

STATE OF MINNESOTA  
IN SUPREME COURT

**FILED**

November 28, 2018

OFFICE OF  
APPELLATE COURTS

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Joel Jennissen, Russell Burnison,  
Mark Vanick, William Reichert, and  
Sunil Lachhramani,

Petitioners,

v.

City of Bloomington, Minnesota,

Respondent.

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**PETITION FOR REVIEW OF  
DECISION OF THE MINNESOTA  
COURT OF APPEALS**

**Appellate Court Case No.: A17-0221**

**Date of Filing of Court of Appeals**

**Decision: October 29, 2018**

Petitioners, Bloomington residents Joel Jennissen, Russell Burnison, Mark Vanick, William Reichert, and Sunil Lachhramani, request that this Court review the October 29, 2018 decision of the Minnesota Court of Appeals.

This matter comes before this Court for a second time, after a reversal and remand to the court of appeals earlier this year. That court affirmed the Hennepin County District Court's January 11, 2017 decision on different grounds. It agreed that Petitioners' proposed charter amendment related to organized collection of solid waste in Bloomington is constitutional, but found that it is actually an "improper referendum" and is therefore barred. Petitioners seek review of this holding.

**STATEMENT OF LEGAL ISSUE**

1. What is an "improper referendum," and is the Petitioners' charter amendment unlawful under this new doctrine? The district court did not address this issue and

noted that Bloomington’s briefing thereon was inadequate, yet the court of appeals decided the case on this point against Petitioners. The court of appeals declared the charter amendment an improper referendum, creating a new legal concept. In doing so, it affirmed the decision of the district court and rejected the measure.

## **STATEMENT OF THE CASE**

This case comes before the Court on stipulated facts. The only remaining issue to be decided concerns a legal question that is a matter of first impression.

The Court has heard oral arguments and received briefs in this case previously, so unnecessary repetition will be avoided. Petitioners are five residents of the City of Bloomington. Bloomington is a home rule charter city under Minnesota Statutes Chapter 410. The reservation of legislative power under the city charter “creates a system of coterminous, dual authority to enact or change legislation,”<sup>1</sup> which Bloomington’s residents share with its city council. City voters also have the right to amend the charter pursuant to Minnesota Statute §410.12. This is specifically codified in the Bloomington City Charter at §5.09.

In late 2014, city officials began the process of organizing collection of solid waste pursuant to Minn. Stat. §115A.94. An initial round of litigation (“*Jennissen I*”) surrounding a rejected ballot initiative with the same language gave rise to the measure in

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<sup>1</sup> *Jennissen I* Order at 6.

its current form. On April 25, 2016, the Honorable James A. Moore decided that a charter amendment, rather than a ballot initiative, was the proper avenue for redress.<sup>2</sup>

This litigation comes as a result of the city's refusal to place the Petitioners' charter amendment ("Charter Amendment") on the ballot.

The Charter Amendment before the Court is brought pursuant to Minn. Stat. §410.12 and has no procedural defects. It consists of two sentences and reads as follows:

Unless first approved by a majority of the voters in a state general election, the City shall not replace the competitive market in solid waste collection with a system in which solid waste services are provided by government-chosen collectors or in government-designed districts. The adoption of this charter amendment shall supersede any ordinances, ordinance amendments, or charter amendments related to solid waste adopted by the city council in 2015-2016.

In its January 11, 2017 decision, the Hennepin County District Court found that the Charter Amendment was preempted by Minnesota Statute §115A.94.<sup>3</sup> The court of appeals affirmed this decision on November 20, 2017. In June of this year, this Court reversed the lower courts, finding that the measure is not preempted by the organized collection process under §115A.94. The dispute was then remanded to the court of appeals to decide two remaining issues: First, is the Charter Amendment manifestly unconstitutional? Second, is the Charter Amendment actually an "improper referendum?"<sup>4</sup>

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<sup>2</sup> *Id.* at 9.

<sup>3</sup> January 11, 2017 Order at 13-17.

<sup>4</sup> Order, *Jennissen et al. v. City of Bloomington* (Minn.Ct.App. Oct. 29, 2018).

The court of appeals properly held that Bloomington’s contract with the trash haulers terminated in March of 2017.<sup>5</sup> “Because the parties do not have rights under the contract between the city and Bloomington Haulers, any charter amendment cannot be manifestly unconstitutional as it would not impair on contractual rights.”<sup>6</sup>

In affirming the lower court, however, the court of appeals recognized for the first time the notion of an “improper referendum.” The court held “that the repealing language in the proposed charter amendment is a referendum by definition,”<sup>7</sup> and is therefore banned.

It is on this point that Petitioners respectfully seek review.

## **STATEMENT OF CRITERIA AND BRIEF ARGUMENT**

The basic premise behind an improper referendum, as defined by the court of appeals in this case, is that a charter amendment is easier to bring about than a referendum in Bloomington. “Allowing a disguised referendum to make it to the ballot by way of the less-stringent requirements of a charter amendment,” the court reasoned, would obviate the referendum provision in the Charter.<sup>8</sup>

The notion that a charter amendment is easier to bring about than a referendum is demonstrably wrong.

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<sup>5</sup> *Id.* at 9.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 12.

<sup>8</sup> *Id.* at 13.

Section 5.10 of the Bloomington City Charter requires signatures equal in number to “15 percent of the total vote at the last regular *municipal election*” to accompany a referendum petition. (Emphasis added). By contrast, the threshold for signatures to amend the charter under Minnesota Statutes §410.12 Subd. 1 is “five percent of the total votes cast at the last previous *state general election* in the city.” (Emphasis added). As in many charter cities including Saint Paul and Minneapolis, municipal elections are held on odd years in Bloomington. Voter turnout at city elections is consistently lower than that of the general elections in even years.<sup>9</sup> And so while 15% is greater than 5%, the court is comparing apples to oranges because the number is drawn from different voter pools. Any charter amendment has consistently required hundreds more signatures than a referendum in Bloomington; between 2015 and 2016, for example, that number was more than double the threshold for a referendum and over 1,300 more signatures.<sup>10</sup>

Since at least 2012 it has been a mathematical certainty that a charter amendment in Bloomington is more difficult to bring about than a referendum in any given year.<sup>11</sup> The badly flawed argument to the contrary was first advanced by the City of Bloomington in its May 22, 2017 brief on page 7. At best, this reflects an alarming lack of familiarity with the City’s own charter. At worst it is a blatant misrepresentation.

If the new legal principle of an improper referendum is to be adopted in Minnesota, this Court must clarify its underpinnings. The current holding by the court of

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<sup>9</sup> Election Results, Bloomington City Clerk’s Office, links for 2010-2017 elections, <https://www.bloomingtonmn.gov/cl/election-results> (Last visited Nov 27, 2018).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

appeals is based on a misunderstanding of the threshold requirements in §410.12 and the Bloomington City Charter §5.09. This scenario is not unique to Bloomington. The Saint Paul City Charter, for example, only requires signatures by 8% of those who voted *for the office of mayor* in the last city election to bring about a referendum.<sup>12</sup> It is simply not true that allowing the Charter Amendment on the ballot will “unreasonably enlarge the right to referendum” as held by the court of appeals.<sup>13</sup>

The court of appeals has redefined for Minnesota voters the authority granted by the Legislature in §410.12. Its new legal construct has created confusion that will doubtless play itself out for many years without this Court’s intervention. The existence of a right to referendum in a city does not negate the right to amend its charter, and there is nothing to suggest that a charter amendment may not repeal an ordinance.

Consistent with the current holding, charter city councils have been granted de facto veto power over any charter amendment that modifies an existing ordinance and is brought outside the window for a referendum. Put another way, the city council may now selectively preempt §410.12. Because voter-initiated legislation presents an inherent conflict with the desires of elected officials, this is tantamount to the deletion of all voter legislative power under the statute.

The next problem is that virtually every ordinance on the books in every city across the state has become un-repealable by the voters under the new doctrine of

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<sup>12</sup> Saint Paul, Minnesota City Charter §8.02, [https://library.municode.com/mn/st.\\_paul/codes/code\\_of\\_ordinances?nodeId=PTICICH\\_CH8INRERE\\_S8.02PE](https://library.municode.com/mn/st._paul/codes/code_of_ordinances?nodeId=PTICICH_CH8INRERE_S8.02PE) (Last visited Nov. 28, 2018).

<sup>13</sup> Order, *Jennissen et al. v. City of Bloomington* (Minn.Ct.App. Oct. 29, 2018) at 13.

“improper referendum.” Only those measures that exist within the window for an actual referendum (just 15 days in Bloomington) may still be changed.<sup>14</sup> The consequences of the current holding in the case at bar are even more pronounced. Recall that voter legislative authority in Bloomington is coequal to that of the city council.<sup>15,16</sup> If the voters cannot repeal an existing ordinance, neither can the city council. This is absurd and completely inconsistent with §410.12.

The State of Minnesota will see a profound impact on public policy as well. The voters who bother to show up for city elections on odd years truly care about their city government. Referendum provisions are drafted to make it easier for the citizens who are the most involved to make a difference. In setting the threshold number for required signatures for a referendum, charter commissions in cities across the state must carefully choose a number that they feel most appropriately strikes a balance between city council power and that of the voters. The current holding has upended this careful balance.

The clear purpose behind §410.12 is to give the voters in a charter city the opportunity to change legislation after having seen its impact outside the narrow window for referendum. Cities across the state under the new doctrine of “improper referendum” will be forced to accurately predict the effects of an ordinance for years to come, or else be stuck with it forever.

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<sup>14</sup> This assumes, of course, that the charter city in question has a referendum provision at all. Minneapolis, for example, does not reserve the power of referendum for its voters. This means that every charter amendment in that city that purports to modify an existing ordinance will be an illegal “improper referendum.”

<sup>15</sup> *Jennissen I* Order at 6.

<sup>16</sup> Bloomington City Charter at §5.01.

While there is no statutory language restricting the substance of a charter amendment, its functional limits are well-settled. Case law has borne out that a charter amendment must be both constitutional and not preempted by state law.<sup>17</sup> The constitutionality requirement has been expanded to ensure that any charter amendment is more broadly consistent with public policy.<sup>18</sup>

In this case, the lower court's holding has rendered unclear the allowable extent and function of charter amendments in the future. For example, must an amendment wholly undo a previous ordinance to qualify as an improper referendum? Suppose the citizens of Bloomington wished to change the signature threshold for a referendum from 15% to 10%. Is this allowable outside the referendum window, or would it be considered an improper referendum? If this is truly the intended result, and the Court wishes to descend into the semantics of city charter amendments this deeply, it must be developed and clarified further.

This Court should grant the Petition because the authority of the voters to amend a city charter as granted by the Legislature in §410.12 has been nearly destroyed by the lower court's holding. Based on a deeply flawed premise, the new principle of "improper referendum" has rendered countless ordinances in municipalities across the state impossible to repeal. Such a momentous development warrants review by the Supreme Court. The other issues having been resolved by the lower courts, the Petitioners

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<sup>17</sup> See, e.g., *Housing and Redevelopment Authority of Minneapolis v. City of Minneapolis*, 198 N.W.2d 531, 293 Minn. 227 (Minn. 1972); *Haumant v. Griffin*, 699 N.W.2d 774 (Minn. App. 2005); *Bicking v. City of Minneapolis*, 891 N.W.2d 304 (Minn. 2017).

<sup>18</sup> See, e.g., *Vasseur v. City of Minneapolis*, 887 N.W.2d 467 (Minn. 2016).



Respectfully ask the Court to grant an injunction directing the City of Bloomington to place the Charter Amendment on the next general election ballot.

Dated: November 28, 2018

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**CERTIFICATION OF COMPLIANCE WITH LENGTH REQUIREMENT**

I, Gregory J Joseph, certify that Appellants' Petition for Review of the Decision of the Minnesota Court of Appeals complies with the length requirement of Minn. R. Civ. App. P. 117, Subd. 3, and contains 1,982 words. This Petition was prepared with Microsoft Office Word 2016 software.

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