NO. A19-0916

State of Minnesota

In Supreme Court

Bruce Clark, Peter Butler, and Ann Dolan,
Respondents,

vs.

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

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases:

Other:

INTRODUCTION

This Court should reject Respondents' defense of the decision below. The proposed referendum on Ordinance 18-39 conflicts with numerous provisions of the Waste Management Act and, if successful, would unconstitutionally impair the organized-hauling contract.

Respondents' arguments concerning conflict preemption are flawed in at least three respects. First, their arguments are premised on the notion that the City is imploring the Court to interpret the Waste Management Act to *require* cities to organize hauling. (Resp. Br. at 15 ("[A] city can ignore the statute altogether."); *id.* at 16 ("There is no directive that cities organize collection of solid waste.").) The City does *not* argue the statute mandates organized collection.

What the City *does* argue is that Minn. Stat. § 115A.941, subd. (a) affords Minnesota cities three discrete options to "comply with" their express statutory mandate to "ensure that every household and business in the city has solid waste collection service." One of those options is that cities "may organize collection." Minn. Stat. § 115A.941, subd. (a). The City's position is simply that, when a duty is imposed by statute, local law (whether a City Charter, initiative, or referendum) cannot preclude or remove the means the legislature provided to perform that duty. Conflict preemption forbids it.

Moreover, what the City *does* argue is that the organized collection statute expressly requires that once an enforceable contract is executed for organized collection, a city (like Saint Paul) "shall establish organized collection through appropriate local

controls [*i.e.*, ordinances].” A referendum that, if successful, would repeal those local controls and, as Respondents concede, render performance of the pre-existing contract “impossible,” would plainly conflict with the statute’s language and purpose.[1] These points are largely ignored in Respondents’ principal brief.

Second, Respondents overstate this Court’s decision in *Jennissen v. City of Bloomington*, 913 N.W.2d 456 (Minn. 2018). They contend that this Court held in *Jennissen* that the organized-collection statute “[s]pecifically allow[s]” the proposed referendum. (Resp. Br. at 8.) It did not. The only issue presented in *Jennissen* was whether the legislature intended to occupy the field of organized collection such that there is no room for “supplemental municipal legislation” under the doctrine of *field* preemption. *Jennissen*, 913 N.W.2d at 460 (“Both parties assert, and the courts below assumed, that only field preemption is at issue in this case.”). The Court declined to consider conflict preemption because no party had raised the issue. *See id.* at 460 n.2 (discussing conflict preemption and stating: “Because the City has not made this argument, we do not consider it.”). While *Jennissen* is informative in many respects (discussed below), its holding is properly limited to the narrow legal issue the Court decided.

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[1] Throughout their brief, Respondents suggest that the City hurriedly entered into a contract with the haulers to insulate itself from referendum. (*See, e.g.*, Resp. Br. at 28 (“The City cannot insulate itself from voter power by a making a contract.”).) This is wrong. The City entered into the contract—almost two years after it began exploring organized collection—because Minn. Stat. § 115A.94, subd. 4(d) instructs that cities must first enter into contracts *before* they can adopt local controls for organized hauling (*i.e.*, ordinances).

Third, and perhaps most importantly, Respondents do not address how the legislature could conceivably have intended the result for which they advocate. Respondents' position, if adopted by this Court, would result in a statutory scheme fraught with peril. To achieve organized hauling, cities are required to first enter into binding contracts with a consortium of haulers *before* they can "establish organized collection through appropriate local controls" (*i.e.*, ordinances). Minn. Stat. § 115A.94, subd. 4(d). If those local controls are then subject to repeal through referendum, rendering contract performance impossible, cities will undoubtedly face significant breach-of-contract claims. Indeed, as Respondents argue in their brief, "[t]he repeal of Ordinance 18-39 would function as the City's announcement of its refusal to perform," and the "[p]assage of the Referendum would not limit the right of the Consortium to recover against the City for breach of contract." (Resp. Br. at 23.)

The legislature could not have intended to create a statutory scheme pursuant to which a city is expressly invited to enter into a binding contract with a consortium of haulers, but then expose the city to a multi-million-dollar breach claim if the local controls enacted to implement that plan and enable contract performance are later repealed through referendum. If that were the law, no reasonable city council with a charter that allows for referendum would pursue organized hauling, and no reasonable hauler would enter into such a contract.

Respondents present similarly flawed arguments concerning the unconstitutional impairment of the City's pre-existing contract. Their argument concedes that the referendum, if passed, would render contract performance impossible because the

referendum would repeal the entire set of the local controls—the implements of the contract—without which the parties cannot meet their mutual contract obligations. As numerous courts have held in similar circumstances, a repeal of Ordinance 18-39 would *directly* impair the parties' pre-existing, legislatively authorized five-year contract. For these and other reasons, this Court should reverse.

ARGUMENT

I. The doctrine of conflict preemption precludes the City's waste-collection ordinance from being subject to referendum.

The parties agree: under the doctrine of conflict preemption, state law preempts local law where the two are irreconcilable, or where the local law "forbids what the statute expressly permits." *Bicking v. City of Minneapolis*, 891 N.W.2d 304, 313 (Minn. 2017). As this Court has similarly stated in the context of federal preemption of state laws, conflict preemption occurs when the local law stands as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *In re Estate of Barg*, 752 N.W.2d 52, 64 (Minn. 2008).

Under this Court's cases, "[i]t is generally said that no conflict exists where the [local law], though different, is merely additional and complementary to or in aid and furtherance of the statute." *Mangold Midwest Co. v. Village of Richfield*, 274 Minn. 347, 143 N.W.2d 813, 817 (1966); *accord State v. Kuhlman*, 729 N.W.2d 577, 580 (Minn. 2007). At the same time, though, local laws cannot forbid what the statute expressly permits. *Bicking*, 891 N.W.2d at 740. In other words, under the doctrine of conflict

preemption, local laws may not curtail or remove rights or benefits provided under state law.[2]

Applying these standards here, the Court should conclude that a referendum of Ordinance 18-39 would be an obstacle to the purposes and objectives of the Waste Management Act.[3] The referendum, if successful, would preclude what the statute expressly permits. Accordingly, under the doctrine of conflict preemption, the Waste Management Act preempts a referendum on the local controls (*i.e.*, ordinances) implemented pursuant to Minn. Stat. § 115A.94, subd. 4(d).

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[2] As other courts have put it, "conflict preemption occurs when [a local law] prohibits activity which is intended to be permitted by state law." *County Comm'rs of Kent Cty. v. Claggett*, 831 A.2d 77, 84 (Md. App. 2003); *see also New York Club Ass'n, Inc. v. City of New York*, 505 N.E.2d 915, 917 (N.Y. App. 1987) (observing that, for purposes of conflict preemption, "inconsistency has been found where local laws prohibit what would have been permissible under State law or impose prerequisite additional restrictions on rights under State law, so as to inhibit the operation of the State's general laws") (internal quotations omitted).

[3] Respondents imply that no decision holds that state law preempts local referendum power. That simply is not the case. Like any other local power, the right to referendum must yield when it would conflict with state law. *See, e.g., Nordmarken v. City of Richfield*, 641 N.W.2d 343, 345-46 (Minn. App. 2002) ("[W]e have concluded that state law preempts local referendum."); *Abrahamson v. City of Le Sueur*, No. A13-0389, 2013 WL 4404719, at *5 (Minn. App. Aug. 19, 2013) (holding that state law preempted the electorate's "use of the city's charter provisions on referendums"); *Cf. Kuznik v. Westmoreland Cty. Bd. of Comm'rs*, 902 A.2d 476, 490-504 (2006) (concluding, based on the doctrine of conflict preemption, that federal Help America Vote Act preempted right to referendum under state law regarding the state's purchase of electronic voting machines).

A. Minn. Stat. § 115A.941.

Section 115A.941 of the Minnesota statutes is fundamental to the conflict preemption analysis. Yet Respondents largely ignore that statute—mentioning it in passing just one time. (Resp. Br. at 16.)

Importantly, section 115A.941, subd. (a) provides that cities and towns with a population of at least 1,000 "*shall ensure* every residential household and business . . . has solid waste collection service." Minn. Stat. § 115A.941, subd. (a) (emphasis added). Compliance with this directive is plainly mandatory. *See, e.g., Sawh v. City of Lino Lakes*, 823 N.W.2d 627, 637-38 (Minn. 2012) (concluding that "the word 'shall' means 'the act referred to is mandatory, not one that is optional or discretionary'") (quoting common dictionary); *see also* Minn. Stat. § 645.44, subd. 16 (providing "'[s]hall' is mandatory").

Moreover, the legislature appreciated that the subject matter of the obligation—garbage collection—is one that touches upon public health and the environment and requires consideration of a number of public policies and financial factors, such as budgeting. *See, e.g.*, Minn. Stat. § 443.34 (stating that the purpose of sections giving cities power to govern "rubbish removal" is "to promote the public health, safety, welfare, convenience, and prosperity of the city"); Minn. Stat. § 115A.02(a) ("It is the goal of [chapter 115A] to protect the state's land, air, water, and other natural resources and the public health by improving waste management in this state").

To this end, section 115A.941, subd. (a) vests cities with three different options "to comply with" the legislative mandate to provide solid waste collection for its

residents: "To comply with this section, a city or town may organize collection, provide collection, or require by ordinance that every household and business has a contract for collection services." Minn. Stat. § 115A.941, subd. (a). The City's point then, is simply this: because the statute affords Minnesota cities the necessary flexibility to meet their legislative mandate, local laws cannot remove one of the three options. Conflict preemption prohibits it.

A hypothetical illustrates this point. If conflict preemption did not apply, there would be nothing to stop the local electorate here from proposing an initiative or amendment to the City Charter to provide that the city council will only exercise the second option: "provide collection" itself. If the city council determined it would be financially ruinous—or otherwise contrary to the public interest—to become a garbage hauler, its hands would be tied. Indeed, Respondents' brief illustrates their position that they can essentially veto any decision the city council makes under section 115A.941, subd. (a):

> If the City Council has the authority under the Charter to choose to enact Ordinance 18-39, then the voters have the authority to repeal it.

(Resp. Br. at 16.)

A referendum on Ordinance 18-39, then, if successful, would not yield a law "complementary to," or "in aid and furtherance of," section 115A.941. It would instead have the effect of removing one of the three options the legislature provided to city councils to meet their statutory mandate to "ensure" trash-collection services. As Respondents acknowledge, a repeal would render organized hauling in Saint Paul

"impossible" because the local controls necessary to carry out that program (price, logistics, etc.) would be gone.

In short, a successful referendum would preclude Saint Paul from meeting its statutory mandate by adopting a system of organized collection. The repeal would prohibit what the statute allows. The Court should therefore conclude that section 115A.941, subd. (a) preempts the proposed referendum.

B. Minn. Stat. § 115A.94.

When a city like Saint Paul exercises its authority under section 115A.941 to undertake organized hauling to meet its mandate to provide trash collection services, section 115A.94 "describes the minimum steps that a municipality is required to take before doing so." *Jennissen*, 913 N.W.2d at 462. Indeed, as this Court observed in *Jennissen*, "the detailed process [in Minn. Stat. § 115A.94] does *not* include a municipality's actual decision to organize collection." *Id.* at 461 (emphasis in original). As discussed above, that decision is already vested in the city council under section 115A.941, subd. (a).

A system of organized hauling is certainly optional—it is one of three options afforded under section 115A.941. *See also* Minn. Stat. § 115A.94, subd. 6 ("The authority granted in this section to organize solid waste collection is optional."). Nevertheless, while organized collection is optional, the requirements in section 115A.94, should a municipality decide to exercise that option, are relevant to the conflict-preemption analysis.

In order to *implement* organized hauling, the statute *requires* that the city first enter into a contract (following a negotiation period of at least 60 days with existing licensed haulers). *See* Minn. Stat. § 115A.94, subd. 4(d). Once an enforceable hauling contract is in place, the statute provides that the city "shall establish organized collection through appropriate local controls" (*i.e.*, ordinances). *Id.*

In this way, the statute presumes that once a city has made the decision to implement organized hauling, has followed the statutory procedures (which include notice to the public and at least one public hearing), and has negotiated an enforceable hauling contract, the city will have the ability to establish local controls to make organized hauling possible. Certainly, the legislature did not intend to leave room for a referendum once this process has reached its conclusion that would render contract performance impossible. This is so for several reasons.

First, as Respondents characterize it, a referendum on the local controls would constitute a repudiation of the pre-existing, legislatively authorized organized hauling contract. (Resp. Br. at 24 ("This is a repeal of the ordinance and a repudiation of the Contract.").) Thus, under Respondents' view, the legislature intended to implement a statutory scheme fraught with peril for the contracting parties that would operate sequentially like this:

- First, cities are told they can implement one of three discrete alternatives in order to "comply with" their express statutory mandate to "ensure that every household and business in the city has solid waste collection service," including "organized collection." Minn. Stat. § 115A.941, subd. (a).

- Second, if a city opts to pursue a form of organized collection, it may do so provided it follows the months-long minimum process outlined in Minn. Stat. § 115A.94.

- Third, if a city follows the process outlined in Minn. Stat. § 115A.94, it may enter into a binding contract with a consortium of haulers to provide for organized hauling. Minn. Stat. § 115A.94, subd. 4(d).

- Fourth, after a valid, enforceable contract is in place, the city "shall establish organized collection through appropriate local controls" (*i.e.*, ordinances).

- Then, after the city invests in a months-long process and enters into a binding, long-term contract with a consortium of haulers, the electorate has the power to repudiate the contract at the end of process and potentially expose the city to a multi-million dollar breach claim and leave the city with no trash plan in place post-referendum.

This could not be what the legislature intended.[4] As this Court observed in *Jennissen*, "the Legislature intended to impose minimum standards in [Minn. Stat. § 115A.94], but also provide municipalities considerable flexibility, should they wish to explore organized collection of solid waste." 913 N.W.2d at 463. Allowing voters to repeal the local implementation of the statutorily authorized, pre-existing contract would paralyze and impair that flexibility. This Court should reverse.

Second, subdivision 6 does not, as Respondents contend, expressly preserve referendum power. As discussed in the City's principal brief, subdivision 6 simply

[4] Quite the opposite – as noted in the City's principal brief, the legislature amended the statute in 2018 to require a *seven*-year contract. That amendment would substantially increase a city's damages exposure if referendum could be used at the end of the process to repudiate the contract.

confirms that organized hauling is "optional" and provides an option to collect solid waste "in addition to authority to govern solid waste collection granted by other law." Minn. Stat. § 115A.94, subd. 6. Thus, for example, if "other law" governed the mechanisms for an "open system" of trash hauling, subdivision 6 clarifies that "[t]he authority granted in this section is . . . in addition to [that] authority."[5] *Id.* Nothing in subdivision 6 suggests that "other" local law may preclude cities from exercising their statutory option to implement a system of organized hauling.

Nor would it make sense for the legislature to have reserved that power in subdivision 6 considering the balance of the statutory scheme it laid out in section 115A.94. Respondents say, for example, that the ability to petition for referendum preserves *their* power to *choose* a particular trash-collection system. (Resp. Br. at 16 ("[I]t allows the voters to make a decision as to whether they wish to convert to this specific collection system – and away from the one Saint Paul has used for decades."); *see also id.* at 31 (stating that a referendum would "ensure that the public supports organized collection").) Aside from the fact that section 115A.941, subd. (a) vests Minnesota *cities* with the power to weigh, pursue, and implement the appropriate collection system, section 115A.94 does *not* deal with the decision to implement organized hauling. *Jennissen*, 913 N.W.2d at 461 ("[T]he detailed process [in Minn. Stat.

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[5] Because the statute uses the words "in addition to," the legislature must have intended for cities to have the option to pursue and implement organized hauling as a supplement to and notwithstanding "other laws" governing waste collection.

§ 115A.94] does *not* include a municipality's actual decision to organize collection.") (emphasis in original). It would be somewhat strange for subdivision 6 to preserve the electorate's alleged right to decide what collection system the city will use when the subject matter of section 115A.94 does not address "a municipality's actual decision to organize collection."

Moreover, the legislature could not have intended subdivision 6 to allow for a decision by the electorate on whether to implement organized hauling *after* the city has entered into the very long-term organized hauling contract pursuant to the power the legislature conferred in subdivision 4. Interpreting the statute that way would truly produce an anomalous and absurd situation where the city has the power to enter into a binding contract, but the electorate then retains the ability (after contract formation) to effectively render performance impossible by repealing the ordinance needed to effectuate the parties' obligations and mutual expectations.

Notably, had the legislature truly intended to give the electorate a say in the *decision* to pursue organized hauling (beyond the required notice and public hearing), it surely could have done so *before* authorizing contract formation. It has done so in other contexts. The statute that gives statutory cities the right to contract contains such an example:

> The council shall have power to make such contracts as may be deemed necessary or desirable to make effective any power possessed by the council. The city may purchase personal property through a conditional sales contract and real property through a contract for deed . . . . When the contract price of property to be purchased by contract for deed or conditional sales contract exceeds 0.24177 percent of

> the estimated market value of the city, the city may not enter into such a contract for at least ten days after publication in the official newspaper of a council resolution determining to purchase property by such a contract; and, if before the end of that time a petition asking for an election on the proposition signed by voters equal to ten percent of the number of voters at the last regular city election is filed with the clerk, the city may not enter into such a contract until the proposition has been approved by a majority of the votes cast on the question at a regular or special election.

Minn. Stat. § 412.221, subd. 2 (emphasis added). The legislature did not incorporate a similar restriction in Minn. Stat. § 115A.94 (or anywhere else in the statute). Instead, it vested cities with express authority to contract for organized hauling and to implement local controls to govern that program. This, too, counsels a conclusion that a post-contract referendum would conflict with the statute.

Third, nothing in *Jennissen* mandates a different result. The Court there recognized that, while Minn. Stat. § 115A.94 provides procedures that govern the minimum process a city must follow before it can organize waste collection, the Minnesota Legislature did not intend to occupy the entire field so as to leave "no room for supplemental municipal legislation." *Jennissen*, 913 N.W.2d at 460. Consistent with *Jennissen* (and the doctrine of conflict preemption), then, the electorate can pursue initiatives to supplement (complement) the minimum statutory requirements. These initiatives might include:

- Requiring a longer exclusive negotiating period than the minimum 60-day period prescribed in Minn. Stat. § 115A.94, subd. 4(d).

- Requiring that the "governing body" provide more than one public hearing before deciding whether to

implement organized collection. *See* Minn. Stat. § 115A.94, subd. 4(c).

- Requiring that all negotiations between the city and the consortium of haulers under Minn. Stat. § 115A.94, subd. 4(d) be open to the public.

What the electorate cannot do, however, is take the option of organized trash collection away such that a city council (or other governing body) cannot pursue an option the legislature afforded in section 115A.941. Attempts to completely curtail organized hauling (or render it impossible) are rightly preempted.

C. Other indicia of conflict preemption.

Finally, in analyzing conflict preemption, it is critical to bear in mind that trash collection presents a significant public-health issue that (as this case demonstrates) requires months of deliberation, consideration, and planning. Thus, while Respondents minimize the consequence of a majority vote as "straight suspension and reversal of a legislative act by the city council, and no more,"[6] the reality is that a repeal would do much more than that. The right to referendum, fundamental as it is, does not operate in a vacuum.

Indeed, Respondents have no answer to the most fundamental question: what happens on November 6 if the referendum succeeds? This is because the referendum power Respondents seek to invoke is properly restricted to decisions that can truly be suspended, repealed, and promptly replaced. Indeed, Respondents ask the Court to "Order immediate suspension of Ordinance 18-39, consistent with the Charter." (Resp.

[6] Resp. Br. at 11.

Br. at 36.) While acknowledging that a successful referendum would result in the suspension and ultimate repeal of Ordinance 18-39, Respondents do not challenge the reality that the City cannot just flip a switch and revert to the open hauling system the next day.

This is precisely why the legislature leaves the hauling decision to the governing municipal body (the city council), and not to the electorate.[7] Minn. Stat. § 115A.941, subd. (a); Minn. Stat. § 443.32. Otherwise, the City Council would be resigned to sentencing Saint Paul to use a trash collection system that the Council has determined through comprehensive studies and extensive public outreach to be inefficient, inequitable, and unsustainable. This is not the law—nor should it be. This Court should conclude that state law preempts a referendum on the post-contract local controls implemented pursuant to Minn. Stat. § 115A.94, subd. 4(d).

II. A referendum that strikes down the City's waste-collection ordinance would violate the contracts clauses of the state and federal constitutions.

Respondents' efforts to justify what would in every way be an unconstitutional impairment of the City's pre-existing contract also lack merit. Their arguments misconstrue the contracts clauses and misapply the *Christensen* test. But most

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[7] As explained in the City's principal brief, Chapter 443 ("Rubbish Removal") also vests *cities* with the authority to determine the best method of garbage collection, to establish corresponding rates for services, and to impose penalties for the violation of related ordinances. *See* Minn. Stat. §§ 443.26, 443.28, 443.29, 443.30, 443.32, 443.35. And section 443.32 (called "Methods") states: "The *city council* shall have the authority to direct the method of handling and storage of rubbish on public or private premises." (emphasis added). Respondents just say Chapter 443 is old. But it has never been repealed.

importantly, they fail to address some of the most important points raised in the City's principal brief.

A. A repeal of Ordinance 18-39 would substantially impair the City's contract.

Under this Court's decision in *Christensen v. Minneapolis Municipal Employees Retirement Board*, 331 N.W.2d 740, 751 (Minn. 1983), the first step is to determine whether the local law would, in fact, operate as a substantial impairment of a contract obligation. The City has demonstrated that a repeal of Ordinance 18-39 would substantially impair the City's pre-existing contract.

The contracting parties entered into a binding, five-year organized-hauling contract pursuant to Minn. Stat. § 115A.94, subd. 4(d).[8] After the contract was formed, the statute directed Saint Paul to enact local controls to govern organized hauling and to permit contract performance. Once that contract was formed and performance had begun, the electorate could not seek to derail the contract by repealing the very local controls required by statute.

If the referendum is successful, the parties *will* have a binding contract, but they will be unable to perform their respective obligations or set service rates. A repeal of the enabling ordinance—but not of the contract—would reach directly into the pre-existing

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[8] Respondents do not challenge the validity of the contract, or that the City followed the required procedures prescribed in the statute. Nevertheless, Respondents repeatedly claim that "the City is attempting to use the Contract Clause . . . to . . . bind the Consortium and itself to the Contract." (Resp. Br. at 20; *see id.* at 29 (asserting that this case is "about . . . binding the City and Consortium to the Contract.").) The reality, however, is that the City and the consortium are already bound by the contract. The City just seeks to retain the ability to perform that binding, legislatively authorized contract.

contract and substantially impair its terms. The parties comprehensively laid out the terms that would govern their mutual obligations (when, where, and how garbage will be collected in Saint Paul, how much haulers will charge for their services, and how the City will guarantee and pay certain delinquent accounts). Ordinance 18-39 implements the local controls and pricing necessary to allow the parties to perform their obligations. Simply put, without an ordinance that governs the residents (when, where, and how they will participate in collection), contractual performance is impossible (as Respondents concede). This *is* impairment.[9]

Numerous authorities support this conclusion. Courts have held under similar circumstances that when states or municipalities enter into contracts (particularly ones *expressly* authorized by statute, as here), neither the states, the municipalities, nor the electorate can undertake to impair those contracts by amending or repealing laws that represent the implements of those contracts.

As this Court observed in *Naftalin v. King*, 252 Minn. 381, 90 N.W.2d 185, 191 (1958):

> Where a contract is entered into on behalf of the state through an act of its legislature, its terms are to be found in the provisions of the act by which it was created. Once the state, pursuant to a legislative act, has exercised its power and entered upon a contract . . . , the state, under the contract clauses of the state and Federal constitutions, cannot impair

[9] Respondents claim that there is no impairment because a repeal of Ordinance 18-39 would simply act as *the City's* repudiation of the contract and the haulers would have a breach claim compensable by damages. But in the same breath, they concede the haulers may be precluded by the *force majeure* clause or by the doctrine of impossibility from recovering anything.

> that contract but is bound to carry out its terms without repealing, postponing, diminishing, or otherwise impairing the tax levies so established for its fulfillment.

See also Davies v. City of Minneapolis, 316 N.W.2d 498, 503-04 (Minn. 1982) (rejecting as unconstitutional a proposed amendment to city charter that would have "quite clearly impair[ed] the contractual rights of the bondholders" under contracts with the city); *City of Middletown v. Ferguson*, 495 N.E.2d 380, 386 (Ohio 1986) ("Once the contract had been executed and performance begun, the voters of the City of Middletown were not free to impair the city's contractual obligations on the contract.");[10] *Continental Ill. Nat'l Bank & Trust Co. of Chicago v. State of Wash.*, 696 F.2d 692, 699-700 (9th Cir. 1983) ("As a creature of the state a municipal corporation derives its power from the legislature. Once having granted certain powers to a municipal corporation, the legislature (*or here, the electorate*), is not free to alter the corporation's ability to perform.") (emphasis added) (citing cases).

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[10] Respondents attempt to distinguish *City of Middletown* because it involved an initiative, not a referendum. But they do not explain why that matters. A rule that says voters can impair a contract by referendum, but not by initiative, would make no sense. Respondents also contend that the court in *City of Middletown* "admitted that, had a referendum been used rather than an initiative, the measure likely would have been allowed." (Resp. Br. at 25 n. 25.) What the court said was: "[H]ad this initiative been brought at an earlier time, before there was an executed contract, and before construction had begun, this controversy likely would not be before us today." *City of Middletown*, 495 N.E.2d at 383. All this means is that an initiative that *precedes* contract formation would not present a constitutional issue because there would have been no contract to impair. This statement cannot be read as an endorsement of a referendum that *follows* contract formation, which is the situation presented here.

Against all of this, Respondents declare that "[n]o party has a right to a contract that is immune from changes in law." (Resp. Br. at 24.) But that is the *opposite* of what the contracts clauses say. *See* Minn. Stat. art. I, § 11 ("No . . . law impairing the obligation of contracts shall be passed."); U.S. Const. art I, § 10, Cl. 1 (declaring that "[n]o state shall . . . pass any . . . Law impairing the Obligation of Contracts.").[11] This Court, too, has stated the obvious import: "The contract clauses prevent retroactive impairment of contracts." *Gretsch v. Vantium Capital, Inc.*, 846 N.W.2d 424, 435 (Minn. 2014).

Respondents also claim that repealing Ordinance 18-39 is constitutionally permissible because "the instant measure does not purport to alter the terms of the Contract itself." (Resp. Br. at 26.) Instead, according to Respondents, the referendum would just "repudiate" the contract, not impair it. (*Id.* at 23.) This Court should not be persuaded.

First, the United States Supreme Court recognized long ago that laws that terminate pre-existing contracts impair the obligations of those contracts. Some two hundred years ago, the Court explained:

> This act is a law impairing the obligation of contracts, and, therefore, unconstitutional and void. A contract is an agreement to do, or not to do, a particular thing. Its obligation

[11] By including this clause in the Federal Constitution, the framers "took the view that treating existing contracts as 'inviolable' would benefit society by ensuring that all persons could count on the ability to enforce promises lawfully made to them—even if they or their agreements later prove unpopular with some passing majority." *Sveen v. Melin*, 138 S.Ct. 1815, 1827 (2018) (Gorsuch, J., dissenting).

> binds the parties to do, or not do, the thing agreed to be done, or not done, and in the manner stipulated. Whatever relieves either party from the performance of the contract, in whole or in part, impairs its obligation.
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> * * *
>
> But even admitting this act to be constitutional, as to all contracts made after it was passed, it was clearly unconstitutional and void as to all contracts then existing, as it was an act or law impairing their obligation. The first impression of any man, learned or unlearned, is, that a law which discharges a contract, without an entire performance of it, impairs its obligation.

Sturges v. Crowninshield, 17 U.S. 122, 131-32 (1819).

Second, a repeal of Ordinance 18-39 would actually *not* cause the City's pre-existing hauling contract to terminate. The district court did not so hold. And Respondents cannot point to any provision in the hauling contract suggesting that the contract would terminate if Ordinance 18-39 is repealed.[12] This is the City's point. The parties would have a valid five-year contract that they would be unable to perform without the local controls contemplated (and required) by sections 115A.94 and 443.28. This is functionally no different that the contractual impairment this Court deemed unconstitutional in *Davies.*

The bottom line is that, if the proposed referendum succeeds, the parties' rights and obligations under the contract will be completely frustrated, and their reasonable

[12] Each time Respondents state in their brief that "termination" will occur, they do so without citation to any record evidence. (*See, e.g.*, Resp. Br. at 23.)

expectations destroyed.[13] This is precisely what the contracts clauses forbid and protect against.

To salvage what would otherwise be a clear and substantial contractual impairment, Respondents point to *Hays v. Port of Seattle*, 251 U.S. 233 (1920), and *Yellow Cab Co. v. City of Chicago*, 3 F. Supp. 2d 919 (N.D. Ill. 2009), as supporting authority. Their reliance is misplaced.

In *Hays*, the state entered into a contract under which Hays agreed to excavate certain waterways of the Port of Seattle according to plans decided by the state and its engineers. 251 U.S. at 234-35. Hays started work but "[a]lmost immediately" stopped when the state exercised an option to change certain plans. *Id.* at 235. Seventeen years then passed without performance by either party. *Id.* at 235-36. Then, in 1913 (year seventeen), the state passed a statute that turned over control of the waterways to local government which, in turn, completed the work. *Id.* at 236-37. Hays sued, claiming unconstitutional impairment of contract.

The Supreme Court held that there had a been a repudiation of contract, not impairment, because Hays "abandoned" or "terminated" the contract himself, and the

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[13] Respondents claim that the City is "feign[ing]" concern for the haulers and note that the "Consortium has not intervened in this suit to argue unconstitutional impairment on its own behalf." (Resp. Br. at 26, 29 n. 25.) The City, however, asked the district court to implead the haulers. Respondents *opposed* the motion, and the district court denied it. Yet Respondents continue to argue that the contracting parties (including the consortium) subjectively contemplated a referendum and included protections against it in their contract (the *force majeure* clause and general clauses that reference the *force majeure* clause). (Resp. Br. at 28-29.) They offer no response, however, to the City's argument that illustrates the district court misinterpreted and misapplied the *force majeure* clause. (App. Br. at 33-36.)

1913 statute that Hays challenged "provided that the project should be abandoned . . . after 17 years of delay without substantial performance." *Id.* at 237. This is hardly persuasive authority here, where the City and the haulers have been performing their contract for almost a year. Moreover, the Court in *Hays* noted that there *would* be unconstitutional impairment if the legislature had "passed an act to alter materially the scope of his contract, to diminish his compensation, or to defeat his lien upon the filled lands." *Id.* This is precisely what the repeal would do here: materially alter the contract, diminish the parties' respective benefits, and erode their reasonable expectations by rendering performance impossible.[14]

Similarly, *Yellow Cab* simply confirms that there is unconstitutional impairment "when the law provides the state or one of its subdivisions with a complete defense to a breach of contract suit, thereby preventing the other party from obtaining damages for breach of contract." 3 F. Supp. 2d at 923 (citing *Horwitz-Matthews, Inc. v. City of Chicago*, 78 F.3d 1248, 1251 (7th Cir. 1996)). In this case, as discussed, repeal of the City's ordinance would result in impossibility of performance of the contract terms. Impossibility is a complete defense to a breach-of-contract claim. *Powers v. Siats*, 244 Minn. 515, 70 N.W.2d 344, 348 (1955). Accordingly, *Yellow Cab* appears to hinder—rather than advance—Respondents' argument.

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[14] The parties agree that a repeal of Ordinance 18-39 would render contract performance impossible. (*See* App. Br. at 32-33 (providing examples of how the ordinance impacts contract performance); Resp. Br. at 23 ("[P]erformance would be rendered impossible . . . if the Referendum were passed.").)

The bottom line is that, if the proposed referendum succeeds, the parties' rights and obligations under the contract will be completely frustrated, and their reasonable expectations destroyed. A repeal would affect direct and fundamental changes to a pre-existing contract, as opposed to merely tangential effects on such contract. Indeed, the very point of the referendum is to disrupt (and potentially displace) the pre-existing contract precisely because Respondents—for reasons that are unknown and may vary substantially—do not want the City to perform that contract. This is what the contracts clauses forbid and protect against.

B. Respondents have not identified the public purpose the referendum seeks to achieve.

The second and third *Christensen* factors require the Court to consider whether the law's proponent has in fact demonstrated "a significant and legitimate public purpose behind the legislation" and further that the legislation is reasonable and necessary to achieve that purpose. *Christensen*, 331 N.W.2d at 750-51. This remains a fundamental problem with the district court's analysis and Respondents' defense of it: they never identify the public purpose the *referendum* seeks to achieve, much less that a referendum impairing a pre-existing, statutorily authorized contract is a reasonable or necessary means of achieving that purpose.

Respondents claim only that the purpose of the referendum is to ensure a public vote on organized hauling. (Resp. Br. at 31 ("The purpose is to let the public vote.").) With all respect, that purported purpose is circular and is not the type *Christensen* requires. The same could be said about any power to create a law that impairs a

contractual obligation (legislation is the only way to fulfill Congress' ability to enact legislation; an initiative is the only way to exercise the right to petition for initiative). *Christensen* requires that Respondents identify the purpose of the *legislation* (*i.e.*, the repeal of Ordinance 18-39), not the purpose of the means to adopt that legislation.

Numerous cases reflect that the ability to petition for new laws (or to repeal existing ones) is an important public interest in the abstract, but it cannot justify impairment of pre-existing contracts. As the court stated in *City of Middletown*, 495 N.E.2d at 383:

> We realize that initiative repeal of the necessary project-related legislation was the only course open to the citizens opposing this project. . . . As it is, however, we must conclude that this initiative ordinance impaired the obligations of the contract . . . in violation of Section 10, Article I of the United States Constitution.

This is not an idle or insignificant point. To justify impairing a pre-existing contract (particularly one authorized by statute), Respondents had to identify the referendum's purpose so the court could determine if that interest could be served by other, less-intrusive means. In *Christensen* itself, for example, this Court struck down as an unconstitutional impairment a statutory amendment making a new minimum-age requirement for pension eligibility applicable to *former*, present, and future municipal officers. The Court specifically noted that the state's concern—correcting perceived inequities in the city's pension plan—is a legitimate one. But the Court went on to reason:

> When this alteration is applied, however, to former city officers, like appellant, who have already left city

> employment and are relying on their monthly pension benefits for living expenses, we do not think that the need for a minimum age requirement is so compelling, or is such a reasonable condition appropriate to the public purpose claimed as to justify impairment of the state's obligation.

Id. at 751. Moreover, the Court observed that the state's interest could be "served sufficiently by less drastic alternatives," for example by applying the amendment prospectively to "elected officials joining the pension plan after enactment of the section." *Id.* at 751-52. The Court therefore concluded that "the statute fails on the third prong of three-part test." *Id.* at 752.[15]

Here, Respondents have not identified if the purpose of the referendum is to supplant organized collection entirely, or if they have more nuanced objections to the ordinance (*e.g.*, the price for services, the inability for "zero wasters" to opt out, the number or size of the bins) that could potentially be allayed through less-intrusive, prospective means, rather than completely derailing and substantially impairing a pre-existing contract. The Court should conclude that Respondents have not satisfied the second or third prongs of the *Christensen* test, and should accordingly reverse the decision below.

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[15] *See also United States Trust Co. of New York v. New Jersey*, 431 U.S. 1 (1977) (reiterating that "an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose" and finding law unconstitutional because "the States could have adopted alternative means of achieving their own goals" that did not impair pre-existing contracts).

CONCLUSION

The Minnesota Legislature afforded cities the option to organize hauling to meet their statutory obligation to "ensure" that their residents have trash-collection services. That statutory scheme preempts a proposed referendum on the post-contract local controls required to make organized hauling possible. Moreover, given that the Waste Management Act *requires* a contract before cities can implement those corollary local controls, a referendum repealing those local controls would unconstitutionally impair Saint Paul's pre-existing contract. This Court should reverse.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the form and length requirements of Minn. R. Civ. App. P. 132.01. The brief is produced with a 13-point, proportionately spaced font, and the length of this document is 6,958 words, including footnotes and headings. This document was prepared using Microsoft Word 2016 software.

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I hereby certify that the content of the accompanying paper brief is identical to the electronic version filed and served, except for any binding, colored cover, or colored back, and I understand that any corrections or alterations to a brief filed electronically must be separately served and filed in the form of an errata sheet.

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