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

RESPONDENTS/CROSS-APPELLANTS' COMBINED RESPONSE AND CROSS-REPLY BRIEF

SPENCER FANE LLP

Jane E. Dueker, MO #43156
Thomas W. Hayde, MO #57368
Arthur D. Gregg, MO #67098
1 N. Brentwood Blvd., Suite 1000
St. Louis, MO 63105
Telephone: (314) 863-7733
Facsimile: (314) 862-4656
jdueker@spencerfane.com
thayde@spencerfane.com
agregg@spencerfane.com

Attorneys for
Respondents/Cross-Appellants

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES v

ARGUMENT IN RESPONSE TO POINTS RELIED ON FOR APPELLANTS/CROSS-RESPONDENTS' APPEAL 1

I. THE TRIAL COURT DID NOT ERR IN FINDING IN APPELLANTS/CROSS-RESPONDENTS' FAVOR ON COUNT I OF THE PETITION BECAUSE ORDINANCE 70078 CONFLICTS WITH MISSOURI REVISED STATUTE SECTION 71.010 AND MISSOURI'S MINIMUM WAGE LAW, MISSOURI REVISED STATUTE SECTIONS 290.500, *ET SEQ.*, IN THAT (1) ORDINANCE 70078 PROHIBITS WHAT MISSOURI'S MINIMUM WAGE LAW PERMITS AND (2) MISSOURI REVISED STATUTE SECTION 285.055 DOES NOT REBUT OR OTHERWISE AFFECT THE CLEAR PREEMPTION OF ORDINANCE 70078 BY MISSOURI REVISED STATUTE SECTION 71.010 AND THE MISSOURI MINIMUM WAGE LAW. 1

A. Ordinance 70078 Conflicts With The Missouri Minimum Wage Law And Mo. Rev. Stat. § 71.010 Because It Prohibits What The Missouri Minimum Wage Law Permits 2

1. "Standard-Setting Prescriptions" Under *Carlson* 15

2. Prohibitions (That Leave Room For Supplementation) Under *Carlson* 18

3. The Missouri Minimum Wage Law Clearly Contains "Standard-Setting Prescriptions" Under *Carlson*..... 20

B. Ordinance 70078 Conflicts With The Missouri Minimum Wage Law And Mo. Rev. Stat. § 71.010 Because Mo. Rev. Stat. § 285.055 Does Not Rebut Or Otherwise Affect Ordinance 70078's Clear Preemption By The Missouri Minimum Wage Law And Mo. Rev. Stat. § 71.010. 22

1. HB 722 Is A Prohibition Not An Authorization 24

2. HB 722 Has No Ability To Render Ordinance 70078 In Compliance With The Missouri Minimum Wage Law And Mo. Rev. Stat. §§ 71.010 and 67.1571 26

II. THE TRIAL COURT DID NOT ERR IN FINDING IN APPELLANTS/CROSS-RESPONDENTS' FAVOR ON COUNT III OF THE PETITION BECAUSE THE ORDINANCE VIOLATES THE CHARTER AUTHORITY OF THE CITY OF ST. LOUIS, IN THAT (1) THE ORDINANCE CONFLICTS WITH MISSOURI REVISED STATUTE SECTION 71.010 AND MISSOURI'S MINIMUM WAGE LAW, MISSOURI REVISED STATUTE SECTIONS 290.500, *ET SEQ.*, AND (2) THE ESTABLISHMENT OF A MINIMUM WAGE IS NOT A PURELY LOCAL CONCERN 29

A. Ordinance 70078 Violates The Charter Authority Of The City In That Ordinance 70078 Conflicts With Mo. Rev. Stat. § 71.010 And The Missouri Minimum Wage Law 29

B. Ordinance 70078 Violates The Charter Authority Of The City In That The Establishment Of A Minimum Wage Is Not A *Purely* Local Concern 30

CONCLUSION FOR RESPONSE TO APPELLANTS/CROSS-RESPONDENTS' APPEAL 31

ARGUMENT IN REPLY TO APPELLANTS/CROSS-RESPONDENTS' ARGUMENT IN RESPONSE TO RESPONDENTS/CROSS-APPELLANTS' POINTS RELIED ON 32

I. APPELLANTS HAVE NOT AVOIDED THE CLEAR PREEMPTION OF ORDINANCE 70078 BY MISSOURI REVISED STATUTE SECTION 67.1571 32

A. Appellants Cannot Identify A Single Case In Which Mo. Rev. Stat. § 67.1571 Was Held Unconstitutional As Part Of The Rationale For The Court's Decision..... 34

B. The City Was In The Class Of The First Persons Aggrieved By Mo. Rev. Stat. § 67.1571 37

C. Mo. Rev. Stat. § 516.500 Demands That "In No Event" Should Appellants Be Allowed To Challenge Mo. Rev. Stat. § 67.1571 In The Present Action 39

D. Equity Demands That In No Event Should Appellants Be Allowed To Challenge Mo. Rev. Stat. § 67.1571 In The Present Action 43

II. ORDINANCE 70078 CREATES LIABILITIES OF CITIZENS AMONG THEMSELVES, IN THAT ORDINANCE 70078 ENLARGES PRESENTLY-EXISTING CONTRACTUAL DUTIES BETWEEN CITIZENS AND QUALIFIES A RIGHT OF ACTION BETWEEN THIRD PARTIES 45

A. Ordinance 70078 Enlarges the Common Law or Statutory Duty or Liability of Citizens Among Themselves 47

B. Ordinance 70078 Creates a Right of Action between Third Persons 49

III. ORDINANCE 70078 CONSTITUTES AN UNDUE, UNAUTHORIZED AND ILLEGAL DELEGATION OF LEGISLATIVE POWERS 51

CONCLUSION FOR REPLY TO APPELLANTS/CROSS-RESPONDENTS' RESPONSE TO RESPONDENTS/CROSS-APPELLANTS' APPEAL 55

CERTIFICATE OF COMPLIANCE 57

CERTIFICATE OF SERVICE 58

TABLE OF AUTHORITIES

Page(s)

CASES

Alumax Foils, Inc. v. The City of St. Louis,

959 S.W.2d 836 (Mo. Ct. App. E.D. 1998) 45

Armco Steel v. City of Kansas City,

883 S.W.2d 3 (Mo. banc 1994) 27

Autumn Ridge Homeowners Association, Inc. v. Occhipinto,

311 S.W.3d 415 (Mo. App. W.D. 2010) 35

Babb v. Missouri Pub. Serv. Comm'n,

414 S.W.3d 64 (Mo. App. W.D. 2013) 12

Bhd. of Stationary Engineers v. City of St. Louis,

212 S.W.2d 454 (Mo. App 1948) 13

Boone Nat. Sav. & Loan Ass'n, F.A. v. Crouch,

47 S.W.3d 371 (Mo. banc 2001) ..... passim

Borron v. Farrenkopf,

5 S.W.3d 618 (Mo. App. W.D. 1999) 3, 4, 14

Brunner v. City of Arnold,

427 S.W.3d 201 (Mo. App. E.D. 2013) 42

C.C. Dillon Co. v. City of Eureka,

12 S.W.3d 322 (Mo. banc 2000) 32

City of Kan. City v. Carlson,

292 S.W.3d 368 (Mo. App. W.D. 2009) ..... passim

City of Kansas, Missouri v. Kansas City Board of Election Commissioners, et al.,

Case No. 1516-CV19627 (Mo. Cir. Sept. 22, 2015) 24

City of Springfield v. Goff,

918 S.W. 2d 786 (Mo. banc 1996) 5, 29

City of St. Louis v. Klausmeier,

112 S.W. 516 (1908) 15, 16, 19, 20

City of St. Louis v. Stenson,

333 S.W.2d 529 (Mo. App. 1960) ..... passim

City of Stanberry v. O'Neal,

150 S.W. 1104 (Mo. App. 1912) 42

City of Webster Groves v. Erickson,

789 S.W.2d 824 (Mo. App. E.D. 1990) 42

Craft v. Philip Morris Companies, Inc.,

190 S.W.3d 368 (Mo. App. E.D. 2005) 35, 36

Empiregas, Inc. of Palmyra v. Zinn,

833 S.W.2d 449 (Mo. App. E.D. 1992) 44

Ex parte Williams,

139 S.W.2d 485 (Mo. banc 1940) 51, 52

Hagely v. Bd. of Educ. of Webster Groves Sch. Dist.,

841 S.W.2d 663 (Mo. banc 1992) 44

Kansas City v. J. I. Case Threshing Mach. Co.,
87 S.W.2d 195 (Mo. 1935) 30
Kansas City v. LaRose,
524 S.W.2d 112 (Mo. banc 1975) 15, 18
Lebeau v. Commissioners of Franklin Cnty., Missouri,
422 S.W.3d 284 (Mo. banc 2014) 41, 42
Levinson v. City of Kansas City,
43 S.W.3d 312 (Mo. App. W.D. 2001) 26, 27
McCarthy v. Cmty. Fire Prot. Dist. of St. Louis County,
876 S.W.2d 700 (Mo. App. E.D. 1994) 40
Missouri Bankers Ass'n, Inc. v. St. Louis County,
448 S.W.3d 267 (Mo. banc. 2014) 30
Missouri Coal. for Env't v. Joint Comm. on Admin. Rules,
948 S.W.2d 125 (Mo. banc 1997) 53, 54
Missouri Hotel and Motel Association, et al. v. City of St. Louis, et al.,
Case No. 004-02638 (Mo. Cir. July 31, 2001) ..... passim
Mo. Roundtable for Life, Inc. v. State,
396 S.W.3d 348 (Mo. banc 2013) 25
New Mexicans for Free Enterprise v. City of Santa Fe,
126 P.3d 1149 (N.M. Ct. App. 2005) 11, 12
Noel v. Bd. of Election,
ED 101630, 2015 WL 3961254 (Mo. App. E.D. June 30, 2015) 6

Page West, Inc. v. Cmty. Fire Prot. Dist. of St. Louis Cnty.,
636 S.W.2d 65 (Mo. banc 1982) 22

Regional Convention and Sports Complex Authority v. City of St. Louis,
Case No. 1522-CC00782 (Mo. Cir. August 3, 2015) 3, 14

Rentschler v. Nixon,
311 S.W.3d 783 (Mo. banc 2010) 44

Richardson v. Quiktrip Corp.,
81 S.W.3d 54 (Mo. Ct. App. 2002) 36

Rizzo v. State,
189 S.W.3d 576 (Mo. banc 2006) 32

Rothwell v. Dir. of Revenue,
419 S.W.3d 200 (Mo. App. W.D. 2013) 9

Schaefer v. Koster,
342 S.W.3d 299 (Mo. banc 2011) 42

State ex rel. Royal Ins. v. Dir. of Missouri Dept. of Ins.,
894 S.W.2d 159 (Mo. banc 1995) 53

State ex rel. Sunshine Enterprises of Missouri, Inc. v. Bd. of Adjustment of City of St. Ann, 64 S.W.3d 310 (Mo. banc 2002) 6

State ex rel. Teefey v. Bd. of Zoning Adjustment of Kansas City,
24 S.W.3d 681 (Mo. banc 2000) ..... passim

State v. Burns,
978 S.W.2d 759 (Mo. banc 1998) 26

State v. Hampton,

653 S.W.2d 191 (Mo. banc 1983) 32

State v. Rowe,

63 S.W.3d 647 (Mo. banc 2002) 24

Swisher v. Swisher,

124 S.W.3d 477 (Mo. App. W.D. 2003) 35

Templemire v. W & M Welding, Inc.,

433 S.W.3d 371 (Mo. banc 2014) 9

The Stroh Brewery Co. v. State,

954 S.W.2d 323 (Mo. banc 1997) 26

Tolentino v. Starwood Hotels & Resorts Worldwide Inc.,

437 S.W.3d 754 (Mo. banc 2014) 6

Vest v. Kansas City,

355 Mo. 1, 194 S.W.2d 38 (1946) 13, 22

Yellow Freight Systems, Inc. v. Mayor's Com'n on Human Rights of City of Springfield,

791 S.W.2d 382 (Mo. banc 1990) ..... passim

CONSTITUTIONAL PROVISIONS

Mo. Const. Art. II, § 1 ..... 53, 55

Mo. Const. Art. III, § 21 ..... 24, 32

Mo. Const. Art. III, § 23 ..... 24, 25, 32

Mo. Const. Art. VI § 19 45

Mo. Const. Art. VI, § 19(a) ..... passim

RULES

Mo. Sup. Ct. R. 55.08 41

STATUTES

Mo. Rev. Stat. § 21.250 23

Mo. Rev. Stat. § 67.1571 ..... passim

Mo. Rev. Stat. § 71.010 ..... passim

Mo. Rev. Stat. § 285.055 ..... passim

Mo. Rev. Stat. § 290.500 *et seq.* ..... passim

Mo. Rev. Stat. § 516.500 ..... passim

LEGISLATIVE MATERIALS

House Bill No. 722 ..... 22, 26, 37

OTHER AUTHORITIES

The Charter of the City of St. Louis, Art. IV, § 1 ..... 51, 53, 54, 55

The Charter of the City of St. Louis, Art. IV, § 11 55

The Charter of the City of St. Louis, Art. IV, § 13 55

The Charter of the City of St. Louis, Art. IV, § 16 55

The Charter of the City of St. Louis, Art. IV, § 23 54

The Charter of the City of St. Louis, Art. IV, § 26 45

Black's Law Dictionary (10th ed. 2014) 2, 3

Merriam–Webster's Collegiate Dictionary (11th ed. 2005) 2

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

I. THE TRIAL COURT DID NOT ERR IN FINDING IN APPELLANTS/CROSS-RESPONDENTS' FAVOR ON COUNT I OF THE PETITION BECAUSE ORDINANCE 70078 CONFLICTS WITH MISSOURI REVISED STATUTE SECTION 71.010 AND MISSOURI'S MINIMUM WAGE LAW, MISSOURI REVISED STATUTE SECTIONS 290.500, *ET SEQ.*, IN THAT (1) ORDINANCE 70078 PROHIBITS WHAT MISSOURI'S MINIMUM WAGE LAW PERMITS AND (2) MISSOURI REVISED STATUTE SECTION 285.055 DOES NOT REBUT OR OTHERWISE AFFECT THE CLEAR PREEMPTION OF ORDINANCE 70078 BY MISSOURI REVISED STATUTE SECTION 71.010 AND THE MISSOURI MINIMUM WAGE LAW.

The October 14, 2015 judgment (the "Judgment") entered by the Honorable Steven Ohmer of the Circuit Court of St. Louis City (the "Trial Court") properly declared Ordinance 70078 of the Revised City Code of the City of St. Louis ("Ordinance 70078") void and unenforceable because it conflicts with Mo. Rev. Stat. §§ 290.500, *et seq*. (the "Missouri Minimum Wage Law") in violation of Mo. Rev. Stat. § 71.010 and in excess of its charter authority under Mo. Const. Art. VI, § 19(a). The Trial Court's determination properly rests on one simple and irrefutable reality: employers in the City of St. Louis. Missouri (the "City") cannot comply with the Missouri Minimum Wage Law without violating Ordinance 70078. Complying with state law in the City subjects

employers to criminal prosecution and civil penalties, a private right of action from any worker, and revocation of City business licenses and permits. The City does not have the authority to repeal state law.

The tortured attempts of Appellants/Cross-Respondents ("Appellants") to label Ordinance 70078 as merely a permissible local "innovation" not only defies common sense but, if accepted by this Court, could be used to justify local "re-regulation" of nearly every state-wide general policy enacted by the General Assembly.

For example, applying the standards of permissible local regulatory authority advocated by Appellants in this case would permit every municipality to set its own utility rates in direct contravention of the Missouri Public Service Commission's state-granted regulatory authority.

The Trial Court wisely declined Appellants' invitation to fundamentally alter the constitutional balance between state and local regulatory authority by judicial fiat.

A. Ordinance 70078 Conflicts With The Missouri Minimum Wage Law And Mo. Rev. Stat. § 71.010 Because It Prohibits What The Missouri Minimum Wage Law Permits

Black's Law Dictionary defines "minimum" as "[o]f relating to, or constituting the smallest acceptable or possible quantity in a given case." MINIMUM, Black's Law Dictionary (10th ed. 2014) (emphasis added); *see also* Merriam–Webster's Collegiate Dictionary (11th ed. 2005) (defining "minimum" as "the *least* quantity assignable, admissible, or possible") (emphasis added). As a definitional matter, the goal of any minimum wage law is to set the smallest acceptable and/or possible wage for

employment. While, as Appellants suggest, a minimum wage "does not, by any natural reading of the word, affirmatively prohibit or permit an entity to pay more," *see* Appellants' Initial Brief (App. Br.") at 40, it does affirmatively prohibit a parallel, competing minimum wage that is higher. Two amounts cannot both be the "smallest acceptable or possible quantity in a given case." *See* MINIMUM, Black's Law Dictionary (10th ed. 2014). Once you set a higher minimum, by definition, the lower minimum disappears. Faced with such outcome-determinative definitions, Appellants' attempt to engraft the word "bare" onto the Missouri Minimum Wage Law—*see* App. Br. at 36, 39—is nothing more than a self-serving gloss which "[i]gnor[es] the common sense reading and understanding of a minimum wage law." *Id*. at 38. The Missouri Minimum Wage Law's very existence mandates that it be the only permissible minimum wage law in the State of Missouri.

While trying to inject ambiguity into the word "minimum," Appellants simultaneously try to improperly restrict the standard for state law preemption. Appellants assert that "[s]tate 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.'" App. Br. at 36 (*quoting Borron v. Farrenkopf*, 5 S.W.3d 618, 620 (Mo. App. W.D. 1999)). Appellants further assert that "[w]hen state law has so completely regulated a given area of the law, then it is said to be occupied, and preempts any local act." *Id.* However, as set forth in *Borron*, "state law can preempt [] local law in two ways." 5 S.W.3d at 622; *see also Regional Convention and Sports Complex Authority v. City of St. Louis*, Case No. 1522-CC00782 (Mo. Cir. August 3, 2015) ("When a local law

is not in harmony with a state law, the state law can preempt the local law in two ways.") (emphasis added).

State law can preempt a local law through **conflict preemption**—*see Borron*, 5 S.W.3d at 622 ("First, if the local law is in direct conflict with the state law, then the local law is determined to be contrary to the state law and, therefore, invalid.")—or **field preemption—***see id.* ("[A] locality may not legislate in areas that are 'occupied' (**thoroughly regulated**) by state law.") (emphasis added).

Ordinance 70078 is *specifically preempted*, via conflict preemption, by Mo. Rev. Stat. § 67.1571, which specifically denies a municipalities' power to enact minimum wage law. *See* Mo. Rev. Stat. § 67.1571 ("No municipality ... shall establish, mandate or otherwise require a minimum wage that exceeds the state minimum wage."); *see also Borron*, 5 S.W.3d at 622 ("[W]hen local laws are preempted, they are determined to be invalid and unenforceable."). Ordinance 70078 is also *generally preempted*, via field preemption, by Mo. Rev. Stat. § 71.010 and the Missouri Minimum Wage Law, which occupies—i.e., thoroughly regulates—the applicable minimum wage in the State of Missouri.

Rather than faithfully delineate the distinctions between conflict and field preemption—Appellants simply try to muddy the waters and conflate the analysis for the two types of preemption—*see* App. Br. at 36 (*quoting Cape Motor Lodge, Inc. v. City of Cape Girardeau*, 706 S.W.2d 208, 211 (Mo. banc 1986) ("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.")—and then cursorily allege that Respondents have not met their burden to overcome Ordinance 70078's presumed validity. App. Br. at 36. Appellants' position self-servingly ignores the nuances of Missouri preemption law and jurisprudence and, thus, is improper.

Under Mo. Const. Art. VI, §19 (a), the ordinance promulgated by a charter city must be "consistent with the constitution and not limited or denied by state statutes." *City of Springfield v. Goff*, 918 S.W. 2d 786, 789 (Mo. banc 1996) (internal quotations omitted). Further, the General Assembly has decreed that municipalities may not enact laws that conflict with State law on the same subject. Mo. Rev. Stat. § 71.010 provides that any municipality "having authority to pass ordinances regulating subjects, matters and things upon which there is a general law of the state . . . shall confine and restrict its jurisdiction and the passage of its ordinances to and in conformity with state law upon the same subject." Mo. Rev. Stat. § 71.010.

"Ordinances may supplement state laws, but when the expressed or implied provisions of each are inconsistent or in irreconcilable conflict, then the statutes annul the ordinances." *State ex rel. Teefey v. Bd. of Zoning Adjustment of Kansas City*, 24 S.W.3d 681, 685 (Mo. banc 2000) (emphasis added); *see also City of Kan. City v. Carlson*, 292 S.W.3d 368, 371 (Mo. App. W.D. 2009) (*quoting Crackerneck Country Club, Inc. v. City of Independence*, 522 S.W.2d 50, 51 (Mo. App. W.D. 1974)) ("An ordinance and state statute conflict if 'their express or implied provisions are so inconsistent and irreconcilable that the statute annuls the ordinance.'").

"To determine if a conflict exists between an ordinance and a state statute, the test is whether the ordinance permits that which the statute prohibits or prohibits that which the statute permits." *Teefey*, 24 S.W.3d at 685; *see also e.g., Noel v. Bd. of Election*, ED 101630, 2015 WL 3961254, at *3 (Mo. App. E.D. June 30, 2015) ("Simply put, the statutes permit what the Initiative Petition attempts to prohibit, and therefore the Initiative Petition is unconstitutional under Article VI, Section 19(a)."); *State ex rel. Sunshine Enterprises of Missouri, Inc. v. Bd. of Adjustment of City of St. Ann*, 64 S.W.3d 310, 314 (Mo. banc 2002) (holding that "[w]here the city prohibits a business that state law permits, the city has the burden to show that the ordinance does not conflict with state law") (emphasis added).

The Missouri Minimum Wage Law already requires employers to pay workers the minimum wage rate set by the state. *See* Mo. Rev. Stat. § 290.502; *see also Tolentino v. Starwood Hotels & Resorts Worldwide Inc.*, 437 S.W.3d 754, 757 (Mo. banc 2014). Ordinance 70078 is not in conformity with the Missouri Minimum Wage Law because Section 2(B)(1)-(2) of Ordinance 70078 prohibits that which the Missouri Minimum Wage Law permits: the existence of a minimum wage at a rate less than the amount set forth in Ordinance 70078. (A132-33). Further, because the Missouri Minimum Wage Law is a general law of the state, Ordinance 70078's conflict with the Missouri Minimum Wage Law places it in further conflict with Mo. Rev. Stat. § 71.010, which requires ordinances to conform to general laws of the state upon the same subject.

An identical attempt by the City to enact a local minimum wage was struck down sixteen (16) years ago. 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*"), the "Memorandum, Order and Judgment" (the "*Missouri Hotel* Judgment") entered by the Honorable Judge Robert H. Dierker ("Judge Dierker") squarely and conclusively addresses the identical issues of *field preemption* in the present case. (A true and accurate copy of the *Missouri Hotel* Judgment is included in the appendix ("A") accompanying Brief of Respondents/Cross-Appellants ("Resp. Br.") at A28 and incorporated herein by reference.) *Missouri Hotel* concerned a challenge to Ordinance 65045 of the Revised City Code of the City of St. Louis (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 preempted by Mo. Rev. Stat. § 67.1571; was preempted by the Missouri Minimum Wage Law, in conjunction with Mo. Rev. Stat. § 71.010; and violated other aspects of the Missouri Constitution and the Charter of the City of St. Louis, adopted June 30, 1914, as amended (the "City Charter"). (A47). The *Missouri Hotel* Judgment upheld the imposition of a minimum wage on employers who held a contract with the City or received City funds but struck down the Living Wage Ordinance on several other grounds, including that it was preempted by the Missouri Minimum Wage Law and Mo. Rev. Stat. § 71.010. (A77-78). In particular, and instructive to the issues presently before this Court, the *Missouri Hotel* Judgment provided that:

[T]he City of St. Louis cannot enact a general minimum wage ordinance and provide for its enforcement unless expressly authorized by the Charter and probably also by enabling legislation. In this case, the City Charter contains only general language authorizing the City to enter into contracts, and contains nothing to authorize imposition of minimum wage standards on third parties. St.L.Charter, art. I, §1(4). Without such authorization, the City is obliged by the terms of §71.010 to conform any ordinance on the subject to the state minimum wage law, §§290.500 et seq., RSMo 2000.

…

By attempting to apply its minimum wage standards to contractors, subcontractors and lessees of City grantees regardless of whether they derive any benefit from the City financial assistance or not, regardless of whether they play any role in the economic development contemplated by the assistance, and without regard to time, Ordinance 65045 conflicts with the state minimum wage statute. By compelling such contractors and lessees to pay the specified minimum wage, the ordinance prohibits what the minimum wage statute permits, i.e., payment of a different minimum wage. In this regard, the ordinance seeks to enlarge the statutory duties of the accountant and his employees among themselves, define a minimum wage different than state law, and is, therefore, not in conformity with the state minimum wage law.

(A61-63). The *Missouri Hotel* Judgment set aside the prior Living Wage Ordinance on grounds that, to the extent it applied to private contracts of employment, it was preempted by the Missouri Minimum Wage Law pursuant to Mo. Rev. Stat. § 71.010. (A64). This holding was essential to the relief granted by the *Missouri Hotel* Judgment and is binding precedent here pursuant to *stare decisis*. *See Rothwell v. Dir. of Revenue*, 419 S.W.3d 200, 206 (Mo. App. W.D. 2013) ("Under the doctrine of stare decisis, 'a court follows earlier judicial decisions when the same point arises again in litigation' and '[w]here the same or an analogous issue was decided in an earlier case, such case stands as authoritative precedent unless and until it is overruled.'") (internal citation omitted); *see also Templemire v. W & M Welding, Inc.*, 433 S.W.3d 371, 387 (Mo. banc 2014) ("As these cases make clear, *stare decisis* is most essential regarding prior statutory interpretations because it is there that the rule of law and respect for the separation of powers meet.").

The City abandoned its appeal of the *Missouri Hotel* Judgment and let its holding stand. Indeed, when *Missouri Hotel* 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 City and other local minimum wage proponents filed cross-appeals. (A83-97). Nonetheless, the Supreme Court, at the behest of minimum wage proponents and the City,[1] in the end dismissed the

[1] *See* Intervenor Appellees' Memorandum of Law in Support of Motion to Dismiss Appeal, filed in the appeal of the *Missouri Hotel* Judgment (A89) ("After Associate

appeal in its entirety, on grounds that "no aggrieved party" filed an appeal. (A103). The City and proponents of the minimum wage ordinance, as promised, withdrew their cross-appeals 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.

Moreover, in further acknowledgement of the well-reasoned arguments set forth in the *Missouri Hotel* Judgment, the City enacted a new living wage ordinance—Ordinance 65597 of the Revised City Code of the City of St. Louis ("Ordinance 65597")—that repealed the Living Wage Ordinance and set forth a minimum wage program within the boundaries established by Judge Dierker's ruling. (A98-101). The wage program set forth in and established by Ordinance 65597 for direct city vendors and grantees is still in effect today.

Industries of Missouri filed its notice of appeal, both the intervenor appellees and appellee the City of St Louis filed notices of cross appeal as protective measures. 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.").

Finding no Missouri authority which contradicts the *Missouri Hotel* Judgment, Appellants deputize the New Mexico Court of Appeals in *New Mexicans for Free Enterprise v. City of Santa Fe*, 126 P.3d 1149, 1159-60 (N.M. Ct. App. 2005) to make their argument. App. Br. at 37.

In *New Mexicans*, the City of Santa Fe was a "home rule" municipality which, per the Constitution of New Mexico, "may exercise all legislative powers and perform all functions not expressly denied by general law or charter." *New Mexicans*, 126 P.3d at 1158 (*quoting* N.M. Const., Art. X, § 6(D)-(E)). Thus, the only issue before the New Mexico Court of Appeals was "whether the [state minimum wage law] evince[d] . . . a clear intent to preempt that governmental area from municipal policymaking, or whether municipal authority to act would be so inconsistent with the [state minimum wage law] that the [same] is the equivalent of an express denial." *Id.* at 1159. There was no statute at issue in *New Mexicans* comparable to Mo. Rev. Stat. § 71.010, i.e. a statute that specifically provided that "[a]ny municipal corporation in this state . . . shall confine and restrict its jurisdiction and the passage of its ordinance to and in conformity with the state law upon the same subject." *Id.*; *see also* Mo. Rev. Stat. § 71.010. (Nor was there, at issue in *New Mexicans*, a New Mexico statute providing for specific preemption, similar to Mo. Rev. Stat. § 67.1571.) *Id.* Appellants' need to rely on *New Mexicans* demonstrates that, in this case, Mo. Rev. Stat. § 67.1571 and Mo. Rev. Stat. § 71.010 (in conjunction with the Missouri Minimum Wage Law) are each, separately and independently, outcome determinative in this case; Appellants must analogize to a state

where these preemption statutes do not exist in order to find case law supporting their contentions.

Even were this Court to entertain the notion of considering *New Mexicans*, it is easily distinguishable from the present case. As an initial matter, the *Missouri Hotel* Judgment is instructive on this point as well: Judge Dierker expressly rejected the suggestion that cases from other jurisdictions ought be afforded persuasive values because "the differences among the states in the matter of municipal corporations law are so pronounced." (A63-64). The only portion of *New Mexicans* which may be of assistance to this Court, for the purpose of persuasion, is its general discussion of whether a state minimum wage is a "general law." *See New Mexicans*, 126 P.3d at 1159 (finding that the statewide minimum wage program is a "general law because it applies generally throughout the state, relates to a matter of statewide concern, and impacts workers across the entire state"); *c.f.* Mo. Rev. Stat. § 71.010 (applying to municipalities that have the authority to, and elect to, "pass ordinances regulating subjects, matters and things upon which there is a general law of the state").

In accordance with the *Missouri Hotel* Judgment, Ordinance 70078 cannot be salvaged as merely providing "additional requirements" or "more regulation" above and beyond the Missouri Minimum Wage Law. *See, e.g.*, *Babb v. Missouri Pub. Serv. Comm'n*, 414 S.W.3d 64, 70 (Mo. App. W.D. 2013) ("[W]hile preemption forbids a conflict with state law, it does not prohibit additional regulations by the locality."). Well beyond appending the Missouri Minimum Wage Law with additional regulations, here Ordinance 70078 would completely supplant the Missouri Minimum Wage Law in every

single instance where the two overlapped; this municipal ouster of state law renders the Missouri Minimum Wage Law meaningless within the borders of the City of St. Louis (the "City"). Indeed, if Ordinance 70078 were permitted to be implemented, and the Missouri Minimum Wage Law were subsequently repealed, the effects of such repeal would be inconsequential for City residents, as if the Missouri Minimum Wage Law had never existed. Such a relationship—between Ordinance 70078 and the Missouri Minimum Wage Law—cannot credibly be regarded as "supplementation."

Such wholesale usurpation is inconsistent with the line of Missouri precedent which acknowledges the ability of local ordinances to supplement state law. *See Teefey*, 24 S.W.3d at 685 ("[W]hen the expressed or implied provisions of each are inconsistent or in irreconcilable conflict, then the statutes annul the ordinances."). While the power of local ordinances to supplement state law may be longstanding, the suggestion that local ordinances can re-regulate conduct targeted by state law to a *different* standard has been long forbidden. *See Vest v. Kansas City*, 355 Mo. 1, 3, 194 S.W.2d 38, 39 (1946) (finding that an ordinance supplements a statute because "it does not attempt to impose a new or different standard" and the ordinance and statute "both may stand in harmony"); *see also Bhd. of Stationary Engineers v. City of St. Louis*, 212 S.W.2d 454, 460 (Mo. App 1948) (finding that an ordinance merely supplements statute where it "conforms to the same standard as that set up by the state law" and "both may stand together in harmony").

Appellants' arguments thus not only muddy the distinctions between *conflict* and *field preemption*, they attempt to collapse the two, making *conflict preemption* a necessary prerequisite for *field preemption*. This sleight of hand perverts well-

established Missouri case law—*see Borron*, 5 S.W.3d at 622; *see also Regional Convention and Sports Complex Authority*, (Mo. Cir. August 3, 2015)—simply because it controverts the basis of Appellants' instant appeal. Regardless, Appellants' arguments are improper: Ordinance 70078 is specifically preempted, via conflict preemption, by Mo. Rev. Stat. § 67.1571 and, separately and independently, generally preempted, via field preemption, by the Missouri Minimum Wage Law and Mo. Rev. Stat. § 71.010. Each of these bases for preemption compel the conclusion that Ordinance 70078 is void and of no force and effect.

That Ordinance 70078 is generally preempted by the Missouri Minimum Wage Law and Mo. Rev. Stat. § 71.010 is apparent even from the case law relied upon by Appellants. App. Br. at 34. In *City of Kansas City v. Carlson*, the 2009 case on which Appellants anchor their defense to preemption, the Missouri Court of Appeals Western District (the "*Carlson* Court") recognized that, although a municipality may have power to "supplement" a state law where the state law leaves certain conduct "unregulated," if a state law provides a standard for some particular conduct, municipalities are without power to implement, and are preempted from enacting, laws that alter that state standard. 292 S.W.3d 368, 374 (Mo. App. W.D. 2009). Appellants' reliance on *Carlson* is misplaced because it compels a conclusion diametrically opposed to the proposition they cite it for, i.e, *Carlson* clearly establishes the Missouri Minimum Wage Law as a standard-setting prescription. App. Br. at 39. Accordingly, Ordinance 70078 conflicts with and is annulled by the Missouri Minimum Wage Law because it regulates the same

conduct set by the Minimum Wage Law to a different standard. *See Carlson*, 292 S.W.3d 368.

As examples of statutes that "set standards for authorized conduct," the *Carlson* Court pointed to the statutes at issue in *City of St. Louis v. Klausmeier*, 112 S.W. 516 (1908) and *City of St. Louis v. Stenson*, 333 S.W.2d 529, 533-34 (Mo. App. 1960). *Id*. at 374. As examples of prohibition statutes, the *Carlson* Court pointed to the statute before it, as well as the statute at issue in *Kansas City v. LaRose*, 524 S.W.2d 112, 117 (Mo. banc 1975). *Id*. at 372-74. *Carlson* and the cases it surveys, as well as the statutes and ordinances analyzed in those cases, demonstrates that the Missouri Minimum Wage Law sets a standard for authorized conduct, which Ordinance 70078 attempts to contravene (and does not, conversely, set forth prohibitions which Ordinance 70078 attempts to supplement and expand upon). Thus, under *Carlson*, Ordinance 70078 is annulled by the Missouri Minimum Wage Law and Mo. Rev. Stat. § 71.010.

1. "Standard-Setting Prescriptions" Under *Carlson*

The first case identified and scrutinized by *Carlson* is *Klausmeier*. *Id*. at 373. In *Klausmeier*, the statute and ordinance before the Supreme Court prescribed percentages and standards for whole milk and skimmed milk sold in the City. 112 S.W. at 518. In particular the state law provided: "[s]kimmed milk: total solids not less than 9.25 per cent" and the ordinance provided: "[s]kimmed milk: total solids not less than 10.5 per cent." *Id*. The Supreme Court in *Klausmeier* found that "[i]n this particular there is a clear conflict between the statute and the ordinance, for a person might sell skimmed milk containing 9.25 per cent of solids, as prescribed by the state law, and still be guilty

of an offense under the ordinance." *Id*. at 519 ("In other words, the ordinance denounces that to be a crime which the statute authorizes to be done."). Accordingly, the Supreme Court held that the ordinance was annulled by the statute. *Id*. ("To hold otherwise would be to subject the statute of the state to the operation of the ordinances of the city.") (emphasis added).

Similarly, in *Stenson*, the statute and ordinance before the St. Louis Court of Appeals concerned limits on "the length of [vehicles] operating on the highways of [Missouri] and within the corporate limits of the [City]." 333 S.W.2d at 533. In particular, the state law provided that "[n]o motor-drawn or propelled vehicle shall be operated on the highways of this state . . . of a total or combined length, including coupling or load, in excess of forty-five feet." *Id*. (*quoting* Mo. Rev. Stat. § 304.170). The ordinance, however, provided that "[n]o person shall drive a commercial vehicle or combination having an over-all length of more than thirty-three feet." *Id*. (internal quotation omitted). The St. Louis Court of Appeals found that "[t]o the extent the ordinance prohibits the described vehicles over 33 feet and under 45 feet in length from being driven on the portion of Riverview Boulevard described therein, it is in conflict with § 304.170." *Id*.

In both *Klausmieier* and *Stenson*, the *Carlson* Court declined to engage in the sophistry Appellants propose. See App. Br. at 40 ("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.") (emphasis added). The *Carlson* Court did not find the statute in *Klausmeier* to be a prohibition—even though it could conceivably be

thought of as prohibiting selling milk of a certain percentage. Nor did the *Carlson* Court find the statute in *Stenson* to be a prohibition—even though it could conceivably be thought of as prohibiting motor vehicles of a certain length. Accordingly, this Court should not find the Missouri Minimum Wage Law to be a prohibition—even though it could conceivably be thought of as prohibiting employers in the City from paying less than a certain amount.

Appellants' reading of *Carlson* ignores the distinction between prescriptions that set generally-applicable standards for authorized conduct and prohibitions that may be "supplemented" because they leave some conduct unregulated. So Appellants simply champion a definition of "prohibition" that engulfs the state's ability to set generally applicable standards for certain conduct, as recognized by *Carlson*. In Appellants' view, every regulation is either a ceiling or a floor, and as long as a municipality does not run afoul of what they believe to be the state law's intent, there can be no conflict. However, *Carlson* clearly acknowledges the ability of the state to regulate—to set standards for authorized conduct—without having its regulations subjugated to a municipalities' attempts to "innovate" and re-regulate that same conduct. *See* App. Br. at 40. To the extent Appellants' position glosses past the nuances of *Carlson*, it should be disregarded. Appellants' glossing becomes all the more apparent when considering the statutes that the *Carlson* Court actually regarded as containing prohibitions.

2. Prohibitions (That Leave Room For Supplementation) Under *Carlson*

Ordinances that regulate conduct, regulated by statute to a different standard (i.e., ordinances that "re-regulate"), are annulled by those statutes under *Carlson*. In contrast, ordinances that regulate new and different conduct (i.e., conduct left unregulated by statute) are consistent with that statute. In *LaRose*, the third case reviewed by *Carlson*, the statute before the Supreme Court provided that "[i]f any person [] shall knowingly and willfully obstruct, resist or oppose any sheriff or any other ministerial officer . . . in the discharge of any [] duty in any case . . . every person so offending shall, on conviction, be adjudged guilty of a misdemeanor." 525 S.W.2d at 117. The ordinance however, generally provided that "[a]ny person who shall in any way or manner hinder, obstruct, molest, resist or otherwise interfere with any city officer or inspector or any member of the police force in the discharge of his official duties shall be guilty of a misdemeanor." *Id*. The Supreme Court noted that "the statute and ordinance were not designed to precisely cover the same area." *Id*. Specifically, the ordinance "applies to any interference with any city officer as well as members of the police force" and the statute "requires that the act be done knowingly and willfully and the ordinance does not contain those words." *Id*. The Supreme Court found that the statute and ordinance were not in conflict because "[t]he ordinance has simply gone further and prohibited interference in [different kinds of cases]." *Id*.

Finally, in *Carlson* itself, appellant Georgia Carlson ("Carlson"), who had been cited for allowing smoking in JC Sports Bar ("JC's") under Kansas City Ordinance

No. 080073 (the "Smoking Ordinance"), argued that the Smoking Ordinance was in conflict with Missouri's Indoor Clean Air Act (the "ICAA"). *Carlson*, 292 S.W.3d at 370. The Western District Court of Appeals (the "*Carlson* Court") noted that ICAA was enacted to ensure patrons had access to smoke-free air "in certain public places" which did not include "bars and billiard parlors such as JC's." *Id*. at 372. However, the Smoking Ordinance prohibited smoking in "all enclosed places of employment within the City" and thus "[did] not exempt bars and billiard parlors such as JC's." *Id*. In arguing for conflict preemption, *Carlson* contended that the ICAA authorized those places it exempted from local smoking regulations, relying on *Klausmeier* and *Stenson*. *Id*. at 373-74. However, the *Carlson* Court found that a plain reading of the ICAA demonstrated that it did not exempt but rather "simply exclude[d] those places meeting its conditions from compliance." *Id*. at 373. The *Carlson* Court distinguished *Klausmeier* as follows:

> In *City of St. Louis v. Klausmeier*, a municipal ordinance setting a standard requiring skimmed milk to contain 10.5 percent solids was held to conflict with a state statute that set a standard of only 9.25 percent. [] The conflict occurred because "a person might sell skimmed milk containing 9.25 percent of solids, as prescribed by the state law, and still be guilty of an offense under the ordinance. In other words, the ordinance denounces that to be a crime which the statute authorizes to be done." []

Id. at 373 (*quoting Klausmeier*, 112 S.W. at 519). With regard to *Stenson*, the *Carlson* Court provided:

> Similarly, in *City of St. Louis v. Stenson*, an ordinance that prohibited commercial vehicles over thirty-three feet in length on portions of a highway was held to conflict with a statute that "authorize[d] the use of the highways ... by all ... vehicles that do not exceed 45 feet in length" because the ordinance prohibited what the statute permitted. []

Id. at 373 (*quoting Stenson*, 333 S.W.2d 529, 533–34)). The *Carlson* Court found that "the statutes at issue in *Klausmeier* and *Stenson* set standards for authorized conduct—the level of solids in milk, the length of motor vehicles on highways." *Id*. at 374. Similarly, the Missouri Minimum Wage Law sets a standard for authorized conduct—the minimum wage that can be paid to employees.

The *Carlson* Court held that "[t]he ordinances at issue in *Klausmeier* and *Stenson* set a different standard and expressly conflicted with the state laws because conduct was affirmatively authorized under the state law, yet illegal under the municipal ordinance." *Id*. at 374 (emphases added). Similarly, Ordinance 70078 sets a different standard and expressly conflicts with the Minimum Wage Law because conduct affirmatively authorized by the Missouri Minimum Wage Law—paying employees a wage rate at an amount greater than the rate set under the Missouri Minimum Wage Law and yet less than the wage rate set forth under Ordinance 70078—is illegal under Ordinance 70078.

3. The Missouri Minimum Wage Law Clearly Contains "Standard-Setting Prescriptions" Under *Carlson*

It is clear under *Carlson* that an ordinance conflicts with a statute where it re-regulates conduct already regulated by that statute to a different standard—requiring a

higher percentage of solids in skim milk or requiring a shorter length of vehicle—and merely "prohibits more" when an ordinance reaches conduct beyond the statute—unknowing interference with an officer in the discharge of their duty and smoking in enclosed areas including bars and billiard halls. This is because under *Carlson*, and the cases it relies on, conduct regulated to a certain standard is impliedly "authorized" by a statute, and, conversely, conduct beyond the scope of a statute is *not* impliedly "exempted" by a statute.

Here, the Missouri Minimum Wage Law sets a standard of authorized conduct. *See* Mo. Rev. Stat. § 290.502 ("[E]very employer shall pay to each employee wages at the rate of $6.50 per hour" and "[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."). Section 2(B) of Ordinance 70078 seeks to re-regulate that very same conduct to a different standard: "[b]eginning October 15, 2015, the minimum wage rate shall be increased to $8.25 per hour." (A132).

Moreover, the re-regulation is comprehensive and exhaustive: Ordinance 70078 does not purport to affect any conduct beyond the scope of the Missouri Minimum Wage Law. (A131-36). Ordinance 70078 does not prohibit *more* conduct than the Missouri Minimum Wage Law; it regulates the same conduct—the payment of wages—to a different standard—purporting to establish a different "minimum" rate—and is thus in irreconcilable conflict with the Missouri Minimum Wage Law and annulled thereby. *Teefey*, 24 S.W.3d at 685; *Carlson*, 292 S.W.3d at 371. Ordinance 70078 does not cobble additional regulations to the Minimum Wage Law. Ordinance 70078 supplants the

entirety of the Missouri Minimum Wage Laws' impact within the City by setting forth a new and different standard. Were Ordinance 70078 to be implemented and enforced, every operative provision of the Missouri Minimum Wage Law would be annulled within the City. As noted, this is a perversion of Missouri precedent. *See Teefey*, 24 S.W.3d at 685. The Missouri Minimum Wage Law cannot "stand in harmony" with Ordinance 70078 in the City; in fact, with Ordinance 70078, the Missouri Minimum Wage Law cannot stand in the City at all. *See Vest*, 194 S.W.2d at 39 (Mo. banc 1946). Thus, Ordinance 70078 attempts to "prohibit precisely what state [law] permits," and thus is preempted. *See Page West, Inc. v. Cmty. Fire Prot. Dist. of St. Louis Cnty.*, 636 S.W.2d 65, 67-68 (Mo. banc 1982).

B. Ordinance 70078 Conflicts With The Missouri Minimum Wage Law And Mo. Rev. Stat. § 71.010 Because Mo. Rev. Stat. § 285.055 Does Not Rebut Or Otherwise Affect Ordinance 70078's Clear Preemption By The Missouri Minimum Wage Law And Mo. Rev. Stat. § 71.010.

On May 5, 2015, House Bill 722 ("HB 722") was approved by the General Assembly. (A true and accurate copy of HB 722 is contained in the Legal File ("L.F.") at L.F. 208). HB 722 amends Mo. Rev. Stat. § 285.055 with the addition of 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.

(A141-42). *See also* 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) one day after the first proposed increase in minimum wage was set to take place pursuant to Ordinance 70078. (A132).

As an initial matter, Appellants incorporate HB 722 / Mo. Rev. Stat. § 285.055 (hereinafter collectively referred to as "HB 722") into their brief—as part of their argument that Mo. Rev. Stat. § 67.1571 and the Missouri Minimum Wage Law, in conjunction with Mo. Rev. Stat. § 71.010, present no conflict with Ordinance 70078—despite having taken the position that HB 722 was unconstitutionally enacted. (L.F. 153-54). Appellants only seem to rely on HB 722 in the hopes that the Court will substitute the preemption analysis of the General Assembly (despite it having not constitutionally

enacted HB 722) for this Court's own. This is improper. Only the judiciary determines the validity of laws, interprets its provisions according to the law and determines its applicability. The only judicial interpretation(s) at issue in this case state that local minimum wages are invalid, as set forth in the *Missouri Hotel* Judgment and the "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"). (A143-44).

Appellants cannot rely on the language of HB 722 to further their interpretations of Mo. Rev. Stat. §§ 71.010, 67.1571 and the Missouri Minimum Wage Law because none of these Missouri statutes is referenced in HB 722. *See State v. Rowe*, 63 S.W.3d 647, 650 (Mo. banc 2002) ("Legislative intent can only be derived from the words of the statute itself."). The plain language used by the General Assembly in the title of HB 722 is "prohibited ordinances" (not "only three months to repeal the Missouri Minimum Wage Law"). HB 722 cannot be regarded as authorizing, or intending to authorize ordinances similar to, Ordinance 70078. The plain title of HB 722 indicates it was intended to "prohibit[] ordinances by political subdivisions." (A141). A prohibition cannot be reimagined as an authorization based on a grandfather clause—especially when such a reading puts HB 722 in violation of the clear title and single subject requirements of Mo. Const. Art. III, §§ 21 and 23.

1. HB 722 Is A Prohibition Not An Authorization

Appellants claim that the "only interpretation of Missouri law that harmonizes all of the statutes is that the [Missouri Minimum Wage Law] does not preempt [Ordinance

70078]." *See* App. Br. at 47. Not so. The actual language of HB 722, which properly evinces legislative intent, hardly permits the enactment of Ordinance 70078. The title of HB 722 provides that it "relat[es] to prohibited ordinances by political subdivisions." (A141). The text of the amendment proposed by HB 722 provides that: [n]o political subdivision shall establish, mandate, or otherwise require an employer to provide to an employee: … A minimum or living wage rate . . . that exceed[s] the requirements of federal or state laws, rules or regulations." *Id*. The amendment goes on to provide that "[t]he provisions of this subsection shall not preempt any state law or local minimum wage ordinance requirements in effect on August 28, 2015. *Id*.

Appellants read these two provisions as setting forth conflicting purposes: the first prohibits municipalities from enacting a minimum wage that exceeds state or federal law and the second authorizes municipalities to enact a minimum wage that exceeds state or federal law as long as such an enactment is effective before August 28, 2015. Appellants' reading clearly places HB 722 in violation of the "clear title" and "single subject" provisions of the Article III, § 23 of the Missouri Constitution. Mo. Const. Art. III, § 23 (providing that "[n]o bill shall contain more than one subject which shall be clearly expressed in its title"); *see also Mo. Roundtable for Life, Inc. v. State*, 396 S.W.3d 348, 351 (Mo. banc 2013) (*quoting Mo. Health Care Ass'n v. Mo.*, 953 S.W.2d 617, 622 (Mo. banc 1997) (internal quotations omitted)) ("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.").

However, these two provisions can and should be read in harmony: the first provision of HB 722 prohibits municipalities from enacting a minimum wage that exceeds state or federal law and the second provision exempts then-existing minimum wage ordinance requirements—such as St. Louis City Ordinance 65597—from this prohibition. Both provisions can and should be read as tailoring the scope of the prohibition identified in the title of HB 722. *State v. Burns*, 978 S.W.2d 759, 760 (Mo. banc 1998) ("This Court is bound to adopt any reasonable reading of the statute that will allow its validity and to resolve any doubts in favor of constitutionality"); *The Stroh Brewery Co. v. State*, 954 S.W.2d 323, 326 (Mo. banc 1997) ("When alternative readings of a statute are possible, we must choose the reading that is constitutional.").

2. HB 722 Has No Ability To Render Ordinance 70078 In Compliance With The Missouri Minimum Wage Law and Mo. Rev. Stat. §§ 71.010 and 67.1571

Appellants' bewildering willingness to impute an unmentioned preemption analysis into HB 722, while disparaging its enactment in the same breath, is further misguided by the fact that HB 722 has no bearing on the constitutionality of Ordinance 70078 because HB 722 was not effective when Ordinance 70078 was passed.

"[W]hile a statute may have a potential existence before its effective date, no rights may be acquired under it and no one is bound to regulate his or her conduct according to its terms, and **all acts purporting to have been done under it prior to that time are void**." *Levinson v. City of Kansas City*, 43 S.W.3d 312, 317 (Mo. App. W.D. 2001) (*quoting* 82 C.J.S. Statutes § 388)) (internal quotation omitted) (emphasis added).

To the extent which Appellants seek to position HB 722 as authorizing Ordinance 70078, such a relationship between HB 722 and Ordinance 70078 is improper. HB 722 has been passed by the Missouri General Assembly, vetoed by the Governor, and then passed again by the Missouri General Assembly. None of these actions "has any legal effect except with respect to emergency legislation," which HB 722 is not. *Levinson*, 43 S.W.3d at 317. Even were HB 722 capable of authorizing Ordinance 70078, the fact that HB 722 was not effective at the time Ordinance 70078 purported to become effective as emergency legislation, August 28, 2015, renders Ordinance 70078 void and unenforceable at the time of enactment. In *Armco Steel v. City of Kansas City*, the Supreme Court of Missouri squarely resolved this issue:

> The effect of that prohibition is that the ordinances were void and unenforceable ab initio—at the time of enactment. Nor were the ordinances validated or ratified by the 1992 amendment of § 92.045. In an analogous context, this Court has stated that an unconstitutional statute "is not validated by a subsequent constitutional amendment, except, possibly, where the later ratifies or confirms it ..." Without express ratification and confirmation, the statute must be reenacted. This rule is equally applicable to an ordinance that was prohibited by a statutory provision at the time of its enactment.

883 S.W.2d 3, 7 (Mo. banc 1994) (internal citations omitted). Appellants thus far have sought to have their cake and eat it too: they undermine the procedural constitutionality of HB 722 while arguing, out of the other side of their mouth, that HB 722 is tantamount

to an authorizer in that it recognizes the purported inability of Mo. Rev. Stat. §§ 71.010 and 67.1571 to annul Ordinance 70078. However, in light of the foregoing, it is clear that HB 722, whether procedurally constitutional or not, is incapable of asserting influence on the present case; it is either procedurally unconstitutional and of no force and effect, or it becomes effective on October 16, 2015, and of no force and effect with regard to Ordinance 70078.

In light of the foregoing, the Trial Court did not err in finding in Respondents' favor on Count I of the Petition because Ordinance 70078 conflicts with Mo. Rev. Stat. § 71.010 and the Missouri Minimum Wage Law, in that Ordinance 70078 prohibits what the Missouri Minimum Wage Law permits and Mo. Rev. Stat. § 285.055 does not rebut or otherwise affect Ordinance 70078's clear preemption by Mo. Rev. Stat. § 71.010 and the Missouri Minimum Wage Law.

II. THE TRIAL COURT DID NOT ERR IN FINDING IN APPELLANTS/CROSS-RESPONDENTS' FAVOR ON COUNT III OF THE PETITION BECAUSE THE ORDINANCE VIOLATES THE CHARTER AUTHORITY OF THE CITY OF ST. LOUIS, IN THAT (1) THE ORDINANCE CONFLICTS WITH MISSOURI REVISED STATUTE SECTION 71.010 AND MISSOURI'S MINIMUM WAGE LAW, MISSOURI REVISED STATUTE SECTIONS 290.500, *ET SEQ.*, AND (2) THE ESTABLISHMENT OF A MINIMUM WAGE IS NOT A PURELY LOCAL CONCERN

A. Ordinance 70078 Violates The Charter Authority Of The City In That Ordinance 70078 Conflicts With Mo. Rev. Stat. § 71.010 And The Missouri Minimum Wage Law

Under Mo. Const. Art. VI, § 19(a), the ordinance promulgated by a charter city must be "consistent with the constitution and not limited or denied by state statutes." *Goff*, 918 S.W. 2d at 789 (internal quotations omitted). As discussed above, Ordinance 70078 prohibits the Missouri Minimum Wage Law and is thus in conflict with the Missouri Minimum Wage Law and Mo. Rev. Stat. § 71.010. Moreover, as discussed more fully in Respondent's. Initial Brief and below, Ordinance 70078 is further in violation of Mo. Rev. Stat. § 67.1571. *See* Resp. Br. at 24-39. Accordingly, Ordinance 70078 is in violation of the City Charter and the Missouri Constitution.

B. Ordinance 70078 Violates The Charter Authority Of The City In That The Establishment Of A Minimum Wage Is Not A *Purely* Local Concern

Apart from the strictures of preemption by state statutes, the authority of a municipality is not without meaningful limits in the first place: notably, municipal legislation may "not invade the province of general legislation involving the public policy of the state as a whole." *Missouri Bankers Ass'n, Inc. v. St. Louis County*, 448 S.W.3d 267, 271 (Mo. banc. 2014) (*quoting Flower Valley Shopping Ctr., Inc. v. St. Louis Cnty.*, 528 S.W.2d 749, 754 (Mo. banc 1975)); *Yellow Freight Systems, Inc. v. Mayor's Comm. On Human Rts.*, 791 S.W.2d 382 (Mo. banc 1990). "[T]he constitution and general laws of the state shall continue in force within the municipalities which have framed their own charters, and that the power of the municipality to legislate *shall be confined to municipal affairs*." *Kansas City v. J. I. Case Threshing Mach. Co.*, 87 S.W.2d 195, 200 (Mo. 1935) (emphasis added).

The problem of a minimum "living wage" for workers is a statewide and national crisis – not of such a distinctly local concern that the City is authorized to enact municipal legislation to address it, pursuant to its delegated powers or any others. The question of whether employers should be required to pay their employees a minimum wage, and the amount of that minimum wage, is one of state and national interest. The extra-local scope of this question is demonstrated by the Ordinance's own prefatory language, (A46) (finding that "real wages for most workers have increased little if at all since the early 1970s"), and even more blatantly so by the original language in Board Bill

83FSAA. (A63) (finding that "real wages for most workers *in the United States* have increased little if at all since the early 1970s") (emphasis added). That the scope of this issue extends beyond purely local considerations is further underscored by the enactments of the General Assembly to set a statewide public policy on the issue. The enactment of the Missouri Minimum Wage Law, and the explicit prohibition on local ordinances in Mo. Rev. Stat. § 67.1751 demonstrate this clearly. Accordingly, the issue of a minimum wage is not a purely local concern such that the City is authorized to legislate the same by local ordinance under the charter authority granted to it by Mo. Const. Art. VI, §19(a).

Because the Ordinance exceeds the City's legislative authority in this way, it must be stricken and declared void. On this point alone, Plaintiffs have satisfied their burden to demonstrate a likelihood of success on the merits.

CONCLUSION FOR RESPONSE TO APPELLANTS/CROSS-RESPONDENTS' APPEAL

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

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

I. APPELLANTS HAVE NOT AVOIDED THE CLEAR PREEMPTION OF ORDINANCE 70078 BY MISSOURI REVISED STATUTE SECTION 67.1571

To avoid the outcome-determinative preemption by Mo. Rev. Stat. § 67.1571, whose clear terms unequivocally prevent Appellants from implementing a local minimum wage, 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. App. Br. at 12-13. 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.

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); *Rizzo v. State*, 189 S.W.3d 576, 578 (Mo. banc 2006). "The 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 and high burden engrafted onto statutory challenges are to engender reliance upon the acts of the legislature. The challenges facing those who

would untimely challenge a statute, citing its procedural unconstitutionality, are codified in Mo. Rev. Stat. § 516.500. Mo. Rev. Stat. § 516.500 places certain burdens on slightly untimely challenges (those within five years of a bill's effective date)—requiring a challenger to establish that despite the untimely action, the challenger was nonetheless among the class of the first persons aggrieved by the statute. *See* Mo. Rev. Stat. § 516.500. However for those egregiously untimely challenges (those beyond five years of a bill's effective date), Mo. Rev. Stat. § 516.500 mandates an outright bar:

> 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).

A. Appellants Cannot Identify A Single Case In Which Mo. Rev. Stat. § 67.1571 Was Held Unconstitutional As Part Of The Rationale For The Court's Decision

Appellants contend that the unconstitutionality of Mo. Rev. Stat. § 67.1571 is "beyond dispute and has been so recognized." App. Br. at 13. Nonetheless, when pressed to substantiate that Mo. Rev. Stat. § 67.1571 has been recognized, they point to the Judgment rendered by the Trial Court and the *Missouri Hotel* Judgment. The former is presently on appeal, and the language Appellants' rely on in the latter is unequivocally *obiter dictum*.

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.

The Trial Court properly disregarded Appellants' claim that Mo. Rev. Stat. § 67.1571 was already declared unconstitutional in 2001. (L.F. 174-75). As noted above, *Missouri Hotel* concerned a challenge to 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 preempted by Mo. Rev. Stat. § 67.1571; was preempted by the Missouri Minimum Wage Law, in conjunction with the general preemption 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 preempted 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*.

Appellants attempt to distinguish *Autumn*, and redefine *obiter dictum*, by arguing that the operative factor for *obiter dictum* are what the court considered, what the court received briefing on and whether the judgment was final. App. Br. at 18-19. This standard is improper and abandoned by Appellants one page later. *See id*. at 20 (noting that "a cursory review of the Kansas City Judgment demonstrates that § 67.1571 was in no way 'necessary' to the court's finding of preemption"). The standard for whether an opinion or finding is *obiter dictum* is its relation to the relief granted by the court. *Richardson v. Quiktrip Corp.*, 81 S.W.3d 54, 59 (Mo. Ct. App. 2002) (*quoting Campbell v. Labor & Indus. Relations Comm'n*, 907 S.W.2d 246, 251 (Mo. App. W.D. 1995). ("Statements . . . are obiter dicta [if] they [are] not essential to the court's decision of the issue before it.").

The finding that Mo. Rev. Stat. § 67.1571 was unconstitutional was not necessary to the relief granted by Judge Dierker in the *Missouri Hotel* Judgment. The same is not true of the *Kansas City* Judgment 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). Notwithstanding Appellants' opinion that the General Assembly and Judge Dierker have unequivocally recognized and adjudicated the unconstitutionality of Mo. Rev. Stat. § 67.1571. The *Kansas City* Judgment nonetheless acknowledged and relied upon its vitality to grant the relief provided therein. Therefore, not only can Appellants not point to a single case where Mo. Rev. Stat. § 67.1571 was ruled unconstitutional as part of the rationale for the court's decision, they are unable to distinguish a case where the reliance on the vitality and ordinance-preempting effects of Mo. Rev. Stat. § 67.1571 was essential to the relief granted.

B. The City Was In The Class Of The First Persons Aggrieved By Mo. Rev. Stat. § 67.1571

As its first bar to Appellants' challenge of Mo. Rev. Stat. § 67.1571, Mo. Rev. Stat. § 516.500 provides that "[n]o 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." Mo. Rev. Stat. § 516.500. However, an exception to this first prohibition exists where "it can be shown that there was no party aggrieved who could have raised the claim within that time." *Id.* "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." *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*. 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. *See Missouri Hotel* Judgment ("[T]he Court finds that intervenor defendants are the first persons aggrieved by an application of §67.1571, and that their challenge to the statute was raised within the time permitted by §516.500."). (A58). The City has already attacked the procedural constitutionality of Mo. Rev. Stat. § 67.1571, with the time permitted by Mo. Rev. Stat. § 516.500, and strategically abandoned its claims on appeal, foreclosing any possibility for further tolling the limitations period of Mo. Rev. Stat. § 516.500 to authorize the City's 2001 claims, which have long since grown stale.

C. Mo. Rev. Stat. § 516.500 Demands That "In No Event" Should Appellants Be Allowed To Challenge Mo. Rev. Stat. § 67.1571 In The Present Action

Appellants' inability to articulate a single case—where an invalidation of Mo. Rev. Stat. § 67.1571 was essential to rationale of the decision handed by the court—also entails they cannot demonstrate that Mo. Rev. Stat. § 67.1571 was challenged on procedural constitutionality grounds within five years, by themselves or any other person. Accordingly, Mo. Rev. Stat. § 516.500 provides that "in no event" should Appellants' challenge to the procedural constitutionality of Mo. Rev. Stat. § 67.1571 be permitted in the present action. *See* Mo. Rev. Stat. § 516.500 ("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.") (emphasis added).

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, 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 Act 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.

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."). Appellants' sophistry that an affirmative defense is elsewhere defined as a mechanism to escape "legal responsibility" misses the point entirely. *See* App. Br. at 17. Whether styled as avoidance of "liability" or avoidance of "legal responsibility," the defense posture is unchanged. Although, contrary to Appellants' conjecture, that if a statute is procedurally unconstitutional but is nonetheless not challenged on that basis within five years, Mo. Rev. Stat. § 516.500 mandates that yes, Appellants do have a "legal responsibility" to comply with that law, to believe otherwise is to eviscerate the stability

that Mo. Rev. Stat. § 516.500 seeks to engender. The present challenge to Mo. Rev. Stat. § 67.1571 seeks to escape that liability.

Regardless of whether an affirmative defense is regarded as a mechanism to escape "liability" or "legal responsibility," Appellants' attack on Mo. Rev. Stat. § 67.1571 is functionally a counterclaim. 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.

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).

Lebeau and its progeny 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 seeking to rely on the *Missouri Hotel* Judgment's "ruling" regarding Mo. Rev. Stat. § 67.1571 *and* style their challenge to Mo. Rev. Stat. § 67.1571 as an affirmative defense, Appellants are speaking out of both sides of their mouths. The *Missouri Hotel* Judgment actually affirms the position that challenges to Mo. Rev. Stat. § 67.1571, regardless of whether they are asserted offensively or defensively, are subject to Mo. Rev. Stat. § 516.500. Similar to the present case, the plaintiffs in *Missouri Hotel* challenged a local minimum wage program, the Living Wage Ordinance. (A47). The defendants, including the City, responded by challenging the procedural constitutionality of Mo. Rev. Stat. § 67.1571. (A48). In response to this challenge to Mo. Rev. Stat. § 67.1571, the plaintiffs "filed a motion to strike, asserting that the issue was not timely raised and that the claim of unconstitutionality is barred by the statute of limitations." *Id.* Judge Dierker affirmatively found "that intervenor defendants are the first persons aggrieved by an application of §67.1571. (A58). Noting that the "[i]ntervenor defendant's amended answer was filed in February, 2001," Judge Dierker applied Mo. Rev. Stat. 516.500 to the *Missouri Hotel* defendants' challenge to Mo. Rev. Stat. § 67.1571 and found that "their challenge to the statute was raised within the time permitted by §516.500." *Id.*

D. Equity Demands That In No Event Should Appellants Be Allowed To Challenge Mo. Rev. Stat. § 67.1571 In The Present Action

That the City was a party to *Missouri Hotel*—wherein the *Missouri Hotel* Judgment explicitly determined the existence of the first class of persons aggrieved by Mo. Rev. Stat. § 67.1571—provides an additional equitable bar to Appellants' stale

attacks on Mo. Rev. Stat. § 67.1571. *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, the limitations 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.

II. ORDINANCE 70078 CREATES LIABILITIES OF CITIZENS AMONG THEMSELVES, IN THAT ORDINANCE 70078 ENLARGES PRESENTLY-EXISTING CONTRACTUAL DUTIES BETWEEN CITIZENS AND QUALIFIES A RIGHT OF ACTION BETWEEN THIRD PARTIES

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

"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)).

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. *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 a local minimum wage program, Ordinance 70078 "set[s] forth remedies for violations of the minimum wage rate." (A124). 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). 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 (for back wages and restitution) and enlarges the common law or statutory duty or liability of citizens among themselves (mandating a higher wage between employers and employees), 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.*

Appellants complain that Respondents have cited no authority for the argument "that setting a wage somehow creates a contract." App. Br. at 22. As an initial matter, Appellants grossly overstate the inquiry, which is whether Ordinance 70078 creates or mandates *contractual obligations* between parties. Moreover, Appellants' complaint misses the point: the implications for employers and employees entering into employment contracts are obvious from the face of Ordinance 70078. While Ordinance 70078 takes care not to expressly prohibit then-existing employment agreements, it nonetheless unavoidably prohibits their terms implicitly. Unlike a law that simply prohibits the assignment of unearned wages, *see* App. Br. at 25, Ordinance 70078 mandates that certain contractual terms exist in every employment agreement. 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).

By restraining an employer from interfering with an employee's right to be paid according to the minimum wage program set forth therein, 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."). Appellants try to distinguish these mandates by characterizes Ordinance 70078 as merely prescribing the remedies set forth in Ordinance 70078 as "penal." App. Br. at 23. However, obligations of *restitution*, between an employer and an employee, cannot credibly be dismissed as "penal."

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. ORDINANCE 70078 CONSTITUTES AN UNDUE, UNAUTHORIZED AND ILLEGAL DELEGATION OF LEGISLATIVE POWERS

Ordinance 70078 vests the Director of the Department of Human Resources of the City (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.*

"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)).

Appellants quote, at length, affirming this exception in the context of police regulations. *See* App. Br. at 28-30. However, 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).

In order to further its goals—placing restrictions and requirements upon the employment of individuals within the City (i.e., lawful business, in itself harmless)—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. Contrary to Appellants' argument, Respondents do not rely on *Williams* for the proposition that "'restrictions on lawful conduct or lawful business' can *never* be delegated," rather *Williams* speaks for the proposition that when determining *whether* a delegation is proper depends in large part on the nature of the conduct as to which the delegation is to be exercised.

Regardless, if the *type* of delegation of power set forth in Ordinance 70078 were subject to an exception, or otherwise proper—which Appellants vehemently dispute—the *manner* in which power is delegated under Ordinance 70078 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, § 1 of the Missouri Constitution; article IV, §§ 1 and 23 of the City Charter and article VI, § 19(a) of the Missouri Constitution.

Article II, § 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.").

"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). 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.

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.

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

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

Respectfully Submitted,

SPENCER FANE LLP

/s/ Jane E. Dueker
Jane E. Dueker, MO #43156
Thomas W. Hayde, MO #57368
Arthur D. Gregg, MO #67098
1 N. Brentwood Blvd., Suite 1000
St. Louis, MO 63105
Telephone: (314) 863-7733
Facsimile: (314) 862-4656
jdueker@spencerfane.com
thayde@spencerfane.com
agregg@spencerfane.com

Attorneys for Respondents/Cross-Appellants

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 16,201 words, excluding the cover page, the signature block, Certificate of Service and this Certificate, as determined by the Microsoft Word 2010 word-counting system.

SPENCER FANE LLP

/s/ Jane E. Dueker
Jane E. Dueker, MO #43156
Thomas W. Hayde, MO #57368
Arthur D. Gregg, MO #67098
1 N. Brentwood Blvd., Suite 1000
St. Louis, MO 63105
Telephone: (314) 863-7733
Facsimile: (314) 862-4656
jdueker@spencerfane.com
thayde@spencerfane.com
agregg@spencerfane.com

Attorneys for Respondents/Cross-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of August, 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:

Michael A. Garvin, Esq.
Mark Lawson, Esq.
Erin McGowan, Esq.
1200 Market Street
City Hall, Room 314
St. Louis, Missouri 63103
(314) 622-3361 (telephone)
(314) 622-4956 (facsimile)
garvinm@stlouis-mo.gov
lawsonm@stlouis-mo.gov
mcgowane@stlouis-mo.gov

James G. Martin, Esq.
John J. Rehmann, II, Esq.
Robert F. Epperson, Jr.
DOWD BENNETT LLP
7733 Forsyth Blvd., Suite 1900
St. Louis, MO 63105
(314) 889-7300 (telephone)
(314) 863-2111 (facsimile)
jmartin@dowdbennett.com
jrehmann@dowdbennett.com
repperson@dowdbennett.com

Attorneys for Appellants/Cross-Respondents

Arthur J. Clemens, Jr., *Amicus Curiae*
P. O. Box 78302
St. Louis, MO 63178
lawscan2001@yahoo.com

Christopher N. Grant
Schuchat, Cook & Werner
1221 Locust Street, Second Floor
St. Louis, MO 63103-2364
cng@schuchatcw.com

Attorneys for Amici Curiae Municipal and Labor Law Scholars, National Employment Law Project and Missouri Jobs with Justice

/s/ Jane E. Dueker