No. A19-0916

STATE OF MINNESOTA
IN SUPREME COURT

Bruce Clark, Peter Butler, and Ann Dolan,

Respondents,

vs.

City of Saint Paul, Minnesota; Sherri Moore,
in her official capacity as City Clerk, and Joseph Mansky,
in his official capacity as Ramsey County Elections Manager,

Appellants.

RESPONDENTS' BRIEF AND ADDENDUM

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I. Is A Referendum on Saint Paul City Ordinance 18-39 preempted by §115A.94 because it is irreconcilable with the statute?

Respondents brought suit under Minnesota Statutes §204B.44 for correction of a ballot error, after the Saint Paul City Council refused to suspend Ordinance 18-39 and place it on the municipal ballot despite a legally sufficient referendum thereon. Doc 1, Apps. Add. 64-65. The district court found in favor of Respondents. Apps. Add. 1-17. It determined that §115A.94, the statute governing organized collection of municipal solid waste, allows for the broad exercise of local charter authority and does not preempt the Referendum. *Id.* The City of Saint Paul appealed and petitioned this Court for accelerated review, which was granted on June 24, 2019. Doc. 46.

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The district court found that the Referendum would not cause unconstitutional contract impairment because the terms of the underlying contract anticipated a voter measure. Apps. Add. 11-16.

APPOSITE AUTHORITIES

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Constitutional and Statutory Authority

Minnesota Constitution, Article I, Section 11.

United States Constitution, Article I, Section 10.

STATEMENT OF THE CASE

This matter originated in Ramsey County District Court before the Honorable Leonardo Castro earlier this year. Suit was brought by Respondents under Minnesota Statute §204B.44, which is a statute designed to remedy ballot errors or omissions, whether deliberate or unintentional. Doc. 1.

The dispute in this case stems from the Saint Paul City Council's refusal to recognize a voter referendum on Ordinance 18-39, which concerns organized collection of solid waste in the City. *See Id.* The petition for referendum was certified as procedurally sufficient by the Ramsey County Elections Clerk, contained enough valid signatures, and was brought within the time frame proscribed by the Saint Paul City Charter. Doc. 1 Ex. C. Citing grounds of preemption by the organized collection statute at §115A.94 and unconstitutional contract impairment, the City Council rejected the measure on November 14, 2018. Apps. Add. 64-65. On February 7, 2019, this suit was initiated. Doc. 1.

The district court found in favor of Respondents, declaring that the organized collection statute provides ample room for city authority under a home rule charter and is thus not preempted. Apps. Add. 7. Judge Castro also found that the Charter provides Saint Paul residents the right to referendum on any ordinance as long as the petition is found to be timely and legally sufficient. *Id.* The district court ordered Ordinance 18-39

suspended in its operation roughly 30 days after its Order, and directed placement on the November, 2019 municipal ballot. Apps. Add. 1-2.[1]

Appellants filed a Notice of Appeal and requested accelerated review, which this Court granted on June 24, 2019. Doc. 46. Oral arguments were scheduled for August 20, 2019, and an accelerated briefing schedule was established to accommodate the statutory deadline for ballot language – August 23, 2019. Minn. Stat. §205.16 (2018).

STATEMENT OF FACTS

This matter comes before this Court on largely undisputed facts. Respondents Bruce Clark, Peter Butler, and Ann Dolan live and vote in Saint Paul (the "City"). Saint Paul is a home rule charter city established under Minnesota Statutes Chapter 410, and it reserves for its voters the powers of initiative, referendum, recall, and charter amendment. Add. 1-2. Under the Charter, any ordinance may be proposed by the electorate in the City, and any ordinance passed by the City Council may be referred to the voters for approval or rejection under the power of referendum in §8.05. *Id.*

For decades, the City has had an open, competitive system of licensed haulers that contract privately with residents to collect solid waste. The Minnesota Waste Management Act ("WMA") establishes priorities and procedures for the regulation of

[1] The portion of the Order suspending the Ordinance would later be stayed. Doc. 56.

solid waste in Minnesota. *See* Minn. Stat. §115A. The City's open system was compliant with the Act, as any system must be.

At some point in 2016, City officials began exploring the possibility of organizing collection of solid waste in the City pursuant to Minnesota Statute §115A.94 of the WMA. Apps. Add. 3. Organized collection is a scheme under which the competitive market in solid waste is replaced by a system of city-defined districts with assigned haulers. Individuals lose the right to contract with their hauler of choice at a competitive, negotiated rate, in favor of a hauler at a fixed price determined by the City. Minn. Stat. §115A.94; App. Add. 3-4.

In order to organize collection, a city must follow certain minimum procedures as laid out in §115A.94. The City in this case chose to avail itself of the procedure in Subdivision 4(d), which is the most abbreviated procedure in the statute. App. Add. 11.

No city is required to organize collection of solid waste, and the procedures in §115A.94 are optional. The statute provides: "The authority granted in this section to organize solid waste collection is optional and is in addition to authority to govern waste collection granted by other law." Minn. Stat. §115A.94, Subd. 6(a).

The statute also expressly leaves room for charter authority: "Except as provided in subdivision 5, a city, town, or county may exercise any authority granted by any other law, including a home rule charter, to govern collection of solid waste." Minn. Stat. §115A.94, Subd. 6(c). The legislature is indifferent toward a city's choice of waste hauling system, and points out that a city is neither required to, nor prevented from, organizing collection. Minn. Stat. §115A.94, Subd. 6(b)(1)-(2).

Last summer, this Court found that the process laid out in §115A.94, though extensive, "…does *not* include a municipality's actual decision to organize collection." *Jennissen v. City of Bloomington*, 913 N.W.2d 456, 461 (Minn. 2018)(emphasis in original). So, the municipality gets the final word, not the legislature.

Against this backdrop, the City executed a contract ("Contract") with the remaining trash haulers on November 14, 2017.[2] Apps. Add. 4. Under §115A.94, the haulers were forced to create a Limited Liability Company ("Consortium"), to collectively negotiate for their interests against those of the City. *Id.* Some ten months after the signing of the Contract with the Consortium, On September 5, 2018, the City passed Ordinance 18-39, which implemented organized collection in the City. *Id.* The City Council had enacted 18-40 the month prior, which also helped to define and enact the plan. *Id.*, *see also* Doc. 2 Ex. G.

Immediately upon passage of the ordinances, Respondents began collecting signatures on petitions for referendum on both Ordinance 18-39 ("Referendum"), and 18-40. The Charter at §8.05 requires signatures "equal in number to eight (8) percent of those who voted for the office of mayor…" at the last election to be presented to the clerk within 45 days of publication of the ordinance. Add. 1. This means 4,932 signatures were required for a referendum on each ordinance. Doc. 1 Ex. C.

On October 16, 2018, the petition for referendum on Ordinance 18-39 was presented to the Ramsey County Elections Manager for certification. Id. Of the 6,469

[2] Several haulers previously licensed in the City either went out of business or sold their interests due to the City's planned conversion to the new system.

signatures gathered by Respondents, 5,541 were certified as valid. Id. The matter was then referred to the City Council on October 31, 2018 as legally sufficient with no procedural defects. *Id.*, App. Add. 5.

The City Council took up the Referendum petition on November 14, 2018. At that meeting, the Council passed Resolution 18-1922, which recognized the Referendum on Ordinance 18-39 as procedurally sufficient but directed the City Clerk not to place it on the municipal ballot. App. Add. 64-65. The reason cited for this rejection was that:

> …the provision of the City Charter allowing referendum for the subject matter of the Petition is preempted by Minnesota Statutes §§443.28 and 115A.94, and is an unconstitutional interference with the Contract between the City and the Consortium, and conflicts with state public policy.

Apps. Add. 64-65.As to the referendum on Ordinance 18-40, that measure was also certified as procedurally sufficient and referred to the City Council for placement on the ballot. Doc. 2 Ex. F. However, in Resolution 18-1760, the City Council directed that the "City Attorney prepare an ordinance for the Council to repeal Ordinance 18-40." *Id.* The referendum on this ordinance was not alleged to be illegal. *Id.*

Respondents filed a petition under Minn. Stat §204B.44 a little less than three months after the Council rejected the petition on the measure before this Court – the Referendum on Ordinance 18-39. Doc. 1.

INTRODUCTION

From the beginning, the objective of the Respondents was to ensure that the public supported the significant disruption that is organized collection of solid waste in Saint Paul. The Charter – the same document which grants authority in equal measure to the City Council – specifically reserves for voters the *right* to referendum on any ordinance. Add. 1-3. This right is not discretionary, and it is not bestowed upon the electorate by the Council.

The city cites two pretextual reasons for denying the Referendum, neither of which has any legal merit. First, far from being "irreconcilable" with the state statute, the Referendum is specifically allowed. This Court determined as much last summer involving the same statute in *Jennissen v. City of Bloomington*. Second, the Referendum cannot possibly cause an impairment of the obligation of the City's Contract with the Consortium. Repudiation of a contract and alteration of its terms are fundamentally different concepts which the City fails to reconcile.

The Referendum is a specifically authorized part of the organized collection process under §115A.94 as well as the Charter, and it must be allowed to go to the voters in Saint Paul this November.

STANDARD OF REVIEW

This case requires the Court to evaluate and interpret provisions in a city charter and state statutes. Both parties agree as to the relevant facts, and the relevant standards of review. "The application of statutes, administrative regulations, and local ordinances to undisputed facts is a legal conclusion and is reviewed *de novo*." *City of Morris v. Sax Investments, Inc*., 749 N.W.2d 1, 8 (Minn. 2008); "Whether state law preempts a municipal charter provision… is a question of law that we review de novo." *Jennissen v. City of Bloomington*, 913 N.W.2d 456, 459 (Minn. 2018).

ARGUMENT

I. The Referendum Is A Proper Measure Under The Saint Paul City Charter.

The City of Saint Paul governs itself through a home rule charter. "The general rule is that, in matters of municipal concern, home rule cities have all the legislative power possessed by the legislature of the state, save as such power is expressly or impliedly withheld." *State Ex. Rel. Lowell v. City of Crookston*, 252 Minn. 526, 528, 91 N.W.2d 81, 83 (Minn. 1958). A charter must be consistent with the state constitution, but otherwise "may provide for the establishment and administration of all departments of a city government, and for the regulation of all local municipal functions, as fully as the

legislature might have done before home rule charters for cities were authorized." *Bicking v. City of Minneapolis*, 891 N.W.2d 304, 307 (Minn. 2017), *citing* Minn. Stat. §410.07.

Expansive authority is reserved for the voters in Saint Paul under the Charter. Section 1.03 clarifies that "It is the intention of this Charter that *every power* which the people of the city might lawfully confer upon themselves… by specific enumeration in this Charter shall be deemed to have been so conferred by the provisions of this section." Charter at §1.03 (emphasis added).[3] The legislative power of the people is coequal and coterminous to that of the city council: "The people shall have the right to propose ordinances, to require ordinances to be submitted to a vote, and to recall elective officials by processes known respectively as initiative, referendum, and recall."[4] Add. 1. The Referendum at bar requires that Ordinance 18-39 be submitted to the voters.[5]

Understanding the function of a referendum in Saint Paul is critical in determining whether the measure before the Court could be preempted or unconstitutional. The Charter at §8.05 provides:

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[3] Available at: https://library.municode.com/mn/st._paul/codes/code_of_ordinances?nodeId=PTICICH_CH1NAGEPO, last visited July 27, 2019. b

[4] The initiative power in Section 8.04 provides that "*Any* ordinance may be proposed by a petition (of the voters)…". Add. 2 (emphasis added).

[5] The League represents that Respondents are seeking to "add" or "adopt" a voter-approval requirement, and "substitute the electorate for the governing body." *See* Amicus Br. at 7, 8, 9, 10, 14. This is wrong. The peoples' power of referendum exists as an inseparable part of the Charter – the same document which confers authority upon the city council. The Cities seek to *erase* it as to this narrow subject area, where it is specifically allowed by both the Charter and §115A.94.

> *Any ordinance*… may be subjected to referendum by a petition filed within forty-five (45) days after its publication. Any ordinance or resolution upon which a petition is filed… shall be suspended in its operation as soon as the petition is found sufficient. If the ordinance or resolution is not thereafter entirely repealed, it shall be placed on the ballot at the next election, or at a special election called for that purpose, as the council shall determine. The ordinance or resolution shall not become operative until a majority of those voting on the ordinance or resolution vote in its favor.[6]

Add. 2 (emphasis added). In this case, both the City and the League attempt to exploit the "colloquial" definition of referendum in order to conjure case law support for their position. The Court must recognize that the *only* two effects of a valid petition for referendum in Saint Paul are: First, suspend the subject ordinance immediately; Second, put it to a vote by the electorate for final approval or disapproval. It is a straight suspension and reversal of a legislative act by the city council, and no more.[7]

As the District Court correctly observed, the legislature did not intend the "governing body" of a city to be limited to its city council. *See* Apps. Add. at 11. Section 115A.94 obviously had to be drafted to apply to every type of municipal

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[6] This Court has succinctly explained that a referendum in Saint Paul "…is the process by which a small percentage of voters may delay the effective date of legislation and compel officials to submit it to the voters for approval or rejection." *St. Paul Citizens for Human Rights v. City Council of City of St. Paul*, 289 N.W.2d 402, 404 n.2 (Minn. 1979).

[7] The Saint Paul Charter's definition of referendum is common to most charter cities in Minnesota. *See, e.g.* Duluth, Minn. City Charter, Chapter VII, Sec. 52, available at https://library.municode.com/mn/duluth/codes/legislative_code?nodeId=a%20-%20Charter. Last visited July 28, 2019. *See also* Bloomington, Minn. City Charter, §5.10, available at http://library.amlegal.com/nxt/gateway.dll/Minnesota/bloomington_mn/bloomingtonminnesotacodeofordinances?f=templates$fn=default.htm$3.0$vid=amlegal:bloomington_mn. Last visited July 28, 2019. *See also* Hutchinson, Minn. City Charter, Section 5.07, available at https://www.ci.hutchinson.mn.us/wp-content/uploads/2017/08/citycharter12-2016.pdf. Last visited July 28, 2019.

government across the State of Minnesota, of which there are many forms.[8] "Thus," as this Court observed, "*the form* of the municipal government adopted in a charter defines the powers held by that government and by its residents." *Vasseur v. City of Minneapolis*, 887 N.W.2d 467, 472 (Minn. 2016). The problem with restricting the "governing body" to the "city council" in Saint Paul, as the Cities urge this Court to do, is that it requires excising huge portions of the Charter, including the entirety of Chapter 8.[9] Nothing in §115A.94 removes the legislative power of the voters; the opposite is true. So, the terms "city" and "governing body" in the organized collection statute must be read expansively, to include the people. Voter power is not subservient to that of the council, and it is not discretionary.

Against this backdrop, Respondents will discuss the flawed reasoning behind both the Cities' theories of preemption and impairment. Appellants have failed to cite a single case in *any* jurisdiction where a simple, up-or-down, voter-initiated referendum has been found to be either preempted, or violative of the contract clause.

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[8] *See* Minnesota Statutes Chapter 412 (2018). These forms include not only statutory cities and charter cities, but many subtypes thereof, including council-manager and strong- and weak- mayor systems within a statutory framework. A charter city may reserve for voters broad authority to legislate, as here, or none at all, as in the case of Minneapolis.

[9] The City's argument at page 25 of its brief is circular. By referring to the "governing body," the legislature's intent was obviously to leave broad discretion to municipalities to assign various duties as applicable. It acknowledges that different cities have different departments with different duties. All the City demonstrates is that the voters did not have the authority to sign the Contract, and couldn't provide notice to themselves. But neither of those duties is assigned to them under the Charter. Any other reading would require the legislature to exhaustively lay out the duties of each element of §115A.94 for each and every city government in the State. That is absurd.

II. The Referendum Does Not Conflict With State Law And It Is Not Preempted.

A. The Referendum Is Expressly Authorized Under The Organized Collection Statute.

Last year, this Court acknowledged the plain language in §115A.94 and conclusively determined that the legislature did not intend to preempt local authority in the area of waste collection. In finding room for the *Jennissen* charter amendment, however, this Court left the preemption door very slightly ajar.[10] So, in the case before the Court today, Appellants are arguing that the legislature intended to provide *explicit* authority for a charter city to exercise wide latitude in the waste collection arena, but *implicitly* take it away at the same time. This is nonsensical, and "courts should construe a statute to avoid absurd results and unjust consequences." *American Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 278 (Minn. 2000).

The test for conflict preemption is well settled. "As a general rule, conflicts which would render an ordinance invalid exist only when both the ordinance and the statute contain express or implied terms that are irreconcilable with each other." *Mangold Midwest Co. v. Village of Richfield*, 143 N.W.2d 813, 816 (Minn. 1966). "More specifically… conflict exists where the ordinance permits what the statute forbids," or

[10] Footnote 2 on Page 6 of this Court's Order in *Jennissen* explains that Amicus League of Minnesota Cities asserted conflict preemption, but the City of Bloomington had not argued it previously. For that reason, this Court declined to consider it. 913 N.W.2d at 462 n.2 (Minn. 2018).

"where the ordinance forbids what the statute expressly permits." *Id.*, citing *Power v. Nordstrom*, 150 Minn. 228, 184 N.W. 967, 18 A.L.R. 733 (Minn. 1921). *See also Bicking v. City of Minneapolis*, 891 N.W.2d 304 at 313 (Minn. 2017).

It is entirely unclear how a referendum on an ordinance that has already been passed by the city council could possibly conflict with §115A.94, unless there were a directive by the legislature to organize collection. There is not. The district court correctly found that the Referendum before the Court, like the voter measure in *Jennissen*, conflicts with the will of the city council, but not the will of the legislature.

Minn. Stat. §115A.94 Subd. 6 provides, in its entirety:

> Subd. 6. **Organized collection not required or prevented.**
>
> (a) The authority granted in this section to organize solid waste collection is *optional* and is *in addition to* authority to govern solid waste collection granted by other law.
>
> (b) Except as provided in subdivision 5, a city, town, or county is not:
>
> (1) required to organize collection; or
>
> (2) prevented from organizing collection of solid waste or recyclable material.
>
> (c) Except as provided in subdivision 5, a city, town, or county may exercise *any authority granted by any other law, including a home rule charter*, to govern collection of solid waste.

(emphasis added).[11]

The organized collection statute was not written to dictate a particular outcome. Rather, it was meant to aid a municipality in its decision-making process. The legislature took pains to point out that all the authority granted "is optional and is in addition to authority to govern solid waste collection granted by other law." Minn. Stat. §115A.94

[11] Subdivision 5 concerns organized collection by a county and is inapplicable here.

Subd. 6(a) (2018). This means that a city can ignore the statute altogether and collect its residents' garbage under its own charter. A city can discontinue the process at any time, and reverse course once implementation is complete. There is no directive or preference for organized collection over open hauling, which the legislature makes clear in Subdivisions 6(b)(1) and 6(b)(2). The statute is written expressly not to preempt local authority.[12] This is settled law.

The City cites a portion of the last sentence in Subdivision 4(d) to attempt to conjure a directive by the legislature, and thus a conflict with the Referendum. The sentence reads, in part, "…the city or town shall establish organized collection through appropriate local controls…" after the contract is signed. This, Appellants argue, is meant to supersede voter power under a home rule charter. But that interpetation requires the wholesale disregard of Subdivision 6. "As a general rule of statutory construction, a statute is to be construed, if possible, so that no word, phrase, or sentence is superfluous, void, or insignificant." *Altenburg v. Board of Sup'rs of Pleasant Mound Tp.*, 615 N.W.2d 874, 879 (Minn. App. 2000) (internal quotations omitted), *citing Duluth Firemen's Relief Ass'n v. City of Duluth*, 361 N.W.2d 381, 385 (Minn. 1985).

Conflict preemption in this context might look like a local ordinance which, for example, eliminates the requirement in §115A.94 Subd. 4(c) for a public hearing

[12] Contrast this with the City's position: "The petitioners may desire an "up or down" vote on the merits of organized collection, but that desire is subsumed in the process the legislature outlined (in the statute)." Apps. Br. at 37. This is demonstrably wrong. The process represents the *minimums* required by a city to organize. The lone public hearing is the only opportunity to be heard for voters in statutory cities. Charter cities, on the other hand, provide far more avenues of redress for the electorate.

altogether, or modified the negotiation period in Subd. 4(d) from a minimum of 60 days to 30 days, or refused to examine the impact of organized collection on traffic patterns, or cost to residents. These would be irreconcilable within the context of *Mangold*, but it is utterly impossible to achieve any of these examples with a referendum.

Regardless of the chosen waste collection system in Saint Paul, the City must comply with the strictures of the Waste Management Act in Minnesota Statutes Chapter 115A. As the City points out, §115A.941 requires that a waste collection system must be in place. Apps. Br. at 20. The Referendum does not present a choice between compliance with the WMA or lawlessness. Put another way, the voters will not decide between having their trash collected by haulers and having heaps of waste lining the streets of Saint Paul. Rather, it allows the voters to make a decision as to whether they wish to convert to this *specific* collection system – and away from the one that Saint Paul has used for decades. This is exactly why Subdivision 6 exists.

There is no directive that cities organize collection of solid waste. If the City Council had the authority under the Charter to choose to enact Ordinance 18-39, then the voters have the authority to repeal it.

B. Minnesota Statutes Section 443.28 Does Not Preempt The Referendum And Is Irrelevant To Organized Collection Altogether.

The City claims that Minn. Stat. §443.28 must preclude the peoples' right to bring about legislation under a home rule charter. *See* Apps. Br. at 20; Apps. Add. at 65. This

law, which hasn't changed since its passage in 1945, is part of an antiquated set of statutes meant to regulate landfills, incinerators, and other "facilities."[13,14] For a number of reasons, this statute cannot be interpreted to preempt the Referendum in the case at bar.

Just like the organized collection statute, Chapter 443 is written to be a supplement to municipal authority and not a substitute for it. The legislature expressly preserved and protected charter power in this chapter. Minn. Stat. §443.34 reads a lot like Subdivision 6 in §115A.94:

> **443.34 POWERS ADDITIONAL.**
> The provisions of sections 443.26 to 443.35 shall be construed as *an addition to existing charter or statutory powers* of any city of the first class and *not as an amendment to or repeal thereof*, the purpose of these sections being to permit any city of the first class to engage in the activities hereinbefore authorized, to promote the public health, safety, welfare, convenience, and prosperity of the city.
>
> (emphasis added).

It is hard to imagine a more explicit reservation of local authority than this. To be clear, in order to find that the requirement in §443.28 to "set rates" preempts the

[13] The City's interpretation of this statute requires the Court to equate "facility" with "garbage truck." Minnesota Statute §443.28 provides that the city council "…is authorized to employ present facilities, and to provide additional facilities, for rubbish disposal." It goes on to provide that the council may set the rates for such rubbish disposal, the basis for those rates, and the like.

[14] "Trash Disposal Facility" is defined in the Contract as "The facility(s) where Trash collected under this Contract is deposited."

Referendum as the City claims, the Court will need to find that the legislature does not reserve charter power for local governments in the above language.[15]

If the provisions of Minn. Stat. Ch. 443 were so important as to preempt local authority in the organized collection process, one would expect at least a passing reference to it in the organized collection statute - §115A.94. There is none. Moreover, there is also no mention of Chapter 443 anywhere in the entirety of the Waste Management Act. It hardly stands to reason that the legislature intends the negation of an enumerated right in §115A.94 by a statute that is completely unreferenced, especially in a law as detailed as the organized collection statute.

The municipal Referendum at bar is not irreconcilable with any statute. Neither does it prohibit what a statute permits, nor permit what a statute prohibits. It is an exercise of the power which is specifically authorized under §115A.94, and expressly reserved for the voters under the Charter. Conflict preemption under these circumstances is a total fiction.

[15] If the City's interpretation of §443.28 in Resolution 18-1922 is correct, and this statute "…requires a city to adopt rates for rubbish removal by ordinance," then Saint Paul has been in violation of this statute for decades. The rates for removal of waste from private residences are negotiated and set by licensed haulers and their customers under the City's open hauling system, not by Saint Paul city government diktat. It's hard to believe this would have escaped scrutiny.

III. The Referendum Would Not Unconstitutionally Impair the Contract If It Passed.

The Contract Clause was written to make sure a government could not use a law to manipulate a contract. The City is attempting to use a contract to manipulate a law.

To understand why unconstitutional impairment is impossible in this case, it is critical to understand the origins and purpose of the provision. The United States Constitution prohibits passage of any law that "…impair(s) the obligation of contracts."[16] U.S. Const., art. I, §10. The framers recognized that with the authority to create laws comes the potential for abuse. The Contract Clause was meant to be a check on this power – to protect those who contract with a government and to safeguard the rights of private parties from improper legislative action. "This language was intended to protect individuals from state interference in their private contracts, particularly against hostile actions by a state." *Yellow Cab Co. v. City of Chicago*, 3 F. Supp.2d 919 (E.D. Ill. 1998), *citing* Robert L. Hale, *The Supreme Court and the Contract Clause: III*, 57 Harv. L.Rev. 852, 891 (1943-44).

When a state entity is itself a party to a contract, the potential for abuse is even greater. So, there is a higher scrutiny "…when the state seeks to impair a contract to which it is a party than when it regulates a private contract since complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the

[16] *See also* Minnesota Constitution, Article I, Section 11.

State's self-interest is at stake." *Christensen v. Minneapolis Municipal Employees Retirement Board, et al.*, 331 N.W. 2d 740, 750-51 (Minn. 1983) (internal citations omitted). Governments inherently have the power to legislate their way into more favorable contract terms, or out of a financial obligation to allow taxpayer funds to be spent elsewhere.[17] These are the foundations and purposes of the contract clause.

Here, the City is attempting to use the Contract Clause in a way that was never intended – to insulate itself against its own voters and bind the Consortium and itself to the Contract. The Referendum does not create more favorable terms for the City; in fact, the opposite may be true. But it is nonetheless a critical check on the power of the council, which is exactly the purpose of §8.05 of the Charter, and exactly the reason why the statute allows for it. As discussed earlier, neither the City nor the League has provided a single example of a referendum on an ordinance, in its simple, two-part function, that was found to unconstitutionally impair a contract. But the lack of precedent is only the first of many problems with the City's argument.

This Court developed a three-part test to evaluate whether a law unconstitutionally impairs a contract. Respondents will evaluate the Referendum under this test to demonstrate that there is nothing illegal about the measure. Case law illustrates the difference between impairment of obligation of contract, and repudiation of a contract. Next, the negotiated language in the Contract reveals that the parties anticipated and

[17] *See United States Trust Co. v. New Jersey*, 431 U.S. 1 at 26, 97 S.Ct. 1505 at 1518 (1977): "If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all."

provided for a voter measure like the Referendum. So, the City is attempting to use the Contract Clause to prevent potential termination by the voters and *bind* it to the Contract, not to demonstrate impairment. Further, the cases cited by Appellants all involve alteration of *terms* of third-party contracts, which is materially different from the case at bar. Impairment is simply not implicated.

The Christensen Test

The test for the presence of a contract clause violation is well-settled. In *Christensen*, this Court analyzed three factors. 331 N.W. 2d 740, 750-51 (Minn. 1983). First, the court asks whether the law has caused substantial impairment of a contract at all. Second, in the event a substantial impairment is found, it may still be permissible if there is a significant and legitimate public purpose behind the legislation. Third, the legislation:

> …is examined in the light of this public purpose to see whether the adjustment of the rights and responsibilities of the contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.

Id. at 751, *citing Energy Reserves Group v. Kansas Power and Light*, 103 S. Ct. 697, 74 L. Ed. 2d 569 (1983) (internal quotation marks omitted). This final prong is essentially a balancing test to ensure that any impairment is commensurate with the goal of the measure.

As to the first, the City has failed to demonstrate that passage of the Referendum would cause an impairment of the obligation of its Contract at all. Next, even if

impairment were present, the Referendum has a significant and legitimate public purpose it seeks to achieve by the purest possible mechanism – an up-or-down vote. Finally, the City presents no meaningful argument that its interests would outweigh the benefit to the public which the Referendum would accomplish.

A. Passage of the Referendum Would not pose a substantial impairment – the first prong of the Christensen test fails.

Appellants allege no impairment of the Contract other than its termination.[18] The Referendum does not *alter the terms* within the provisions of the Contract, it renders the whole of the Contract void. This is a repudiation of a contract, not an impairment.

An early U.S Supreme Court case, *Hays v. Port of Seattle*, delineates between a law that repudiates a contract previously entered into by a governing body, and one that impairs its obligation. 251 U.S. 233, 40 S.Ct. 125, 64 L.Ed. 243 (1920). That case involved the passage of a law that had the effect of terminating a government contract with a private individual related to the construction of a waterway. *Id.* at 235. The Washington legislature passed a measure which effectively terminated the agreement and relinquished the public land involved to the municipality. *Id.* at 237. The Court found that no unconstitutional impairment had occurred because the non-breaching party retained its "right to recover from the state for the damages sustained." *Id.*

[18] The City does not argue that it is illegal for the *council* to repeal Ordinance 18-39, only that the voters are forbidden to do so.

Here, as in *Hays*, the City's Contract with the Haulers would be terminated (or performance would be rendered impossible) if the Referendum were passed. The repeal of Ordinance 18-39 would function as the City's announcement of its refusal to perform, as the city council can only "speak" through ordinances and resolutions. Passage of the Referendum would not limit the right of the Consortium to recover against the City for breach of contract, although the terms of the Contract itself may not allow for it. Regardless of whether the Consortium is ultimately successful in a suit against the City, unconstitutional impairment is simply not implicated here.

Yellow Cab, while not binding, provides an excellent explanation of the difference between impairment and breach. *Id.* at 922-923. To paraphrase, the difference between the two is "whether the non-breaching party has an available remedy." *Id., citing Horwitz-Matthews, Inc. v. City of Chicago*, 78 F.3d 1248, 1250-51 (7th Cir. 1996). It goes on:

> If some legislative action announces the state's refusal to perform its contractual obligation, the state has simply breached the contract. Thus, even if the state repudiates its contract by enacting a law that purports to repeal the state's obligation, the state remains obligated to pay the other party's damages under the law of contracts.

Id. Finally, "…if the legislative action does not prevent a non-breaching party from seeking damages in a breach of contract action against a state or one of its subdivisions, there has been no unconstitutional impairment of a contract obligation." *Id. citing Horwitz-Matthews*, 78 F.3d. at 1251-52. at 1251-52

In the case at bar, the legislative function of the Referendum fits squarely within the definition of "breach" outlined in the above passage. In no way does it purport to limit any remedy the Haulers could seek, and its simple effect, if passed by the voters, is nothing more than a reversal of the City's enactment of Ordinance 18-39. This is a repeal of the ordinance and a repudiation of the Contract, not impairment.

To further illustrate this critical difference:

> "…if a State undertakes to alter substantially the terms of a contract, it must justify the alteration, and the burden that is on the state varies directly with the substantiality of the alteration. A serious alteration of the terms of a contract resulting from state legislation is permissible…" only under certain circumstances.

Christensen, 331 N.W.2d 740, 750 (Minn. 1983), *citing White Motor Corp. v. Malone*, 599 F.2d 283 at 287 (8th Cir.1979). This passage clarifies that impairment concerns changing the *terms* of a contract, not doing away with it altogether. No party has a right to a contract that is immune from changes in law.

Again, in this case, there is no allegation that any of the terms of the Contract are being altered. *Yellow Cab* and *Horwitz-Matthews* are not binding upon this Court, but the principle is sound nonetheless. Respondents urge the Court to adopt this reasoning and order the placement of the Referendum on the ballot.

1. Davies is inapposite authority.

Appellants rely heavily on *Davies v. Minneapolis,* 316 N.W.2d 498 (1982), to urge this Court to find impairment. But *Davies*, like the other cases cited by the City, is materially different from the case at bar in a number of ways.[19]

The charter amendment in *Davies v. Minneapolis* sought to repeal a tax enacted to fund construction of the Metrodome. This would have eliminated the security for third parties who purchased $55,000,000 in bonds to finance the construction of the stadium. *Id.* at 499. The *Davies* scenario was found to be very similar to that of *United States Trust Co* and would have created a hobbled agreement that no party could lawfully have entered into at the outset.[20] So, the case involved reaching into the terms of the contract to change the city's obligation to pay its debts. The Referendum at bar bears no resemblance to the charter amendment in *Davies*.

First, among its numerous and complicated subdivisions, the *Davies* amendment purported to *alter the terms* of a contract – as in *Christensen* – and change the rights of

[19] Appellants cite *City of Middletown v. Ferguson*, 493 N.E.2d 380 (Ohio 1986), an Ohio Supreme Court case, to argue that the Referendum is illegal. That case is distinguishable in a number of ways. First, it involved a multi-part initiative, not a referendum. Second, like Davies, it turned on impairment of bondholder rights, which are not implicated in the case at bar. Finally, the *Middletown* Court admitted that, had a referendum been used rather than an initiative, the measure likely would have been allowable. *Id.* at 380.

[20] *United States Trust Co v. New Jersey*, 431 U.S. 1, 97 S.Ct. 1505 (1977) involved bonds issued to finance the World Trade Center. New Jersey promised bondholders that the collateral would not be used to finance public transportation projects. After the state government went back on its promise and repealed the provision, the U.S. Supreme Court found that the repeal "totally eliminated an important security provision and thus impaired the obligation of the States' contract." *Id.* at 19.

the bondholders. *Davies* did not involve a referendum.[21] Rather, the convoluted amendment in *Davies* was unequivocal in its intention to repeal the tax on which the bonds were based, and replace it with money from the general fund to be paid as damages resulting from the admitted impairment. *Id.* at 500. It was this impairment of the third-party bondholders' contracts, not the alleged harm to the City of Minneapolis, that *Davies* turned on. Here, the Referendum is a simple, binary choice to approve or repeal the legislation. The City has presented no evidence of third-party harm, and its feigned concern for the rights of the Consortium is disingenuous at best.

Dovetailing with this distinction, the charter amendment in *Davies* did not cause termination of the contract between First Trust Company of St. Paul and the bondholders.[22] Instead, as discussed earlier, it materially altered the rights and responsibilities of a private, third party, and simultaneously would have limited recovery. The bondholders in *Davies* were not refunded the money they paid to finance the stadium. Rather, the charter amendment in that case would have destroyed the security on the instrument they signed while retaining their funds. This is plainly distinguishable from the Referendum at bar because the instant measure does not purport to alter the terms of the Contract itself.

[21] The City describes this as the voters in *Davies* "…seeking a referendum to amend the City Charter." App.Br. at 35. This is an example of the difference between a colloquial referendum and the measure before this Court.

[22] Unlike the case at bar, a private party in *Davies* – the bank that issued the bonds – intervened in the litigation to assert contract impairment on behalf of its bondholders.

Next, "To the extent the proposed amendment would have superseded the stadium legislation by prohibiting further levy of a sales tax on Minneapolis businesses, it was a valid proposed amendment to the Minneapolis City Charter." *Id.* at 502. In other words, had the amendment in *Davies* been limited to a straight repeal of the tax, it would have been perfectly legal. Here, the Referendum seeks just this – a straight repeal of Ordinance 18-39 and the laws that stemmed from it.

Finally, the charter amendment in *Davies* is similar to other measures brought in Minneapolis, in that it presents the opportunity for voters to create their own legislation from a blank slate.[23] Importantly, Minneapolis does not reserve for its people any of the powers of initiative, referendum, or recall. *See Vasseur v. Minneapolis*, 887 N.W.2d at 472. (Minn. 2016). Because of these restrictions, the Minneapolis City Charter opens the door to attempts to skirt the Charter through disguised referenda and initiatives. Contrast this scenario with the measure at bar. The Referendum is a reserved power for the voters in Saint Paul and represents a simple reversal of a council action.

Neither Davies nor either of the other two state cases from foreign jurisdictions is apposite authority.[24] Appellants' exclusion of the Referendum from the ballot cannot be justified on this basis.

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[23] *See, e.g., Vasseur v. Minneapolis*, 887 N.W.2d 467 (Minn. 2016); *Haumant v. Griffin*, 699 N.W.2d 774 (Minn. Ct. App. 2005); *Bicking v. City of Minneapolis*, 891 N.W.2d 304 (Minn. 2017).

[24] The City also cites an Oregon case from 1930 to support its position. *Elliott v. City of Eugene*, 294 P. 358 (Ore. 1930). While the subject matter is similar, it involved a charter amendment brought a year after the ordinance was passed, and turned on reservation of

2. The Contract Makes Provisions For The Referendum.

There is no dispute that a minimum requirement in §115A.94 Subd. 4(d) is the signing of a contract. But the foundation of the City's argument is that the contract then becomes immune from *any* municipal authority under the Charter and *can never be undone*. Appellants cite no support for this proposition because it is simply wrong.

Recall that the Charter creates a coequal legislative body in Saint Paul. City Council authority is checked by that of the voters. Justice Oliver Wendell Holmes observed: "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them." *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357 (1908). The only alleged "impairment" present in this case is the potential termination of the contract by a legislative act of the voters. There is no *alteration of terms*. The City cannot insulate itself from voter power by making a contract.

The reason Appellants are forced to equate repudiation with impairment is because the negotiated terms of the Contract provide for the Referendum. In other words, if Appellants had done as they are required under the Charter and submitted the measure to the voters, then the terms of the Contract would have governed the conduct of the parties. The City's failure to adhere to its own governing document proves that this case is not

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power to the "sovereign." *Id.* The law underlying this case is simply too disconnected to be relevant.

about impairment, or concern for the rights of the haulers or of third parties. It is about silencing the voters and binding the City and Consortium to the Contract.[25]

The Contract is replete with protections for both the City and the Consortium in the event of a referendum:

> "The City, the Consortium, and the Consortium Members shall not be held responsible for performance if its performance is prevented by acts or events beyond the party's reasonable control, including, but not limited to: …legislative, judicial, or executive acts (each of the foregoing, a "Force Majeure Event")."

Doc. 2, Ex. E at 48 §13.6. Moreover, "Consortium will not be responsible for failure to perform a scheduled pickup, when prevented from doing so as the result of… Force Majeure Events, including but not limited to imposition of laws or governmental orders…" *Id.* at 11 §2.1.8. Billing policies are also protected specifically: "…the Consortium may discontinue all attempts to collect outstanding balances from RDUs if continuing collections would be contrary to law…" *Id.* at 25 §2.15.12.

Further, "…the Consortium and the Consortium Members shall not be liable in any manner and shall not be considered in default or assessed any Liquidated Damages, for any failure to perform… due to an event of Force Majeure or for any breach by the City…" *Id.* at 40-41 §12.1.

This language demonstrates that neither the Consortium nor the City believed that Charter authority was removed once the Contract was signed, including that of the voters. Plainly, if the Referendum were passed, the Contract provides ample protections for the

[25] Again, the Consortium has not intervened in this suit to argue unconstitutional contract impairment on its own behalf.

parties. None of the terms would be altered, and performance by both parties would be excused. The statute and the Charter should be allowed to function as they were written because contract impairment is not implicated in this case.

B. There Is a Significant, Legitimate Public Purpose Behind the Referendum.

Even if this court finds that passage of the Referendum would impair the Contract, and even if it finds that impairment to be substantial, the measure is still permissible because it fits within the second prong of the *Christensen* framework. The state "…must demonstrate a significant and legitimate public purpose behind the legislation." *Christensen*, 331 N.W.2d 740 at 751. The Referendum falls squarely within this definition.

Both the Cities' briefs make much of the lengthy, detailed processes that Saint Paul followed while organizing collection. Indeed, organized collection is a radical departure from open hauling. It necessitates the assumption of significant new responsibilities and liabilities by the City, constitutes the termination of thousands of individual contracts, and destroys the free market and competitive pricing system. Clearly, the City Council and government officials took this decision seriously.

It follows, then, that the enactment of Ordinance 18-39 would carry the same significance as its repeal. The ability to make this important choice is what the Referendum seeks. While the processes in §115A.94 are detailed, the legislature plainly felt that the electorate in a charter city was qualified to make the ultimate decision itself.

The Referendum's public purpose is to ensure broad support for such a radical change by the purest mechanism available – a vote.

The Cities allege that the "stated purpose" of the Referendum is to impair the City's Contract, and then misrepresent the language on the ballot petition to support this contention. The pertinent language is as follows:

> We, being registered voters residing in the City of Saint Paul, Minnesota, petition the Saint Paul City Council to hold a referendum on Ordinance 18-39, **creating Saint Paul Legislative Code Chapter 220, entitled "Residential Coordinated Collection,"** to regulate coordinated collection of certain residential trash, including service levels, billing rates and the duties of property owners.

Doc. 28 Ex. K (emphasis in original). This is mischaracterized (and misquoted) by both parties as a deliberate attempt to "*challenge* the coordinated collection of trash, including service levels, billing rates and the duties of homeowners," thus intending to impair the contract. Apps. Br. at 39 n.17; Amicus Br. at 5 n.9, 13 n.29 (emphasis added).

The Charter requires that "(t)he petition shall state, at the head of each page or in an attached paper, a description of the ordinance or resolution involved." Saint Paul, Minn. Charter at §8.05. A petition for referendum in Saint Paul is not required to state any purpose, and this one did not. Rather, it outlined what Chapter 220 did – this is a *description of the ordinance* as mandated by the Charter, not a purpose statement as alleged by the Cities. This sort of misrepresentation is not an argument, and not a legitimate basis for rejection of the Referendum.

The purpose is to let the public vote. Respondents seek to exercise this Charter right to ensure that the public supports organized collection of solid waste in the City. The Referendum is for the benefit of the entirety of Saint Paul. Petitioners did not

attempt to permanently enjoin the City from organizing collection, or make it apply to only a small cross-section of the city (although this Court's holding in *Jennissen* makes it clear that such a measure would have been a valid part of the process). This broad benefit is exactly the type of public good the exception was created for.

Contrast this with the measure in *Davies*. The charter amendment in that case was not "reasonable and necessary to serve an important public purpose." *Davies*, 316 N.W.2d at 502. On the contrary, the appellants in that case did not even allege that such a purpose existed. *Id.* Consequently, Respondent – Intervenor First Trust Company of St. Paul made its voice loudly heard on behalf of the bondholders to defend their contractual interests. *Id.* at 501.

In the event that this Court finds a substantial impairment of the City's Contract with the Consortium, it must recognize that the public purpose behind the Referendum could not be clearer. It is both significant and legitimate, and it is also narrowly tailored to minimize impairment and achieve the desired outcome.

C. The Balancing Test Favors Allowing the Referendum.

The third element of the *Christensen* framework essentially requires the Court to balance the reasonableness of any impairment with the public purposes advanced by the legislation. So, in the event that impairment is found, the Court must determine whether the Referendum's impact on the Contract is "based upon reasonable conditions and is of a character appropriate to the public purpose justifying the law's adoption." *Jacobson v.*

Anheuser-Busch, Inc., 392 N.W.2d 868, 872 (Minn. 1986). The City has failed to present any argument that would justify preclusion of the Referendum on this basis.

The City claims "(a) repeal of Ordinance 18-39 would create nothing short of a chaotic situation that would leave the City in limbo for months and potentially require the City to spend millions from its emergency reserves to meet the statutory requirement." Apps. Br. at 38. This "chaos in the streets" argument, and the recitation of the necessary steps to organize, simply do not justify the deletion of the Charter right to referendum.

More than 6,400 people signed the Petition for Referendum on 18-39 within 45 days of passage of the Ordinance. Apps. Add. 64. The signatures were collected by unpaid volunteers who worked on a short timeline to meet the deadlines imposed by the Charter. It is these resident signatories – and quite possibly a majority of those who live in Saint Paul - whose interests would be served by suspending and repealing Ordinance 18-39. But the benefit to the public is far greater. As the District Court observed, recognizing the Referendum "…ensures that the constitution of Saint Paul is being followed and protects voter rights." Apps. Add. at 16.

The City has failed to show why this particular Referendum's effects on this particular Contract are unconstitutional, and any arguments it presents toward the balance of interests seem to boil down to the inconvenience the measure would present if passed. Consequently, any balancing of burdens and public purposes tips sharply in favor of allowing the ballot measure to be presented to the voters.

IV. Denying The Referendum is Terrible Public Policy.

The opponents of Ordinance 18-39 are not the only beneficiaries. *All* the voters in charter cities who have the right to referendum will have their Constitutional and Charter rights vindicated. To validate the City's actions in denying the Referendum will recognize a "sweat of the brow" principle for the first time. If a city government invests enough time, effort, and money (even if it is the minimum required by statute), and wants the measure to remain in place badly enough, then the voter right to repeal it may properly be erased. This is terrible policy.

Section 115A.94, Subdivision 4(d) reads, in pertinent part: "Upon execution of an agreement between the participating licensed collectors and the city or town," the city shall establish organized collection using local controls. Appellants chose to avail themselves of the abbreviated process in 4(d), rather than abide by the far more onerous requirement of an organized collection options committee as outlined in Subdivision 4(b). It also allowed the City to avoid the six-month waiting period in Subdivision 4(c).[26]

However, rather than passing the ordinance enacting organized collection "upon execution of the agreement," as the statute dictates, the City waited nearly 10 months to do so. Minn. Stat. §115A.94 Subd. 4(d). Contrast this with Bloomington's actions in *Jennissen*. The contract in that case was signed December 21, 2015, and Ordinance 2015-45 was passed *later that same day*. 913 N.W.2d 456, 458 (Minn. 2018), *see also*

[26] This waiting period was plainly enacted to allow room for charter measures like the Referendum, as was the 30-day waiting period in the City Charter at §6.11.

Bloomington, Minn. Code of Ordinances, Ch. 10, Art. II.[27] The Contract was signed on November 10, 2017, and Ordinance 18-39 was not passed until September 5, 2018. Apps. Br. at 13-14. During this time, the City was "implementation planning," including "conducting necessary public outreach." Apps. Br. at 14. No ordinances or resolutions were passed by the council during this time; Ordinances 18-39 and 18-40 were the first and only meaningful opportunities the voters had to be heard.

Respondents are not arguing that the City was required to enact the local control *immediately* upon signing the contract. That said, during this lengthy 10-month delay, the City only complicated matters for itself. The voters had nothing to do with this choice; a referendum under the Charter is designed to *prevent* situations like this because it must be brought quickly after passage of an ordinance. Appellants' dodging of the six-month waiting period in 4(d) only made matters worse. Its delay in passage of the Ordinance is not justification to disregard the Referendum.

The excuse that it would be too chaotic and difficult to put a contingency plan in place, has worn thin. By the time the November election takes place, it will have been more than a year since the Referendum was recognized as procedurally sufficient by the Elections Clerk, and nine months since this action was filed. Apps. Add. at 64, 5. It is incumbent upon city officials to comply with the Waste Management Act, and they will

[27] Available at: http://library.amlegal.com/nxt/gateway.dll/Minnesota/bloomington_mn/bloomingtonminnesotacodeofordinances?f=templates$fn=default.htm$3.0$vid=amlegal:bloomington_mn. Last visited July 29, 2019.

have had ample time to do so. The City's choice to ignore the provisions in the Charter should not excuse it from solving the problem it created for itself.

CONCLUSION

As the district court correctly observed:

> Without doubt, this Referendum may be frustrating for the City Council and city departments which spent countless hours carefully implementing the process for organized collection, but this tension between the electorate and its council is a healthy byproduct of Saint Paul being a home rule charter city.

Apps. Add. at 16. The Referendum at bar is neither irreconcilable with §115A.94 nor unconstitutional. The electorate in Saint Paul is a coequal governing body; Charter power reserved for the voters goes well beyond a single "public input hearing." The Referendum carries with it the same legal force as the underlying ordinance itself and must not be rejected.

Respondents Respectfully request that this Court recognize the Referendum as legally sufficient in all respects and proper for placement on the ballot. We also ask that this Court Order immediate suspension of Ordinance 18-39, consistent with the Charter, and direct its placement on the November 5, 2019 Saint Paul municipal ballot.

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Dated: July 31, 2019

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CERTIFICATION OF COMPLIANCE WITH LENGTH REQUIREMENT

I, Gregory J Joseph, certify that this Brief complies with the length requirement of Minn. R. Civ. App. P. 132.01 Subd. 3. This Brief was prepared using a proportional, 13-point font with Microsoft Office Word 2016 software and contains 9,457 words.

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