No. SC95401

IN THE MISSOURI SUPREME COURT

COOPERATIVE HOME CARE, INC., ET AL.,

Respondents/Cross-Appellants,

v.

CITY OF ST. LOUIS, ET AL.,

Appellants/Cross-Respondents.

Appeal from the Circuit Court of St. Louis City, Missouri

The Honorable Steven R. Ohmer

Circuit Court No. 1522-CC10607

APPELLANTS/CROSS-RESPONDENTS' COMBINED CROSS-RESPONSE AND INITIAL APPELLATE BRIEF

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STATEMENT OF FACTS

A. Missouri's Minimum Wage Statutory Scheme.

In 1990, the State of Missouri enacted the Missouri Minimum Wage Law ("MMWL") which prohibits employers from paying workers in the state a wage less than the minimum set by the law. Mo. Rev. Stat. § 290.500, *et seq*. In 1998, the State of Missouri enacted Missouri Revised Statute § 67.1571, which states, "No municipality. . . shall establish, mandate, or otherwise require a minimum wage that exceeds the state minimum wage." The provision was originally introduced as House Bill 1346, which was a stand-alone measure titled "Relating to wages," but it did not pass out of the committee. Ex. F.[1] The provision was re-introduced as a late amendment to § 18 of House Bill 1636. Ex. G, attachment 12(a) at 812. House Bill 1636 is titled "To repeal [various statutes] related to community improvement districts, and to enact in lieu thereof eighteen new sections relating to the same subject" and, in all respects other than § 18, relates to the establishment, proper governance, and operation of community improvement districts ("CIDs"). Ex. G, attachment 13. Exclusive of § 18, there is no mention of the minimum wage, or wages more generally. *Id.*

The constitutionality of § 67.1571 was challenged in 2001. In *Missouri Hotel and Motel Association*, the Circuit Court of St. Louis City reviewed § 67.1571's validity and

[1] Unless otherwise noted, all exhibit citations herein refer to Appellant/Cross-Respondents' trial exhibits received by the court below, which will be deposited with this Court pursuant to Rule 81.16 of the Missouri Rules of Appellate Procedure.

found that it had been enacted in violation of the single subject and clear title rules of the Missouri Constitution. Ex. D at 28-31, *Missouri Hotel and Motel Association, etc. et al., v. City of St. Louis*, No. 004-02638, DAILY LABOR REPORT, pp. 17-20 (Mo. Cir. July 31, 2001).

In January 2015, House Bill 722 was proposed and, after a series of amendments, was adopted by the General Assembly on May 6, 2015. Ex. E, attachment 2. In relevant part, House Bill 722 provides:

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

Id. (emphasis added). It was widely reported locally and nationally that House Bill 722 provided a "deadline" of August 28, 2015, by which municipalities could enact a local minimum wage ordinance. *See e.g.*, Ex. J (St. Louis Post Dispatch) (House Bill 722 "specifies that it won't preempt any 'local minimum wage requirements in effect on August 28, 2015.' That means that, even if the state measure is signed into law, any St. Louis minimum wage increase approved before that date would be allowed to remain on the books."); Ex. K (USA Today) ("In Missouri, cities face a deadline if they want a different minimum wage than the state has. That's because lawmakers last month passed

a bill prohibiting cities from adopting local policies, including a local minimum wage, but cities with a different one in place before Aug. 28 would be exempt.").

Governor Nixon vetoed House Bill 722 on July 10, 2015. Ex. E, attachment 1 at 9. In his veto letter, the Governor reasoned that policies like the minimum wage are "matters traditionally within the purview of local government." *Id.* He further questioned House Bill 722 stating, "How is St. Robert affected if St. Louis passes a minimum wage higher than that required by state law?" *Id.* The Governor concluded, "the issues impacted by House Bill 722 are *local* issues." *Id.* (emphasis in original).

On September 16, 2015, by a vote of more than 70% in favor, the General Assembly overrode the veto of House Bill 722. *Id.* at 16-17. The above quoted provision of House Bill 722 has been codified at Missouri Revised Statute § 285.055. The statute went into effect on October 16, 2015.

B. The Ordinance.

On June 5, 2015, shortly after the passage of House Bill 722 (prior to the veto), City of St. Louis Alderman Shane Cohn, together with eight other co-sponsors, introduced Board Bill 83 which the Board of Aldermen passed, as amended, on August 28, 2015, as Ordinance 70078 (the "Ordinance").[2] *See* Ex. A; *see also* Exs. J, K. City of

[2] The definitions provision of the Ordinance was amended on October 2, 2015, by passage of Ordinance 70090, to exclude sheltered workshops from the Ordinance. Ex. B. There are no issues before the Court regarding the passage or effect of Ordinance 70090.

St. Louis Mayor Slay signed the Ordinance into law on August 28, 2015.[3] Under the Ordinance, beginning October 15, 2015, the minimum wage in the City of St. Louis would have exceeded the state minimum wage. The Ordinance further provides, however, that "[i]f the state or federal minimum wage rate is at any time greater than the minimum wage rate established by this Ordinance, then the greater shall become the minimum wage rate for purposes of this Ordinance." Ex. A, § 2(B)(4).

The overall purpose of the Ordinance is "for the preservation of public peace, health, and safety." Ex. A, § 9. The express terms of the Ordinance set forth the City's intent to address the local health, welfare, and safety concerns suffered by low wage earners in the City of St. Louis. The Ordinance states the following:

> WHEREAS, low-wage workers in the St. Louis region struggle to meet their most basic needs and to provide their children a stable foundation, a safe dwelling, and an opportunity to obtain a high-quality education; and
>
> WHEREAS, the population of the City of St. Louis suffers from higher rates of poverty than surrounding areas and a high prevalence of obesity,

[3] Respondents/Cross-Appellants initially challenged the emergency clause in the Ordinance that allowed Mayor Slay to immediately sign it into law; however, they dismissed that claim and it is not before the Court on appeal. L.F. 160. Respondents/Cross-Appellants have not made any procedural challenge to how the Ordinance was enacted.

> diabetes, heart disease, and other health problems associated with low-incomes; and
>
> WHEREAS, many workers in the City of St. Louis cannot fully participate in our region's dynamic civil life or pursue myriad educational, cultural, and recreational opportunities that constitute a flourishing life because many struggle to meet their households' most basic needs; and
>
> WHEREAS, minimum wage laws promote the general welfare, health, and prosperity of the City of St. Louis by ensuring that workers can better support and care for their families and fully participate in the community. . .

Ex. A, pp. 1-2.

Respondents/Cross-Appellants did not challenge these findings before the trial court. The findings set forth in the Ordinance are also supported by evidence that was before the Board of Aldermen. For example, the Board of Aldermen heard testimony from Dr. Jason Purnell regarding how the gap in health and welfare, even between different zip codes within the City of St. Louis, is tied to level of income. Ex. L. Dr. Purnell also cited research indicating that increasing the minimum wage would have a positive health impact on City of St. Louis inhabitants. *Id*. Dr. Purnell's testimony is supported by a report he co-authored on the same topic. Ex. M. Other data before the trial court also clearly shows the minimum wages necessary to meet cost of living and other basic needs in the City of St. Louis are drastically different than the wages necessary to meet those same basic needs in other cities in Missouri and across the country. *See generally* Exs. N, O.

The Ordinance draws its authority from several provisions in the City of St. Louis' Charter. Specifically, the Charter empowers the City of St. Louis to:

- "regulate all acts, practices, conduct, business, occupations, callings, trades, uses of property and all other things whatsoever detrimental or liable to be detrimental to the health, morals, comfort, safety, convenience or welfare of the inhabitants of the city," Ex. C, Charter, at Art. I, § 1(25);
- "prescribe limits within which business, occupations and practices liable to be . . . detrimental to the health, morals, security or general welfare of the people may lawfully be established, conducted or maintained," *Id.* at Art. I, § 1(26); and,
- "do all things whatsoever expedient for promoting and maintaining the comfort, education, morals, peace, government, health, welfare, trade, commerce or manufactures of the city or its inhabitants," *Id.* at Art. I, § 1(33).

Each of these Charter provisions is cited in the Ordinance itself. Ex. A, p. 3.

C. Present Lawsuit; Procedural History.

Following passage of the Ordinance, Respondents filed their seven-count Petition seeking a declaratory judgment that the Ordinance is invalid, and seeking injunctive relief enjoining Appellants from enforcing the Ordinance.[4] Respondents' Petition alleges that

[4] Respondents voluntarily dismissed Counts VI and VII of their Petition. L.F. 160.

the Ordinance conflicts with various Missouri statutes, the Missouri Constitution, and violates the charter authority granted to the City of St. Louis. L.F. 8. The Petition, more specifically, alleges:

- The Ordinance, which provides for a local minimum wage, conflicts with Mo. Rev. Stat. §§ 71.010 and 290.500, et seq., which provides for a state minimum wage (Count I), L.F. 23-24;
- The Ordinance conflicts with Mo. Rev. Stat. § 67.1571's prohibition of municipalities enacting their own minimum wage laws (Count II), L.F. 24-25;
- The Ordinance violates the City of St. Louis' charter authority – granted by Art. VI, § 19(a) of the Missouri Constitution – insofar as the establishment of a minimum wage is not "a purely local concern" (Count III), L.F. 25-27;
- The Ordinance violates the City of St. Louis' charter authority insofar as it "enlarges duties or liabilities of citizens among themselves" (Count IV), L.F. 27-29; and
- The Ordinance violates the City of St. Louis' charter authority, as well as Art. II, § 1 of Missouri's Constitution, insofar as it provided for an improper delegation of legislative powers (Count V), L.F. 29-31.

Appellants timely filed their Answer to the Petition, which includes an affirmative defense that Mo. Rev. Stat. § 67.1571 is unenforceable because it violates Article III, Sections 21 and 23 of the Missouri Constitution. L.F. 126-157.

Following briefing and oral argument, the trial court issued its Findings of Fact, Conclusions of Law, and Judgment on October 14, 2015. L.F. 165-180. There, the trial court ruled in favor of Respondents on Counts I and III and in favor of Appellants on Counts II, IV and V. On Counts I and III the trial court found that the Ordinance conflicted with Mo. Rev. Stat. § 71.010 and 290.500 and, therefore, also violated the charter authority of the City of St. Louis. L.F. 172-174, 177. It is this finding that is the subject of Appellants' instant appeal.

The trial court ruled in favor of Appellants on Count II, finding that § 67.1571 is unconstitutional. L.F. 175. The trial court also ruled in favor of Appellants on Counts IV and V, finding that the Ordinance did not violate the City of St. Louis' charter authority as alleged in those counts. L.F. 177-179. It is these findings that is the subject of Respondents' instant cross-appeal.

On October 16, 2015, just two days after the trial court's entry of its judgment, House Bill 722 went into effect and was codified at Missouri Revised Statute § 285.055. Pointing to this development, Appellants filed a Motion to Amend or Modify Judgment. L.F. 181-192. The trial court denied that motion, and the trial court's judgment became final on November 12, 2015. L.F. 193-195.

STANDARD OF REVIEW

The Missouri Supreme Court has exclusive jurisdiction to determine the validity of a state statute. *Hodges v. City of St. Louis*, 217 S.W.3d 278, 279 (Mo. banc 2007) (citing Mo. Const. Art. V, sec. 3). The standard of review for constitutional challenges to

a statute is *de novo*. *Id.*; s*ee also Peters v. Johns*, No. SC 95678, 2016 WL 2997589, *2 (Mo. banc May 20, 2016) (citing *Geier v. Mo. Ethics Comm'n*, 474 S.W.3d 560, 564 (Mo. banc 2015)). Likewise, "[w]here the issue is a question of law, the Court reviews the trial court's conclusions *de novo*." *Id.* at 280.

ARGUMENT IN RESPONSE TO RESPONDENTS/CROSS-APPELLANTS' POINTS RELIED ON

I. THE TRIAL COURT DID NOT ERR IN FINDING IN APPELLANTS' FAVOR AND AGAINST RESPONDENTS ON COUNT II OF THE PETITION BECAUSE MO. REV. STAT. § 67.1571 IS UNCONSTITUTIONAL IN THAT IT VIOLATES THE SINGLE SUBJECT RULE SET OUT IN ARTICLE III, SECTION 23 OF THE MISSOURI CONSTITUTION, WHICH RESPONDENTS DO NOT DISPUTE, AND APPELLANTS ARE NOT BARRED BY THE LIMITATIONS PERIOD OF MO. REV. STAT. § 516.500 FROM RAISING THE CONSTITUTIONALITY OF § 67.1571 AS AN AFFIRMATIVE DEFENSE.

Passed by the General Assembly in 1998, Mo. Rev. Stat. § 67.1571 purports to prohibit municipalities from establishing a minimum wage above the state minimum wage. Respondents argue enactment of the Ordinance is therefore prohibited by § 67.1571. Respondents do not address the question of why the General Assembly in 2015 passed Mo. Rev. Stat. § 285.055 (House Bill 722) if § 67.1571 was viewed as valid and already precluded municipalities from passing a minimum wage ordinance. The answer to this question is found in the fact that it is beyond dispute that § 67.1571 is

unconstitutional. Indeed, § 67.1571 is a textbook example of how to violate the clear title and single subject requirements of §§ 21 and 23 of Article III of the Missouri Constitution. Not even the Respondents have attempted to argue otherwise.

A. Section 67.1571 violated the Missouri Constitution's clear title and single subject requirements.

Section 67.1571 was enacted in violation of the clear title and single subject requirements of the Missouri Constitution. Article III, § 23 of the Missouri Constitution, often referred to as the "single subject" and "clear title" provision, states that "[n]o bill shall contain more than one subject which shall be clearly expressed in its title" except for certain bills related to state debts or bond issues and general appropriation bills. The test for whether a bill violates the single subject rule is "whether the bill's provisions fairly relate to, have a natural connection with, or are a means to accomplish the subject of the bill as expressed in the title." *Mo. Roundtable for Life, Inc. v. State*, 396 S.W.3d 348, 351 (Mo. banc 2013) (quoting *Mo. Health Care Ass'n v. Attorney Gen. of the State of Mo.*, 953 S.W.2d 617, 622 (Mo. banc 1997) (internal quotations omitted)). The policy reasons underlying § 23 of Article II are well documented. *See e.g.*, *Mo. Roundtable for Life, Inc.*, 396 S.W.3d at 351 (the provision serves to ensure the public is aware of the subject matter of pending laws and is to "facilitate orderly procedure, avoid surprise, and prevent 'logrolling'").

Section 67.1571's prohibition on local minimum wages was enacted as a late amendment to the CID Act, HB 1636 of 1998, in an amendment to § 18 of the bill. Ex.

G, attachment 12(a) at 812.[5] The bill originally related to the establishment, proper governance, and operation of community improvement districts ("CIDs"). Ex. G, attachments 10-11. It said nothing about local minimum wages.

The addition of § 67.1571 by § 18, prohibiting municipalities from establishing a minimum wage above the state minimum wage, without connection to the operation of CIDs, went far beyond the bill's core subject in violation of Missouri's single subject rule. *See e.g., 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"). In fact, Representative Charles Pryor initially proposed § 67.1571 in a separate bill, HB 1346, that was never voted on. Ex. F. It was only when he succeeded in slipping § 67.1571 into the CID Act as a late amendment that he was able to muster the votes necessary for enactment.

The minimum wage amendment to the CID Act violated the clear title requirement of the Missouri Constitution. Indeed, nothing about minimum wages is included in the title, which is "An Act to repeal [certain specified code sections] relating to community

[5] The Court may take judicial notice of the bill, its various versions, and portions of the Journals of the House and Senate relating to its enactment. *See Schweich v. Nixon*, 408 S.W.3d 769, 778 (Mo. banc 2013) ("This court may take judicial notice of a bill, just as it does of statutes or of the proceedings by which laws are enacted."); *Brown v. Morris*, 290 S.W.2d 160, 167-68 (Mo. banc 1956) ("[C]ourts may judicially notice the history of legislation as reflected by the record in the legislative journals.").

improvement districts, and to enact in lieu thereof new sections relating to the same subject." Ex. G, attachment 13. The title gives no notice that the bill prohibits municipalities from enacting minimum wage requirements unconnected to community improvement districts.

As an unrelated subject that was also not communicated in the CID Act's title, § 67.1571 was adopted in violation of the Constitution's single subject and clear title rules. Its late addition was hidden at the back of the bill, and was added because it could not be enacted on its own. Accordingly, it was unconstitutionally enacted and is void.

B. Section 67.1571 violated the Missouri Constitution's prohibition on amending a bill contrary to its original purpose.

Article III, § 21 of the Missouri Constitution provides that "no bill shall be so amended in its passage through either house as to change its original purpose." A bill violates Missouri's original purpose requirement if it adds provisions that are "not logically connected to or germane" to its original purpose. *See e.g., Legends Bank v. State*, 361 S.W.3d 383, 387 (Mo. banc 2012) (provisions relating to campaign finance and ethics are not logically connected or germane to procurement, which was the original purpose of SB 844).

As noted above, § 67.1571 was enacted only after it was slipped into the CID Act of 1998 as a late amendment. Because the CID Act concerned only CIDs prior to the inclusion of § 67.1571, the late amendment of § 67.1571 relating to minimum wages was contrary to the bill's original purpose. Under no argument or interpretation could the issue of municipalities' authority to require a minimum wage be connected or germane to

the operation of CIDs. Thus, § 67.1571's late inclusion to the CID Act violated the original purpose requirement. *See Mo. Ass'n of Club Execs., Inc. v. State*, 208 S.W.3d 885, 888 (Mo. 2006) (provisions regulating adult entertainment that were added during the next-to-last day of legislative session to a bill relating to traffic offenses "were not remotely within the original purpose of the bill, but rather constitute a textbook example of the legislative log-rolling that section 21 is intended to prevent.")

C. The trial court in 2015, Judge Dierker in 1998, and the General Assembly have all recognized that § 67.1571 is unconstitutional.

As pointed out above, the unconstitutionality of § 67.1571 is beyond dispute and has been so recognized. The trial court, of course, in this matter found that § 67.1571 was unconstitutional, as did Judge Dierker in 1998, as discussed further below. In fact, to date, Respondents have failed to point to any instance where § 67.1571's compliance with Article III Sections 21 and 23 was considered by any court and a different conclusion was reached.[6] Moreover, the Missouri General Assembly obviously reached the same conclusion.

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6 As discussed on page19, *infra*, although a recent Kansas City trial court decision favorably cited § 67.1571, that court did not examine the constitutionality of the statute. Ex. H, Judgment, *Kansas City v. Kansas City Bd. Of Election Comm'rs*, Case No. 1516-CV19627 (Mo. Cir. Sept. 22, 2015). It was also not necessary to the Kansas City court's ruling because, unlike this case, the court held that HB722 preempted the ballot initiative at issue in that case. *Id.*

The General Assembly's 2015 enactment of House Bill 722 to prohibit precisely what § 67.1571, enacted in 1998, attempted to prohibit reflects the General Assembly's recognition that § 67.1571 is invalid. A fundamental principle of statutory construction in Missouri is that "the legislature is not presumed to have intended a meaningless act." *Murray v. Missouri Highway and Transp. Comm'n*, 37 S.W.3d 228, 233 (Mo. banc 2001) (citation omitted). Courts are to construe statutes on the "theory that the legislature intended to accomplish something" and presume that a statute has some substantive effect and was not enacted as a "meaningless act of housekeeping." *City of Willow Springs v. Missouri State Librarian*, 596 S.W.2d 441, 445 (Mo. banc 1980) (citation omitted); *see also Clair v. Whittaker*, 557 S.W.2d 236, 240 (Mo. banc 1977) (citation omitted).

One of the chief goals of the new preemption law, House Bill 722, was to ban local minimum wage ordinances — *exactly* the same ordinances that § 67.1571 was designed to invalidate. *C.f.*, Mo. Rev. Stat. § 67.1571; Mo. Rev. Stat. § 285.055.2/Ex. E. If the General Assembly understood § 67.1571 to be valid, the part of House Bill 722 prohibiting cities from enacting a minimum wage exceeding state rates would be meaningless, duplicative and illogical. Similarly, House Bill 722's express recognition that "any state or local minimum wage ordinance requirements in effect on August 28, 2015" "shall not [be] preempt[ed]" would stand in direct conflict with § 67.1571's blanket preemption of local minimum wage laws beginning in 1998. This Court has consistently recognized that this is contrary to longstanding principles of statutory interpretation and construction. *See Gash v. Lafayette Cnty.*, 245 S.W.3d 229, 232 (Mo.

banc 2008) (construction of statutes is to be "reasonable and logical and to give meaning to the statutes") (citation omitted).

D. No statute of limitations applies to raising the constitutional infirmity of § 67.1571 as an affirmative defense.

Faced with a patently unconstitutional statute to rely upon, Respondents insist this Court must nonetheless enforce it because, they contend, Mo. Rev. Stat. § 516.500's five-year statute of limitations allows Appellants to enforce § 67.1571 without regard to its unconstitutionality. Respondents are misguided, however, because – as the trial court properly recognized – that limitations period applies only to affirmative causes of action; a party may raise the unconstitutionality of a statute as an affirmative defense at any time, regardless of the applicable statute of limitations. *Boone Nat. Sav. & Loan Ass'n, F.A. v. Crouch*, 47 S.W.3d 371, 375 (Mo. 2001) ("Under Missouri law, even though a claim may be barred by the applicable statute of limitations, the essence of the claim may be raised as a defense."). Moreover, this Court has held that this principle applies to affirmative defenses that raise procedural objections to state statutes. *Lebeau v. Comm'rs of Franklin Cnty., Missouri*, 422 S.W.3d 284, 291 n.6 (Mo. banc 2014) ("Had [plaintiffs] waited to assert their claims as a defense to a municipal violation, they would not have been time barred from doing so under this Court's recent precedent. The ability to raise these procedural constitutional claims as a defense with no statute of limitations may be of particular significance."). Because Appellants raised the validity of § 67.1571 as an affirmative defense in this case, the trial court properly found the statute invalid again, notwithstanding any statute of limitations for affirmative causes of action.

Respondents go to great lengths to explain why they may, and this Court must, enforce a law (§ 67.1571) that is universally accepted as unconstitutional. To this end, Respondents strangely make much of the fact that Appellants **successfully** challenged in 1998 the constitutionality of § 67.1571 in *Missouri Hotel and Motel Association, etc., et al., v. City of St. Louis*, No. 004-02638, DAILY LABOR REPORT, pp. 17-20 (Mo. Cir. July 31, 2001). Ex. D. For the reasons discussed in response to Respondents' argument on laches below, this argument is without merit.

Respondents further argue that Appellants' reliance upon the defense of unconstitutionality is not an affirmative defense – but a "declaratory counterclaim" – because Respondents in their Petition did not seek a "judgment establishing fault or liability on the part of Appellants."[7] Respondents' Initial Br. 35. According to Respondents, avoidance of "fault or liability" is now the test to determine whether an affirmative defense exists. To support adoption of this test, Respondents point to

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7 Respondents also seem to argue that it was improper for Appellants to raise unconstitutionality as an affirmative defense in a declaratory action. *But see Firemen's Ret. Sys. of St. Louis v. City of St. Louis*, 789 S.W.3d 484, 485 (Mo. banc 1990) (defendant raised constitutionality of enabling act as an affirmative defense to declaratory judgment lawsuit); *Bd. of Cnty. Comm'rs of Palm Beach Cnty. v. Hibbard*, 292 So.2d 1, 2 (Fla. 1974) (defendant raised constitutionality of law as an affirmative defense to declaratory judgment action).

language from *Crouch* where this Court observed that an affirmative defense "is a matter that is asserted to avoid **liability**." Respondents' Initial Br. at 35 (citing *Crouch*, 47 S.W.3d at 375) (emphasis in original). The Court in *Crouch* did not establish avoidance of liability as the test of an affirmative defense in all cases, however. To the contrary, numerous cases have long used more expansive language when considering what an affirmative defense "is." Indeed, this Court has described an affirmative defense as being asserted by the "pleading of additional facts not necessary to support a plaintiff's case which serves to avoid the defendants' **legal responsibility**." *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 383 (Mo. banc 1993) (emphasis added); *see also, Gash v. Lafayette Cnty.*, No. WD65589, 2007 WL 324589 (Mo. Ct. App. Feb. 6, 2007) (transferred to this Court) (citations omitted) ("An affirmative defense has been defined as a defense that seeks to defeat or avoid the plaintiff's cause of action . . . because there are additional facts that permit the defendant to avoid the legal responsibility alleged."). Here, Respondents have argued that Appellants "[broke] the law" by passing the Ordinance in violation of § 67.1571. *See* Respondents' Initial Br. 29. However, Appellants did not "break the law" because they had no "legal responsibility" to comply with an unconstitutional statute. And Appellants' position in this regard was properly raised as an affirmative defense.

Respondents remarkably believe they may use § 67.1571 as a sword and interject it into this lawsuit, while Appellants may not use its patent (and previously recognized) unconstitutionality as a shield. Appellants have neither law nor equity on their side. This

Court cannot be required to enforce an unconstitutional statute in order to invalidate an ordinance that is presumed valid.

E. The issue of § 67.1571's constitutional infirmity was litigated within the five year statute of limitations.

Although § 516.500's five-year statute of limitations does not apply here, § 67.1571's constitutional infirmity was, in fact, actually litigated within five years of its enactment. As noted above, in *Missouri Hotel and Motel Association*, Judge Dierker of the Circuit Court of St. Louis City reviewed § 67.1571's validity and found that it had been enacted in violation of the single subject and clear title rules of the Missouri Constitution. Ex. D at 17-20. This 2001 decision was rendered within five years of § 67.1571's enactment in 1998. As such, the statute's constitutional infirmity was raised and litigated within the statute of limitations relied upon by Respondents. Thus, assuming counterfactually that the statute of limitations was applicable to the case at bar, it would not serve as an obstacle to Appellants raising the issue of § 67.1571's unconstitutionality.

Respondents argue that the 2001 decision may not be considered because Judge Dierker's ruling was "obiter dictum." *See* Respondents' Initial Br. 29. This is incorrect. A leading claim by Plaintiffs in *Missouri Hotel and Motel Association*, just as it is in this case, was a declaration that § 67.1571 precludes enforcement of the living wage ordinance at issue in that case. Ex. D at 24. Just as was done here, Defendants raised the constitutionality of § 67.1571 as an affirmative defense. *Id.* Judge Dierker's judgment expressly states that "[b]ecause the Court is confronted with a petition seeking

declaratory relief, the Court has considered itself obliged to address all of the issues that appear to have been raised by the parties." *Id.* at 3. Moreover, the parties would only have been able to appeal Judge Dierker's judgment — as they did — had it been a final judgment "leaving nothing for future determination." *Ndegwa v. KSSO, LLC*, 371 S.W.3d 798, 801 (Mo. banc 2012). That the appeal was ultimately dismissed by this Court because plaintiffs were not sufficiently "aggrieved" to have standing does not convert Judge Dierker's judgment that § 67.1571 is unconstitutional into dictum. Even when a trial court rules against a party on specific important claims, if the judgment ultimately grants the party the *relief* it sought, the party is not aggrieved for purposes of Mo. Rev. Stat. § 512.020, and cannot pursue an appeal. *See, e.g.*, *State ex rel. Parsons v. Bd. of Police Comm'rs of Kansas City*, 245 S.W.3d 851, 854 (Mo. Ct. App. 2007); *Parker v. Swope*, 157 S.W.3d 350, 352 (Mo. Ct. App. 2005).

Autumn Ridge Homeowners Ass'n, Inc. v. Occhipinto, 311 S.W.3d 415 (Mo. Ct. App. 2010), upon which Respondents primarily rely, is distinguishable. Unlike *Missouri Hotel and Motel Association*, in which the constitutionality of § 67.1571 was extensively briefed and litigated by the parties, *Autumn* was a case in which neither party requested findings of fact or conclusions of law, but the court nonetheless included certain findings in its opinion that were not supported by the record. *Autumn*, 311 S.W.3d at 417-18.

Respondents further argue that the *Missouri Hotel and Motel Association* ruling did not "invalidate" § 67.1571 because a Circuit Court in Kansas City recently found § 67.1571 to be "necessary" to its finding that recent efforts to secure a local minimum wage in Kansas City by way of a ballot initiative were preempted. *See* Ex. H, *City of*

Kansas City, Missouri v. Kansas City Board of Election Commissioners et al, Case No. 1516-CV19627 (Mo. Cir. Sept. 22, 2015) (the "Kansas City Judgment"). However, the Kansas City Judgment actually undermines Respondents' argument here that the (August 28, 2015) Ordinance is invalid. First, even a cursory review of the Kansas City Judgment demonstrates that § 67.1571was in no way "necessary" to the court's finding of preemption. There, the court was addressing an attempt to make a November 3, 2015 ballot question of the local wage ordinance. Ex. H, Kansas City Judgment. Thus, falling after the August 28, 2105 preemption deadline set forth in House Bill 722, the preemption provision of House Bill 722 applied squarely and unquestionably to the local minimum wage ordinance that was being pursued in Kansas City. Indeed, the briefing before the court there does not even raise § 67.1571. Ex. H. And certainly the issue of § 67.1571's constitutionality was not raised as an affirmative defense as was the case here. *Id.*

F. The doctrine of laches is inapplicable.

Respondents argue that Appellants are barred by the doctrine of laches from challenging the constitutionality of § 67.1571. Respondents' Initial Br. 38-39. In this regard, Respondents take the remarkable position that Appellants' **successful** 1998 challenge to the constitutionality of § 67.1571 in *Missouri Hotel and Motel Association, etc. et al., v. City of St. Louis*, No. 004-02638, DAILY LABOR REPORT, pp. 17-20 (Mo. Cir. July 31, 2001), precludes a similar challenge here. As noted above, in *Missouri Hotel and Motel Association*, Judge Dierker found § 67.1571 unconstitutional - the position advocated by Appellants in that case. Yet, Respondents take issue with

Appellants' decision to thereafter "abandon" the challenge to constitutionality of that statute. It defies all reason that it is the Appellants' responsibility to secure appellate review on a decision that Appellants agreed with, and Respondents have cited no authority to the contrary. Moreover, any issues of unfairness that may come into play because of an inability to challenge Judge Dierker's ruling at that time are obviated by the fact that Respondents are now, in this case, before this Court, in the position to have all such issues addressed. There are no equitable concerns present here that warrant application of the doctrine of laches.

II. THE TRIAL COURT DID NOT ERR IN FINDING IN APPELLANTS' FAVOR AND AGAINST RESPONDENTS ON COUNT IV OF THE PETITION BECAUSE THE ORDINANCE DOES NOT CREATE LIABILITIES OF CITIZENS AMONG THEMSELVES.

In their second point on appeal, Respondents challenge the trial court's judgment that the Ordinance is not unconstitutional on the grounds that it does not create liabilities of citizens among themselves. The trial court correctly held that on its face the Ordinance does not create civil liability from one citizen to another. L.F. 177 at ¶ 60. Because the Ordinance must be construed in light of the presumption of liability, the trial court denied Respondents' argument. *Id.* at 178, ¶ 62. In their argument on appeal, Respondents do not raise any new arguments or cite any new authority compelling a different conclusion. This Court, too, should find that the Ordinance does not create civil liability among citizens and deny Respondents' second point on appeal.

A. The Ordinance does not enlarge liability of citizens among themselves.

Respondents argue, as they did unsuccessfully to the trial court, that the Ordinance "clearly creates a civil liability from one citizen to another, i.e., from an employer to an employee, within the context of contractual and similar obligations." Respondents' Initial Br. 45 (internal quotation marks and citation omitted). To support this proposition, Respondents cite provisions of the Ordinance that prohibit employers from paying employees a wage less than that set forth in the Ordinance and from interfering with other protected rights, such as the right against discrimination, to be informed of the protections in the Ordinance, and from exercising the rights set forth in the Ordinance. *Id.* at 45-46 (citing Ex. A, §§ 3-5). Respondents conclude that these rights protected by the Ordinance "dictate[] the terms of prospective employment contracts . . . [and] create[] liability—in the form of increased compensation—within presently-existing contractual obligations between an employer and employee." *Id.* at 46.

As an initial matter, the Ordinance does not unconstitutionally "dictate the terms of prospective employment contracts" as Respondents assert. Respondents cite no authority for the tortured argument that setting a minimum wage somehow creates a contract. Indeed, the provisions of the Ordinance Respondents cite expressly *prohibit* employers from entering an agreement, *i.e.*, contract, to pay an employee less than the minimum wage or engaging in other prohibited conduct. A prohibition against an employer engaging in an unlawful act cannot be characterized as a creation of a contract, otherwise every workforce regulation could be said to result in the creation of an

employment contract. Respondents' same logic would seem to render even the State MMWL unconstitutional.

Respondents' argument that the Ordinance "creates liability—in the form of increased compensation" is likewise flawed. Respondents tellingly omit any reference whatsoever to the enforcement provisions of the Ordinance itself, which are the sole provisions of the Ordinance that set forth liabilities for violations. Respondents ignore those controlling provisions of the Ordinance because they conclusively undermine Respondents' position. As the trial court recognized, the Ordinance "does not state that it creates a civil liability from one citizen to another." L.F. 177 at ¶ 60.

To the contrary, the Ordinance vests the sole authority to "to take appropriate steps to enforce this Ordinance" and "investigat[e] any possible or suspected violation of this Ordinance" in the Department of Human Services and the City Counselor's Office. Ex. A, § 5(B). The penalties for violations of the Ordinance are further limited to fines and jail time. *Id.* at § 5(C). While the Ordinance provides that employers *may* be subject to pay restitution to employees, this too is penal in nature and does not create a civil cause of action between the employee and employer. *See Marshall v. Kansas City*, 355 S.W.2d 877, 881 (Mo. banc 1962) (a municipal corporation may by ordinance, within the scope of its police power, regulate conduct and prescribe a penalty for violation of an ordinance); *see also City of St. Louis v. Brune Mgmt. Co.*, 391 S.W.2d 943, 946 (Mo. Ct. App. 1965) (stating that ordinance that subjects offender to a fine is penal in nature); *Tabor v. Ford*, 241 Mo. App. 254, 258 (Mo. Ct. App. 1951) (a statute that imposes a penalty to be recovered by the government is regarded as penal).

Finally, the penalty provisions of the Ordinance are expressly limited "to the extent allowed by the City Charter and the law." Ex. A, §5(C). Missouri law gives municipal judges the authority to order conditions of probation that the court believes will serve to compensate the victim. Mo. Rev. Stat. § 479.190.2. Hence, the provision merely describes an aspect of municipal ordinance enforcement that the City's municipal judges already possess pursuant to state law. In no way does the Ordinance enlarge liability of citizens among themselves.

B. The Ordinance does not create a private cause of action.

Similarly, Respondents argue, as they did before the trial court, that simply because the Ordinance prohibits certain employers from paying a wage lower than that set forth in the Ordinance, it creates a "cause of action" between the employee and employer. This argument is largely a rehash of Respondents' flawed argument that the Ordinance expands liabilities of citizens among themselves and likewise finds no support in the text of the Ordinance itself or applicable legal authority.

The provision of the Ordinance Respondents cite as purportedly creating a private cause of action is titled "Penalty for Violations." There is no "cause of action" created there. Instead, that provision merely prescribes penalties for violation of the Ordinance, including fines and jail time:

> Performance of any act prohibited by this Ordinance, and failure to perform any act required by the Ordinance, shall be punishable by a sentence of not more than 90 days in jail, or by a fine of not more than $500.00 per violation or both or by any combination of sentence and fine up to and

> including the maximum sentence and maximum fine. Each day that any violation hereunder continues is a separate violation subject to the penalties provided in this Ordinance. In addition to all other penalties set forth herein, an Employer may be subject to conditions which will serve to compensate the victim, including that the Employer pay restitution to any Employee in the form of unpaid back wages plus interest from the date of non-payment or underpayment, to the extent allowed by the City Charter and the law.

Ex. A, §5(C).

As stated above, these are penal sanctions, not a cause of action. *See e.g.*, *Marshall*, 355 S.W.2d at 881; *City of St. Louis*, 391 S.W.2d at 946; *Tabor*, 241 Mo. App. at 258. That the penal sanctions provided under the Ordinance may benefit employees does not erode the City's constitutional authority to exercise its police powers to enforce the Ordinance. "The function of the police power has been held to promote the health, welfare, and safety of the people by regulating all threats either to the comfort, safety, and welfare of the populace or harmful to the public interest." *Damon v. City of Kansas City*, 419 S.W.3d 162, 183 (Mo. Ct. App. 2013).

The Supreme Court has previously found the regulation of wages to be an appropriate exercise of police power. In *Heller v. Lutz*, the Supreme Court held that a law prohibiting the assignment of unearned wages was a valid exercise of police power to prohibit an act detrimental to the public welfare. 164 S.W. 123, 127 (Mo. 1912). The Court said:

> The exercise of the police power, as evidenced by various phases of legislation affecting individual liberty or personal rights, has met with judicial approval in many cases; the rule to be deduced therefrom being that in civilized society there is no such thing as an unrestrained power on the part of the individual to contract; this right being subject to wise and beneficial police regulations, and, when an act which may prove detrimental to the public welfare is prohibited by a general statute, it will be upheld unless it is clearly in violation of some provisions of the organic law.

Id. at 126. The *Heller* Court found the law was designed to protect "the unfortunate and improvident from the unscrupulous and overreaching" and found it to be a "wholesome" exercise of the police power. *Id*. at 127; *see also Brinley v. Karnes*, 595 S.W.2d 465, 467 (Mo. Ct. App. 1980) (recognizing that protecting wage earners is valid exercise of the police power).

Here, the Ordinance operates as a police power as did the law at issue in *Heller*. Unlike *Yellow Freight System, Inc. v. Mayor's Commission on Human Rights*, 791 S.W.2d 386 (Mo. banc 1990), the case cited by Respondents, the Ordinance does not establish a civil action that can be brought by a citizen. The Ordinance is a valid exercise of the City's police power and seeks to prohibit an act detrimental to the public welfare. *Heller*, 164 S.W. at 127. *Yellow Freight* itself makes clear that in determining whether an ordinance runs afoul of the prohibition on the creation of civil liabilities the issue turns

on "the *nature of the remedy* provided by the ordinance." *Id*. at 384 (emphasis added). Here, the remedies prescribed by the Ordinance are strictly penal in nature.

This Court should reject Respondents' argument that the Ordinance creates a civil liability or cause of action among its citizens. The Court should follow the analysis in *Heller* to conclude that the City's regulation of wages is a "wholesome" exercise of its police power designed to protect the City's wage earners. *Heller*, 164 S.W. at 127. Respondents have not carried their burden to overcome the presumption that the Ordinance is valid.

III. THE TRIAL COURT DID NOT ERR IN FINDING IN APPELLANTS' FAVOR AND AGAINST RESPONDENTS ON COUNT V OF THE PETITION BECAUSE THE ORDINANCE DOES NOT IMPROPERLY DELEGATE LEGISLATIVE POWERS.

In their third point on appeal, Respondents claim the Ordinance violates the general principle announced by this Court in *Ex parte Williams*, 139 S.W.2d 485, 491 (Mo. banc 1940), against delegation of legislative authority. L.F. 29-30. Yet Respondents admit—as they must—that *Williams* and a long line of cases that followed set forth a number of "general exceptions" to a prescription against the delegation of legislative powers. The trial court properly concluded that the Ordinance falls within two of these general exceptions. L.F. 178-79 at ¶¶ 66-67. Respondents' argument does nothing to undermine the trial court's conclusion, which this Court should affirm.

A. The Ordinance squarely falls within the "well settled" nondelegation exceptions articulated by this Court.

The sole authority on which Respondents rely for the proposition that the Ordinance constitutes an unlawful delegation of authority is this Court's decision in *Ex parte Williams*, 139 S.W.2d 485, 490 (Mo. 1940). In that case, the Court rejected the very argument Respondents made before the trial court, and make again here, after finding the City of St. Louis ordinance at issue was enacted under the City's police power. *Id.* The Court acknowledged the general principle—cited by Respondents in this case—"that in order for a statute or ordinance to be valid, which places restrictions upon lawful conduct or lawful business, in themselves harmless, it must specify the rules and conditions to be observed in such conduct or business." *Id*. The Court went on to state, however:

> On the other hand, it is equally well settled that it is not necessary that statutes or ordinances prescribe a rule of action where they deal with situations which require the vesting of some discretion in public officials, as, for instance, where it is difficult or impracticable to lay down a definite, comprehensive rule; or where the discretion relates to the administration of a police regulation and is necessary to protect the public morals, health, safety, and general welfare; or where personal fitness is a factor to be taken into consideration."

Id. at 490. Because the Court found the ordinance to be enacted under the City's police powers, it held as a matter of law there was no delegation of legislative powers, only a lawful vesting of administrative discretion. *Id.*

The holding in *Williams*, that ordinances enacted under police powers or that vest discretion in public officials need not specify rules and conditions to be followed in carrying out that discretion, has been repeatedly affirmed by this Court. For example, in *ABC Security Service, Inc. v. Miller*, the Court stated:

> The courts recognize three general exceptions to the strict rule which requires the inclusion of standards in an ordinance or statute when a delegation is made to an administrative body: (1) where the ordinance or statute deals with situations which require the vesting of some discretion in public officials, and where it is difficult or impracticable to lay down a definite, comprehensive rule; (2) where the discretion relates to the administration of a police regulation and is necessary to protect the public morals, health, safety and general welfare; (3) where personal fitness is a factor to be taken into consideration.

514 S.W.2d 521, 524-25 (Mo. 1974); *see also Menorah Med. Ctr. v. Health and Educ. Facilities Auth.*, 584 S.W.2d 73, 83-84 (Mo. 1979) (same). More than thirty-five years ago, this Court recognized:

> Modern regulatory agencies must often determine factual questions which could not have been anticipated at the time of the legislative enactment. Missouri courts have recognized the need for rules which provide for the

> needed flexibility to adapt to the increasing complexities of modern society. The liberalizing trend in interpreting statutes which are faced with nondelegation challenges has been recognized and adopted by Missouri courts.

Menorah Med. Ctr., 584 S.W.2d at 84.

Respondents attempt to distinguish the holding in *Williams* and its progeny (while selectively taking quotes out of context) by asserting that the nondelegation exceptions espoused by the Court turn entirely on the nature of the conduct being regulated. Respondents' Initial Br. 50. The implication of Respondents' argument is that "restrictions on lawful conduct or lawful business" can *never* be delegated. That is not what *Williams* stands for. Indeed, the local ordinance at issue in *Williams* regulated solicitations for charitable, patriotic, or philanthropic contributions—inarguably lawful conduct. *Id.* at 1124. While the Court began its analysis by recognizing the general prescription against delegation of legislative authority to regulate lawful conduct or business, it went on to acknowledge the "equally well settled" exceptions to that general principle, quoted above. *Id.* at 490. Because the Court held that regulating charitable solicitations was within the city's police power—in that the "the police power extends to all things which bear a substantial relation to the public health, safety and welfare"—it found the discretion to regulate *lawful* conduct and business set forth in the ordinance was properly delegable. *Id.* at 488, 490.

That is precisely what is at issue in this case. The Ordinance falls squarely within two of the nondelegation exceptions articulated by this Court. First, the City of St. Louis

passed the Ordinance pursuant to its police powers and, by its terms, the Ordinance is necessary to protect the public morals, health, safety and general welfare. *Compare* Ex. A, § 9 ("This being an Ordinance for the preservation of public peace, health, and safety it is hereby declared to be an emergency measure. . . .") *with Williams*, 139 S.W.2d at 488 ("[T]he police power extends to all things which bear a substantial relation to the public health, safety and welfare.").

Second, the Ordinance deals with situations that require the vesting of some discretion in public officials, and where it is difficult or impracticable to lay down a definite, comprehensive rule. The Ordinance, for example, excludes from the definition of "Employee" certain individuals "engaged in the activities of an educational, charitable, religious, or non-profit organization" or "employed on a casual basis to provide baby-sitting services." Ex. A, §1(F)(1), (4). The definition of "Minimum Wage" under the Ordinance also includes all "Wages, Commissions, Piece-Rate, and Bonuses actually received by the employee." Ex. A, § 1(G). Each of those terms is, in turn, separately defined in the Ordinance. It is not difficult to imagine scenarios in which the Director may be called upon to determine whether a particular individual might qualify as an "Employee" under the Ordinance or whether or not an item of value received by an Employee might constitute a Wage or Bonus such that it qualified as part of the Employee's Minimum Wage. These are mere examples of the myriad "factual questions which could not have been anticipated at the time of the legislative enactment" and thus justify the vesting of discretion in the Director to promulgate rules regarding the

interpretation, application, and enforcement of the Ordinance. As a matter of law, that is not an unlawful delegation of legislative authority.

B. The Ordinance does not violate constitutional separation of powers by permitting a so-called "legislative veto."

Respondents' secondary argument is that even if the delegation of power set forth in the Ordinance were subject to the nondelegation exceptions announced in *Williams*, "the *manner* in which power is delegated is unconstitutional." Respondents' Initial Br. 51. This argument lacks all merit. Respondents cite no authority whatsoever for their bald assertion that the concept of a "legislative veto" applies to local governments and none exists. There is nothing in the Missouri Constitution, City Charter, or interpretative case law that would prevent a local legislative body from retaining authority to review administrative-rule making properly delegated to an agency.

There are no limitations in the City of St. Louis' Charter that curb the Board of Alderman's power to review and approve proposed rule-making promulgated by a City agency. To the contrary, the City Charter unquestionably empowers the City to regulate all businesses, Art. I, § 1(26); to do "all things whatsoever expedient for promoting or maintaining the comfort, education, morals, peace, government, health, welfare, trade, commerce or manufactures of the city or its inhabitants," Art. I, § 1(33); and, "to exercise all powers granted or not prohibited to by law or which it would be competent for this charter to enumerate." Art. I, § 1(35). The Board of Aldermen has the power to review proposed rules and regulations.

Respondents' citation to City Charter provisions that vest legislative power in the Board of Aldermen is circular and unavailing. This Court has been clear that the legislative branch has the power to delegate that authority under certain circumstances. *See, e.g., Williams*, 139 S.W.2d at 491. As discussed above, and concluded by the trial court, the Ordinance is one such circumstance where legislative power may be properly delegated.

Moreover, while the concept of a "legislative veto" has been discussed in certain judicial opinions, *see e.g., Missouri Coal. for the Env't v. Joint Comm. on Admin. Rules*, 948 S.W.2d 125 (Mo. banc 1997), this discussion has occurred in the context of state government and the Missouri Constitution, which handles separation of powers differently. *See* Mo. Const. (1945), Art. II, § 1. There is no analogy here. The portion of the Missouri Constitution concerning local governments, Article VI, has no provision imposing a particular brand of separation of powers on city governments. Therefore, St. Louis City, through its Board of Aldermen, clearly has the power to reserve and the power to review and approve administrative rule-making, even though the proposed rule-making is to be done by an officer designated in the Ordinance. Respondents have not carried their burden to overcome the presumption that the Ordinance is valid.

CONCLUSION FOR RESPONSE TO RESPONDENTS/CROSS-APPELLANTS' CROSS-APPEAL

Based upon the foregoing, Appellants/Cross-Respondents respectfully submit that the judgment of the trial court on Counts II, IV, and V must be affirmed.

POINTS RELIED ON FOR APPELLANTS/CROSS-RESPONDENTS' APPEAL

I. THE TRIAL COURT ERRED IN FINDING IN RESPONDENTS' FAVOR ON COUNT I OF THE PETITION BECAUSE THE ORDINANCE DOES NOT CONFLICT WITH MISSOURI REVISED STATUTE SECTION 71.010 AND MISSOURI'S MINIMUM WAGE LAW, MISSOURI REVISED STATUTE SECTION 290.500 *ET SEQ.* IN THAT THE ORDINANCE IS PRESUMED VALID AND (1) RESPONDENTS DID NOT CARRY THEIR BURDEN OF PROVING THAT THE ORDINANCE PROHIBITS WHAT MISSOURI'S MINIMUM WAGE LAW PERMITS AND (2) MISSOURI REVISED STATUTE SECTION 285.055 RECOGNIZES THAT MISSOURI'S MINIMUM WAGE LAW DOES NOT PREEMPT THE ORDINANCE.

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

Brinkers Missouri, Inc. v. Director of Revenue, 319 S.W.3d 433 (Mo. banc 2010)

Sumners v. Sumners, 701 S.W.2d 720 (Mo. 1985)

South Metropolitan Fire Protection District v. City of Lee's Summit, 278 S.W.3d 659 (Mo. banc. 2009)

Mo. Rev. Stat. § 290.500 *et seq.*

Mo. Rev. Stat. § 285.055

II. THE TRIAL COURT ERRED IN FINDING IN RESPONDENTS' FAVOR ON COUNT III OF THE PETITION BECAUSE THE CITY'S AUTHORITY TO ENACT THE ORDINANCE IS NOT DENIED BY MISSOURI REVISED STATUTE SECTION 71.010 IN THAT THE ORDINANCE IS PRESUMED

VALID AND (1) APPELLANTS DID NOT CARRY THEIR BURDEN OF PROVING THAT THE ORDINANCE PROHIBITS WHAT MISSOURI'S MINIMUM WAGE LAW PERMITS AND (2) MISSOURI REVISED STATUTE SECTION 285.055 RECOGNIZES THAT MISSOURI'S MINIMUM WAGE LAW DOES NOT PREEMPT THE ORDINANCE.

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

Bezayiff v. City of St. Louis, 963 S.W.2d 225 (Mo. Ct. App. 1997)

Marshall v. Kansas City, 355 S.W.2d 877 (Mo. banc 1962)

Missouri Constitution, Article VI, § 19(a)

Mo. Rev. Stat. § 290.500 *et seq.*

Mo. Rev. Stat. § 285.055

Charter of the City of St. Louis, article I, §§ 1(25)-(26), (33)

ARGUMENT OF APPELLANTS/CROSS-RESPONDENTS

I. THE TRIAL COURT ERRED IN FINDING IN RESPONDENTS' FAVOR ON COUNT I OF THE PETITION BECAUSE THE ORDINANCE DOES NOT CONFLICT WITH MISSOURI REVISED STATUTE SECTION 71.010 AND MISSOURI'S MINIMUM WAGE LAW, MISSOURI REVISED STATUTE SECTION 290.500 ET SEQ. IN THAT THE ORDINANCE IS PRESUMED VALID AND (1) RESPONDENTS DID NOT CARRY THEIR BURDEN OF PROVING THAT THE ORDINANCE PROHIBITS WHAT MISSOURI'S MINIMUM WAGE LAW PERMITS AND (2) MISSOURI REVISED STATUTE SECTION 285.055 RSMO RECOGNIZES THAT

MISSOURI'S MINIMUM WAGE LAW DOES NOT PREEMPT THE ORDINANCE.

"Ordinances are presumed to be valid and lawful." *McCollum v. Dir. of Revenue*, 906 S.W.2d 368, 369 (Mo. banc. 1995). To overcome this presumption, in the context of a preemption argument, it is Respondents burden to establish that the Ordinance is "expressly inconsistent or [is] in irreconcilable conflict with the general law of the state." *City of Kansas City v. Carlson*, 292 S.W.3d 368, 373 (Mo. Ct. App. 2009) (*citing McCollum*, 906 S.W.2d at 369; *see e.g.*, *Borron v. Farrenkopf*, 5 S.W.3d 618, 622 (Mo. Ct. App. 1999); *Frech v. City of Columbia*, 693 S.W.2d 813, 815 (Mo. banc 1985); *State ex rel. Hewlett v. Womach*, 196 S.W.2d 809, 814 (Mo. banc 1946). This principle is also set forth in Missouri Revised Statute § 71.010, which provides that municipal ordinances that regulate "matters and things upon which there is a general law of the state . . . shall... [be] in conformity with the state law upon the same subject." The test for whether a conflict between a local ordinance and state law exists has been more specifically described as being whether the ordinance "prohibits what the statute permits" or "permits what the statute prohibits." *Cape Motor Lodge, Inc. v. City of Cape Girardeau*, 706 S.W.2d 208, 211 (Mo. banc 1986).

A. The Ordinance is consistent with the MMWL.

The MMWL, which sets a "bare minimum" wage for the entire state, does not conflict with or otherwise preempt the Ordinance. State law preempts an area of law when the state "has created a comprehensive scheme on a particular area of the law, leaving no room for local control. When state law has so completely regulated a given

area of the law, then it is said to be occupied, and preempts any local act." *Borron*, 5 S.W.3d at 624 (citations omitted). Here, the MMWL does not identify the state minimum wage as being the only permissible minimum wage, nor does it "completely regulate" the area of minimum wages, set up a "comprehensive scheme" concerning minimum wages, or "exhaustively address the subject of minimum wages." *See New Mexicans for Free Enter. v. City of Santa Fe*, 126 P.3d 1149, 1159-60 (N.M. Ct. App. 2005) (comparing lack of comprehensive scheme in minimum wage law as compared to comprehensive children's code described in *ACLU v. City of Albuquerque*, 992 P.2d 866 (N.M. 1999)). Indeed, the Missouri General Assembly's recent passage of House Bill 722, and its recognition of the validity of local minimum wage ordinances in effect on August 28, 2015, speaks directly to the MMWL's lack of a "comprehensive scheme" in this area.

The MMWL prohibits an employer from paying less than a minimum wage, prescribed by state statute. *See* Mo. Rev. Stat. § 290.502(2). The Ordinance therefore is entirely consistent, and does not conflict, with the MMWL as it also prohibits (and does not permit) St. Louis employers from paying less than the State of Missouri's prescribed minimum wage. *See* Ex. A, § 2.B.4 ("if the state or federal minimum wage is at any time greater than the minimum wage rate established by this Ordinance, then the greater rate shall become the minimum wage rate for purpose of this Ordinance."). In other words, the purpose of the MMWL is to prohibit employers from paying workers too little, and the Ordinance obviously does not run afoul of this prohibition by paying workers more than the MMWL. As discussed further below, to the contrary, the Ordinance embraces and supplements the goals of the MMWL.

Ignoring the common sense reading and understanding of a minimum wage law, Respondents argue that the MMWL is actually for the benefit of the employers insofar as the MMWL does not "prohibit" employers from paying too little, but that its purpose is to "permit" employers to pay the state minimum wage. *See* L.F. 23-24, ¶ 50. This argument turns the purpose and understanding of minimum wage legislation on its head and is without merit. Indeed, this Court recently described the purpose of Missouri's minimum wage law as "'ameliorating the unequal bargaining power as between employer and employee' and 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) (citations omitted) (emphasis added).

Thus, the purpose of the MMWL as recognized by the Missouri Supreme Court is to protect employees, which is precisely the stated purpose of the Ordinance. Indeed, the very text of the Ordinance repeatedly expresses concern for those City of St. Louis employees whose "real wages . . . have increased little if at all since the early 1970s," and who thereby "struggle to meet their most basic needs and to provide their children a stable foundation . . ." *See* Ex. A, p. 1. The Ordinance further identifies concerns over health issues that plague those "associated with low-incomes" and finds that "minimum wage laws promote the general welfare, health, and prosperity of the City of St. Louis by **ensuring that workers** can better support and care for their families and fully participate in the community." *Id.* at p. 2 (emphasis added). Thus, as with the MMWL, the Ordinance is designed to protect "the rights of those who toil."

The Ordinance supplements – rather than conflicts with – the purpose of the MMWL. Importantly, this is consistent with established Missouri precedent, which allows for local ordinances to supplement state laws. *See e.g.*, *State ex rel. Teefey and Agri-Lawn, Inc. v. Bd. of Zoning Adjustment of Kansas City*, 24 S.W.3d 681, 685 (Mo. banc. 2000). Indeed, this kind of local supplementation of state laws is nothing new. *See e.g.*, *Brockus*, 434 S.W.3d at 90; *Frech*, 693 S.W.2d at 813; *Vest v. Kansas City*, 194 S.W.2d 38 (Mo. 1946); *Bhd. of Stationary Eng'rs v. City of St. Louis*, 212 S.W.2d 454 (Mo. Ct. App. 1948). Preemption therefore does not prohibit extra regulations at the municipal level. *Borron*, 5 S.W.3d at 622; *State ex rel. Hewlett v. Womach*, 196 S.W.2d 809, 814 (Mo. banc 1946). If an ordinance "merely prohibits *more* than the state statute, the two measures are not in conflict." *Carlson*, 292 S.W.3d at 371 (emphasis in original); *see also Miller v. Town & Country*, 62 S.W.3d 431, 438 (Mo. Ct. App. 2001) ("An ordinance that merely enlarges on the provision of a statute by requiring more than the statute requires creates no conflict between the two."). Finally, courts in other states have likewise acknowledged that municipal minimum wage ordinances do not conflict with state laws that set an hourly wage floor. *New Mexicans for Free Enterprise*, 126 P.3d at 1159-60 ("municipal power to set a minimum wage higher than that of the [state minimum wage] is not 'expressly denied by general law' within the meaning of the home rule amendment"); *City of Baltimore v. Sitnick*, 255 A.2d 376, 385-86 (Md. Ct. App. 1969).

Such is the case here. The MMWL simply sets a floor for hourly wages in order to provide a bare minimum level of protection to Missouri employees—it does not

provide that the only permissible wage is the minimum wage, and it does not prohibit or regulate wages that exceed the state minimum wage rate. A "minimum" does not, by any natural reading of the word, affirmatively prohibit or permit an entity to pay more. It only prohibits an entity from paying less. Thus, the Ordinance plainly and unquestionably supplements, and provides City of St. Louis employees "more than," the protections afforded by the MMWL. *Carlson*, 292 S.W.3d at 371-72.

In the court below Respondents did not satisfy their burden and overcome the legal presumption that the Ordinance is valid, and they cannot do so now. The MMWL and the Ordinance have precisely the same purpose – to "protect the rights of those who toil." And the Ordinance merely supplements and enhances the MMWL's measures to accomplish this purpose. In short, the MMWL sets a floor, and allows local government to innovate above the floor. That is precisely what St. Louis City did here. Respondents cannot show that there is an irreconcilable conflict between the MMWL and the Ordinance, and the Trial Court's ruling to the contrary was erroneous.

B. The Ordinance is consistent with the "laws of the State."

House Bill 722 is an unambiguous acknowledgement of the City's pre-existing authority to pass the Ordinance. House Bill 722 provides amendments to two separate chapters of the Missouri Code, one of which is Missouri Revised Statute § 285.055. That amendment sets forth definitional terms and provides, in its entirety:

> 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 or local minimum wage ordinance requirements in effect on August 28, 2015**.

Ex. E, attachment 2 (emphasis added).

The General Assembly's two-sentence pronouncement is unambiguous. Recognition of the City of St. Louis' authority to pass the Ordinance is the only plausible interpretation. If the City of St. Louis did not have authority to pass a local minimum wage ordinance, the provision of House Bill 722 prohibiting local minimum wage ordinances after "August 28, 2015" would be a purposeless prohibition and have no meaning. Similarly, it would make no sense for the state legislature to provide for a several month window under which the City of St. Louis could exercise authority it never had. The Court should not accept Respondents' invitation to completely disregard the plain language of a state law passed within just the last year which was so important to the General Assembly that it was passed not just by a majority, but passed again four months later (after Respondents instituted this lawsuit) by a two-thirds vote over a Governor's veto. *See Brinkers Missouri, Inc. v. Dir. Of Revenue,* 319 S.W.3d 433, 438 (Mo. banc 2010) (citing *Akins v. Dir. of Revenue*, 303 S.W.3d 563, 565 (Mo. Banc 2010)) ("[T]he primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute."); *see also Aquila Foreign Qualifications Corp. v. Dir. of Revenue*, 362 S.W.3d 1, 4 (Mo. banc 2012) (construction of a statute should avoid unreasonable or absurd results).

The trial court also erred in concluding that House Bill 722 has no bearing on this case because it had not yet gone into effect when the Ordinance was passed and did not go into effect until two days after issuance of the trial court's judgment. As an initial matter, Respondents do not rely on House Bill 722 for the creation of any rights that did not already exist before House Bill 722 became effective. Rather, the significance of House Bill 722 is its unmistakable recognition of the City of St. Louis' existing authority to pass the Ordinance by August 28, 2015, otherwise the entirety of House Bill 722's amendment to § 285.055—which became effective after August 28—is meaningless. *See State ex rel. Clark v. Gray*, 931 S.W.2d 484, 488 (Mo. Ct. App. 1996) (once a bill is "transmitted to the appropriate depository agent, the bill's status as a properly enacted law 'becomes immutable.'").

Moreover, while House Bill 722 may not have been effective when the trial court rendered its judgment, there is no dispute that it is now the law of the State of Missouri and is in "force and effect." It is therefore incumbent upon this Court to consider House Bill 722 when determining the "general state law" of Missouri, the legislative intent and state policy that regulates the subject matter of minimum wage, and whether Ordinance 70078 is in conformity with that law, legislative intent and state policy. *See* Mo. Rev. Stat. § 71.010 (addressing ordinances that regulate subjects covered by a general law of the state). There are fewer principles that have been recognized longer in American jurisprudence. Chief Justice Marshall himself held that courts are to, post-judgment, consider the consequences of laws that were not in effect at the time of the original judgment. *See United States v. The Schooner Peggy*, 5 U.S. 103, 110 (1801) ("[I]f,

subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied."). And, in *Simpson v. Stoddard County*, 73 S.W. 700, 713-714 (Mo. 1903), this Court addressed how and whether a judgment, on appeal, could be affected by the subsequent enactment of a law by the Missouri legislature:

> The only remaining question is the power of this court to apply the curative provisions of the act of 1901 to this case, the act not being in force at the time of the trial in the lower court. This is the first time this question has ever been presented to this court for determination. Upon an examination of this subject, we find that recognized authority fully supports the contention of respondents, and that this court has the power and it is appropriate to apply the provisions of this curative act to the cause before us. Mr. Chief Justice Marshall, in the case of *United States v. The Schooner Peggy*, 1 Cranch, 103, 2 L. Ed. 49, announces the doctrine very tersely.

This principal has been repeatedly cited to and relied upon by Missouri courts ever since. *See e.g., State ex rel. Holland Indus., Inc. v. Div. of Transp. of State of Mo.*, 762 S.W.2d 48, 50 (Mo. Ct. App. 1988) ("The rule that an appellate court must decide a case upon the basis of the law in effect at the time of decision is rooted in *United States v. Schooner Peggy*."); *Geran v. Xerox Educ. Servs., Inc.*, 469 S.W.3d 459, 468 (Mo. Ct. App. 2015) ("[I]f, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its

obligation denied.") (quoting *Sumners v. Sumners*, 701 S.W.2d 720, 723 (Mo. banc 1985)); *Sturgess v. Guerrant*, 583 S.W.2d 258 (Mo. Ct. App. 1979); *Harper v. Harper*, 4 S.W.3d 626, 628 (Mo. Ct. App. 1999) ("the statute on which husband relies was changed during the time this case has been on appeal").

In *Sumners v. Sumners*, 701 S.W.2d 720 (Mo. 1985), this Court again pointed to Justice Marshall's early decision, finding it appropriate to apply a change in the law retroactively. *Id.* at 722 ("In the specific context of changes in the pertinent law while a case is on appeal, Chief Justice Marshall stated . . ."). In addition, in *Sumners*, the Court discussed the two exceptions to the rule of applying a change in law retroactively: (1) if the change concerns procedural, rather than substantive law; and (2) if the parties relied on the law prior to the change, then the new law would not be applied "in order to avoid injustice and unfairness." *Id.* at 723. Here, the change in law occurred within the short window between judgment and the parties' time to file a motion to amend, while the trial court retained jurisdiction of the matter. *See* Missouri Supreme Court Rules 75.01 and 78.07 (d). Were there any doubt, Respondents preserved the issue for appeal by timely filing a Rule 75.01 motion to amend or modify the judgment, L.F. 181-90, which the trial court denied, L.F. 193-95. As such, this Court should consider the constitutionality of the Ordinance in light of House Bill 722.

Finally, none of the exceptions cited by *Sumners* apply here. First, the "procedural exception" is inapposite as the law set forth in House Bill 722 is substantive. Second, the Respondents cannot allege reliance upon the law prior to the enactment of House Bill 722 as their argument necessarily is that House Bill 722 is merely duplicative of the MMWL

and Missouri Revised Statute §67.1571, both of which (according to Respondents) likewise provide for state preemption of minimum wage laws.

C. Statutes must be interpreted to be consistent with each other.

Established cannons of statutory construction, and common sense, easily dispose of Respondents tortured reading of the three laws passed by the General Assembly. House Bill 722's recognition of the pre-existing authority to pass local minimum wage requirements controls over any suggestion that such authority would conflict with the MMWL (or § 67.1571). *See e.g., Earth Island Inst. v. Union Elec. Co.*, 456 S.W.3d 27, 33 (Mo. banc 2015), *reh'g denied* (Mar. 31, 2015) (quoting *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment."); *Mo. Hosp. Ass'n v. Air Conservation Comm'n*, 874 S.W.2d 380, 398 (Mo. Ct. App. 1994) (internal citations omitted) ("Statutory amendments may be used to clarify or restate legislative intent, and subsequent statutes may be considered in construing previously enacted statutes, in order to ascertain the uniform and consistent purpose of the legislature."). Instead of reading the MMWL and House Bill 722 to conflict, the Court "must attempt to harmonize them and give them [each] effect." S. *Metro. Fire Prot. Dist. v. City of Lee's Summit*, 278 S.W.3d 659, 666 (Mo. banc 2009) (quoting *City of Clinton v. Terra Found., Inc.*, 139 S.W.3d 186, 189 (Mo. Ct. App. 2004)). "If harmonization is impossible, 'a chronologically later statute, which functions in a particular way will prevail over an earlier statute of a more general nature, and the latter statute will be regarded as an exception to or qualification of the earlier general statute.'" *S. Metro. Fire*

Prot. Dist., 278 S.W.3d at 666 (quoting S*mith v. Mo. Local Govt. Employees Retirement System*, 235 S.W.3d 578, 582 (Mo. Ct. App.2007)).

The General Assembly's enactment of House Bill 722 undermines Respondents' argument that the MMWL, enacted in 1990 (and § 67.1571, enacted in 1998), already served to preempt the adoption of local minimum wage ordinances. Under Respondents' argument, House Bill 722 was unnecessary and meaningless and the General Assembly's efforts to override Governor Nixon's veto were therefore merely a waste of time and resources. Presumably, Respondents would have this Court believe the General Assembly simply did not understand the pre-existing nature of state law governing minimum wages. This all, however, runs contrary to long-established principals of statutory construction:

> In ascertaining the legislative intent as expressed in a statute courts are aided by certain well established rules. One such rule is that in the construction of statutes it is presumed that the legislature is aware of the interpretation of existing statutes placed thereon by the states' appellate courts, and that in amending a statute or enacting a new one on the same subject it is ordinarily the intent of the legislature to effect some change in the existing law. If this were not so the legislature in amending a statute would be accomplishing nothing, and legislatures are not presumed to have intended a needless and useless act.

Wright v. J.A. Tobin Construction Co., 365 S.W.2d 742, 744 (Mo. Ct. App. 1963), *citing State ex rel. M. J. Gorzik Corp. v. Mosman*, 315 S.W.2d 209, 211 (Mo. 1958); *see also*

McCoy v. The Hershewe Law Firm, P.C., 366 S.W.3d 586, 594 (Mo. Ct. App. 2012) (same); *City of Willow Springs v. Missouri State Librarian*, 596 S.W.2d 441, 444-45 (Mo. banc 1980) (citation omitted) (courts are to construe statutes on the "theory that the legislature intended to accomplish something" and presume that a statute has some substantive effect and was not enacted as a 'meaningless act of housekeeping.'"). The only way to harmonize the General Assembly's MMWL, the old preemption statute (§ 67.1571), and the new preemption statute (House Bill 722), is to find: (1) the 1990 MMWL did not preempt local minimum wage ordinances, thereby necessitating the need of the old preemption statute in 1998 to facilitate such preemption; (2) as discussed above, that the old preemption statute was unconstitutional and abandoned, requiring the enactment of the new preemption statute in 2015 in House Bill 722; and (3) the Ordinance adopted on August 28, 2015, and before the preemption deadline announced in House Bill 722, is not preempted. This interpretation, which allows the three statutes all passed by the General Assembly to work in harmony, has the further benefit of reflecting precisely what happened. The only interpretation of Missouri law that harmonizes all of the statutes at issue is that the MMWL does not preempt the Ordinance.

Moreover, "[i]f harmonization is impossible, 'a chronologically later statute, which functions in a particular way will prevail over an earlier statute of a more general nature, and the latter statute will be regarded as an exception to or qualification of the earlier general statute.'" *S. Metro. Fire Prot. Dist.*, 278 S.W.3d at 666. Similarly, House Bill 722's recognition of the pre-existing authority to pass local minimum wage requirements controls over any suggestion that such authority would conflict with §

290.500 to § 290.530. *See e.g., Earth Island Inst.*, 456 S.W.3d at 33 (quoting *Morton*, 417 U.S. at 550-51 ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.")). To read all of the sections enacted by the General Assembly regulating the subject of minimum wage in harmony, this Court must interpret the legislative intent and state policy surrounding the MMWL as not preempting local minimum wage ordinances. It was the lack of preemption that, in turn, caused the General Assembly to enact House Bill 722 to change the status quo and preempt those local minimum wage ordinances enacted after August 28, 2015.

II. THE TRIAL COURT ERRED IN FINDING IN RESPONDENTS' FAVOR ON COUNT III OF THE PETITION BECAUSE THE CITY'S AUTHORITY TO ENACT THE ORDINANCE IS NOT DENIED BY MISSOURI REVISED STATUTE SECTION 71.010 IN THAT THE ORDINANCE IS PRESUMED VALID AND (1) APPELLANTS DID NOT CARRY THEIR BURDEN OF PROVING THAT THE ORDINANCE PROHIBITS WHAT MISSOURI'S MINIMUM WAGE LAW PERMITS AND (2) MISSOURI REVISED STATUTE SECTION 285.055 RECOGNIZES THAT MISSOURI'S MINIMUM WAGE LAW DOES NOT PREEMPT THE ORDINANCE.

The Missouri Constitution grants St. Louis City "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). St. Louis City is further empowered to enact all ordinances that promote the health, safety, peace, comfort, and the general welfare of those who live and work in the City. *Bezayiff v. City of St. Louis*, 963 S.W.2d 225, 229 (Mo. Ct. App. 1997). Moreover, the Charter specifically empowers the City of St. Louis to:

- "regulate all acts, practices, conduct, business, occupations, callings, trades, uses of property and all other things whatsoever detrimental or liable to be detrimental to the health, morals, comfort, safety, convenience or welfare of the inhabitants of the city," Ex. C, Charter at Art. I, § 1(25);
- "prescribe limits within which business, occupations and practices liable to be . . . detrimental to the health, morals, security or general welfare of the people may lawfully be established, conducted or maintained," *Id.*, at Art. I, § 1(26); and,
- "do all things whatsoever expedient for promoting and maintaining the comfort, education, morals, peace, government, health, welfare, trade, commerce or manufactures of the city or its inhabitants," *Id.*, at Art., § 1(33).

The City of St. Louis' authority to enact a minimum wage ordinance is, therefore, well-grounded in the Missouri Constitution and the Charter. The City of St. Louis may enact ordinances within this scope of authority without enabling legislation at the state level, and any such ordinance will be presumed to be valid and lawful. *City of St. John v.*

Brockus, 434 S.W.3d 90, 93 (Mo. Ct. App. 2014); *Smith v. City of St. Louis*, 409 S.W.3d 404, 426 (Mo. Ct. App. 2013); *Carlson*, 292 S.W.3d at 372 n. 3; *see also McCollum*, 906 S.W.2d at 369 ("Ordinances are presumed to be valid and lawful.").

When a constitutional charter city's power to pass an ordinance under Article VI, § 19 of the Missouri Constitution is challenged, as it is in this case, the dispositive question for the Court "to ask [is] not whether the City had authority for its ordinance, but whether its authority to enact the [ordinance] was denied by other law." *Carlson*, 292 S.W.3d at 371 (citing *Cape Motor Lodge, Inc. v. City of Cape Girardeau*, 706 S.W.2d 208, 210 (Mo. banc. 1986)). Moreover, a charter city's ordinance "may not invade the province of the general legislation involving the public policy of the state as a whole." *Missouri Banker's Ass'n, Inc. v. St. Louis Ctny.*, 448 S.W.3d 267, 271 (Mo. banc 2014). The grant of legislative powers to a charter city through Article VI, §19 is limited to those powers "incident to [the] city's affairs." *City of Maplewood v. Marti*, 891 S.W.2d 500, 503 (Mo. Ct. App. 1994) (citing *Yellow Freight Systems*, 791 S.W.2d at 385) ("legislature has no authority to confer ... under § 19(a) . . . a power not incidental to [a city] as a municipality").

A. Passage of a local minimum wage is incidental to City of St. Louis' affairs.

The trial court properly concluded that the Ordinance "by its own express terms is limited to local concerns." L.F. 176, at ¶ 54. In doing so, the trial court found "no merit" to Respondents' argument that the Ordinance exceeds St. Louis City's authority because it goes beyond purely local concerns and extends to matters of statewide and national concerns." *Id.* at ¶¶ 52, 54. The premise of Respondents' position is that "[t]he problem

of a minimum 'living wage' for laborers is a national crisis . . . and, is not of such a distinctly local concern that the City is authorized to address it." L.F. 26, at ¶ 57. As the trial court properly held, this argument fails to overcome the presumption that the Ordinance is valid.

Respondents concede that the issue at hand – a "living wage" – constitutes a "crisis." Yet, Respondents would have the Court rule that the City of St. Louis is without the power to address it. This is not the case. The standard set by this Court is that the City of St. Louis' powers used to enact the Ordinance need only be "incident to it as a municipality" and "may not invade the providence of general legislation involving the public policy of the state as a whole." *Yellow Freight Systems*, 791 S.W.2d at 385-86 (citations and quotation marks omitted). The living wage of the City of St. Louis' workers is patently something that is incident to the City of St. Louis. The City of St. Louis is empowered to enact all ordinances that "have a substantial and rational relationship to the health, safety, peace, comfort, and the general welfare of [its] habitants." *Bezayiff*, 963 S.W.2d at 229. The Ordinance by its very terms demonstrates that it has such a relationship. *See e.g.*, Ex. A, pp. 1-3. Moreover, it is Respondents' burden to demonstrate otherwise.

Respondents' position wholly ignores the obvious issue faced by the Board of Aldermen: while the problem of a low living wage is faced outside City of St. Louis itself, the solution to a minimum living wage must, by definition, address distinctly local concerns and factors. For example, what determines a "living wage" depends on where a worker lives. Respondents cannot credibly contest that a living wage in New York City

or Chicago would be different than a living wage in the City of St. Louis. Similarly, a living wage in the City of St. Louis would not be the same as a living wage in Cape Girardeau or Joplin, or even Kansas City or Jefferson City.[8] Because of the distinctly local differences in the solution to this admitted "crisis," the efforts undertaken by the Board of Aldermen plainly address an issue of local concern.

The concerns set forth above were acknowledged and addressed recently by Missouri Governor Jay Nixon. In vetoing House Bill 722, Governor Nixon wrote that policies like the minimum wage are "matters traditionally within the purview of local government." *See* Ex. E(1) at 9, Letter of Jeremiah W. Nixon. Governor Nixon likewise recognized that as a diverse state, there are times when Missouri's "local elected officials may be best suited to determine the appropriate—and local—priorities . . . it is important that local governments have the ability to build on the minimum standards that are set at the state level." *Id.*

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[8] Ex. O, Dr. Amy K. Glassmeier, Massachusetts Institute of Technology, Living Wage Calculator for various cities in Missouri, *available at* http://livingwage.mit.edu/counties/29510; Ex. N, National Low Income Housing Coalition, Out of Reach 2015 at 130-34, full report *available at* http://nlihc.org/sites/default/files/oor/OOR_2015_FULL.pdf. The U.S. Bureau of Labor Statistics also separately tracks Consumer Price Index data for both the St. Louis and Kansas City regions. *See* http://www.bls.gov/regions/subjects/consumer-price-indexes.htm#MO.

The Ferguson Commission echoed the Governor's sentiments in its report, which set forth its recommendations of what key steps the St. Louis region must take to address the well-documented crisis and problems. Among the Ferguson Commission's signature priorities was its recommendation to raise the minimum wage. Ex. I at 52, 57, excerpts of Ferguson Commission Report, full report *available at* http://3680or2khmk3bzkp33juiea1.wpengine.netdna-cdn.com/wp-content/uploads/2015/09/101415_FergusonCommissionReport.pdf. In its report, the Commission highlighted the St. Louis-specific data regarding what level of income would be necessary to provide for a family, addressed issues that are unique to the St. Louis region, and praised the Ordinance that is now before the Court. *Id*. at 51-52 In sum, the Ferguson Commission and its report is a timely example of how the issues and concerns that are impacted and addressed by the minimum wage, while national in scope, are ones that must be addressed locally.

Finally, precedent found in Missouri and other jurisdictions has long recognized that ordinances addressing issues similar to that addressed by the Ordinance are incidental to the affairs of a municipality and therefore within the proper exercise of city authority. For example, in *Marshall v. Kansas City*, 355 S.W.2d 877 (Mo. banc 1962), plaintiffs challenged Kansas City's anti-discrimination ordinance covering private hotels and restaurants. Clearly, race relations were then, as they are now, a matter of statewide and national importance. *Id*. at 879. Yet, this Court upheld the ordinance as a proper exercise of city power. *Id*. at 884; *see also, Carlson*, 292 S.W.3d at 373; *Howe v. City of St. Louis*, 512 S.W.2d 127 (Mo. 1974) (upheld City "anti-blockbusting" ordinance, even

though it was challenged, *inter alia*, on grounds it violated First Amendment). Similar to the circumstances in these cases, the "crisis" concerning a minimum living wage for the City of St. Louis' employees unquestionably raises a distinctly local concern and the City of St. Louis was authorized to address it through the passage of the Ordinance. Respondents did not overcome their burden before the trial court to prove otherwise, and they cannot do so now.

B. The Ordinance is not in conflict with state laws.

Despite holding that the Ordinance is limited to purely local concerns and does not extend to legislation involving the public policy of the state as a whole, the trial court nonetheless concluded that it "must" enter judgment in Respondents' favor on Count III because it concluded on Count I that the Ordinance conflicts with the MMWL. For the reasons explained in Appellants' first point on appeal, above, the Ordinance does not conflict with the MMWL but rather supplements it. Accordingly, the trial court's judgment on Count III should be reversed and judgment should be entered in Appellants' favor.

CONCLUSION FOR CROSS-APPEAL

Based upon the foregoing, Appellants/Cross-Respondents respectfully submit that the judgment of the trial court on Counts I and III must be reversed and judgment entered in Appellants/Cross-Respondents' favor.

Date: June 9, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH MISSOURI SUPREME COURT RULES 55.03 AND 84.06

This brief complies with the requirements of Rule 55.03. This brief complies with the type-volume limitations of Missouri Supreme Court Rule 84.06 because this brief contains 16,297 words, excluding the parts of the brief exempted by Rule 84.06(b). This brief complies with the typeface and the type style requirements of Rule 84.06 because this brief has been prepared in a proportionally styled typeface using Microsoft Word in 13-point font size and Times New Roman type style.

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CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2016, a true and correct copy of the foregoing brief was filed electronically with the Clerk of the Court using the Missouri efiling system, which will automatically send email notification to counsel of record.

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