STATE OF MINNESOTA
IN SUPREME COURT
NO. A17-0131

Minnesota Chamber of Commerce, Minnesota Recruiting and Staffing Association, National Federation of Independent Business, TwinWest Chamber of Commerce, Graco Inc., and Otogawa-Anschel General Contractors and Consultants LLC, Appellants/Petitioners, v. City of Minneapolis, Respondent.	**RESPONSE TO PETITION FOR REVIEW OF DECISION OF COURT OF APPEALS AND CONDITIONAL REQUEST FOR CROSS REVIEW** DATE OF FILING OF COURT OF APPEALS DECISION: September 12, 2017

TO: The Supreme Court of the State of Minnesota.

Respondent City of Minneapolis ("City") respectfully requests that the Court deny Appellants/Petitioners' ("Petitioners") Petition for Review of the Court of Appeals's unpublished decision in this matter. None of the criteria of Rule 117 are satisfied by Petitioners. The lower courts' decisions on the issues raised by Petitioners – conflict and field preemption – are squarely within long-established precedent. Even if Petitioners were seeking review of a final decision on their preemption claims, instead of a ruling on a temporary injunction, discretionary review by this court would not be warranted. Consequently, the criteria of Rule 117 of the Minnesota Rules of Civil Appellate Procedure cannot be satisfied and the Petition should be denied. In the alternative, if this

Court grants the Petition for Review, Respondent respectfully conditionally seeks cross review of the portion of the Court of Appeals's decision that affirms District Court's grant of a temporary injunction based on the alleged extraterritorial reach of the City of Minneapolis Sick and Safe Time Ordinance ("Ordinance").

I. Statement of the Case.

Petitioners filed this lawsuit challenging the Ordinance on the ground that it is in conflict with, and impliedly preempted by, state law, and that the Ordinance exceeded the City's territorial authority because it applies to employers who are not physically located in Minneapolis, but whose employees' work takes them into the City of Minneapolis for at least 80 hours in a year. (Addendum to Petitioners' Petition for Review ("Add.") at 3.) Petitioners sought declaratory and injunctive relief to prevent the Ordinance from going into effect on July 1, 2017. (*Id.*) Petitioners concurrently filed a motion for a temporary injunction and to have the temporary and permanent injunction hearings consolidated. (*Id.*)

The District Court, the Honorable Mel I. Dickstein presiding, held oral argument on the temporary injunction on December 8, 2016, and, at that time, ordered additional briefing on the extent to which the Ordinance may permissibly reach beyond the borders of the City of Minneapolis. (*Id.*)

On January 19, 2017, the District Court issued an Order, denying Petitioners' request to temporarily enjoin the Ordinance in its entirety based on alleged conflict or field preemption. (Add.3-4.) The District Court concluded that the Petitioners were unlikely to succeed on the merits of these claims. (Add.35-37.) The District Court also

concluded that Petitioners were likely to prevail on their challenge to the alleged extraterritorial reach of the Ordinance. (Add.42.) The District Court, therefore, temporarily enjoined the City from enforcing the Ordinance against "any employer resident outside the geographic boundaries of the City of Minneapolis" until after the hearing on the merits of this case, or further order of the Court. (Add.46.)

Petitioners filed a notice of appeal with the Court of Appeals, seeking review of the District Court's denial of injunctive relief on the basis of conflict or field preemption. (Add.2.) The City filed a notice of related appeal, seeking review of the temporary injunction based on the alleged extraterritorial reach of the Ordinance. (*Id.*) On the parties' stipulation, the District Court stayed further proceedings pending the outcome of the parties' appeals. (Add.4.) Petitioners filed a motion for expedited review in the Court of Appeals along with a Petition for Accelerated Review in this Court. Both Petitioners' motion and Petition for Accelerated Review were denied. (*Id.*)

After briefing and oral argument, the Court of Appeals issued an unpublished opinion affirming the District Court. (Add.1.) The Court of Appeals held that the District Court reasonably concluded that Petitioners were unlikely to succeed on the merits of their conflict or field preemption claims, and that the District Court correctly declined to temporarily enjoin the Ordinance in its entirety. (Add.9.) The Court of Appeals further held that the District Court did not abuse its discretion in temporarily enjoining enforcement of the Ordinance against "nonresident employers." (Add.17.) The panel noted that "the parallel is strong" between the Ordinance and a previous ordinance upheld by this Court in *State v. Nelson*, 68 N.W. 1066 (Minn. 1896). (Add.15.) But the

panel determined that "we cannot conclude that [Petitioner] has not made 'a doubtful showing as to the likelihood of prevailing on the merits.'" (Add.17.) Petitioners' petitioned this Court for review on the issues of conflict and field preemption.

II. Argument.

A. The criteria of Rule 117 cannot be met because the lower courts correctly dismissed Petitioners' preemption claims and the scope of review of a temporary injunction is limited.

Petitioners summarily and without analysis argue that review should be granted because of the importance of the question presented; an exercise of this Court's supervisory powers is warranted; and because a decision by this Court will help develop, clarify or harmonize the law. Petition at 6; *see* Minn. R. Civ. App. P. 117, subd. 2(a), (c), (d). These arguments fail because, as two lower courts have now correctly held, Petitioners' claims of conflict and field preemption are without merit.

A conflict between an ordinance and state law will render an ordinance invalid only if "both the ordinance and the statute contain express or implied terms that are irreconcilable with each other." *Mangold Midwest Co. v. Vill. of Richfield*, 143 N.W.2d 813, 816 (Minn. 1966). A conflict exists when the ordinance "permits what the statute forbids" or the ordinance "forbids what the statute *expressly* permits." *Id.* (emphasis added). There is no conflict where the ordinance "though different, is merely additional and complementary to or in aid and furtherance of the statute." *Id.* at 817. In support of their argument, Petitioners continue to rely on decisions in which the Legislature expressly limited the ability of municipalities to legislate on a topic or where the Legislature had established a policy favoring statewide uniformity. *See Bicking v. City of*

Minneapolis, 891 N.W.2d 304, 315 (Minn. 2017) (recognizing that the Legislature had included an express provision that the statutory provisions at issue "are exclusive of and supersede all home rule charter provisions and special laws on the same subject heretofore and hereafter adopted." (quoting Minn. Stat. § 466.11)); *Nw. Residence, Inc. v. City of Brooklyn Ctr.*, 352 N.W.2d 764, 774 (Minn. App. 1984) (state law expressly limited the scope of conditions municipalities could require of an applicant for a special use permit); *State v. Anderson*, No. A15-0315, 2015 WL 5312255, at *3 (Minn. App. Sept. 14, 2015) (Legislature expressed "policy to promote 'uniformity of laws relating to the use' of state waters" (quoting Minn. Stat. § 86B.0001 (2014))).

Here, the Legislature has neither expressly limited municipal authority nor expressed a policy favoring uniformity. In such cases, Courts have routinely found no conflict between state law and local regulation even if state law implicitly permits the conduct prohibited by the local regulation. *See, e.g.*, *Power v. Nordstrom*, 184. N.W. 967, 968-69 (Minn. 1921) (upholding local ordinance prohibiting exhibition of motion pictures on Sundays even though state law already prohibited the conduct of a variety of activities on Sundays, but did not prohibit the exhibition of motion pictures); *Canadian Connection v. New Prairie Twp.*, 581 N.W.2d 391, 395 (Minn. App. 1998) (upholding local ordinance imposing setback requirements on feedlot facilities even though state law would permit construction of facilities that would be prohibited by the ordinance); *State v. Dailey*, 169 N.W.2d 746, 747-48 (Minn. 1969) (upholding local ordinance criminalizing prostitution despite fact that ordinance criminalized conduct beyond that criminalized by state criminal statutes). There is no conflict between the Ordinance and

state law and the lower courts properly concluded that Petitioners are unlikely to prevail on their conflict preemption claim.

Petitioners' field preemption claim similarly fails. Field preemption occurs when "state law fully occupies a particular field of legislation, [and] there is no room for local regulation." *Canadian Connection*, 581 N.W.2d at 394. A court examines four questions to determine whether a local ordinance is barred by field preemption:

(1) What is the subject matter being regulated?

(2) Has the subject matter been so fully covered by state law as to have become solely a matter of state concern?

(3) Has the Legislature in partially regulating the subject matter indicated that it is a matter solely of state concern?

(4) Is the subject matter itself of such a nature that local regulation would have unreasonably adverse effects upon the general populace of the state?

Mangold, 143 N.W.2d at 820. Here, Petitioners argue that the lower courts erred by defining the subject matter of the Ordinance as "private-employer provided sick and safe leave." (Petition at 10.) But even if the subject matter is broadened to "employer-provided leave" as Petitioners request, no field preemption can be shown. Chapter 181 of Minnesota Statutes contains a scattershot of different leave provisions adopted at irregular intervals by the Legislature:

• Leaves for Adoptive Parents, Minn. Stat. §181.92, enacted in 1983;

• Pregnancy and Parenting Leave, Minn. Stat. §181.941, enacted in 1987;

• School Conference and Activities Leave, Minn. Stat. §181.9412, enacted in 1990;

• Sick Leave Benefits, Minn. Stat. §181.9413, enacted in 1990;

• Bone Marrow, Organ and Blood Donation Leave, Minn. Stat. §181.945, enacted in 1990;

• Leave for Organ Donation, Minn. Stat. §181.9456, enacted in 2006;

• Authorization for Blood Donation Leave, Minn. Stat. §181.9458, enacted in 2008;

• Leave for Civil Air Patrol Service, Minn. Stat. §181.946, enacted in 1997;

• Leave for Families of Mobilized Military Members, Minn. Stat. §181.947 - .948, enacted in 2006.

It is not a comprehensive scheme. In addition, each of the provisions of Chapter 181 added rights for employees. There is nothing in Chapter 181, or in the history of its various provisions, that would suggest the Legislature intended to preempt the field and restrict additional employee protections.

Moreover, Petitioners have ignored the limited scope of the question on appeal. This is an interlocutory appeal from an order on a temporary injunction. In light of the narrow scope of review, it is premature for the Court to speak on the issues raised by Petitioners' challenge to the Ordinance. Review should be denied.

B. If this Court grants the Petition for Review, the City conditionally seeks cross review of the temporary injunction based on the alleged extraterritorial reach of the Ordinance.

If this Court is inclined to grant review of the preemption issues raised by Petitioners, the City conditionally seeks cross review of the portion of the Court of Appeals decision affirming the District Court's temporary injunction of enforcement of

the Ordinance against nonresident employers. The Court of Appeals erred in finding that Petitioners had met their burden to be entitled to preliminary injunctive relief. The panel recognized the strength of the parallel between the Ordinance and a previous ordinance upheld by this Court in *State v. Nelson*, 68 N.W. 1066 (Minn. 1896). (Add.15.) In fact, the Ordinance cannot be deemed to have impermissible extraterritorial reach as long as *Nelson* remains good law. The panel did not meaningfully distinguish *Nelson*, but instead relied heavily on the deferential standard of review in finding that "we cannot conclude that [Petitioner] has not made 'a doubtful showing as to the likelihood of prevailing on the merits.'" (Add.17.) If this Court is inclined to review the legality of the Ordinance at this preliminary stage, review of all challenged aspects of the Ordinance, including alleged impermissible extraterritorial effects, is appropriate. If the question presented is important enough for this Court to rule at this time, certainly the issue of the application of the entire Ordinance should be considered at the same time. See Minn. R. Civ. App. P. 117, subd. 2(a).

III. Conclusion.

For all of the foregoing reasons, the City respectfully requests that the Petition for Review be denied. If this Court grants the Petition, the City conditionally seeks cross review of the temporary injunction based on the alleged extraterritorial reach of the Ordinance.

Dated: November 6, 2017

/s/ *Sarah McLaren*_____

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I hereby certify that this document conforms to the requirements of the applicable rules, is produced with a proportional font, and the length of this document is 1,943 words. This document was prepared using Microsoft Word 2010.

Dated: November 6, 2017

/s/ *Sarah McLaren*_____
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