IN THE MISSOURI SUPREME COURT

NO. SC95368

CITY OF KANSAS CITY, MISSOURI,
Plaintiff/Respondent,

v.

KANSAS CITY BOARD OF ELECTION COMMISSIONERS, ET AL.,
Defendants,

REV. SAMUEL E. MANN, ET AL.,
Intervenors/Appellants

Appeal from the Sixteenth Judicial Circuit Court
Jackson County, Missouri
The Honorable Justine E. Del Muro

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

The City of Kansas City ("City") agrees with Appellants that if the question before the Court is whether the two statutes relied upon by the trial court in its judgment, section 67.1571 RSMo. and section 285.055 RSMo., are unconstitutional, then jurisdiction in this Court would be proper pursuant to Article V, section 3 of the Missouri Constitution. This Court has exclusive appellate jurisdiction of all cases involving the validity of a statute of this state. MO. CONST. Art. V, § 3.

For reasons stated herein, the City questions whether Appellants have properly framed the issue. The argument the City advanced in the trial court was that the ordinance proposed by Appellants in their initiative petition was unconstitutional because it was contrary to state law.

While Appellants did raise an affirmative defense that House Bill 722 (285.055 RSMo.) is unconstitutional, Appellants never asked the trial court for a declaratory judgment that either section 67.1571 RSMo. or section 285.055 RSMo. are unconstitutional. (L.F. 33). Rather, Appellants argued in the trial court that the City should be required to hold an election on their proposed ordinance so that Appellants could challenge section 67.1571 RSMo. and section 285.055 RSMo. in a subsequent proceeding. In light of this argument, it does not appear that the trial court engaged in an analysis of whether section 67.1571 RSMo. or 285.055 RSMo. are unconstitutional.

If the trial court was not asked to rule on the constitutionality of section 67.1571 RSMo. or 285.055 RSMo., or did not rule on the constitutionality of those statutes, the issue is not preserved for appellate review. "'[I]n order for the issue of the constitutional

validity of a statute to be preserved for appellate review, the issue must not only have been presented to the trial court, but the trial court must have ruled thereon.'" *Sharp v. Curators of University of Missouri*, 138 S.W.3d 735, 738 (Mo. App. E.D. 2003) (quoting *Estate of McCluney*, 871 S.W.2d 657, 659 (Mo. App. W.D. 1994)). See also *Atkins v. Department of Bldg. Regulations, City of Springfield*, 596 S.W.2d 426, 433-34 (Mo. 1980); *Kersting v, City of Ferguson*, 388 S.W.2d 794, 796 (Mo. 1965). "It must appear affirmatively from the record that the trial court ruled adversely to appellants upon a constitutional issue, so as to present it for appellate review." *Kersting*, 388 S.W.2d at 796.

Since it does not appear that the trial court was asked to rule on the constitutionality of section 67.1571 RSMo. or 285.055 RSMo., and it does not appear that the trial court reached those issues, the constitutionality of those statutes is not preserved for review. Instead, Appellants asked the trial court to require the City to hold an election on their proposed ordinance – despite the fact that two state laws expressly prohibit the City from enacting such an ordinance. An appeal involving a challenge to the constitutional validity of a proposed municipal ordinance does not involve any matter reserved for the exclusive jurisdiction of the Missouri Supreme Court under Article V, section 3 of the Missouri Constitution. *State ex rel. Chastain v. City of Kansas City*, 289 S.W.3d 759 (Mo. App. W.D. 2009).

STATEMENT OF FACTS

Appellants are a committee of petitioners that submitted an initiative petition to the City of Kansas City ("City") seeking the adoption of a local minimum wage

ordinance. (L.F. 7, ¶ 8; 32 ¶ 8). Sufficient signatures were gathered to meet the requirements of the City Charter. (L.F. 7, ¶ 9; 32 ¶ 9). The City Council passed an alternative ordinance that did not meet the approval of the petitioners. (L.F. 7, ¶ 10; 32, ¶ 10). The petitioners submitted a demand, pursuant to the City Charter, that their original ordinance be placed before the voters. (L.F. 7; ¶ 11; 32, ¶ 11).

The ordinance proposed by the petitioners would increase the minimum wage in the City to $10.00 an hour, with annual increases beginning in 2017 of $1.25 per hour, to reach $15.00 per hour in 2020. (L.F. 7, ¶ 12; 32, ¶ 12). The current minimum wage in the state of Missouri is $7.65 an hour. (L.F. 7, ¶ 13; 32 ¶ 13). The alternative ordinance passed by the City Council would have eventually increased the minimum wage in the City to $13.00 per hour, as opposed to $15.00 per hour. (L.F. 90). The alternative ordinance, however, never went into effect because a different group of citizens challenged it with a referendum petition.[1] (L.F. 79; L.F. 95; Tr. 50, Lines 3-13).

During the 2015 session of the Missouri General Assembly, the legislature passed Senate Substitute No. 2 for House Committee Substitute for House Bill 722 ("House Bill 722"), which sought to enact section 285.055.2 RSMo., prohibiting any city or political

[1] Section 503(b)(2) of the City Charter provides that an ordinance shall not take effect if within ten days after passage of the ordinance a notice signed by not less than 100 registered voters of the City stating their intention to circulate referendum petitions is filed with the City Clerk. The Court may take judicial notice of a City Charter provision. *Pollard v. Board of Police Com'rs*, 665 S.W.2d 333, 340-41 (Mo. 1984).

subdivision from establishing a minimum or living wage rate that exceeds the requirements of federal or state law. (L.F. 7, ¶ 14; L.F. 22). The bill included language stating that it would not preempt any local minimum wage ordinances in effect on August 28, 2015. (L.F. 22). This provision would have applied to the $13.00 per hour proposal that was passed by the City Council, because that proposal was passed in July 2015, but the ordinance never went into effect due to the referendum petition. (L.F. 79; L.F. 95; Tr. P. 50, Lines 3-13).

On July 10, 2015, Missouri Governor Jay Nixon vetoed House Bill 722. (L.F. 8, ¶ 15; L.F. 32, ¶ 15).

On August 20, 2015, the City Council passed Committee Substitute for Ordinance 150660, placing the minimum wage ordinance proposed by the petitioners on the ballot for the November 3, 2015 election. (L.F. 8, ¶ 16; L.F. 12-20; L.F. 32, ¶ 16). The City was aware that the Missouri General Assembly could override the Governor's veto of House Bill 722, the effect of which would prohibit the City from enacting the law proposed in the initiative petition at a November election. (L.F. 8, ¶ 17; L.F. 14). For this reason, the City included the following language in Committee Substitute for Ordinance 150660:

> **Section 3. INVALIDITY OF NOTICE TO ELECTION AUTHORITIES UPON ACTION OF THE MISSOURI GENERAL ASSEMBLY.**

A. ***Invalidity of notice by State preemption.*** That the notice to the election authorities authorized by Section 2 of this ordinance is withdrawn and of no effect if the Missouri General Assembly overrides the Governor's veto of Senate Substitute No. 2 for House Committee Substitute for House Bill 722 at the 2015 Veto Session commencing September 16, 2015, in that the General Assembly will have enacted the following prohibition:

> No political subdivision shall establish, mandate, or otherwise require an employer to provide to an employee:
>
> (1) A minimum or living wage rate; or
>
> (2) Employment benefits;
>
> that exceed the requirements of federal or state laws, rules, or regulations. The provisions of this subsection shall not preempt any state law or local minimum wage ordinance requirements in effect on August 28, 2015.

and the provisions proposed by the initiative petition presented to the City by a committee of petitioners will not be in effect on August 28, 2015.

B. ***Effect of Invalidity of Notice to Election Authorities***. If the events described by Section 3.A of this ordinance occur, the City Clerk will immediately inform the election authorities that its authorization for conducting a special municipal election is invalid and of no effect, and the special election scheduled for November 3, 2015, will not be held.

> **C.** ***Payment of Election Costs.*** If the events described by Section 3.A of this ordinance occur, the City acknowledges its obligation to pay the authorized election costs incurred by the election authorities for activities, including printing of ballots and preparing for publication of notices, taken in reliance on the notice authorized by Section 2 of this ordinance.

(L.F. 14).

On August 25, 2015, the City Clerk provided notice of the election to the election authorities that serve the City. (L.F. 9, ¶ 18; L.F. 13).

On September 10, 2015, the City Council passed Resolution 150754, expressing its opposition to House Bill 722 and the actions taken by the General Assembly to prevent municipalities from regulating minimum wage at the local level. (L.F. 97).

On September 16, 2015, the Missouri legislature overrode the Governor's veto of House Bill 722. (L.F. 9, ¶ 19; L.F. 32, ¶ 19).

On September 18, 2016, the City filed its Petition for Removal of a Ballot Question Pursuant to § 115.127.3 RSMo. for the November 3, 2015 Election. (L.F. 1). The City requested an expedited hearing on the matter because the court only had jurisdiction to decide the issue until September 22, 2015. (L.F. 6; L.F. 10, ¶ 25). The City stated in its Petition that it would pay the election costs incurred by the election authorities in preparing for the election. (L.F. 10, ¶ 26).

The case was initially taken up for a hearing on September 21, 2015. (Supp. Tr. 1). On that date, the petitioners filed a motion to intervene, which was granted. (Supp.

Tr. 6, Lines 12-13). Immediately after the motion to intervene was granted, the petitioners filed a motion for change of judge. (Supp. Tr. 7, Lines 10-13).

At that time, the trial court asked why the City needed a court order to remove the question from the ballot. (Supp. Tr. 9, Lines 13-18). The City responded that its notices to the election authorities were, in fact, conditional, and included language stating that they would be withdrawn if the General Assembly overrode the Governor's veto. (Supp. Tr. 9, Lines 9-25; Supp. Tr. 10, Lines 1-3). Counsel for the Kansas City Board of Election Commissioners[2] stated that the election authorities did not believe they had the authority to remove the issue from the ballot without a court order, because the election ballot had already been certified. (Supp. Tr. 10, Lines 11-17; Supp. Tr. 11, Lines 1-5).

The trial court granted petitioners' application for change of judge. (Supp. Tr. 11, Lines 21- 24).

The matter was heard on September 22, 2015. (L.F. 2-3). The City argued that it was preempted by House Bill 722 from passing a minimum wage that is greater than the state minimum wage. Accordingly, the City argued that moving forward with the

[2] The City is served by four election authorities: the Kansas City Board of Election Commissioners, the Clay County Board of Election Commissioners, the Platte County Board of Election Commissioners, and the Cass County Clerk. Only counsel for the Kansas City Board of Election Commissioners attended the court hearings in this matter. Counsel for the other election authorities signed affidavits stating they consented to the relief the City was requesting. (Tr. 5, Lines 8-24).

election, which would cost the City about $500,000.00, would give false hope to the City's minimum wage workers, but would not result in a change in the law. (Tr. 9, Lines 9-25; Tr. 10, Lines 1-3).

The petitioners urged the trial court to require the City to move forward with the election, because they argued an election on their proposal was a necessary step that had to occur before they could challenge the legality of House Bill 722 or section 67.1571 RSMo., another statute that they noted expressly prohibited the City from enacting a minimum wage that is greater than the state minimum wage. (Tr. P. 21, Lines 1-6; Tr.15, Lines 9-21). The trial court issued its Judgment on the same day, in which it granted the relief requested by the City and ordered the minimum wage issue removed from the November 3, 2015 ballot. (L.F. 62-63).

On October 22, 2015, the City Council passed Resolution 150908, which again declared the City Council's support for increasing the minimum wage, but acknowledged that a trial court in St. Louis had recently entered a judgment holding that the Missouri Minimum Wage Law[3] preempts cities from enacting minimum wage rates that are greater than the state minimum wage. (L.F. 101). The Resolution also noted that while the City Council had passed an ordinance to increase the minimum wage, that ordinance was challenged by a referendum. (L.F. 101).

On November 9, 2015, Appellants' Motion for New Trial/to Reconsider Judgment was denied. (L.F. 112). This appeal follows.

ARGUMENT

[3] Sections 290.500 to 290.530 RSMo.

Standard of Review

In a bench-tried case, the appellate court must sustain the trial court's judgment unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Brown v. Carnahan*, 370 S.W.3d 637, 646 (Mo. banc 2012) (citing *Murphy v. Carron,* 536 S.W.2d 30, 32 (Mo. banc 1976)). A determination of the constitutional validity of a proposed initiative petition is a question of law the appellate court reviews *de novo. Noel v. Bd. of Election*, 465 S.W.3d 88, 91 (Mo. Ct. App. 2015).

Response to Appellants' Point I

The trial court did not err in granting the City's Petition for removal of Appellants' proposed ordinance from the ballot because Appellants' proposed ordinance is unconstitutional on its face pursuant to Article VI, Section 19(a) of the Missouri Constitution in that the proposed ordinance requires what is prohibited by section 67.1571 RSMo. and section 285.055 RSMo.

A. Appellants Did Not Preserve a Constitutional Challenge to Section 67.1571 RSMo. or Section 285.055 RSMo.

Appellants have argued that the trial court erred in granting the City's request to remove the minimum wage question from the ballot because they contend that the two

statutes relied upon by the trial court – House Bill 722 (section 285.055 RSMo.) and section 67.1571 RSMo.[4] – are unconstitutional.

"A statute is presumed to be constitutional." *State v. Young*, 362 S.W.3d 386, 390 (Mo. 2012). The court will not invalidate a statute unless "'it clearly and undoubtedly violates some constitutional provision and palpably affronts fundamental law embodied in the constitution.'" *Id.* (quoting *State v. Richard*, 298 S.W.3d 529, 531 (Mo. 2009)). "A person challenging the constitutional validity of a statute must meet his burden of proof by demonstrating that the act clearly and undoubtedly violates the constitution." *Bone v. Dir. of Revenue*, 404 S.W.3d 883, 886 (Mo. 2013).

"'[I]n order for the issue of the constitutional validity of a statute to be preserved for appellate review, the issue must not only have been presented to the trial court, but the trial court must have ruled thereon.'" *Sharp*, 138 S.W.3d at 738 (quoting *Estate of McCluney*, 871 S.W.2d 657, 659 (Mo. App. W.D. 1994)); See also *Atkins*, 596 S.W.2d at 433-34; *Kersting*, 388 S.W.2d at 796. "It must appear affirmatively from the record that the trial court ruled adversely to appellants upon a constitutional issue, so as to present it for appellate review." *Kersting*, 388 S.W.2d at 796.

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[4] The City notes that Appellants have argued on page 16 if their brief that the City raised section 67.1571 RSMo. as a justification for not moving forward with the election for the first time at the hearing in the trial court. The City did not raise this argument in the trial court; it was Appellants who raised it. (Tr. 15, Lines 9-12). The trial court then relied on section 67.1571 RSMo., in addition to House Bill 722.

Appellants asserted an affirmative defense that House Bill 722 was unconstitutional. (L.F. 33). Appellants, however, did not file a counterclaim seeking a declaratory judgment[5] that either House Bill 722 or section 67.1571 RSMo. were unconstitutional, or a counterclaim seeking a writ of mandamus to require the City to hold an election on their ordinance. In fact, at the hearing in the trial court, Appellants argued that an election on their proposed ordinance, and approval by the voters, were necessary steps that had to occur *before* they could challenge the constitutionality of House Bill 722 or section 67.1571 RSMo. (L.F. 28; L.F. 43-44; Tr.18, Lines 22-25; Tr.19, Lines 1-2; Tr. 20, Lines 22-25; Tr. 21, Lines 1-6).

In paragraph six of their Motion to Intervene, Appellants argued that "unless the proposed ordinance goes forward to the electorate, the constitutionality of the alleged preemption could not be challenged." (L.F. 28). Appellants advanced the same argument at the hearing in the trial court. (Tr. 18, Lines 22-25; Tr.19, Lines 1-2; Tr. 20, Lines 22-25; Tr. 21, Lines 1-6). In their Motion and Supporting Suggestions in Opposition to the City's Petition, Appellants argued that a challenge to the statutes that

[5] Section 527.110 of the Declaratory Judgment Act requires that the Missouri Attorney General be served in any proceeding which alleges that a state statute is unconstitutional. The Missouri Attorney General was not served with Appellants' answer. The requirement to serve the Attorney General when challenging the constitutionality of a statute is mandatory. *Land Clearance for Redevelopment Authority of City of St. Louis v. City of St. Louis*, 270 S.W.2d 58, 63 (Mo. 1954).

expressly state that the City may not adopt a minimum wage that is more than the state minimum wage did not become ripe unless and until the voters approved their proposed ordinance at an election. (L.F. 44).

The essence of Appellants' argument was that the City should be ordered to move forward with the election despite two state laws expressly preempting the City from adopting Appellants' proposed ordinance, because, Appellants argued, they would not be permitted to challenge the constitutionality of the two state laws unless and until the voters adopted their proposed ordinance at the polls. Appellants, therefore, made it clear they were not asking the court to declare the two statutes unconstitutional. Rather, they were asking the court to order the City to hold an election so that the Appellants could have the opportunity to challenge the constitutionality of section 67.1571 RSMo. and House Bill 722 in a *subsequent* proceeding.

In light of this, it does not appear that the trial court engaged in an analysis of whether section 67.1571 RSMo. or House Bill 722 (285.055 RSMo.) are unconstitutional. Accordingly, the City submits that the trial court cannot be found to have erred in failing to declare either law unconstitutional, because Appellants never asked the court for such relief. Instead, Appellants argued that the City should be forced to hold an election despite the fact that Appellants' proposed ordinance conflicted with state law, so that Appellants could challenge those state laws if the voters adopted their ordinance.

B. The Initiative Power is Not Absolute

The issue before the trial court was whether the City could be compelled to place a proposed ordinance before the voters when that ordinance is in direct conflict with state

law. The trial court correctly determined that the City cannot be required to hold such an election. *Noel v. Bd. of Election*, 465 S.W.3d 88, 92 (Mo. Ct. App. 2015); *State ex rel. Hazelwood Yellow Ribbon Committee v. Klos*, 35 S.W.3d 457, 469 (Mo. E.D. 2000).

The initiative power is not unlimited, and is restricted to legislation within the power of the municipality to adopt. *Baum v. City of St. Louis*, 123 S.W.2d 48, 50 (Mo. 1938). "The initiative and referendum provisions of the city charter provide an additional method for the adoption of ordinances, but the fact that such method is pursued adds not additional validity to the ordinance." *Id.* The initiative cannot be used to pass an ordinance that is unlawful, and the courts will not order an election for a law that would be unenforceable. *International Telemeter of Columbia v. City of Columbia*, 488 S.W.2d 224, 228 (Mo. App. W.D. 1972).

Missouri law is clear that a municipality will not be forced to place legislation that is unconstitutional on its face before the voters. *Kansas City v. McGee*, 269 S.W.2d 662, 666 (Mo. 1954); *State ex rel. Sessions v. Bartle*, 359 S.W.2d 716, 719 (Mo. 1962); *State ex rel. Card v. Kaufman*, 517 S.W.2d 78, 81 (Mo. 1974); *Hazelwood*, 35 S.W.3d at 469; *Noel*, 465 S.W.3d at 91.

"[P]re-election review of the facial constitutionality of an initiative petition is warranted given the 'cost and energy expended relating to elections' and to avoid the 'public confusion generated by avoiding a speedy resolution of a question.'" *City of Kansas City v. Chastain*, 420 S.W.3d 550, 554-55 (Mo. 2014) (quoting *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 828 (Mo. 1990)).

A City will not be required to hold an election on a law that would be void if adopted. "Cities may not enact ordinances that conflict with state statutes or regulations." *State ex rel. Sunshine Enterprises of Missouri, Inc. v. Bd. of Adjustment of City of St. Ann*, 64 S.W.3d 310, 313 (Mo. 2002). "If the ordinance [is] in fact unconstitutional, or [is] void for any other reason, that would be a complete defense to this action. We would not impose upon Kansas City the burden and expense of submitting to a vote an ordinance which would be of no effect if adopted." *State ex rel. Cranfill v. Smith*, 330 Mo. 252, 256, 48 S.W.2d 891, 893 (Mo. 1932).

C. Appellants Proposed Ordinance is Unconstitutional on Its Face

The City is a charter city governed by Article VI, Section 19(a) of the Missouri Constitution, which reads as follows:

> Any city which adopts or has adopted a charter for its own government, shall have 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 of this state and are not limited or denied either by the charter so adopted or by statute. Such a city shall, in addition to its home rule powers, have all powers conferred by law.

MO. CONST. ART. VI, section 19(a).

A city ordinance that conflicts with a state statute violates Article VI, section 19(a) and is void. *Hazelwood*, 35 S.W.3d at 469; *Noel*, 465 S.W.3d at 92. The test is whether the ordinance permits what a statute prohibits or prohibits what a statute permits. *Id.*

In *Noel*, the Eastern District of the Missouri Court of Appeals held that a proposed initiative petition that sought adoption of an ordinance that would have conflicted with the Missouri Tax Increment Financing (TIF) statutes was unconstitutional on its face and could not be required to be submitted to the voters. *Noel*, 465 S.W.3d at 92. The ordinance proposed in *Noel* would have prohibited any "unsustainable energy producer" from receiving TIF benefits. *Id.* The court held that the proposal was unconstitutional on its face, because the TIF Act does not place any restrictions on what type of entity may participate in the program. *Id*.

> The [TIF] statutes grant the city full discretion in deciding who can make use of a TIF plan… and the Initiative Petition would forbid the city from even considering a plan from any person or group the Initiative Petition defines as an Unsustainable Energy Producer. Simply put, the statutes permit what the Initiative Petition attempts to prohibit, and therefore the Initiative Petition is unconstitutional under Article VI, Section 19(a).

Noel, 465 S.W.3d at 92.

In the *Hazelwood* case, the Eastern District of the Missouri Court of Appeals held that a city charter amendment proposed through the initiative was unconstitutional on its face pursuant to Article VI, § 19(a) because it stated that the city could only approve TIF plans or projects: "if at a duly conducted city election two-thirds of the voters voting on the proposition vote in favor of the proposed redevelopment plan, redevelopment project, redevelopment project area or tax increment financing measure." *Id.* at 470.

The court noted that section 99.835.3 RSMo. expressly prohibits voter approval of TIF "obligations," while the proposed legislation required an election on every "tax increment financing measure." *Id.* at 470. "[B]y requiring a referendum vote on every 'tax increment financing measure,' the proposed charter amendment patently contravenes section 99.835.3." *Id.* at 470. "It requires precisely what the statute prohibits. It thus violates Article VI, § 19(a)." *Id.*

Appellants' ordinance would require employers in the City to pay a minimum wage that is more than the state minimum wage. (L.F. 16-20). Specifically, section 38-204 of the proposed ordinance establishes a living wage of $10.00 per hour beginning on September 1, 2017, which would then be increased each year by $1.25 an hour, until a wage of $15.00 per hour is reached. (L.F. 18). The proposed ordinance provides that any person violating the ordinance would be subjected to a fine of $500.00. (L.F. 19).

House Bill 722 enacted a new section 285.055.2 RSMo. which provided that no city could establish, mandate or otherwise require an employer to pay a minimum or living wage rate "that exceeded the requirements of federal or state laws, rules, or regulations." It also provided that "[t]he provisions of this subsection shall not preempt any state law or local minimum wage ordinance requirements in effect on August 28, 2015."

Under the plain language of section 285.055.2, the City is prohibited from enacting the ordinance proposed by Appellants. Their proposed ordinance would require exactly what section 285.055.2 prohibits. "It requires precisely what the statute prohibits. It thus violates Article VI, § 19(a)." *Hazelwood,* 35 S.W.3d at 470.

Appellants proposed ordinance also violates the express language of section 67.1571 RSMo. Appellants raised this issue in the trial court. (Tr.15, Lines 9-21; Tr. 16, Lines 15-19). As a result, the trial court's judgment relied on section 67.1571 RSMo., in addition to House Bill 722. Section 67.1571 states as follows: "No municipality as defined in section 1, paragraph 2, subsection (9) shall establish, mandate or otherwise require a minimum wage that exceeds the state minimum wage." Municipality is defined as "any city, village, incorporated town, or county of this state, or in any unincorporated area that is located in any county with a charter form of government and with more than one million inhabitants." 67.1401.2(9) RSMo.

Under the plain language of section 67.1571 RSMo., the City is prohibited from enacting the ordinance proposed by Appellants. Their proposed ordinance would require exactly what section 67.1571 prohibits. "It requires precisely what the statute prohibits. It thus violates Article VI, § 19(a)." *Hazelwood,* 35 S.W.3d at 470. The trial court did not err in determining that Appellants' proposed ordinance is expressly prohibited by 285.055.2 RSMo. and 67.1571 RSMo.[6]

[6] Appellants have argued on page 8 of their brief that the City's Charter includes provisions which allow the City to enact a living wage. The provisions quoted by Appellants are not found in the City Charter; they are provisions from the ordinance that Appellants proposed. Regardless, even if the City's Charter purported to give the City the authority to enact Appellants' ordinance, the City's Charter must also be consistent with state law pursuant to Article VI, Section 19(a) of the Missouri Constitution.

D. City Had No Ministerial Duty to Submit Appellants' Ordinance to the Voters

While Appellants did not seek an order in mandamus requiring the City to move forward with the election, they did argue that the City's petition should be denied and that the City should be required to hold the election. Even if their answer could be interpreted broadly as a claim seeking an order in mandamus, however, Appellants were not entitled to such relief.

"Mandamus may not be used to establish new rights, but instead may be used only to enforce existing rights." *State ex rel. City of Crestwood v. Lohman*, 895 S.W.2d 22, 27 (Mo. App. W.D. 1994). "Mandamus will not lie to directly challenge and thereby determine the validity or constitutionality of an ordinance or statute respecting the duty involved." *Id.*

> (M)andamus lies only to enforce a plain ministerial duty, and . . . since a plain ministerial duty cannot exist which is made to appear only by declaring a statute unconstitutional, the writ will not issue if it is necessary in order to fix upon the respondent the duty sought to be enforced to declare a statute in conflict with such alleged duty unconstitutional.

State ex rel. Gladfelter v. Lewis, 595 S.W.2d 788, 790 (Mo. Ct. W.D. 1980) (quoting *State ex rel. Seigh v. McFarland*, 532 S.W.2d 206, 209 (Mo.banc 1976)).

Appellants argued that the City should be required to hold an election on their proposed ordinance so that Appellants could challenge the legality of House Bill 722 and

section 67.1571 in a subsequent proceeding. Such an argument is an acknowledgment that the City had no ministerial duty to hold the election. A mandamus proceeding cannot be used to challenge and determine the validity of the state laws that expressly prohibit the City from enacting Appellants' proposed ordinance. *Lohman*, 895 S.W.2d at 27.

CONCLUSION

The City Council supports an increase in the minimum wage and opposes the actions taken by the Missouri Legislature to prohibit local control on this issue. Unfortunately, Appellants' desire and the City Council's support for increasing the minimum wage does not change the fact that an ordinance that conflicts with state law would be void – regardless of whether it was passed by the elected officials or adopted by the voters at the polls.

This Court has recognized that pre-election review of the facial constitutionality of an initiative petition is warranted given the cost of holding an election and the public confusion that results by holding an election on a law that the City has no authority to enact. *Chastain*, 420 S.W.3d at 554-55; *Missourians to Protect the Initiative Process*, 799 S.W.2d at 828.

Appellants and the amicus parties have argued that the two statutes relied upon by the trial court are unconstitutional. The City opposes these statutes, but both statues are

the law of the State of Missouri.[7] The City cannot be ordered to spend half a million dollars to hold an election on a proposed ordinance when that ordinance is, as noted by the trial court, "clearly and unequivocally" prohibited by two state laws. Such an election would give false hope to the City's residents, but would not result in a change in the law.

Appellants did not ask the trial court to determine that the two statutes were unconstitutional; they asked the trial court to order the City to hold an election so that Appellants could raise the constitutional issues in a subsequent proceeding. It was not error for the trial court to deny this request. For these reasons, the trial court's judgment should be affirmed.

Respectfully Submitted,

OFFICE OF THE CITY ATTORNEY

[7] With regard to the Missouri Minimum Wage Law, the trial court did not rely on sections 290.500 through 290.530 RSMo. in reaching its decision. The City did not rely on the Missouri Minimum Wage Law as a reason for removing the issue from the November election ballot, and did not raise the issue in this proceeding until a St. Louis trial judge entered a judgment holding that St. Louis was preempted by the Missouri Minimum Wage Law from enacting a minimum wage greater than the state minimum wage. In response to the St. Louis decision, the City Council in Kansas City adopted Resolution 150908, reaffirming its support for increasing the minimum wage, acknowledging the St. Louis decision, and stating that it may consider adopting a local minimum wage after the St. Louis case is decided.

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CERTIFICATE OF COMPLIANCE AND OF SERVICE

Sarah Baxter, attorney for Respondent, hereby certifies that this brief contains the information required by Rule 55.03, that this brief is in compliance with the limitations contained in Rule 84.06(b), that Respondent's brief contains 6,014 words, that the brief was prepared using Microsoft Word 13 point Times New Roman font. I hereby certify that I electronically filed Respondent's Brief through the Missouri eFiling System this 2nd day of May 2016, and that notification of such filing will be sent to the following:

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