IN THE SUPREME COURT OF MISSOURI

NO. SC95401

Cooperative Home Care, Inc., et al.,
Respondents/Cross-Appellants,

v.

City of St. Louis, Missouri, et al.,
***Appellants/Cross-Respondents*.**

On Appeal from the Circuit Court of St. Louis City, Missouri
The Honorable Steven R. Ohmer, Judge

BRIEF OF RESPONDENTS/CROSS-APPELLANTS

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JURISDICTIONAL STATEMENT

This is a direct appeal from the October 14, 2015 judgment (the "Judgment") entered by the Honorable Steven Ohmer of the Circuit Court of St. Louis City (the "Trial Court") declaring that Ordinance 70078 of the Revised City Code of the City of St. Louis ("Ordinance 70078") was void and of no force and effect because it conflicts with state statute and exceeds the constitutional charter authority of the City of the St. Louis, Missouri (the "City"). (A true and accurate copy of the Judgment is contained in the Legal File ("L.F.") at L.F. 159, and included in the appendix accompanying this brief at A1 and incorporated herein by reference.) Defendants, Appellants/Cross-Respondents in the present action ("Appellants"), initially filed an appeal with the Missouri Court of Appeals Eastern District (*Cooperative Home Care, Inc., et al. v. City of St. Louis, et al.*, Cause No. ED103705, hereinafter, the "Eastern District Appeal"), appealing the Trial Court's decision on Counts I and III.

Plaintiffs, Respondents/Cross-Appellants in the present action ("Respondents"), then filed the instant cross-appeal with this Court, appealing *inter alia* the Trial Court's decision on Count II and declaration that the 1998 enactment of Mo. Rev. Stat. § 67.1571, was procedurally unconstitutional. On January 8, 2016, Respondents filed their Consent Motion for Transfer to the Supreme Court in the Missouri Court of Appeals Eastern District, arguing that this Court has exclusive appellate jurisdiction over this case and seeking to transfer the Eastern District Appeal to this Court to be consolidated with the instant appeal, so that the entire appeal may be considered and

resolved by a single appellate court. On January 11, 2016, the Missouri Court of Appeals Eastern District entered its order transferring the Eastern District Appeal to this Court.

In order for Appellants to succeed in this case and successfully reverse the Judgment's outcomes, Appellants must have this Court uphold the Trial Court's declaration that Mo. Rev. Stat. § 67.1571 is invalid. Accordingly, the constitutionality of at least one state statute[1] is directly at issue in this case. Therefore, this Court has *exclusive appellate jurisdiction* of this case pursuant to Art. V, § 3 of the Missouri Constitution.

[1] In addition to Mo. Rev. Stat. § 67.1571, the constitutionality of the passage of House Bill 722 ("HB 722"), which is now effective as Mo. Rev. Stat. § 285.055, is also at issue. Appellants rely on HB 722 / Mo. Rev. Stat. § 285.055 for the proposition that the General Assembly recognized the invalidity of Mo. Rev. Stat. § 67.1571. Notwithstanding this reliance, Appellants also claim that HB 722 / Mo. Rev. Stat. § 285.055 is void, invalid, unenforceable, and unconstitutional because it was enacted in violation of Mo. Const. Art. III, §§ 21 and 23.

STATEMENT OF FACTS

I. FACTUAL HISTORY

A. The Missouri Minimum Wage Law

On May 2, 1990, House Bill No. 1881 was passed by the Missouri General Assembly (the "General Assembly") and signed into law by the Governor of the State of Missouri as Mo. Rev. Stat. § 290.500, *et seq*. (the "Missouri Minimum Wage Law"). (A160).

B. The Mo. Rev. Stat. § 67.1571 Prohibition

In 1998, House Bill No. 1636 was passed by the General Assembly and signed into law by the Governor of the State of Missouri as Mo. Rev. Stat. § 67.1571. (L.F. 174). Mo. Rev. Stat. § 67.1571 provides that "[n]o municipality as defined in [Mo. Rev. Stat. § 67.1401.2(9)] shall establish, mandate or otherwise require a minimum wage that exceeds the state minimum wage." Mo. Rev. Stat. § 67.1571.

C. Ordinance 65045 (the City's First Minimum Wage Program) and *Missouri Hotel*

In August 2000, the citizens of the City, by initiative petition and vote, adopted Ordinance 65045 of the Revised City Code of the City of St. Louis ("Ordinance 65045"). (A true and accurate copy of Ordinance 65045 is included in the appendix accompanying this brief at A23 and incorporated herein by reference.) Section Three of Ordinance 65045 required that parties who contract with the City, or are granted financial assistance from the City, and certain vendors and subcontractors of those parties, pay their

employees "an hourly wage rate which on an annual basis . . . is equivalent to 130% of the federal poverty guidelines for a family of three." (A24).

In *Missouri Hotel and Motel Association, et al. v. City of St. Louis, et al.*, Case No. 004-02638 (Mo. Cir. July 31, 2001) ("*Missouri Hotel*"), Judge Dierker issued his "Memorandum, Order and Judgment" (the "*Missouri Hotel* Judgment") declaring Ordinance 65405 invalid and enjoining its enforcement. (A true and accurate copy of the *Missouri Hotel* Judgment is included in the appendix accompanying this brief at A28 and incorporated herein by reference.) In *Missouri Hotel* a group of plaintiffs sought declaratory and injunctive relief to preclude enforcement of Ordinance 65045, relying in part on Mo. Rev. Stat. § 67.1571. (A20). By way of defense, the City and intervening defendant St. Louis Living Wage Campaign, proponents of the at-issue minimum wage initiative (collectively, the "*Missouri Hotel* Defendants"), claimed "that section 67.1571 is unconstitutional by reason of the clear title and single subject requirements." (A48).

The plaintiffs prevailed in *Missouri Hotel*. Central to the holding set forth in—and the relief granted by—the *Missouri Hotel* Judgment, Judge Dierker "declared that Ordinance 65045 contravene[d] §§290.500 et seq., RSMo 2000." (A77). Judge Dierker also "declared that . . . Ordinance 65045 contravene[d] article I, §10 and article V, §23 of the Constitution of Missouri, §478.220, RSMo 2000, and article IV, §24 and article XII, §3 of the Charter of the City of St. Louis." (A78).

Separate and apart from the central holding in the *Missouri Hotel* Judgment—that Ordinance 65045 was void and unenforceable, Judge Dierker incidentally determined that Mo. Rev. Stat. § 67.1571 "as adopted by the substitute H.B. 1636 is not within the title of

the bill and does not fairly relate to or have a natural connection with community improvement districts" and that "[s]ince it has no relationship with the core purpose of the bill, §67.1571 is unconstitutional." (A56). This finding was expressly detached from the relief granted, i.e. Judge Dierker expressly found that "Ordinance 65045 *is not* prohibited by §67.1571, RSMo 2000, which is unconstitutional." (A77) (emphasis supplied).

Although plaintiff Associated Industries of Missouri ("Associated Industries"), who is also a party in the present action, prevailed in *Missouri Hotel*, it nonetheless filed a notice of appeal seeking to challenge Judge Dierker's finding that Mo. Rev. Stat. § 67.1571 was unconstitutional to preserve the validity of the preemption set forth in Mo. Rev. Stat. § 67.1571 for future local attempts to frustrate the Missouri Minimum Wage Law. (A true and accurate copy of the docket sheet from *Missouri Hotel and Motel Association, et al., Appellants/Cross-Respondents v. City of St. Louis, et al., Respondents/Cross-Appellants,* Case No. SC84107 (Mo. Sept. 10, 2002) (the "*Missouri Hotel* Appeal") is included in the appendix accompanying this brief at A83 and incorporated herein by reference.) (A87). The *Missouri Hotel* Defendants each filed notices of cross-appeal. (*Id.*).

In opposition to the appeal filed by Associated Industries, the *Missouri Hotel* Defendants argued that because Associated Industries prevailed in voiding and enjoining enforcement of Ordinance 65045, it was no longer an aggrieved party entitled to appeal the *Missouri Hotel* Judgment. (A true and accurate copy of Intervenor Appellee's Memorandum of Law in Support of Motion to Dismiss Appeal is included in the

appendix accompanying this brief at A88 and incorporated herein by reference.) (A88-89). The *Missouri Hotel* Defendants further represented that they would voluntarily dismiss their notices of appeal if Associated Industries' appeal was dismissed. (A89).

Associated Industries and the *Missouri Hotel* Defendants concluded their briefing schedule before this Court on July 15, 2002. (A84). On August 5, 2002, Board Bill No. [02] 43, as passed by the City of St. Louis Board of Aldermen (the "Board of Aldermen"), was signed into law by Mayor Francis G. Slay (the "Mayor") as Ordinance 65597 of the Revised City Code of the City of St. Louis ("Ordinance 65597"). (A true and accurate copy of Ordinance 65597 is included in the appendix accompanying this brief at A98 and incorporated herein by reference.) (A102). Ordinance 65597 complied with the holding of the *Missouri Hotel* Judgment. Specifically, "it repeal[ed] Ordinance 65045 pertaining to a living wage and enacting in lieu thereof a new ordinance establishing the St. Louis Living Wage Law." (A98). The minimum wage program set forth in Ordinance 65597 applied only to direct vendors of the City and did not mandate a minimum wage, higher than the Missouri Minimum Wage Law, between private parties. (A99-100).

On September 5, 2002, this Court heard oral arguments on the *Missouri Hotel* Appeal and was advised of Ordinance 65597. (A83). On September 10, 2002, the Supreme Court agreed with *Missouri Hotel* Defendants and dismissed Associated Industries' appeal, "as no aggrieved party filed an appeal." (A true and accurate copy of

the order dismissing the *Missouri Hotel* Appeal is included in the appendix accompanying this brief at A103 and incorporated herein by reference.) (A103).

D. Amendment to the Missouri Minimum Wage Law

The Missouri Minimum Wage Law was amended by ballot referendum Proposition B which passed on November 6, 2006 and became effective January 1, 2007. (A160). Mo. Rev. Stat. § 290.502.1 of the Missouri Minimum Wage Law provides that:

> effective January 1, 2007, every employer shall pay to each employee wages at the rate of $6.50 per hour, or wages at the same rate or rates set under the provisions of federal law as the prevailing federal minimum wage applicable to those covered jobs in interstate commerce, whichever rate per hour is higher.

Mo. Rev. Stat. § 290.502.1.

Mo. Rev. Stat. § 290.510 of the Missouri Minimum Wage Law further provides that "[t]he director [of the department of labor and industrial relations] shall have authority to investigate and ascertain the wages of persons employed in any occupation included within the meaning of Mo. Rev. Stat. § 290.500 to 290.530." Mo. Rev. Stat. § 290.510.

Mo. Rev. Stat. § 290.522 of the Missouri Minimum Wage Law also provides that:

> Every employer subject to any provision of sections 290.500 to 290.530 or of any regulations issued under sections 290.500 to 290.530 shall keep a summary of sections 290.500 to 290.530, approved by the director, and copies of any applicable wage regulations issued under sections 290.500 to

> 290.530, or a summary of the wage regulations posted in a conspicuous and accessible place in or about the premises wherein any person subject thereto is employed. Employers shall be furnished copies of the summaries and regulations by the state on request without charge.

Mo. Rev. Stat. § 290.522.

Mo. Rev. Stat. § 290.525 of the Missouri Minimum Wage Law states that an employer is guilty of a class C misdemeanor for violation the Missouri Minimum Wage Law. Mo. Rev. Stat. § 290.525.

Finally, Mo. Rev. Stat. § 290.502.2 of the Missouri Minimum Wage Law provides that "[t]he minimum wage shall be increased or decreased on January 1, 2008, and on January 1 of successive years, by the increase or decrease in the cost of living." Mo. Rev. Stat. § 290.502.2. Under the Missouri Minimum Wage Law, the state minimum wage rate is currently $7.65 per hour. (L.F. 5).

E. Ordinance 70078 (the City's Second Minimum Wage Program)

Thirteen years later, on August 28, 2015, the Board of Aldermen passed Board Bill 83FSAA which purported to amend the Revised City Code of the City of St. Louis (the "City Code"). (A true and accurate copy of Board Bill 83FSAA is appended to the Verified Petition for Declaratory Judgment and Injunctive Relief (the "Petition") as Exhibit A, and also included in the appendix accompanying this brief at A104 and incorporated herein by reference.) (L.F. 16, 131, 163). That same day, Board Bill 83FSAA was signed by the Mayor and became effective immediately as Ordinance 70078. (A true and accurate copy of Ordinance 70078 is appended to the Petition as

Exhibit B, and also included in the appendix accompanying this brief at A124 and incorporated herein by reference.) (*Id.*).

Ordinance 70078 purports to respond to certain "defining issues of our time[,] includ[ing] the increase in income inequality, the growing gap between rich and poor, and the obstacles preventing people from rising into the middle class." (A124). Ordinance 70078's preamble further notes that "real wages for most workers have increased little if at all since the early 1970s." (*Id.*). This language curtails the original finding, set forth in Board Bill 83FSAA when presented to the Board of Aldermen, that "real wages for most workers ~~in the United States~~ have increased little if at all since the early 1970s." (A104) (strikethrough in original).

Section 2(A) of Ordinance 70078 requires employers to pay each of their employees an established minimum wage rate for hours worked within the geographical boundaries of the City. (A131). Ordinance 70078 proposes a series of graduated increases to reach a threshold minimum wage rate by January 1, 2018. (A132). On the date which Ordinance 70078 purports to become effective, the minimum wage rate under section 2(B)(1) of Ordinance 70078 is the minimum wage rate established by the State of Missouri. (*Id.*). Beginning on October 15, 2015, the minimum wage rate under Ordinance 70078 increases to $8.25 per hour. (*Id.*). Beginning on January 1, 2016, the minimum wage rate under Ordinance 70078 increases to $9.00 per hour. (*Id.*). Beginning on January 1, 2017, the minimum wage rate under Ordinance 70078 increases to $10.00 per hour. (*Id.*). Beginning on January 1, 2018, the minimum wage rate under Ordinance 70078 increases to $11.00 per hour. (*Id.*). Thereafter, beginning January 1,

2021, the minimum wage rate under section 2(b)(2) of Ordinance 70078 shall be increased annually on a percentage to reflect the rate of inflation. (A132-33).

However, if the state or federal minimum wage rate is at any time greater than the minimum wage rate established by Ordinance 70078, then that greater rate shall become the minimum wage rate under section 2(b)(4) of Ordinance 70078. (A134).

In anticipation of the first change of the minimum wage rate under Ordinance 70078, employers are required to post in a conspicuous place at each of their facilities, where any employee works, a notice advising the employee of the current minimum wage and the employee's rights under section 4(A) of Ordinance 70078. (A136-37).

Under section 5(A) of Ordinance 70078, the Director of the Department of Human Resources of the City (the "Director") is also authorized, with direction and approval from the Ways and Means Committee of the Board of Aldermen (the "Ways and Means Committee"), to promulgate rules and regulations regarding the interpretation, application, and enforcement of Ordinance 70078. (A137). The Director is also required to make available to employers the notices required to be posted at employer's facilities, subject to approval from the Ways and Means Committee. (A137). Section 2(E), 3(C) and 3(D) of Ordinance 70078 provide that it shall be a violation of Ordinance 70078 for any employer to, among other things, (1) pay any employee a wage below the minimum wage rate set forth in Ordinance 70078, (2) enter into an agreement whereby the employer will pay an employee to work for less than the minimum wage set forth in Ordinance 70078 and (3) violate the rules and regulations promulgated to set the annual

minimum wage rate, or that are otherwise promulgated to interpret, apply, or enforce Ordinance 70078. (A135-36).

As penalty for violation of Ordinance 70078, section 5(C) provides that an employer "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." (A138). Additionally, an employer "may be subject to conditions which will serve to compensate the victim, including that the [e]mployer pay restitution to any [e]mployee in the form of unpaid back wages plus interest from the date of non-payment or underpayment." (*Id.*) Finally, repeated or intentional violations of Ordinance 70078 may subject an employer's business license to revocation by the License Collector's Office under section 5(D). (*Id.*). Such violations may also subject any occupancy permits, other permits, variances or licenses held by the employer to revocation by defendant Board of Public Service of the City of St. Louis, Missouri as well. (A138-39).

Finally, Ordinance 70078 styles itself as emergency legislation by alleging the following:

> This being an Ordinance for the preservation of public peace, health, and safety, it is hereby declared to be an emergency measure within the meanings of Sections 19 and 20 of article IV of the Charter of the City of St. Louis and therefore shall become effective immediately upon its passage and approval by the Mayor.

(A140).

F. The HB 722 / Mo. Rev. Stat. § 285.055 Prohibition

On May 5, 2015, HB 722 was approved by the General Assembly. (A true and accurate copy of HB 722 is included in the appendix accompanying this brief at A141 and incorporated herein by reference.) (L.F. 208). HB 722 amends Mo. Rev. Stat. § 285.055 with the following language:

> No political subdivision shall establish, mandate, or otherwise require an employer to provide to any 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.

Mo. Rev. Stat. § 285.055. On July 10, 2015, HB 722 was returned by the Governor of the State of Missouri, Jeremiah W. Nixon ("Governor Nixon") without his signature and with objections thereto ("Governor Nixon's Veto"). (L.F. 150). Governor Nixon's Veto of HB 722 was overridden by the General Assembly on September 16, 2015. (L.F. 154).

Mo. Rev. Stat. § 21.250 provides that "[w]hen a bill that has passed both houses of the general assembly is returned by the governor without his signature, and with objections thereto, and upon a reconsideration, passes both houses by the constitutional majority . . . it shall become effective thirty days after approval by constitutional majorities in both houses of the general assembly." Mo. Rev. Stat. § 21.250. Accordingly, HB 722 did not become effective until October 16, 2015. (L.F. 202).

October 16, 2015 is one day *after* the first proposed increase in minimum wage was set to take place pursuant to Ordinance 70078. (A132).

G. The Kansas City Judgment

On September 22, 2015, Circuit Judge Justine Del Muro of the Circuit Court for Jackson County issued her "Judgment/Order" in *City of Kansas, Missouri v. Kansas City Board of Election Commissioners, et al.*, Case No. 1516-CV19627 (Mo. Cir. Sept. 22, 2015) (the "Kansas City Judgment"), striking the question presented by Committee Substitute for Ordinance No. 150660 ("Ordinance 150660") from the November 3, 2015 election. (A true and accurate copy of the Kansas City Judgment is included in the appendix accompanying this brief at A143 and incorporated herein by reference.) (A143-44). Like the present case, Ordinance 150660 sought to establish a minimum wage higher than the Missouri Minimum Wage Law. (A true and accurate copy of Ordinance 150660 is included in the appendix accompanying this brief at A145 and incorporated herein by reference.) (A150-51). Unlike the present case, the party seeking to rescind the effort to enact a local minimum wage ordinance, in light of Mo. Rev. Stat. §§ 67.1571 and 285.055, was the City of Kansas City, Missouri. (A143).

The Kansas City Judgment held, in relevant part, that:

> Section 67.1571.1 RSMo. states, "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." House Bill No. 722 (§285.055 RSMo.) states, "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." **These two provisions clearly and unequivocally prohibit Plaintiff from establishing a minimum wage**, as proposed by Committee Substitute for Ordinance No. 150660. Committee Substitute for Ordinance No. 150660 is **inconsistent with the above state statutes and is therefore unconstitutional, on its face**. *See*, Missouri Constitution, Article VI, § 19(a).

(A143-44) (emphases added). A direct appeal of the Kansas City Judgment is presently before this Court as *City of Kansas City, Respondents v. Kansas City Board of Election Commissioners, et al., Respondents, and Samuel E. Mann, et al., Appellants*, Case No. SC95386.

II. PROCEDURAL HISTORY

A. The Parties

Respondents in this case are Cooperative Home Care, Inc. ("Cooperative"); Missouri Chamber of Commerce and Industry ("Missouri Chamber"); Missouri Restaurant Association, Inc. ("Missouri Restaurant"); the Missouri Retailers Association ("Missouri Retailers"); National Federation of Independent Business ("NFIB"); Naufel, Inc. d/b/a Carrie Elligson Gietner Home ("Gietner") and Associated Industries. (L.F. 10-11). Respondents are comprised of two Missouri healthcare providers located within the City and five Missouri non-profit or benevolent corporations whose

membership is comprised of organizations and individuals in various industries throughout Missouri and who have members located within the City. (L.F. 11-13).

Cooperative is a corporation organized and existing under the laws of the State of Missouri with its principal place of business in the City. (L.F. 160). Cooperative will be required to pay higher wages to some of its employees under Ordinance 70078. (L.F. 165).

Geitner is a corporation organized and existing under the laws of the State of Missouri with a principal place of business in the City of St. Louis. (L.F. 161). Geitner will be required to pay higher wages to some of its employees under Ordinance 70078. (L.F. 165).

Missouri Chamber is a non-profit corporation organized and existing under the laws of the State of Missouri. (L.F. 160). Missouri Restaurant is a non-profit corporation organized and existing under the laws of the State of Missouri. (L.F. 161). Missouri Retailers is a benevolent corporation organized and existing under the laws of the State of Missouri. (L.F. 161). NFIB is a non-profit corporation organized and existing under the laws of the State of California. (L.F. 161). Associated Industries is a nonprofit corporation organized and existing under the laws of the State of Missouri. (L.F. 161). The issues at stake in the lawsuit underlying this appeal are germane to the purposes of Missouri Chamber, Missouri Restaurant, Missouri Retailers, NFIB and Associated Industries, and relevant to the operations of their members. (L.F. 160-61).

The Appellants in this case are the City; the Mayor; the City Counselor of the City; Eddie Roth, in his official capacity as the Director and as a Member of the Board of Public Service of the City; Mavis Thompson, in her official capacity as License Collector of the City; the Board of Public Service of the City; as well as Richard T. Bradley, Melba Moore, Greg Hayes, Richard Gray, Curtis Skouby and Stephen Runde, all in their official capacities as Members of the Board of Public Service of the City.

B. Claims Alleged in the Petition

This action is one involving questions of whether the local minimum wage program adopted by Board of Aldermen on August 28, 2015, as Board Bill 83FSAA, and signed into law by the Mayor that same day as Ordinance 70078, conflicts with one or more sections of Missouri statute, including Mo. Rev. Stat. §§ 67.1571, 71.010 and 290.500, *et seq*., and violates one or more provisions of the Missouri Constitution, including Art. VI, § 19(a).

In the Petition, Respondents allege that the local minimum wage program set forth in Ordinance 70078 (the "City's Minimum Wage Program") violates multiple sections of Missouri statute and multiple provisions of the Missouri Constitution. (L.F. 8-79). Count I alleges that the City's Minimum Wage Program conflicts with Mo. Rev. Stat. §§ 71.010 and 295.500, *et seq*. (L.F. 23-24). Count II alleges that the City's Minimum Wage Program conflicts with Mo. Rev. Stat. § 67.1571. (L.F. 24-25). Count III alleges the City's Minimum Wage Program violates the charter authority granted to the City under Art. VI, § 19(a) of the Missouri Constitution, in that a minimum wage program is not a purely local concern. (L.F. 25-27). Count IV alleges that the City's

Minimum Wage Program further violates the charter authority granted to the City, in that it creates or enlarges duties and/or liabilities from one citizen to another. (L.F. 27-29). Finally, Count V alleges the City's Minimum Wage Program constitutes an illegal delegation of legislative powers, in violation of the charter authority and Art. II, § 1 of Missouri's Constitution. (L.F. 29-31). Counts VI and VII were voluntarily dismissed by Respondents. (L.F. 160).

In response to the Petition, Appellants filed their Answer to Plaintiffs' Verified Petition for Declaratory Judgment and Injunctive Relief ("Appellants' Answer"). (L.F. 126-57). As part of the additional and affirmative answers in Appellants' Answer, Appellants allege that Mo. Rev. Stat. § 67.1571 is invalid in that it violates Article III, Sections 21 and 23 of the Missouri Constitution. (L.F. 151-53). Appellants further allege that the passage of HB 722 by the General Assembly has significance for the constitutionality of Mo. Rev. Stat. § 67.1571 and the City's Minimum Wage Program set forth in Ordinance 70078. (L.F. 152-54). First, in adopting HB 722, the General Assembly tacitly recognized the invalidity and ineffectiveness of Mo. Rev. Stat. § 67.1571. (L.F. 152-53). Second, HB 722 specifically acknowledges the City's ability to promulgate a local minimum wage program—such as the City's Minimum Wage Program—and recognizes that such a local minimum wage program would not be in conflict with other, then-existing Missouri minimum wage laws, namely Mo. Rev. Stat. §§ 71.010 and 295.500, *et seq*. (L.F. 152-53). Notwithstanding their reliance on HB 722 in the immediately preceding paragraphs of Appellants' Answer, Appellants finally allege that HB 722 is "void, invalid, unenforceable, and unconstitutional" because

it was enacted in violation of Article III, Sections 21 and 23 of the Missouri Constitution. (L.F. 153-54).

C. The Judgment

After briefing and oral argument, which occurred on October 6, 2015, the Trial Court entered the Judgment on October 14, 2015. (L.F. 165-80).

In favor of Respondents, the Trial Court ruled that Ordinance 70078 was invalid in that it conflicted with Mo. Rev. Stat. §§ 71.010 and 295.500, *et seq*., as set forth in Count I of the Petition. (L.F. 172-74). In light of such conflict, the Trial Court also determined that Ordinance 70078 violated the charter authority granted to the City under Article VI, Section 19(a) of the Missouri Constitution. (L.F. 177).

Against Respondents, the Trial Court ruled that Mo. Rev. Stat. § 67.1571 was invalid in that it was enacted in violation of Article III, Section 23 of the Missouri Constitution. (L.F. 175). The Trial Court also ruled that Ordinance 70078 did not violate the charter authority granted to the City under the Missouri Constitution, as set forth in Count IV of the Petition, and did not constitute an illegal delegation of legislative powers as set forth in Count V of the Petition. In addition to the ruling that Mo. Rev. Stat. § 67.1571 is invalid, Respondents also appeal the Judgment's ruling on Counts IV and V of the Petition.

D. Post-Judgment Filings

After entry of the Judgment, Appellants filed their Rule 75.01 Motion to Amend or Modify Judgment (the "Appellants' Motion to Modify"), citing HB 722 (at that time, and now presently, effective as Mo. Rev. Stat. § 285.055). (L.F. 181-92). Appellants'

Motion to Modify argued that HB 722, as a newly enacted statute, must now be read in harmony with Mo. Rev. Stat. §§ 71.010 and 290.500, *et seq*., and that such a harmonious reading would not place Ordinance 70078 in conflict with then-existing Missouri minimum wage law. (L.F. 186). Appellants' Motion to Modify was denied and the Judgment became final on November 13, 2015. (L.F. 193-94).

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN FINDING IN FAVOR OF APPELLANTS AND AGAINST RESPONDENTS ON COUNT II OF THE PETITION, BECAUSE MO. REV. STAT. § 67.1571 CONFLICTS WITH AND PREEMPTS ORDINANCE 70078, IN THAT MO. REV. STAT. § 516.500 PROHIBITS ANY CLAIM THAT THE 1998 PASSAGE OF MO. REV. STAT. § 67.1571, IN HOUSE BILL NO. 1636, VIOLATED THE SINGLE SUBJECT RULE SET OUT IN ART. III, SECTION 23 OF THE OF THE MISSOURI CONSTITUTION

Hammerschmidt v. Boone County, 877 S.W.2d 98 (Mo. banc 1994)

Boone Nat. Sav. *& Loan Ass'n, F.A. v. Crouch* 47 S.W.3d 371 (Mo. banc 2001)

Mo. Rev. Stat. § 67.1571

Mo. Rev. Stat. § 516.500

II. THE TRIAL COURT ERRED IN FINDING IN FAVOR OF APPELLANTS AND AGAINST RESPONDENTS ON COUNT IV OF THE PETITION, BECAUSE ART. VI, § 19(a) DOES NOT PERMIT ORDINANCE 70078 WHICH CREATES LIABILITIES OF CITIZENS AMONG THEMSELVES, IN THAT ORDINANCE 70078 ENLARGES PRESENTLY-EXISTING CONTRACTUAL DUTIES BETWEEN CITIZENS, AND AUTHORIZES AND QUALIFIES A RIGHT OF ACTION BETWEEN THIRD PARTIES

Yellow Freight Systems, Inc. v. Mayor's Com'n on Human Rights of City of Springfield, 791 S.W.2d 382 (Mo. banc 1990)

Alumax Foils, Inc. v. The City of St. Louis, 959 S.W.2d 836 (Mo. App. E.D. 1998)

Mo. Const. Art. VI, § 19(a)

III. THE TRIAL COURT ERRED IN FINDING IN FAVOR OF RESPONDENTS AND AGAINST APPELLANTS ON COUNT V OF THE PETITION, BECAUSE ORDINANCE 70078 CONSTITUTES AN UNDUE, UNAUTHORIZED AND ILLEGAL DELEGATION OF LEGISLATIVE POWERS, IN THAT IT VESTS RULE-MAKING AUTHORITY IN THE DIRECTOR OF THE DEPARTMENT OF HUMAN RESOURCES OF ST. LOUIS CITY SUBJECT TO APPROVAL BY THE WAYS AND MEANS COMMITTEE OF THE BOARD OF ALDERMEN

Missouri Coal. for Env't v. Joint Comm. on Admin. Rules, 948 S.W.2d 125 (Mo. banc 1997)

Ex parte Williams, 139 S.W.2d 485, 491 (Mo. banc 1940)

State ex rel. Royal Ins. v. Dir. of Missouri Dept. of Ins., 894 S.W.2d 159 (Mo. banc 1995)

STANDARD OF REVIEW

In bench-tried cases, the judgment of the trial court will be affirmed "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." *White v. Director of Revenue*, 321 S.W.3d 298, 307-08 (Mo. banc 2010) (*citing Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)); *Tully v. Tully*, 813 S.W.2d 926, 928 (Mo. App. E.D. 1991); *Dyna Flex Ltd. v. Charleville*, 890 S.W.2d 413, 414 (Mo. App. E.D. 1995); *Breda v. Breda*, 788 S.W.2d 769, 771 (Mo.App. E.D. 1990) ("The decree or judgment of the trial court shall be affirmed if it could properly have been reached on any reasonable theory 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."). When litigation involves a challenge to the constitutional validity of a Missouri statute, the trial court presumes its validity. *Mo. Prosecuting Attorneys v. Barton City*, 311 S.W.3d 737, 740 (Mo. banc 2010); *Missouri Ass'n. of Club Executives v. State*, 208 S.W.3d 885, 888 (Mo. banc 2006). The purpose of this presumption is to place the burden on the party challenging constitutionality. *St. Louis Cnty. v. Prestige Travel, Inc.*, 344 S.W.3d 708, 712 (Mo. banc 2011).

The appellate court also must apply the proper standard of review for the error claimed on appeal. A claim that the judgment erroneously declares or applies the law involves review of the propriety of the trial court's construction and application of the law. *White*, 321 S.W.3d at 308. Determining if a statute is constitutional involves an application of the law subject to *de novo* review. *StopAquila.org v. City of Peculiar*, 208 S.W.3d 895, 899 (Mo. banc 2006). With respect to such *de novo* questions, "the

appellate court reviews the trial court's determination independently, without deference to that court's conclusions." *Moore v. Bi-State Dev. Agency*, 132 S.W.3d 241, 242 (Mo. banc 2004).

ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING IN FAVOR OF APPELLANTS AND AGAINST RESPONDENTS ON COUNT II OF THE PETITION, BECAUSE MO. REV. STAT. § 67.1571 CONFLICTS WITH AND PREEMPTS ORDINANCE 70078, IN THAT MO. REV. STAT. § 516.500 PROHIBITS ANY CLAIM THAT THE 1998 PASSAGE OF MO. REV. STAT. § 67.1571, IN HOUSE BILL NO. 1636, VIOLATED THE SINGLE SUBJECT RULE SET OUT IN ART. III, SECTION 23 OF THE OF THE MISSOURI CONSTITUTION

In 1998, House Bill No. 1636 was passed by the General Assembly and signed into law by the Governor of the State of Missouri as Mo. Rev. Stat. § 67.1571. (L.F. 174). Mo. Rev. Stat. § 67.1571 specifically denies municipalities the power to enact minimum wage laws. Mo. Rev. Stat. § 67.1571, which is titled "Minimum wage," provides that "[n]o municipality as defined in [section 67.1401.2(9)] shall establish, mandate or otherwise require a minimum wage that exceeds the state minimum wage." Mo. Rev. Stat. § 67.1571. As defined, municipality includes the City. Mo. Rev. Stat. § 67.1401.2(9) (defining "municipality" 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"). Here, the City purports to do what Mo. Rev. Stat. § 67.1571 expressly prohibits – establish a local minimum wage that exceeds the Missouri Minimum Wage Law. Mo. Rev.

Stat. §§ 290.500, *et seq*. Mo. Rev. Stat. § 67.1571 denies the City such power. This conflict with Mo. Rev. Stat. § 67.1571 renders Ordinance 70078 void and of no effect pursuant to Art. VI, § 19(a) of the Constitution (providing that charter cities "shall have all powers which the general assembly of the state of Missouri has authority to confer upon any city," provided "such powers … are not limited or denied either by the charter so adopted or by statute").

To avoid the inescapable conclusion that Mo. Rev. Stat. § 67.1571 prevents Appellants from implementing a local minimum wage,[2] Appellants assert as an affirmative defense that Mo. Rev. Stat. § 67.1571 is procedurally unconstitutional in that it was enacted in violation of the clear title, single subject and original purpose requirements of Art. III, §§ 21 and 23 of the Missouri Constitution. (L.F. 152-53). The Judge ruled only on the single subject requirement set forth in Art. III, § 23 to declare Mo. Rev. Stat. § 67.1571 procedurally unconstitutional. (L.F. 175) ("House Bill 1636

[2] On May 28, 2015, Winston Calvert, as City Counselor to the City, prepared a memorandum regarding the legality of the City's Minimum Wage Program (the "City Counselor's Brief"). (A true and accurate copy of the City Counselor's Brief is included in the appendix accompanying this brief at A153 and incorporated herein by reference.) (A153-56) The City Counselor's Brief provides that "[o]n its face, [Mo. Rev. Stat. § 67.1571] seems to preempt the attached minimum wage ordinance. However, in [*Missouri Hotel*] the Circuit Court for the City of St. Louis held that § 67.1571 was unconstitutional." (A155).

violates the single subject rule set out in Article III, Section 23 of the Missouri Constitution and Section 67.1571 RSMo should be severed from it…").

Due to the statute of limitations contained in Mo. Rev. Stat. § 516.500, however, it is much too late for anyone to challenge the procedural constitutionality of Mo. Rev. Stat. § 67.1571 by way of a direct action or as an affirmative defense.

As a general matter, claims of procedural defects are already highly disfavored. *C.C. Dillon Co. v. City of Eureka*, 12 S.W.3d 322, 327 (Mo. banc 2000) (*quoting Stroh Brewery Co. v. State*, 954 S.W.2d 323, 326 (Mo. banc 1997) ("The use of these procedural limitations to attack the constitutionality of statutes is not favored."); *Rizzo v. State*, 189 S.W.3d 576, 578 (Mo. banc 2006) ("Indeed, acts of the legislature carry with them a strong presumption of constitutionality."). Moreover, "[t]he burden of establishing [a statute's] unconstitutionality rests upon the party questioning it." *State v. Hampton*, 653 S.W.2d 191, 194 (Mo. banc 1983) (citation omitted). The disfavor on which procedural challenges are looked—as with the presumption and burden a party challenging the constitutionality of a statute on procedural grounds must overcome—are to engender reliance upon the acts and acumen of the legislature.

Mo. Rev. Stat. § 516.500 codifies this reliance; for procedural challenges not timely brought within the limitations period, Mo. Rev. Stat. § 516.500 ensures that such challenges can never be brought:

> No action alleging a procedural defect in the enactment of a bill into law shall be commenced, had or maintained by any party later than the adjournment of the next full regular legislative session following the

> effective date of the bill as law, unless it can be shown that there was no party aggrieved who could have raised the claim within that time. In the latter circumstance, the complaining party must establish that he or she was the first person aggrieved or in the class of first persons aggrieved, and that the claim was raised not later than the adjournment of the next full regular legislative session following any person being aggrieved. **In no event shall an action alleging a procedural defect in the enactment of a bill into law be allowed later than five years after the bill or the pertinent section of the bill which is challenged becomes effective.**

Mo. Rev. Stat. § 516.500 (emphasis supplied).

Mo. Rev. Stat. § 516.500 recognizes that "[a] defect in the form of a bill does not impact on an individual's substantive rights." *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 105 (Mo. banc 1994) (Holstein, J., concurring); *see also Sernovitz v. Dershaw*, 127 A.3d 783, 789 (Pa. 2015) (noting that section 516.500 is based upon Judge Holstein's concurrence in *Hammerschmidt*). By placing a hard limit on procedural challenges—no later than the adjournment of the next full regular legislative session, unless no party was previously aggrieved, but even then, never later than five (5) years after enactment—Mo. Rev. Stat. § 516.500 "strike[s] a balance between a citizen's right to insist that the legislature comply with constitutional procedural safeguards that prevent logrolling and [promoting the] stability and finality of legislative enactments." *Hammerschmidt*, 877 S.W.2d at 105 (Holstein, J., concurring).

In 1998, House Bill No. 1636 was passed by the Missouri General Assembly and signed into law by the Governor of the State of Missouri as Mo. Rev. Stat. § 67.1571. (L.F. 174). Appellants' challenge is well beyond the adjournment of the next legislative session, and even if Appellants were the first party to be aggrieved—which Respondents vehemently deny—Appellants' challenge is well beyond the unequivocal five-year window, after which "no action alleging a procedural defect in the enactment of a bill into law" shall occur. Mo. Rev. Stat. § 516.500.

Nearly eighteen (18) legislative sessions have come and gone, with Mo. Rev. Stat. § 67.1571 on the books for nearly two decades. In an attempt to avoid the outcome-determinative effects of Mo. Rev. Stat. § 516.500—and an intact Mo. Rev. Stat. § 67.1571—Appellants contend (1) that Mo. Rev. Stat. § 67.1571 was already struck as procedurally unconstitutional by Judge Dierker in 2001, in the *Missouri Hotel* Judgment, and (2) that, regardless, Mo. Rev. Stat. § 516.500 does not bar them from challenging the procedural constitutionality of Mo. Rev. Stat. § 67.1571 seventeen years later by way of an affirmative defense.

The Trial Court properly disregarded Appellants' claim that Mo. Rev. Stat. § 67.1571 was already declared unconstitutional in 2001. (L.F. 174-75). Contrary to Appellants' protestations, Judge Dierker's ruling in the *Missouri Hotel* Judgment regarding Mo. Rev. Stat. § 67.1571 was *obiter dictum* that has no precedential effect on the validity of Mo. Rev. Stat. § 67.1571. The Trial Court erred, however, in allowing Appellants to assert a procedural challenge against Mo. Rev. Stat. § 67.1571, and in declaring Mo. Rev. Stat. § 67.1571 invalid, because this challenge was undertaken in

violation of the statute of limitations contained in Mo. Rev. Stat. § 516.500. The Trial Court further erred in allowing Appellants' procedural challenge to go forward because Appelants had the opportunity to, and in fact did, assert a procedural challenge to the constitutionality of Mo. Rev. Stat. § 67.1571 *in compliance* with the statute of limitations contained in Mo. Rev. Stat. § 516.500 back in 2001 (within *Missouri Hotel*), then strategically abandoned that challenge on appeal and complied with Mo. Rev. Stat. § 67.1571 for fourteen (14) years. Consequently, Appellants' assertion in this case, that Mo. Rev. Stat. § 67.1571 contains a procedural defect, is not an affirmative-defense shield, but rather an affirmative sword to justify Appellants' blatantly ignoring and breaking the law.

A. Judge Dierker's Ruling in the *Missouri Hotel* Judgment regarding Mo. Rev. Stat. § 67.1571 was *Obiter Dictum*

Contrary to the preamble in Ordinance 70078 and Appellants' arguments, Mo. Rev. Stat. § 67.1571 is not void because of Judge Dierker's ruling in the *Missouri Hotel* Judgment. Judge Dierker's conclusion that Mo. Rev. Stat. § 67.1571 was enacted in violation of procedural requirements in the Missouri Constitution was *obiter dictum*, with no preclusive or binding effect on this Court or in this case. As much was acknowledged by the *Missouri Hotel* Defendants.

As noted above, *Missouri Hotel* concerned a challenge to Ordinance 65045, known as the Living Wage Ordinance (the "Living Wage Ordinance"). (A28-29). The Living Wage Ordinance purported to set a minimum wage applicable to all employers who held contracts with the City to provide services, or received any financial assistance

from, or administered by, the City, and all subcontractors of such employers. (A24-25). The Living Wage Ordinance was challenged on multiple grounds, including that it was pre-empted by Mo. Rev. Stat. § 67.1571; was pre-empted by the Missouri Minimum Wage Law, in conjunction with the general pre-emption statute, Mo. Rev. Stat. § 71.010; and violated other aspects of the Missouri Constitution and the City Charter. (A47). The court held in favor of the plaintiffs and struck down the Living Wage Ordinance on several grounds, including that it was pre-empted by the Missouri Minimum Wage Law and Mo. Rev. Stat. § 71.010 – but not pursuant to Mo. Rev. Stat. § 67.1571, which Judge Dierker *incidentally* found was procedurally unconstitutional. (A77-78).

Since Ordinance 65045 was invalidated without any reliance on Judge Dierker's findings regarding Mo. Rev. Stat. § 67.1571, the *Missouri Hotel* Judgment's conclusion, that Mo. Rev. Stat. § 67.1571 was enacted unconstitutionally, was *obiter dictum*. An *obiter dictum* "is a gratuitous opinion." *Swisher v. Swisher*, 124 S.W.3d 477, 482 (Mo. App. W.D. 2003). "Statements are obiter dicta if they are not essential to the court's decision of the issue before it." *Id*. *Dicta* may be persuasive, but it is not a binding precedent. *Id*.

Holdings or language extraneous to the relief granted by the trial court have no preclusive or precedential effect. This is apparent from *Autumn Ridge Homeowners Association, Inc. v. Occhipinto*, where the Court of Appeals for the Western District of Missouri considered the appropriateness of appealing a finding which was beyond those determinations required to dispose of the claim. 311 S.W.3d 415 (Mo. App. W.D. 2010). The court noted that "[v]arious cases say that irrelevant, superfluous, or overly broad

incidental findings do not require reversal if the judgment is otherwise supported by the evidence." *Id*. at 420; *see also Craft v. Philip Morris Companies, Inc.*, 190 S.W.3d 368, 378 (Mo. App. E.D. 2005) ("On appeal, points of error relating to separable, excess legal conclusions are moot."). In *Autumn*, the court found that an appeal—limited to a judgment's superfluous language—was inherently moot because such language had no collaterally preclusive effect. *Id.* As with the language considered by the Western District in *Autumn*, there is no collaterally preclusive effect to the *Missouri Hotel* Judgment's decision regarding the constitutionality of Mo. Rev. Stat. § 67.1571 because such language was not "part-and-parcel of the issues properly decided before the court." *Id*.

Indeed, when plaintiff Associated Industries (who is also a member of Respondents in this case) filed an appeal of the *Missouri Hotel* Judgment's finding that Mo. Rev. Stat. § 67.1571 was unconstitutional, the Supreme Court, at the behest of minimum wage proponents and with the acquiescence of the City,[3] in the end dismissed the appeal in its entirety, on grounds that "no aggrieved party" filed an appeal (the City did not appeal and proponents of the minimum wage ordinance withdrew their cross-

[3] *See* Intervenor Appellee's Memorandum of Law in Support of Motion to Dismiss Appeal (A88) ("Intervenor appellees will withdraw their notice of cross-appeal if this motion is granted. Counsel for intervenor appellees have also been authorized by counsel for appellee the City of St. Louis to represent that the City of St. Louis will similarly withdraw its notice of cross appeal if this motion is granted.").

appeal because a new minimum wage ordinance, that conformed with the *Missouri Hotel* Judgment, was enacted and signed by the Mayor prior to oral argument). (A103). Thus, the statement in the *Missouri Hotel* Judgment that Mo. Rev. Stat. § 67.1571 was unconstitutional clearly has no preclusive or precedential effect; the Supreme Court would not even review it because the plaintiffs were not, and could not be, "aggrieved" by such *dicta.* As in *Autumn*, the *Missouri Hotel* Judgment's findings with regard to Mo. Rev. Stat. § 67.1571 were inessential and therefore "moot." *See also Calvert v. Plenge*, 351 S.W.3d 851, 857 (Mo. App. E.D. 2011) ("Statements that are not essential to a trial court's holding have only persuasive force, and therefore need not, and in fact cannot, be appealed."). The City, having strategically withdrawn its cross-appeal challenging the *Missouri Hotel* Judgment, pulling the proverbial rug out from under local minimum wage opponents' appeal, cannot now claim that Mo. Rev. Stat. § 67.1571 was properly declared invalid, by virtue of the *Missouri Hotel* Judgment, in 2001.

Indeed, as noted above, it is much too late for the City to have Mo. Rev. Stat. § 67.1571 set aside as procedurally unconstitutional. The short limitations period set forth in Mo. Rev. Stat. § 516.500 can only be tolled if "it can be shown that there was no party aggrieved who could have raised the claim within that time." Mo. Rev. Stat. § 516.500. But to benefit from such tolling, a party must show that they were in the first group of those aggrieved by the statute and must not bring the claim later than adjournment of the next full legislative session following any person being aggrieved. *Id*. As Judge Dierker noted in the *Missouri Hotel* Judgment, the City was in the first class aggrieved by Mo. Rev. Stat. § 67.1571 in 2001. (A58). The City has already attacked

the procedural constitutionality of Mo. Rev. Stat. § 67.1571 and strategically abandoned its claims on appeal, foreclosing any possibility for further tolling the limitations period of Mo. Rev. Stat. § 516.500. Most importantly, pursuant to the plain wording of Mo. Rev. Stat. § 516.500, under **no circumstances** shall a challenge to the procedural constitutionality of a provision be had or maintained more than five years from its enactment. *Id*.

Mo. Rev. Stat. § 67.1571 was adopted in 1998. (L.F. 174). The first aggrieved party, the City, who is also a party in the present action, availed itself of any arguable tolling in 2001, when it challenged the constitutionality of Mo. Rev. Stat. § 67.1571 in *Missouri Hotel*. Moreover, the five-year absolute limitation expired in 2003. Appellants may not avoid the explicit pre-emptive effect of Mo. Rev. Stat. § 67.1571 by resurrecting its 2001 claims, which, as of 2015, have long since grown stale.[4]

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[4] As further demonstration that Mo. Rev. Stat. § 67.1571 was not invalidated by the *Missouri Hotel* Judgment, the 2015 Kansas City Judgment held, in relevant part, that:

> Section 67.1571.1 RSMo. states, "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." House Bill No. 722 (§285.055 RSMo.) states, "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."

B. No Exception to the Limitations Period set forth in Mo. Rev. Stat. § 516.500 Applies to Appellants Because Appellants' Procedural Challenge Is Not An Affirmative Defense.

The Trial Court improperly determined that Mo. Rev. Stat. § 516.500 places no bar on Appellants' challenges to the procedural constitutionality of Mo. Rev. Stat. § 67.1571 so long as such a challenge is couched as an affirmative defense, citing *Boone Nat. Sav. & Loan Ass'n, F.A. v. Crouch* for the proposition that "[u]nder 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." 47 S.W.3d 371, 375 (Mo. banc 2001). (L.F. 174) Proper application of *Crouch*, however, mandates reversal of the Trial Court's invalidation of Mo. Rev. Stat. § 67.1571. Specifically, in *Crouch*, the defendant did not,

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> **These two provisions clearly and unequivocally prohibit Plaintiff from establishing a minimum wage**, as proposed by Committee Substitute for Ordinance No. 150660. Committee Substitute for Ordinance No. 150660 is inconsistent with the above state statutes and is therefore unconstitutional, on its face. See, Missouri Constitution, Article VI, § 19(a).

(A143-44) (emphases added). Unlike the "invalidation" of Mo. Rev. Stat. § 67.1571 contained in the *Missouri Hotel* Judgment, the Kansas City Judgment's holding—that Ordinance 150660 conflicted with Mo. Rev. Stat. § 67.1571—was necessary to the relief as granted and as sought in *City of Kansas, Missouri v. Kansas City Board of Election Commissioners, et al.*, Case No. 1516-CV19627 (Mo. Cir. Sept. 22, 2015).

and had no chance to, assert a violation of the Equal Credit Opportunity Act. *Crouch*, 47 S.W.3d at 376. Also distinguishing the present case from *Crouch*, asserting an untimely violation of the Equal Credit Opportunity is contemplated by the federal statute's equitable and remedial nature. *Id*. *Crouch* involved a defendant in need of a shield; Appellants, who had knowledge of, asserted, and then voluntarily abandoned their procedural challenge to the constitutionality of Mo. Rev. Stat. § 67.1571, conversely, seek to use *Crouch* as a sword. Nor is there any equitable dimension to Mo. Rev. Stat. §§ 67.1571 or 516.500 on which Appellants can otherwise rely. Here, equity demands that Appellants not be able to take a second bite at the apple nearly eighteen (18) years later.

Respondents' Petition sought a declaratory judgment, invalidating Ordinance 70078 and providing injunctive relief regarding enforcement of the same. (L.F. 8-35). At no point in Respondents' Petition or in subsequent filings have Respondents sought a judgment establishing fault or liability on the part of Appellants. Accordingly, Appellants are not asserting the unconstitutionality of Mo. Rev. Stat. § 67.1571 defensively, to avoid liability or damages. *See Crouch*, 47 S.W.3d at 375 ("Under Missouri's pleading rules, an affirmative defense is a matter that is asserted to **avoid liability**, even if the facts pleaded in the petition are proved.") (emphasis added).

Where Appellants are not asserting the unconstitutionality of Mo. Rev. Stat. § 67.1571 to escape liability, they functionally assert it as a declaratory counterclaim within Respondents' initial declaratory action. *McCarthy v. Cmty. Fire Prot. Dist. of St. Louis County*, 876 S.W.2d 700, 702 (Mo. App. E.D. 1994) ("Whether a pleading is a

'counterclaim' or an 'affirmative defense' often depends on the intent of the pleader."). Missouri courts are authorized to look beyond how a party has styled their response (whether as an "affirmative defense" or a "counterclaim") to determine the function of the allegation and the nature of the attending request. *Crouch*, 47 S.W.3d at 374 ("Under our pleading rule, Rule 55.08, if an affirmative defense is called a counterclaim, or vice versa, the court is to treat the counterclaim or affirmative defense as though it were properly labeled."); *see also* Mo. Sup. Ct. R. 55.08 ("When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court may treat the pleadings as if there had been a proper designation.").

While Missouri courts will not generally hold an improper pleading designation against Appellants, this does not entitle Appellants to smuggle their counterclaim past the clear and unequivocal statute of limitations of Mo. Rev. Stat. § 516.500 (applying broadly to "complaining parties" and providing "**[i]n no event** shall an action alleging a procedural defect in the enactment of a bill into law be allowed later than five years after the bill or the pertinent section of the bill which is challenged becomes effective") (emphasis added).

Even as a counterclaim, Appellants' claims are improper. Appellants cannot successfully assert a counterclaim, that Mo. Rev. Stat. § 67.1571 is procedurally invalid, *against* Respondents. While Respondents appropriately derive rights from Mo. Rev. Stat. § 67.1571, Respondents are not the appropriate real party in interest for claims that Mo. Rev. Stat. § 67.1571 is invalid.

The foregoing distinction—between a counterclaim and a true affirmative defense—also undercuts any reliance Appellants might hope to place on *Lebeau v. Commissioners of Franklin Cnty., Missouri*, 422 S.W.3d 284, 291 (Mo. banc 2014). In *Lebeau*, the Supreme Court of Missouri considered whether plaintiffs "must first be charged with a crime or municipal ordinance violation . . . to have a ripe controversy." *Id*. at 291. Separate and apart from any issue before it, in a footnote, the Supreme Court opined that had plaintiffs "waited to assert their claims [of procedural unconstitutionality] as a defense to a municipal violation, they would not have been time barred from doing so under this Court's recent precedent." *Id*. at 291, N.6. Clearly the situation contemplated in *Lebeau* concerned a claim of procedural unconstitutionality asserted as an affirmative defense to avoid liability from the party charged with enforcing the offending law. *Crouch*, 47 S.W.3d at 375. The same is true regarding the "recent precedent" *Lebeau* cited. *See Schaefer v. Koster*, 342 S.W.3d 299, 300, N.1 (Mo. banc 2011) ("Section 516.500, which places a limit upon when an 'action' can be 'commenced, had or maintained' to challenge procedural irregularities in the enactment of a law, does not apply *to a criminal defendant who raises a challenge to the offending statute as a defense in the criminal case*.") (emphasis added).

Schaefer and *Lebeau* are further distinguishable from the present case in that the former involved a criminal action and the latter hypothesized about the prosecution of a municipal violation. "Municipal ordinance violations are said to be 'quasi-criminal in nature.'" *City of Webster Groves v. Erickson*, 789 S.W.2d 824, 826 (Mo. App. E.D. 1990) (*quoting Strode v. Director of Revenue*, 724 S.W.2d 245, 247 (Mo. banc 1987));

see also City of Stanberry v. O'Neal, 150 S.W. 1104, 1105 (Mo. App. 1912) ("Thus it has been ruled, time and again, by the Supreme Court, that such cases are quasi criminal, which is no less than saying that they are like criminal cases in many respects."). The rationale for allowing individuals to assert the unconstitutionality of a statute as a defense to the prosecution of a criminal action—i.e., the heightened due process concerns—does not extend to actions for declaratory judgment. *See, e.g., Brunner v. City of Arnold*, 427 S.W.3d 201, 220 (Mo. App. E.D. 2013) (noting that, in quasi-criminal actions, there are a "myriad of due process and other constitutional issues at stake"). Moreover, in a criminal or quasi-criminal action, the party seeking to enforce a statute or ordinance is *de facto* the real party in interest, against whom the constitutionality or validity of a statute or ordinance can properly be claimed.

In light of the foregoing, the limitations periods set forth in Mo. Rev. Stat. § 516.500 prohibits Appellants from reviving a claim regarding the procedural constitutionality of Mo. Rev. Stat. § 67.1571 in this action.

C. The Doctrine of Laches Prevents Appellants from Challenging the Procedural Constitutionality of Mo. Rev. Stat. § 67.1571

Even if Mo. Rev. Stat. § 516.500 placed no bar on Appellants' ability to challenge Mo. Rev. Stat. § 67.1571—which Respondents vehemently deny—Appellants' ability to challenge Mo. Rev. Stat. § 67.1571 is independently, and further, barred by the doctrine of laches. *See Rentschler v. Nixon*, 311 S.W.3d 783, 787 N.3 (Mo. banc 2010) ("Although the legal bar of [section 516.500] may not be raised procedurally, the doctrine of laches may still operate to bar such unreasonably tardy claims...") (emphasis added).

"The doctrine of laches is the equitable counterpart of the statute of limitation defense." *Empiregas, Inc. of Palmyra v. Zinn*, 833 S.W.2d 449, 451 (Mo. App. E.D. 1992); *see also, e.g., Crouch*, 47 S.W.3d at 376 ("An affirmative avoidance might include, for example, a defense of laches that Ms. Crouch knew her rights, did not assert them, and acquiesced in the granting of further credit by Boone National."). "'Laches' is the neglect for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done." *Hagely v. Bd. of Educ. of Webster Groves Sch. Dist.*, 841 S.W.2d 663, 669 (Mo. banc 1992). Even if Appellants can circumvent Mo. Rev. Stat. § 516.500 by couching their challenge as an affirmative defense, they cannot so circumvent equity. This is especially true where, as here, the City asserted and abandoned their challenge to the procedural constitutionality of Mo. Rev. Stat. § 67.1571 more than a decade ago. The City's neglect in not doing "what should have been done" for an "unreasonable and unexplained length of time" operates to bar their claim under the doctrine of laches.

In light of the foregoing, doctrine of laches prohibits Appellants from reviving a claim regarding the procedural constitutionality of Mo. Rev. Stat. § 67.1571 in this action.

II. THE TRIAL COURT ERRED IN FINDING IN FAVOR OF APPELLANTS AND AGAINST RESPONDENTS ON COUNT IV OF THE PETITION, BECAUSE ART. VI, § 19(a) OF THE MISSOURI CONSTITUTION PROHIBITS ORDINANCE 70078, WHICH CREATES LIABILITIES OF CITIZENS AMONG THEMSELVES, IN THAT ORDINANCE 70078 ENLARGES PRESENTLY-EXISTING CONTRACTUAL DUTIES BETWEEN CITIZENS, AND AUTHORIZES AND QUALIFIES A RIGHT OF ACTION BETWEEN THIRD PARTIES

Charter cities derive their constitutional grant of power from Art. VI, § 19(a) of the Missouri Constitution:

> 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, § 19(a). "Section 19(a) clearly grants to a constitutional charter city all power which the legislature is authorized to grant." *Yellow Freight Systems, Inc. v. Mayor's Com'n on Human Rights of City of Springfield*, 791 S.W.2d 382, 385 (Mo. banc 1990). However, "[t]he state by granting to [a] city the right to adopt and frame a charter for its own government did not confer upon [that] city the right to assume under its charter all of the powers which the state may exercise within the city, but conferred the

right to assume those powers incident to it as a municipality." *Id.* (internal citations omitted).

Mo. Const. Art. VI, § 19(a) requires that charter city ordinances "be consistent with the constitution and not limited or denied by state statutes." *Alumax Foils, Inc. v. The City of St. Louis*, 959 S.W.2d 836, 839 (Mo. Ct. App. E.D. 1998) (*citing City of Springfield v. Goff*, 918 S.W.2d 786,789 (Mo. bane 1996)). The City is a constitutional charter city pursuant to Art. VI, § 19 of the Missouri Constitution. The City operates under a charter approved by voters on June 30, 1914, as amended (the "Charter") and, accordingly, is granted all power which the legislature is authorized to grant and "possesses all powers which are not limited or denied by the constitution, by statute, or the charter itself." *Yellow Freight*, 791 S.W.2d at 385 (*quoting State ex inf. Hannah v. City of St. Charles*, 676 S.W.2d 508, 512 (Mo. banc 1984)).

Art. IV, § 26 of the Charter states:

> The board of aldermen shall not have power to relieve or exempt any person from the payment of any tax or from any burden imposed by law; nor to authorize the compromise of any disputed contractual demand, or any allowance on account thereof not provided for in the contract, except on recommendation of the board of estimate and apportionment.

(A207). This provision makes it clear that the Board of Aldermen does not have the authority to alter the contractual obligations between private citizens.

Furthermore, Missouri case law reinforces this point. "It has been repeatedly ruled in this state that a city has no power, by municipal ordinance, to create a civil liability

from one citizen to another, nor to relieve one citizen from that liability by imposing it on another." *Yellow Freight*, 791 S.W.2d at 384 (*quoting City of Joplin v. Wheeler*, 158 S.W. 924, 928-29 (Mo. banc 1913)). This doctrine operates independently, and separate from, the strictures on municipal legislative authority derived from Mo. Const. Art. VI, § 19(a). *Yellow Freight*, 791 S.W.2d at 386 ("[T]he denial of the power to create the cause of action described above need not rest upon a specific definition of the scope of the powers the legislature is authorized to delegate to a city charter city under art. VI, § 19(a).").

The issue here is not whether the City, and other charter cities, can adjust private rights and liability generally or with regard to private contracts, property rights, or other substantive areas that may reach beyond local boundaries. The narrow question before this Court is whether municipal legislative authority extends to creating a private cause of action as a remedy for conduct prohibited by Ordinance 70078. On this issue, Missouri courts have "repeatedly ruled" that it does not and endorsed the "general rule" proffered by Eugene McQuillin:

> A well-established general rule illustrates the basic limitation upon the authority of a city to create a cause of action for recovery by an individual: "[A] municipal corporation cannot create by ordinance a right of action between third persons or enlarge the common law or statutory duty or liability of citizens among themselves."

Yellow Freight, 791 S.W.2d at 384 (*quoting* 6 E. McQuillin, Municipal Corporations § 22.01 (3rd ed. Rev. 1988)) (noting that this "limitation is recognized in Missouri").

In addition to establishing the City's Minimum Wage Program, Ordinance 70078 "set[s] forth remedies for violations of the minimum wage rate." (A124). Section 2(E) of Ordinance 70078 provides that:

> It shall be a violation of this Ordinance for any Employer to pay any Employee a Wage below the minimum wage rate set forth herein. Each day that the Employer pays the Employee a Wage below the minimum wage rate set forth herein shall be a separate violation.

(A135). Section 3(A) of Ordinance 70078 provides that:

> It shall be a violation of this Ordinance for an employer or any other person to interfere with, restrain, or deny the exercise of, or the attempt to exercise[,] any right protected under this Ordinance.

(*Id.*). Section 3(B)(6) of Ordinance 70078 provides that:

> It shall be unlawful, and a violation of this Ordinance, for any employer to discharge any employee, to reduce the compensation of any employee, to take any adverse action against an employee, or to discriminate against an employee because the employee engaged in any of the following activities: … exercising, in good faith, the rights protected by this Ordinance [and]… **availing himself or herself of the civil remedies provided herein.**

(A136). Finally, section 3(C) of Ordinance 70078 provides that:

> It shall be a violation for an Employer to enter into any agreement whereby the Employer will pay an individual to work for less than the minimum

wage prescribed in this Ordinance as that minimum wage may be amended from time to time.

(*Id*.).

With regard to penalties for the foregoing violations, section 5(C) of Ordinance 70078 provides:

> Performance of any act prohibited by this Ordinance, and failure to perform any act required by this 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.

(A138). Finally, by way of an additional consequence, section 5(C) goes on to provide that:

> 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.

(*Id*.) (emphasis added).

The Trial Court properly states that Ordinance 70078 cannot (1) create a right of action between third persons or (2) enlarge the common law or statutory duty or liability

of citizens among themselves. *Yellow Freight*, 791 S.W.2d at 384 (*quoting* 6 E. McQuillin, Municipal Corporations § 22.01 (3rd ed. Rev. 1988)). (L.F. 177). The Trial Court erred in determining that Ordinance 70078 does not enlarge common law or statutory duties, or create a cause of action between third parties, simply because "Ordinance 70078 does not state that it creates a civil liability from one citizen to another." (*Id.*). Because Ordinance 70078 creates a right of action between third persons and enlarges the common law or statutory duty or liability of citizens among themselves, it is in violation of the Missouri Constitution, void and of no force and effect.

A. Ordinance 70078 Enlarges the Common Law or Statutory Duty or Liability of Citizens Among Themselves

With regard to the latter—the enlargement of liability of citizens among themselves—"[t]he application of this doctrine to cases based on negligence has led to differences of opinions and conflicting decisions[], but as applied to contractual and similar obligations and liabilities it has never been questioned." *Id.* (*quoting Wheeler*, 158 S.W. at 928-29). Here, Ordinance 70078 clearly "create[s] a civil liability from one citizen to another," i.e., from an employer to an employee, within the context of "contractual and similar obligations." *Id.*

As an initial matter, section 3(C) of Ordinance 70078 expressly prohibits prospective agreements whereby an employer will pay an employee to work for less than the prescribed minimum wage rate. (A136). While Ordinance 70078 takes care not to expressly prohibit then-existing employment agreements, it nonetheless unavoidably prohibits their terms implicitly. Also, Ordinance 70078 mandates that certain contractual

terms exist in every employment agreement or relationship. First, section 3(A) of Ordinance 70078 prohibits an employer to interfere with, restrain, or deny the exercise of any right protected therein. (A135). Such rights clearly include an employee's right to be paid pursuant to the minimum wage rate set forth in Ordinance 70078: sections 4(A) and 4(B) of Ordinance 70078 require an employer to advise an employee, via a posting and a notice, of the current minimum wage rate and the employee's rights under Ordinance 70078. (A137-38). Advising employees of their rights under Ordinance 70078 mandates a wholesale inclusion of sections 2, 3 and 5 of Ordinance 70078, which are titled, respectively, "Wage Requirements," "Other Prohibited Conduct" and "Enforcement." (A131-39). Ordinance 70078 champions an employee's right to be paid according to the minimum wage rate set forth therein. By restraining an employer from interfering with this right, Ordinance 70078 not only dictates the terms of prospective employment contracts, it also creates liability—in the form of increased compensation—within presently-existing contractual obligations between an employer and employee, when the employer's payment obligations run afoul of the minimum wage rate set forth in Ordinance 70078. *Yellow Freight*, 791 S.W.2d at 387 (quoting *U.S. Life Title Ins. Co. v. Brents*, 676 S.W.2d 839, 842 (Mo. App. W.D. 1984)) ("[L]aws providing for penalties and forfeitures are always given only prospective application, and retrospective application would render such a statute unconstitutional.").

In light of the foregoing, Ordinance 70078 clearly enlarges the duties or liabilities of citizens among themselves and, accordingly, is in violation of the Missouri Constitution, void and of no force and effect.

B. Ordinance 70078 Creates a Right of Action between Third Persons

A city has no power, by municipal ordinance, to create civil liability from one citizen to another. *Yellow Freight*, 791 S.W.2d at 384. With regard to whether Ordinance 70078 creates a right of action between third persons, "[t]he basic issue can be placed in proper perspective only by consideration of the nature of the remedy provided by the ordinance." *Id.*

Under the express terms of Ordinance 70078, any kind of recovery is predicated upon the determination of a violation of Ordinance 70078. Specifically, Ordinance 70078 provides that paying an employee a wage below the minimum wage rate as set forth in Ordinance 70078 constitutes a violation of Ordinance 70078. (A135-36). Therefore the cause of action purportedly created by Ordinance 70078 is for the benefit of an individual, i.e. the employee. *Yellow Freight*, 791 S.W.2d at 385. Moreover, the cause of action established by a violation of Ordinance 70078 creates liability from one citizen to another, i.e. from the employer to the employee. (A138) (providing that an employer "may be subject to conditions which will serve to compensate the victim, including that the [e]mployer pay restitution to any [e]mployee in the form of unpaid back wages plus interest from the date of non-payment or underpayment"). For this reason alone, Ordinance 70078 is in violation of the Missouri Constitution and of no force and effect.

This doctrine, which bars the creation of civil liability between citizens, "as applied to contractual and similar obligations and liabilities[,] . . . has never been questioned." *Yellow Freight*, 791 S.W.2d at 384 (*quoting Wheeler*, 158 S.W. at 928-29).

Therefore Ordinance 70078 is in conflict with the Missouri Constitution by mandating a provision of a contract between private employers and employees, i.e. an established minimum wage rate. *See* Ordinance, 70078 § 3(C) ("It shall be a violation for an Employer to enter into any agreement whereby the Employer will pay an individual to work for less than the minimum wage prescribed in this Ordinance as that minimum wage may be amended from time to time."). Liability and recoupment under said contract, with regard to that provision, is compelled and established solely by violation of Ordinance 70078. Thus, by its own terms, Ordinance 70078 creates a contractual liability from one citizen to another. Such a power is not and cannot be delegated to any municipality, including the City, by the State.

III. THE TRIAL COURT ERRED IN FINDING IN FAVOR OF RESPONDENTS AND AGAINST APPELLANTS ON COUNT V OF THE PETITION, BECAUSE ORDINANCE 70078 CONSTITUTES AN UNDUE, UNAUTHORIZED AND ILLEGAL DELEGATION OF LEGISLATIVE POWERS, IN THAT IT VESTS RULE-MAKING AUTHORITY IN THE DIRECTOR OF THE DEPARTMENT OF HUMAN RESOURCES OF ST. LOUIS CITY SUBJECT TO APPROVAL BY THE WAYS AND MEANS COMMITTEE OF THE BOARD OF ALDERMEN

Ordinance 70078 vests the Director with the authority "to promulgate rules and regulations regarding the interpretation, application, and enforcement of [the] Ordinance." (A137). "Such rules and regulations may include, but are not limited to, those further *defining* terms used in [Ordinance 70078], and setting forth more particularized applications of [Ordinance 70078's] exceptions and exemptions. *Id*. However, this grant of power is subject to the "direction and approval from the Ways and Means Committee." *Id*.

As an initial matter, "[a] legislative body cannot delegate its authority, but *alone* must exercise its legislative functions." *Ex parte Williams*, 139 S.W.2d 485, 491 (Mo. banc 1940) (*quoting Cavanaugh v. Gerk*, 280 S.W. 51, 52 (Mo. banc 1926)) (emphasis added). The legislative power of the City is vested in the Board of Aldermen. *See* Charter, Art. IV, § 1. (A188).

Appellants and the Trial Court rely on an exception to this non-delegation rule, which permits "discretion" where it "relates to the administration of a police regulation

and is necessary to protect the public morals, health, safety, and general welfare." *Id*. at 490 (*quoting State ex rel. Mackey v. Hyde*, 286 S.W. 363, 366 (Mo. banc 1926)); *see also* L.F. 179 ("The Court finds that, to the extent Ordinance 70078 delegates the authority of the City's Board of Aldermen, it falls within the general exceptions to the rule that a legislative body cannot delegate its authority."). However, the Trial Court predicated this finding on its finding that "Ordinance 70078 … *expressly states* that it is necessary to protect the public morals, health, safety and general welfare." L.F. 179. (emphasis added). This is improper. The validity of a grant of discretion does not depend on how a statute or ordinance is styled by its drafters; rather, "[t]he validity of a grant of discretion depends largely upon the *nature of the business or thing* with respect to which it is to be exercised." *Williams*, 139 S.W.2d at 490 (quoting *Hyde*, 286 S.W. at 366) (emphasis added). An exemplar provided by the Supreme Court in *Williams* is particularly relevant here: "it is well established that in order for a … 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*. quoting *Hyde*, 286 S.W. at 366) (emphasis added).

Regardless of how its drafters elected to style it, Ordinance 70078 places restrictions and requirements upon the employment of individuals within the City (i.e., lawful business, in itself harmless) without specifying the rules and conditions to be observed in such conduct or business. (A137). In order to propel this goal, Ordinance 70078 vests substantial authority in the Director, allowing him or her to define the terms of Ordinance 70078 and develop "particularized applications" of its prohibitions.

(A137). Accordingly, Ordinance 70078 is void because it constitutes an undue, unauthorized and illegal delegation of legislative powers.

Even if the *type* of delegation of power set forth in Ordinance 70078 were subject to an exception, or otherwise proper, the *manner* in which power is delegated is unconstitutional. The power vested in the Director by Ordinance 70078 is subject to the "direction *and approval* from the Ways and Means Committee of the Board of Aldermen." *Id*. (emphasis added). To authorize the Director to "promulgate" rules and regulations, while simultaneously subjecting that authority to approval by the Ways and Means Committee, constitutes a legislative veto, in violation of article II, section 1 of the Missouri Constitution; article IV, sections 1 and 23 of the City Charter and article VI, section 19(a) of the Missouri Constitution.

Article II, Section 1 of the Missouri Constitution provides that:

> The powers of government shall be divided into three distinct departments--the legislative, executive and judicial--each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.

Mo. Const. Art. II, § 1. "The legislative power of the [City] shall, subject to limitations of this charter, be vested in the [Board of Aldermen] …" *See* City Charter, art. IV, § 1. (A188). In enacting Ordinance 70078, the Board of Aldermen performed a legislative function. *Missouri Coal. for Env't v. Joint Comm. on Admin. Rules*, 948 S.W.2d 125,

134 (Mo. banc 1997). However the authority granted to the Director under Ordinance 70078—to promulgate rules and regulations—is inarguably an executive function. *State ex rel. Royal Ins. v. Dir. of Missouri Dept. of Ins.*, 894 S.W.2d 159, 161 (Mo. banc 1995) ("Rulemaking is an executive power."); *Missouri Coal. for Env't v. Joint Comm. on Admin. Rules*, 948 S.W.2d 125, 133 (Mo. banc 1997) ("Promulgation of rules and regulations is an executive function."). Conditioning the authority of the Director to promulgate rules and regulations only upon approval by the Ways and Means Committee of the Board of Aldermen permits an unconstitutional legislative interference into an executive power. *Id*. ("A preemptive action of the legislature, whether such action be suspension of a rule, revocation of a rule, or prior approval of a proposed rule, must be a 'legislative' action.").

"Once the legislature 'makes its choice in enacting legislation, its participation ends." *Joint Comm. on Admin. Rules*, 948 S.W.2d 125, 134 (Mo. banc 1997) (quoting *Bowsher v. Synar*, 478 U.S. 714, 733-34 (1986)). "The legislature may not unilaterally control execution of rulemaking authority after its delegation of rulemaking power, regardless of whether it does so by suspension, revocation, or *prior approval of administrative rules*." *Id*. (emphasis added) (noting that the legislature can permissibly attempt to control the executive branch through amendatory or supplemental legislation, the power of appropriation or committee hearings, investigations, or information requests). The Board of Aldermen's goal of empowering itself to curtail the Director's overzealous intrusion in citizen's lives is laudable, however, it does not warrant an equally overzealous concentration of power in the Board of Aldermen.

The strong separation of powers policy written into the constitution is reflective of its authors' belief in Thomas Jefferson's proposition that "concentration of the three powers 'in the same hands is precisely the definition of despotic government.'" *Joint Comm. on Admin. Rules*, 948 S.W.2d 125, 134 (quoting Gordon S. Wood, Creation of the American Republic, 1776–1787 451–52 (1969)). The "absorption of 'all the powers of government, legislative, executive, and judiciary,' even if by the democratically elected legislature, amounts to no more than " 'elective despotism.'" *Id*.

> The doctrine of the separation of powers [is not meant to] promote efficiency but to preclude the exercise of arbitrary power. The purpose [is] not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

Myers v. United States, 272 U.S. 52, 293, 47 S.Ct. 21, 85, 71 L.Ed. 160 (1926) (Brandeis, J., dissenting).

The Charter forms the second barrier to the constitutionality of the legislative veto set forth in Ordinance 70078. As noted above, the Ways and Means Committee's "prior approval of a proposed rule[] must be a 'legislative action.'" *Joint Comm. on Admin. Rules*, 948 S.W.2d at 134. However, Art. IV, §§ 1 and 23 of the Charter limit the legislative powers of the Board of Aldermen to the passage of ordinances. Art. IV, § 1 of the Charter provides that legislative power of the City is vested in the Board of Aldermen. *See* Charter, Art. IV, § 1. (A188). Art. IV, § 23 of the Charter, which is titled "Legislative and administrative powers of the board," provides that the Board of

Aldermen "shall have power *by ordinance* … to exercise *all the powers* of the city and prove all means necessary or proper therefor." *See* Charter, Art. IV, § 23 (emphasis added). (A203). In authorizing a "legislative action" outside the strictures imposed for the adoption of ordinances –*see, e.g.,* Charter Art. IV, § 11 (providing that ordinances are to be passed by bill), 13 (providing that bills are to contain a single subject), and 16 (setting forth the procedure for the adoption of ordinances) – the Board of Aldermen violated City Charter and Art. VI, § 19(a) of the Missouri Constitution (providing that charter cities, such as the City, shall have powers that, *inter alia*, "are not limited or denied … by the charter so adopted.") (A197-200). By authorizing a grant of authority to the Director which is, in every instance, curtailed by the Ways and Means Committee's approval, the Board of Aldermen also attempted to grant themselves a "legislative action" immune from the Charter mandates regarding the proper passage of an ordinance. The only proper curtailment of the Director's rule-making authority is confined to that outlined in Art. IV of the Charter relating to the procedures for bill passage and ordinance adoption. See, Charter, Art. IV, §§ 11, 13, 16. (*Id.*). Accordingly, Ordinance 70078 is in violation of Art. II, § 1 of the Missouri Constitution; Art. IV, §§ 1 and 23 of the Charter, and therefore, Art. VI, § 19(a) of the Missouri Constitution as well. In light of the foregoing, Ordinance 70078 is void, invalid and unenforceable.

Ordinance 70078 authorizes the Director to promulgate rules and regulations to define its terms and set forth particularized applications of its general prohibits. (A137). This grant is, in and of itself, an indictment of the entirety of the Ordinance 70078. Absent appropriately promulgated rules and regulations, Ordinance 70078 is left hanging

in the wind, with loose definitions and only general applications. Accordingly, it cannot be said that this provision is severable.

The City and the Board of Aldermen were in a rush to get Ordinance 70078 on the books before it was further barred by Mo. Rev. Stat. § 285.055. In an effort to beat their deadline—August 28, 2015—they drafted a vague, generally applicable ordinance, styled the same as an emergency ordinance, and enacted it on the day of their deadline. Knowing it was half-baked, the Board of Aldermen authorized the Director to distill Ordinance 70078 down into concrete language, defining its terms and giving it particularized applications. However, the Board of Aldermen, nervous about the potential ramifications, did not want to completely relinquish their control over the substance of Ordinance 70078. So they drafted themselves a backdoor legislative veto. The result of which is an impermissible violation of the Missouri Constitution and the Charter. The impropriety of the Board of Aldermen's unwillingness to give up control, not only renders that portion of Ordinance 70078 invalid, it serves as an indictment of the entirety of Ordinance 70078. Accordingly, Ordinance 70078, in its entirety, is unconstitutional, void, invalid and unenforceable.

CONCLUSION

For all the foregoing reasons, we respectfully submit that the Trial Court's Judgment, ruling in favor of Appellants and against Respondents on Counts II, IV and V, must be reversed. Respondents also submit that the Trial Court's Judgment, ruling in favor of Respondents and against Appellants on Count I and III, must be affirmed.

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of April, 2016, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system on all counsel of record. In addition, a copy of the foregoing was sent via e-mail to the following:

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Supreme Court Rule 84.06(c), that this Brief of Respondents complies with Rule 55.03, and with the limitations contained in Rule 84.06(b), and that it contains 14,798 words, excluding the cover page, the signature block, Certificate of Service and this Certificate, as determined by the Microsoft Word 2010 word-counting system.

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