

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

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Bruce Clark, Peter Butler, and Ann Dolan,

Case Type: Civil Other/Ballot Omission  
Declaratory Judgment  
Honorable Leonardo Castro

Petitioners,

Court File No. 62-CV-19-857

v.

City of Saint Paul, Minnesota;

and,

Shari Moore, in her official capacity  
Saint Paul City Clerk;

and,

Joseph Mansky, in his official capacity  
Ramsey County Elections Manager;

Respondents.

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**PETITIONERS' MEMORANDUM OF  
LAW OPPOSING RESPONDENTS'  
MOTION TO STAY ORDER PENDING  
APPEAL**

**INTRODUCTION**

In its May 30, 2019 Order, this Court correctly identified the referendum on Ordinance 18-39 (“Referendum”) as proper, and granted Petitioners both forms of relief mandated by Section 8.05 of the City Charter. Effective July 1, 2019, enforcement of the underlying ordinance is suspended, and the enactment or repeal of 18-39 is dependent upon an up-or-down vote by the people of Saint Paul. This provision was drafted to

provide Saint Paul voters with meaningful legislative authority, and this is exactly how it is designed to function.

Nevertheless, the City has asked this Court to disregard the first of these two elements of a referendum, and delay indeterminately the second. For a variety of reasons, a continuing stay will cause irreparable harm to the residents of the City and must be denied.

### ARGUMENT

The grant of a stay is by its very nature an equitable remedy. In deciding whether to grant a stay pending appeal, a trial court has broad discretion in determining which details are relevant. *Webster v. Hennepin County*, 891 N.W.2d 290, 293 (Minn. 2017). Rather than mandating a strict set of factors, courts have encouraged wide latitude and “individual judgments in each case, meaning that the formula cannot be reduced to a rigid set of rules.” *Id.*, citing *Hilton v. Braunskill*, 481 U.S. 770, 776-78, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987).

In the instant case, the Court should recognize the City’s unclean hands throughout the process and deny the request to further damage Petitioners with an extended stay. Next, the Court should weigh the Petitioners’ and the public’s interest in remaining “secure in victory” while the appeal is pending, against the City’s interest in maintaining the status quo. *Id.*, citing *DRJ, Inc. v. City of St. Paul*, 741 N.W.2d 141 (Minn.App.2007). The final relevant factor concerns whether irreparable injury will be

suffered by either party in the absence of a stay. *Id.*, citing *State v. Northern Pacific Railway Co.*, 221 Minn. 400, 22 N.W.2d 569, 574-75 (internal citations omitted) (1946).<sup>1</sup>

Petitioners will address each relevant factor, and demonstrate that a continued stay of the Court’s May 30<sup>th</sup> Order is inappropriate.

**A. This Court was divested of jurisdiction when the Notice of Appeal was filed.**

As a threshold matter, Minnesota Rule of Appellate Procedure 108.01, Subdivision 2 makes it clear that this issue is no longer properly before this Court. The rule provides, in pertinent part: “the filing of a timely and proper appeal suspends the trial court’s authority to make any order that affects the order or judgement appealed from.”<sup>2</sup> Minn. R. Civ. App. P. 108.01, Subd 2 (2019). The rule goes on to exempt from this prohibition matters that are “independent of, supplemental to, or collateral to” the underlying order being appealed.

The Saint Paul City Charter defines a referendum in §8.05 as a voter measure with two distinct functions: First, upon certification of procedural sufficiency, the underlying ordinance “shall be suspended in its operation.” Second, the ordinance is placed on the next ballot in the city for approval or rejection by the voters. Far from being an

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<sup>1</sup> Because the Supreme Court has granted accelerated review in this case, the majority of the reasons cited by the City to grant a stay are irrelevant. Specifically, there is no longer a question whether these issues will be granted a “full appellate review,” and there is no risk that the arguments by each party will be “lost to the void of justiciability.” Resp. Memo at p. 8.

<sup>2</sup> The City of Saint Paul timely filed its Notice of Appeal in this case on June 13, 2019, and requested expedited review that same day.

“independent” or “collateral” question, to stay enforcement of this Court’s order goes to the very heart of the issue at hand.

No authority is cited by the City for the trial court to retain jurisdiction on such a fundamental question once the matter has been turned over to the appellate courts.<sup>3</sup> Nonetheless, should this Court determine that it retains jurisdiction over this issue, the City’s history of misconduct shows why this Court should deny its request for a stay nonetheless.

**B. “He who seeks equity must do equity, and he who comes into equity must come with clean hands.”<sup>4</sup>**

Despite the City’s representation to the contrary, there has been no material change in circumstances whatsoever since this Court’s May 30<sup>th</sup> Order. Indeed, there has been no change since November 14, 2018, when the City passed Resolution 18-1922 (Ex. D), which confirmed the legal sufficiency of the petition for referendum on Ord 18-39.

First, it should be noted that The City’s contract with the Consortium provided for a Commencement Date of either October 1, 2018, or April 1, 2019.<sup>5</sup> The City always had the option to delay commencement of its new trash plan until April of 2019.

On September 27, 2018, the City Clerk was presented with a procedurally sufficient Petition to repeal Ordinance 18-40, a companion ordinance concerning

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<sup>3</sup> Matters on which the trial court has been held to retain jurisdiction as collateral to the underlying issue include attorney fees in an eminent domain case. *See, e.g., Spaeth v. City of Plymouth*, 344 N.W.2d 815 (Minn. 1984).

<sup>4</sup> *Hruska v. Chandler Associates, Inc.*, 372 N.W.2d 709 (Minn. 1985), citing *Johnson v. Freberg*, 178 Minn. 594, 597-98, 228 N.W.2d 159, 160 (1929).

<sup>5</sup> *See* Ex. E at p. 10, §1.

organized collection in Saint Paul.<sup>6</sup> Rather than delay enactment in light of the thousands of valid signatures, however, the City pressed forward with its new scheme.

In November, 2018, the referendum on 18-39 was recognized as procedurally sufficient. However, the City did not suspend its enforcement or repeal it as required by the Charter. Instead, the council rejected the measure on highly spurious legal grounds, thereby creating the basis for this litigation. Again, the City made no attempts to compromise.

On January 9, 2019, counsel for Petitioners wrote a letter to the Mayor and all seven councilmembers.<sup>7</sup> The purpose of this correspondence was to again request the opportunity to meet with City officials to recognize the Referendum as legitimate, and to reach an amicable compromise without the need to file suit. No response of any kind was received. At no point since this litigation began has the City made any attempt to approach Petitioners to find a solution to the problem it has created for itself. The City has demonstrated that a Court Order is the only authority it will respect. Even then, the City disingenuously continues to claim that it is required to perform its November 14, 2017, contract, ignoring the clear reasoning of this Court's May 30 Memorandum.

As this Court points out, two events have occurred which arguably triggered the contract's Force Majeure clause excusing performance. First, the Petitioners have exercised their right to a referendum, i.e., a legislative event. Second, this Court's May 30 Order constitutes a judicial event. Each of these separate acts is beyond the control of

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<sup>6</sup> See Ex. F.

<sup>7</sup> See Joseph Affidavit, Attached hereto as Exhibit I.

the parties to the contract, thereby excusing performance. Memorandum at pp 10-12. It is the City's choice to ignore this clear avenue of relief, but the claim that it continues to be bound by the contract's terms, rings hollow.

By its continuing refusal to honor the mandate in §8.05 of the Charter, Saint Paul has already stolen for itself an 8-month stay in the suspension of Ordinance 18-39. With its recent stay motion, it is now asking the Court to maintain the status quo – a continuation of this illicit benefit – seeking to extend it 90 days past the ruling of the appellate courts.<sup>8</sup> Such a stay would obliterate the voters' right to suspend the ordinance and effectively nullify one of the two central purposes of a referendum under the Saint Paul Charter. This Court must not allow that to happen.

**C. Petitioners will suffer irreparable harm if a stay is granted.**

If a stay is granted, irreparable harm will be suffered by each of the Petitioners. They, like the thousands of other Saint Paul residents who signed the referendum petition, will continue to be denied one of their fundamental constitutional rights under the City Charter. This is precisely the type of harm that must be prevented at all costs.

Petitioners are like countless other residents who have never participated in the mandatory trash program in Saint Paul. Some, like Peter Butler and Bruce Clark, have not had residential trash service for more than 20 years. (Butler Decl., ¶3; Clark Decl.,

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<sup>8</sup> The Supreme Court has set oral arguments for August 20, 2019 to accommodate the ballot-language deadline set by Minnesota Statute §205.16, subd. 4. In practice, this will mean November 20, 2019 is the earliest the stay will conclude – two weeks after the fall election.

¶3). Ann Dolan was assigned a hauler she would never have chosen to stop at her residence each week, which disposes of nonexistent waste from an empty can near her garage. (Dolan Decl., ¶7).

These stories aside, the question of whether the City's organized scheme is superior to an open hauling system is not before this Court. Nor is the question of whether the new plan is cost-effective, efficient, or even desirable. The harm suffered by Petitioners and the residents of the City is much more serious and tangible. The ability to affect change through citizen legislation, enshrined in the Constitution and City Charter, is being robbed by a lawless city government. Voter disenfranchisement has reached new heights in Saint Paul, and this is truly irreparable harm.

By contrast, the City's brief largely consists of a recitation of the difficulties it encountered in establishing organized collection. This is not a basis for granting a stay, nor does it show irreparable harm. The only harm cited by the City in the absence of a stay appears to be financial. This, too, is largely exaggerated.

**D. The practical effects of the stay expiring on June 30, 2019 are minimal.**

Regardless of the City's unclean hands, and no matter the harm Petitioners will suffer if a stay is granted, this Court is still left with the question of what will happen to trash collection in the City, absent a stay of the Court's Order. The apocalyptic scenario presented by the City is disingenuous at best. The reality is much less complicated, and will likely only result in an additional expenditure by the taxpayers. While unfortunate, and avoidable had the City respected voter rights earlier in the process, it is not

irreparable harm. Moreover, costs will not begin to approach the figures outlined by the City in its memorandum.<sup>9</sup>

The City does not have the option of failing to comply with the Waste Management Act in Minnesota Statute §115A. This means that residential trash service, in one form or another, must be provided. Fortunately, as Respondents concede, each of the 74,000 households in Saint Paul already has a hauler designated to pick up its garbage.<sup>10</sup> In other words, the City need not completely undo organized collection and reinstate open hauling in the time frame described; rather, it need only find a way to provide continuity of service, and compliance with the WMA, in the absence of recently-codified Chapter 220 of the City Code.<sup>11</sup> This is far less daunting a proposition than the City presents.

## **CONCLUSION**

Home rule charter cities like Saint Paul reserve for their residents the power of referendum to keep the authority of the city council and mayor in check. Voter measures give people the power to excise or create individual pieces of legislation for narrow relief, which creates a healthy tension between City officials and the electorate. The

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<sup>9</sup> The City discusses costs on page 7 of its memorandum. Absent in the analysis, however, is the cost savings by transitioning away from the City's scheme. Shifting responsibility for waste disposal to the household, including the ability to opt out of service and share cans, will mitigate costs significantly.

<sup>10</sup> Resp. Memo. in Support of Stay at p. 4, 5, 7.

<sup>11</sup> Ordinance 18-39 created Chapter 220, which serves as the basis for organized collection in Saint Paul.

City's continuing disregard of voter power must not be rewarded by extending the illicit stay of the suspension of Ordinance 18-39, or by denying the voters' right to choose in November. The City has created a mess for itself, but eradicating the power of referendum by granting an extended stay will only exacerbate the problem.

Dated: June 25, 2019

By:           /s/ Gregory J Joseph            
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**Acknowledgement**

I hereby acknowledge that, pursuant to Minn. Stat. §549.211, subd. 3, sanctions may be imposed by this Court if it determines that Minn. Stat. §549.211, subd. 2, has been violated.

Dated: June 25, 2019

*/s/ Gregory J Joseph*  
Gregory J Joseph, MN Bar No. 0346779