New Madrid and Maryville. Cities are impacted in different ways by problems like heroin and methamphetamine abuse, housing discrimination, and the cost of living. They should have the ability to confront these issues, and to seek to remedy their effects, in their own way. To the extent opponents claim that *Amici*'s view turns the state into a checkerboard of different city regulations, this contention is

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ordinances that conflict with the Kentucky Constitution, state statute, or federal law. KRS § 83.410; KRS § 82.082. A conflict with a statute occurs only if the power at issue "is expressly prohibited by a statute or there is a comprehensive scheme of legislation on the same general subject." KRS § 82.082.

contrary to the democratic principles of local control embodied in Section 19(a) giving cities the power to set standards responsive to the demands and needs of their citizens. In addition, navigating varying minimum wage rates is not much different from navigating varying sales tax rates, zoning prohibitions, and health code requirements from city to city.

Local minimum wage ordinances are an important legal and economic tool. In an effort to respond to higher local living costs and to bring the minimum wage closer to a living wage level, these laws have proven, both legally and economically, that it is feasible to raise wages in accordance with economic indicators.[15] In the past fifteen years, scores of cities and counties have enacted minimum wage ordinances. They include Johnson County, Iowa; Los Angeles, California; and Chicago, Illinois.[16] (See Figure 1 for a complete list of cities and counties that have successfully enacted a minimum wage law.)

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[15] *See* National Employment Law Project, City Minimum Wage Laws: Recent Trends and Economic Evidence (Sept. 2015) (available at http://www.nelp.org/content/uploads/City-Minimum-Wage-Laws-Recent-Trends-Economic-Evidence.pdf).

[16] *Id*.; *see also* Raise the Minimum Wage, Local Minimum Wage Laws and Current Campaigns, http://www.raisetheminimumwage.com/pages/local-minimum-wage (last viewed Dec. 7, 2015).

Figure 1: Citywide Minimum Wage Ordinances in the U.S.[17]

City	Year Passed	Minimum Wage
Santa Fe, New Mexico	2003	$9.50 (2006) (Current: $10.84)
San Francisco, California	2003	$8.50 (2004)
Albuquerque, New Mexico	2012	$8.50 (2013) (Current: $8.75)
San Jose, California	2012	$10.00 (2013) (Current: $10.30)
Bernalillo County, New Mexico	2013	$8.50 (2014) (Current: $8.65)
Washington, D.C.	2013	$11.50 (2016)
Montgomery County, Maryland	2013	$11.50 (2017)

[17] *See* Raise the Minimum Wage, Local Minimum Wage Laws and Current Campaigns, http://www.raisetheminimumwage.com/pages/local-minimum-wage (last viewed Mar. 30, 2016).

Prince George's County, Maryland	2013	$11.50 (2017)
SeaTac, Washington	2013	$15.00 (2014) (Current: $15.24)
Las Cruces, New Mexico	2014	$10.10 (2019)
Santa Fe County, New Mexico	2014	$10.66 (2014) (Current: $10.84)
Mountain View, California	2014	$10.30 (2015)
Sunnyvale, California	2014	$10.30 (2015)
Oakland, California	2014	$12.25 (2015) (Current: $12.55)
Berkeley, California	2014	$12.53 (2016)
Richmond, California	2014	$13.00 (2018)
Chicago, Illinois	2014	$13.00 (2019)
San Francisco, California	2014	$15.00 (2018)
Louisville, Kentucky*	2014	$9.00 (2017)
Seattle, Washington	2014	$15.00 (2017–21)

Emeryville, California	2015	$15.00 (2018)
Los Angeles, California	2015	$15.00 (2020–21)
Los Angeles County, California	2015	$15.00 (2020–21)
Bangor, Maine	2015	$9.75 (2019)
Portland, Maine	2015	$10.68 (2017)
St. Louis, Missouri*	2015	$11.00 (2018)
El Cerrito, California	2015	$15.00 (2019)
Santa Clara, California	2015	$11.00 (2016)
Palo Alto, California	2015	$11.00 (2016)
Johnson County, Iowa	2015	$10.10 (2017)
Sacramento, California	2015	$12.50 (2020)
Tacoma, Washington	2015	$12.00 (2018)
Lexington, Kentucky*	2015	$10.10 (2018)
Mountain View, California	2015	$15.00 (2018)

Santa Monica, California	2016	$15.00 (2020) $15.37 (2017 for hotels, motels & businesses within)
Long Beach, California	2016	$13.00 (2019)

***** Challenge to validity of local law pending.

The most rigorous research to date, examining scores of state and local minimum wage increases across the United States, has found no evidence that higher minimum wages have harmed the competitiveness of states and cities by pushing businesses across state lines or into other counties and little, if any, adverse effect on employment levels and hours.[18] Furthermore, the actual

[18] *See, e.g.*, Arindrajit Dube et al., "Minimum Wage Effects across State Borders: Estimates Using Contiguous Counties" *The Review of Economics and Statistics* (Nov. 2010) 92(4): 945–64 (comparing employment patterns in more than 250 pairs of neighboring counties in the U.S. that had different minimum wage rates between 1990 and 2006 and finding no difference in job growth rates); Michael Reich et al., University of California, Berkeley, "The Economic Effects of a Citywide Minimum Wage" (2007) (finding that San Francisco's higher minimum wage had not led the city's employers to reduce either their employment levels or hours worked) (available at

experiences of cities that have recently raised the minimum wage at the local level have shown that such increases can lead to positive experiences for workers and local economies. For example, in San Jose, California, after voters in 2012 approved raising the city's minimum wage, the *Wall Street Journal* reported that "[f]ast-food hiring in the region accelerated once the higher wage was in place. By early [2014], the pace of employment gains in the San Jose area beat the improvement in the entire state of California."[19] And, in Seattle, which is slowly

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http://www.irle.berkeley.edu/cwed/wp/economicimpacts_07.pdf); Bureau of Business and Economic Research, University of New Mexico, "Measuring the Employment Impacts of the Living Wage Ordinance in Santa Fe, New Mexico" (Jun. 2006) (finding that Santa Fe's minimum wage had no discernible impact on employment per firm when compared to Albuquerque and actually did better than Albuquerque in terms of employment changes) (available at http://bber.unm.edu/pubs/EmploymentLivingWageAnalysis.pdf.)

[19]Eric Morath, "What Happened to Fast-Food Workers When San Jose Raised the Minimum Wage?" *Wall Street Journal* (Apr. 9, 2014) (available at http://blogs.wsj.com/economics/2014/04/09/what-happened-to-fast-food-workers-when-san-jose-raised-the-minimum-wage/).

raising its minimum wage to $15 per hour, the restaurant business is booming: dozens of new restaurants have opened since the first increase went into effect.[20]

Of course, opponents offer their own view of the effects of local minimum wage ordinances. But, it should be left to the people to hear this debate and to vote on the matter. The Court should not construe the Minimum Wage Law to deny the citizens of the City of Kansas City the power to determine for themselves how to better their community.

CONCLUSION

For the foregoing reasons, and those presented in the brief of Intervenors, *Amici Curiae* respectfully request that this Court uphold the Initiative Petition as valid under Missouri law.

[20] Jeanine Stewart, "Apocalypse Not: $15 and the cuts that never came," *Puget Sound Business Journal*, (Oct. 23, 2015) (available at http://www.bizjournals.com/seattle/print-edition/2015/10/23/apocolypse-not-15-and-the-cuts-that-never-came.html).

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned certifies that:

(1) this brief contains the information required by Rule 55.03;

(2) this brief complies with the limitations contained in Rule 84.06(b);

(3) there are 10, 614 words in this brief.

/s/ Christopher N. Grant
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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of April 2016, a copy of *Amici*'s Brief was served by operation of the Court's electronic filing system to the following:

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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000996

KENTUCKY RESTAURANT ASSOCIATION, INC., ET AL. MOVANT

v. JEFFERSON CIRCUIT COURT
ACTION NO. 15-CI-000754

LOUISVILLE/JEFFERSON COUNTY
METRO GOVERNMENT RESPONDENT

ORDER
DENYING

** ** ** ** ** ** ** **

This matter is before the Court on the combined motion of Kentucky Restaurant Association, Inc. ("KRA"), Kentucky Retail Federation, Inc. ("KRF"), and Packaging Unlimited, LLC (collectively "Appellants") for CR[1] 76.33 and CR 65.07 injunctive relief from the Jefferson Circuit Court's June 29, 2015 Order denying Appellants' motion for judgment on the pleadings and motion for injunctive relief. Appellants allege Ordinance No. 216, Series 2014 (O-470-14), "An Ordinance Relating To Minimum Wages To Be Paid To Employees By

[1] Kentucky Rule of Civil Procedure

Employers In Louisville Metro," ("Ordinance") conflicts with Kentucky's minimum wage statute in that it raises the local minimum wage above the floor set by KRS[2] 337.275(1) and argue that that they will suffer immediate and irreparable injury before the issues they raise on appeal can be resolved. The crux of Appellants' argument for injunctive relief is that if the ordinance is ultimately found to be void, Appellants are without recourse to recoup the overpayment of wages to employees. The Court disagrees.

The Ordinance generally adopts the definitions of KRS 337.010 and reads in pertinent part:

> Every Employer within the jurisdictional boundaries of Louisville Metro shall pay to each of its Employees wages at a rate of not less than $7.75 per hour beginning on July 1, 2015, $8.25 per hour beginning on July 1, 2016, and $9.00 per hour beginning on July 1, 2017.

Further, the Ordinance provides that beginning on July 1, 2018, and for each year thereafter the minimum wage shall be increased by the prior year's Consumer Price Index for the south urban region as published by the Bureau of Labor Statistics.

[2] Kentucky Revised Statute

On February 13, 2015, Appellants filed a complaint for declaratory and injunctive relief in the Jefferson Circuit Court alleging the ordinance was void because it conflicted with Kentucky statutes and void because it creates an unauthorized private cause of action. Appellants filed a motion for judgment on the pleadings, and Metro Government responded and filed a cross-motion for judgment on the pleadings. The facts were not in dispute, and the issues raised were only those of law. A hearing was held on June 10, 2015.

On June 29, 2015, the Circuit Court entered an order denying Appellant's motion for judgment on the pleadings and injunctive relief. The Circuit Court granted Metro Government's motion for judgment on the pleadings and deemed the Ordinance lawful and enforceable. Appellants' request for emergency and intermediary relief in this Court followed.

At this stage the Court does not adjudicate the motion for injunctive relief; however, the necessity of demonstrating a likelihood of success on the underlying claim is implicit in the required showing for emergency relief. *See Shamaeizadeh v. McDonald-Burkman*, 74 S.W.3d 748, 750 (Ky. 2002). Consequently, the Court must consider whether Appellants may be entitled to an injunction staying the effectiveness of the ordinance increasing the minimum wage in Jefferson County.

Appellants argue that allowing the ordinance to take effect will irreparably harm them because, as businesses that employ workers from throughout Louisville and surrounding areas, they will have the burden of calculating different wages in different parts of the Commonwealth for the same or similar job duties. And, if they not are successful in obtaining an injunction from this Court, they will be unable to recoup the extra wages they paid during the period between when the ordinance takes effect and when an injunction issues.

Injunctive relief is an extraordinary remedy; Appellants' burden is to demonstrate more than a mere "possibility" of harm. And, "the need to show "'substantial and immediate irreparable injury' is especially strong when plaintiffs seek to enjoin the activity of state or local government." *International Franchise Ass'n v. City of Seattle*, ___F. Supp.3d___, 2015 WL 1221490 (W.D. Wash. March 17, 2015) (citing *Hodgers-Dugin v. de la Vina*, 199 F.3d 1037, 1042 (9th Cir. 1999) ("The Supreme Court has repeatedly cautioned that, absent a threat of immediate and irreparable harm, the federal courts should not enjoin a state to conduct its business in a particular way.")). The Courts have long construed "irreparable injury" as "something of a ruinous nature." *Bender v. Eaton*, 343 S.W.2d 799, 801 (Ky. 1961). It must be an "incalculable damage to the applicant ... either to the liberty of his person, or to his property rights, or other far-reaching and conjectural consequences." *Litteral v. Woods*, 223 Ky. 582, 4 S.W.2d 395,

397 (1928); *see also Robertson v. Burdette*, 397 S.W.3d 886, 891 (Ky. 2013) (citations omitted). "Inconvenience, expense, annoyance" do not constitute irreparable injury. *Fritsch v. Caudill*, 146 S.W.3d 926, 930 (Ky. 2004). The mere loss of valuable rights . . . [does not] constitute [] great and irreparable injury." *Schaetzley v. Wright*, 271 S.W.2d 885, 886 (Ky.App. 1954).

In *Maupin v. Stansbury*, 575 S.W.2d 695, 698 (Ky.App. 1978), this Court clarified the burden which must be satisfied prior to a grant of injunctive relief under CR 65.04:

> CR 65.04 sets out the substantive elements for temporary injunctive relief by providing that the remedy is warranted only where it is clearly shown that one's rights will suffer immediate and irreparable injury pending trial. The purpose of these requirements is to insure that the injunction issues only where absolutely necessary to preserve a party's rights pending the trial of the merits. Although the injunction is not to be substituted for a full trial on the merits, *Oscar Ewing Inc. v. Melton*, ... it is clear that the party must show, either by verified complaint, affidavit, or other proof, that such harm is likely to occur unless the injunction issues.

To satisfy the "immediate and irreparable injury" prong of this standard, *Maupin* instructs that "in the area of temporary injunctive relief, the clearest example of irreparable injury is where it appears that the final judgment would be rendered completely meaningless should the probable harm alleged occur

prior to trial." *Id.* *Maupin* envisions a balancing of the equities in addition to an assessment of whether the substantive aspects of CR 65.04 have been met:

> ...in any temporary injunctive relief situation the relative benefits and detriments should be weighed. *Kentucky High School Athletic Association v. Hopkins*, Ky. App., 552 S.W.2d 685 (1977). Obviously, this entails a consideration of whether the public interest will be harmed by the issuance of the injunction or whether its effect will merely be to maintain the status quo.

Id.

Finally, *Maupin* reiterates the standard by which appellate courts are to review the grant or denial of a temporary injunction:

> Therefore, in light of the above discussion, applications for temporary injunctive relief should be viewed on three levels. **First, the trial court should determine whether plaintiff has complied with CR 65.04 by showing irreparable injury. This is a mandatory prerequisite to the issuance of any injunction.** Secondly, the trial court should weigh the various equities involved. Although not an exclusive list, the court should consider such things as possible detriment to the public interest, harm to the defendant, and whether the injunction will merely preserve the status quo. Finally, the complaint should be evaluated to see whether a substantial question has been presented. If the party requesting relief has shown a probability of irreparable injury, presented a substantial question as to the merits, and the equities are in favor of issuance, the temporary injunction should be awarded. However, the actual overall merits of the case are not to be addressed in CR 65.04 motions. **Unless a trial court has abused its discretion in applying the above standards, we will not set aside its decision on a CR 65.07 review.**

Appellants' claim of irreparable harm in support of their request for emergency relief is as follows:

> Compliance with the Ordinance will require Appellants and their member-employers to begin paying certain employees at a rate above the minimum wage standards set forth in KRS Chapter 337 as early as July 1, 2015. Should the Court of Appeals or the Kentucky Supreme Court ultimately find the Ordinance to be an invalid exercise of Metro Government's powers, Appellants and their members will not be able to recoup overpayments issued as a result of compliance with the Ordinance during the pendency of this appeal. Such overpayments amount to an irreparable injury that will be incurred by the myriad Louisville/Jefferson County employers absent this Court's emergency relief staying enforcement of the Ordinance.

Appellants have not shown, however, that the potential overpayments, *should the Ordinance be struck*, cannot be recovered. In sum, their argument is conclusory, and this Court routinely rejects conclusory arguments when a party seeks emergency relief. Rather, Appellants' argument amounts to merely "an anticipated danger or an apprehension of it." The Court has reviewed the hearing conducted in the trial court and the bulk of that argument centered around whether Ordinance 216 conflicted with KRS Chapter 337, whether Chapter 337 was a comprehensive scheme, and whether Metro Council has the power under Home Rule legislation to enact Ordinance 216. Appellants presented absolutely no argument that they would suffer irreparable injury upon the implementation of

Ordinance 216. In fact, the words "irreparable injury"[3] were not even used during the hearing before the trial court. Furthermore, this Court has reviewed all the materials submitted in this Court, including attached affidavits. Nothing therein illustrates to this Court in any way how the Appellants will suffer irreparable harm. The law is absolutely clear that absent a *showing* that any potential overpayments are not recoverable, an adequate remedy at law exists. The Kentucky Supreme Court has held that "[i]nconvenience, expense, annoyance" in recovering overpayment do not constitute irreparable injury. *Fritsch*, 146 S.W.3d at 930. Consequently, these conclusory statements are insufficient to illustrate to the Court that the trial court abused its discretion in denying the injunctive relief Appellants sought.

Furthermore, Appellants' motion actually sets forth that reconciliation of paychecks is a relatively simple matter, *should they prevail*. They state as follows:

> Conversely, should this Court grant the requested emergency relief and the Ordinance is ultimately upheld, there is no risk of irreparable injury to Metro Government, or the employees who are beneficiaries between earned wages and paid wages by issuing supplemental paychecks retroactively. Should the Ordinance be upheld, affected employees can easily be made whole. The same cannot be said for employers who would not be able to withhold or deduct from future

[3] Certainly, the words "irreparable injury" are not necessarily magic words that a party must use. However, Appellants had the burden to present some evidence that they would suffer injury of a ruinous nature. To be clear, before the trial court, Appellants presented absolutely no arguement of any type of injury at all. And, beyond their conclusory statements to this Court, Appellants have done little else to advance their cause.

wages, if any, to recoup overpayments issued while complying with an invalid ordinance.

Accordingly, it would appear that if reconciliation is easy enough on employers if an underpayment is made, then it should be easy enough if an overpayment is made. *Thus, Appellants have not shown this Court why reconciliation cannot be accomplished should their request for emergency relief be denied, yet they ultimately prevail on the merits.* This is their burden and the very essence of proving irreparable harm.

Reviewing other considerations that *Maupin*, 575 S.W.2d at 699, sets forth, *i.e.*, possible detriment to the public interest, harm to the defendant, and whether the injunction will merely preserve the status quo, the Court concludes that these weigh heavily against granting the requested emergency relief. Metro Government was elected by the voters in Jefferson County and Louisville to govern and pass ordinances that serve the public's interest. The Court concurs with other Courts in deciding that setting the minimum wage in a given locality is within Metro's police powers. *See Rui One Corp. v. City of Berkeley*, 371 F.3d 1137 (9th Cir. 2004) (citing *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756, 105 S.Ct. 2380 (1985) (quoting *DeCanas v. Bica*, 424 U.S. 351, 356, 96 S.Ct. 933 (1976))).

Further, nothing in the language of KRS 337.275(1) leads this Court to believe that the General Assembly intended to occupy the field to set a

comprehensive scheme for a minimum wage or to set a mandatory maximum amount for a minimum wage if local governments, *answering to the voters in their respective communities*, determined that a higher minimum wage is necessary based on the unique needs of the citizens in their communities. "In order to rise to the level of a comprehensive system or scheme, the General Assembly must establish a definite system that explicitly directs the actions of a city." *Danheiser v. City of Henderson*, 4 S.W.3d 542, 549 (Ky. 1999) (citing *Whitehead v. Estate of Bravard*, 719 S.W.2d 720 (Ky. 1986)). A city may pass legislation on a subject that has been addressed by the General Assembly so long as it does not prevent local governments from establishing additional legislation and there is no conflict between the enactments. *Id.* "'With the institution of Home Rule, the General Assembly changed the equation and delegated all essential and implied powers to cities except those specifically denied to them." *Id.* (citing J. David Morris, *Municipal Law*, 70 K.L.J. 293-96)).

The Court agrees with the trial court that the General Assembly set a "floor for wages" in KRS 337.275(1) and that localities may increase the minimum wage when they conclude that it serves the public interest in doing so. The Court believes that the language of KRS 337.395 also supports that the General Assembly did not intend to create a comprehensive scheme.

What may be a decent, livable wage in one part of the Commonwealth, may not be so at all in another part of the Commonwealth. We are a Commonwealth of 120 counties, numerous smaller cities, with only two larger urban areas, (Louisville/Jefferson (609,893) and Lexington-Fayette County (308,428)) and three smaller urban areas, (Bowling Green (61,488), Owensboro (58,416) and Covington (40,956)).[4] As a general matter, it is widely known that the cost of living in an urban environment is often much higher than it is in a more rural setting. In enacting this Ordinance, Metro Government stated that "Whereas, Louisville has been recognized as a Compassionate City it is incumbent upon us to take legislative steps to help lift working families out of poverty, decrease income inequality, and boost our economy...." These interests are legitimate interests of any government and serve the public interest. Accordingly, the public interest weighs against granting emergency relief.

Regarding consideration of the status quo, Ordinance No. 216 will be the status quo effective July 1, 2015. To enjoin its implementation, in which the public has an interest, would be diverting from the status quo, enacted by the duly elected governing body of Louisville/Jefferson County. Thus, this factor weighs against the request for relief.

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[4] United States Census Bureau, Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2013. http://factfinder.census.gov/bkmk/table/1.0/en/PEP/2013/PEPANNRES/0400000US21.16200 (last visited June 30, 2015).

As cited in Ordinance 216, several other cities across the United States have increased their local minimum wages. While certainly what courts from other jurisdictions have decided regarding this issue is not binding on courts in the Commonwealth, opinions from other jurisdictions can serve as persuasive authority on the question the Court faces presently and the likelihood of success on the merits. The opinion in *International Franchise Ass'n v. City of Seattle*, ___ F. Supp.3d ___, 2015 WL 1221490 (W.D. Wash. March 17, 2015) provides a comprehensive review of the issue at bar. While only considering it for persuasive authority-- in conjunction with the foregoing analysis-- the Court determines that the likelihood of success on the merits is low. Hence, this factor weighs against granting emergency relief.

Requiring employers to pay a higher minimum wage may certainly present a burden to them, that likely has far-reaching consequences. But, maintaining a lower minimum wage for hard-working employees has consequences as well. Metro Government was tasked by the voters to weigh these consequences, and it determined that a raise in the minimum wage was warranted. Nothing in the statute convinces this Court that Metro Government acted beyond its Home Rule powers, so the likelihood of success on the merits is low, and Appellants have not shown this Court how they will be irreparably harmed, *in the*

event the Ordinance is in fact overturned on the merits. Consequently, the equities weigh strongly in favor of denial of the request for emergency relief.

For the reasons as stated, the trial court did not abuse its discretion in denying injunctive relief to Appellants. Accordingly, the Court ORDERS that Appellants' motion for CR 65.07 relief be and is hereby DENIED.

ENTERED: JUN 30 2015

JUDGE, COURT OF APPEALS