NO. A22-1190

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September 29, 2022

OFFICE OF APPELLATE COURTS

State of Minnesota

In Supreme Court

Kolten Kranz, David Clark, and Craig Black,

Appellants,

v.

City of Bloomington, Minnesota,

and

Christina Scipioni, in her official capacity as Bloomington City Clerk,

and

Mark V. Chapin, in his official capacity as Hennepin County Auditor,

and

Steve Simon, in his official capacity as Secretary of State,

Respondents.

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STATEMENT OF LEGAL ISSUES

Consistent with the Court's grant of accelerated review, the issue before the Court is:

Whether the district court erred by failing to order the City of Bloomington to place on the November 8, 2022 municipal ballot a question seeking to amend the Bloomington City Charter to repeal Ranked Choice Voting because it could not be severed from an unrelated provision governing the method of the proposed amendment's repeal.

1. This issue was raised in Appellants' petition under Minn. Stat. §204B.44 for correction of a ballot error and issuance of a temporary restraining order and mandatory injunction, after Respondent City of Bloomington ("City," or "Bloomington") refused to place a procedurally sufficient charter amendment ("Charter Amendment") on the municipal ballot for the November, 2022 election. Index #1.
2. The trial court dismissed the petition by order on August 24, 2022. Add. 1-12; Index #37. The trial court held that one of the four sections of the Charter Amendment was illegal and refused to sever it from the remaining legal provisions. *Id.* at 9-12.
3. The issue was preserved for appeal by timely filing of the notice of appeal and presentation of the same in the Petition for Accelerated Review, which the Court granted on August 30, 2022.
4. Most Apposite Authorities:
    a. *Housing & Redevelopment Authority v. City of Minneapolis*, 198 N.W.2d 531 (Minn. 1972).
    b. *McAlpine v. University of Alaska*, 762 P.2d 81 (Alaska 1988).
    c. Minn. Const. Art. XII sec. 4, 5.
    d. Minn. Stat. § 410.12.

STATEMENT OF THE CASE

Appellants filed this action in Hennepin County District Court on August 18, 2022, under Minn. Stat. § 204B.44, to correct the City of Bloomington's failure to place a Charter Amendment which would present voters with the choice to repeal Ranked Choice Voting ("RCV") on the November 2022 municipal election ballot. Appellants challenge the portion of the August 24, 2022 decision by Judge James A. Moore not to issue a mandatory injunction ordering Bloomington to sever allegedly illegal language from the Charter Amendment and place the remaining legal provisions on the ballot. (Add. 8-12, Index #37). After the Court issued its order denying the requested relief on August 24, 2022, Appellants immediately filed a Petition for Accelerated Review on August 25, 2022, which the Court granted on August 30, 2022.

Appellants assert that severance of the one section of the Charter Amendment, which Bloomington and Judge Moore assert are illegal, and placement of the remaining three sections, which Bloomington and Judge Moore agreed are legal, on the ballot, is proper under these circumstances pursuant to the Court's holding in *Housing & Redevelopment Authority v. City of Minneapolis*, 198 N.W.2d 531 (Minn. 1972) ("*HRA*").

HRA recognized that language in a charter amendment can be severed in part to remove an illegal provision while preserving the legal language to be presented to voters. *HRA*, 198 N.W.2d at 538 ("There remains the question of whether provision 23(a) is severable from provisions 23(b) and 23(c) for purposes of submitting 23(a) separately to the voters for approval."). But *HRA* only addressed one scenario: where multiple sections of a ballot question were illegal, leaving only one legal, substantive provision that rendered

the charter amendment "substantially emasculated" by the striking of the rest. *Id. HRA* thus left unanswered this very important question: under what circumstances may unlawful language in a proposed charter amendment be excised, and the remainder presented to voters? The case at bar provides an opportunity to pick up where *HRA* left off, and thereby harmonize the ability of a city council, by and through its city attorney, to sever out unlawful language which does not "substantially emasculate" a voter-initiated charter amendment and present the remainder to the voters for potential approval.

STATEMENT OF FACTS

I. The Parties.

Petitioners are residents and voters in Bloomington, which is a home rule charter city organized under the Minnesota Constitution, Article XII, § 4. The Bloomington City Charter reserves for its residents the right to propose charter amendments by petition in the process outlined in Minn. Stat. § 410.12. Bloomington City Charter § 5.04.

Appellants Kolten Kranz, David Clark, and Craig Black are residents and registered voters in the City of Bloomington. Each of them also signed the petition to present the Charter Amendment to the voters at the November municipal election. Respondent City of Bloomington and Christina Scipioni, its City Clerk, have specific assigned duties related to the acceptance or rejection of charter amendments under Minn. Stat. § 410.12. The City of Bloomington is specifically responsible for the rejection of the Charter Amendment before the Court. Respondents Mark V. Chapin and Steve Simon, in their official capacities as Hennepin County Auditor and Secretary of State, respectively, have specific duties related to placement of ballot measures on municipal ballots within the timelines

established by statute. Neither party took any position on the validity of the Charter Amendment, the severance of any portion thereof, or the merits of the underlying Petition, and were named in this lawsuit in the event that the Court ordered placement of the measure on the ballot in the November 2022 election or any subsequent election.

II. Residents of Bloomington Initiate a Petition to Amend the Bloomington City Charter to Repeal Ranked Choice Voting.

In early Spring 2022, The Petitioners and others initiated a petition to amend the Bloomington City Charter to allow voters to choose whether to repeal RCV in Bloomington. Index #1, Petition ¶¶ 17-18. Notably, this petition would undo the adoption of RCV by the City in 2020, when the City Council itself proposed the adoption of RCV by charter amendment, and it passed by the slimmest of margins—51.19%, when 51.00% was required for passage.[1] The clear policy disagreement and corresponding adverse relationship between the City Council and the Petitioners on the issues presented by the Charter Amendment is notable.

As required by statute, five residents of the City, including Petitioner Kranz, formed a committee to circulate a petition to collect signatures of registered voters equal to five percent of the total votes cast in the city at the last state general election. Index #1, Petition ¶ 17 & Ex. C; Minn. Stat. § 410.12. Both Appellants and the City agree this total is 2,769, and that the circulators gained at least 3,321 valid signatures, including all Petitioners.

[1] https://electionresults.sos.state.mn.us/results/Index?ErsElectionId=136&scenario=LocalRacesInCounty&CountyId=27&show=Go (City Question 3 (Bloomington)) (last accessed Sept. 29, 2022).

Index #1, Petition ¶ 17. The full language of the Charter Amendment is as follows:

> § 4.02 PRIMARY ELECTIONS.
>
> On the second Tuesday in August before the regular municipal election there must be a primary election to select two nominees for each elective office at the regular municipal election, unless two nominees or fewer file for each elective office.
>
> § 4.04 FILING OF CANDIDATES.
>
> An eligible person who desires to be elected to any elected office must file an affidavit with the city clerk not more than 84 days nor less than 70 days before the primary election, paying to the clerk a fee of $50.00. The city clerk must prepare and print at city expense the necessary ballots or other material required for an election. The ballots or other material must not contain political party designation of any candidate.
>
> § 4.07 PROCEDURES AT ELECTIONS.
>
> The council can adopt rules and regulations by ordinance that it considers necessary or desirable to regulate the conduct of elections subject to this charter and Minnesota Statutes as applicable.
>
> § 4.08 RANKED-CHOICE VOTING METHOD PROHIBITED.
>
> Unless first approved by two-thirds of the voters in a regular municipal election, the City of Bloomington shall not use the Ranked-Choice Voting method to elect any candidate to any municipal office. Ranked-Choice Voting is defined as any election method by which voters rank candidates for an office in order of their preference.

Add. 3 (Order at 3); Add. 13 (Charter Amendment). A cursory review of the four provisions reveals that Sections 4.02, 4.04, and 4.07 merely restore the former method of voting in Bloomington before the adoption of RCV – the traditional primary system used by hundreds of jurisdictions across Minnesota. Section 4.08, in contrast, has nothing to do with how elections are held; it would only apply if the measure were approved by the voters, and only then if the City wished to revert back to RCV. It is thus distinct from the

other three sections both in its nature (a procedure to undo the other three sections) and its timing (only relevant where the city or voters attempt to change the substantive method of elections in Bloomington). *Id.*

III. The City Finds the Petition Procedurally Sufficient But Waits Three Weeks and Then Rejects the Entire Charter Amendment Solely Because of Its Objection to Section 4.08.

The petition was presented to the City Clerk on June 21, 2022 and was recognized as procedurally sufficient on July 13, 2022. Add. 4 (Order at 4). However, *three weeks later*, on August 8, 2022, the Bloomington City Council voted unanimously to reject the Charter Amendment because of its belief that § 4.08 was illegal. Index #1, Petition ¶¶ 23-24, Ex. D. The City specifically objected to § 4.08 for two reasons: first, that it unlawfully conflicts with Minn. Stat. § 410.12; second, that it would restrict the City's ability to hold a special election to approve the measure. *Id.* The City did not object to any of the three remaining substantive portions of the Amendment. *Id.* The City Council has never identified any procedural or substantive issue with the Charter Amendment except for one single element: Section 4.08.

IV. Appellants Filed This Lawsuit to Place the Charter Amendment on the Ballot.

Petitioners filed this action on August 18, 2022 to require the City to place the Charter Amendment on the Ballot, and requested an emergency judicial assignment. Index #1-9. The District Court ordered a hearing to take place on August 23, Index #12, and the parties submitted briefing between August 18 and the afternoon of August 23, Index #13-35. On August 24, the District Court denied the Petition. Add. 1-12. In its decision, the

District Court noted that Sections 4.02, 4.04, and 4.07 are legal, which is also something the City of Bloomington does not dispute. Add. 10-11. It also recognized that this Court's holding in *HRA* "leaves open the possibility that a court could, in an appropriate circumstance, sever an illegal provision of a proposed charter amendment and order that the remainder be presented to the voters." Add. 9-10.

However, the District Court held that "(s)ection 4.08 is unconstitutional but integral to the purposes of the proposed Charter Amendments," and that its severance would "substantially emasculate" the measure. *Id.* at 11. It therefore refused to sever it from the remainder, meaning that no portion, including the three unquestionably legal provisions, will make the ballot.

This appeal follows. On appeal, Appellants have only presented the question of whether the unquestionably legal provisions should have been placed on the November 2022 ballot because Section 4.08 is severable from the remainder of the Charter Amendment's provisions. The legality of Section 4.08 is not at issue in this appeal.

ARGUMENT

City councils in home-rule charter cities in Minnesota have the power to sever portions of proposed charter amendments which are manifestly unconstitutional and retain the remainder for voters to act upon. This Court recognized this power in *HRA* fifty years ago by expressly entertaining whether severance was appropriate. In that case, over the dissent of two justices, the Court held that severance was not appropriate based on the facts before it. In the ballot question before the Court in *HRA*, nearly the entire proposed amendment was held to be illegal, and was thus "substantially emasculated" and not

reflective of the primary purpose or meaning of the question as initially drafted. Thus, while the Court recognized the *power* to sever out unlawful language in *HRA*, the Court decided that *HRA* did not present facts which made severance proper.

This case is different. Unlike in *HRA*, the language of Section 4.02, 4.04, and 4.07 of the Charter Amendment are not denigrated *at all* by the severance of Section 4.08. They are entirely unrelated in substance and in the time of their application to Bloomington residents. Section 4.08 is merely a procedural provision to rescind Sections 4.02, 4.04, and 4.07. While Sections 4.02, 4.04, and 4.07 would impact every municipal election in Bloomington, Section 4.08 would only be relevant where voters decide to reinstate RCV. The indisputably legal provisions of the Charter Amendment would serve to restore the traditional primary method of voting by themselves, and are only tangentially connected with the provision the City and the District Court held was illegal. Thus, this case presents the logical follow-up to *HRA*: is severance proper if the primary purpose and meaning behind the underlying amendment is *not* destroyed? The answer is yes, and the City should have placed Sections 4.02, 4.04, and 4.07 on the November 2022 Bloomington municipal ballot.

A decision to allow, prior to a vote, severance of a part of a proposed charter amendment with unlawful language which would not "substantially emasculate" the primary purpose of the charter amendment would yield substantial public policy benefits. First, it is consistent with Bloomington's already-existing practice of allowing modification (by the City Council, no less) of proposed voter legislation via initiative after signature collection but before the vote. Second, numerous jurisdictions in Minnesota have

the same practice related to citizen-led initiatives. Third, severance or amendment of unlawful language is common in proposed laws in the Legislature. Fourth, judicial review of already-passed ordinances, statutes, and contracts has happened in countless cases. Notably, if the full language of the Charter Amendment had been placed on the ballot and passed by Bloomington voters, there is no question that a court reviewing it would have upheld Sections 4.02, 4.04, and 4.07 regardless of the legality of Section 4.08.

Finally, case law and statutes already provide several procedural safeguards to ensure that any removal of unlawful language from a charter amendment would still yield ample time for voters to consider the final measure, that the resulting proposed legislation would be legal, and that the original spirit and purpose of the measure will be preserved. This Court should answer the question raised in *HRA* which has been unaddressed for fifty years, sever § 4.08 from the remainder of the Charter Amendment, and Order the other three sections' placement on the Bloomington municipal ballot at the next special or general election for consideration by the voters.

I. Standard of Review.

This case requires the Court to evaluate and interpret provisions in a city charter, state statutes, and the Minnesota Constitution. All parties agree as to the relevant facts. "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).

II. *HRA* Recognized the Doctrine of Severability As Applied to Charter Amendments, and This Court Should Apply That Doctrine to These Facts.

This Court was right in *HRA* that severance was improper under the facts of that case. But under the *HRA* standard, severance of Section 4.08 from the Charter Amendment and placement of the rest on the ballot should have happened here. A straightforward analysis of *HRA* and comparison to this case demonstrates that the two scenarios are worlds apart.

A. Placing what was left of the *HRA* amendment on the ballot was impossible because the Court could not determine the amendment's primary purpose after striking the illegal portions.

In *HRA*, a charter amendment was proposed that consisted of four sections. Two of the four were held to be illegal, one was legal, and the final section was a post-enactment severability provision which the court found inapplicable unless and until city voters approved the measure—and then only where a court were to later analyze the provisions together. *HRA*, 198 N.W.2d at 533-34. In summary, the amendment at issue in *HRA* was an attempt to shift the balance of power in Minneapolis from the City Council to the voters via a quasi-rule-by-referendum system. The *only* provision of the amendment at issue held to be valid and legal by the Court was one that would have instituted the power of initiative in the city of Minneapolis.

That "legal" provision was Section 23(a). As the Court noted, it "merely implement[ed] a right conferred by Minn. Const. art. 11 and by Minn. Stat. § 410.20." Specifically, § 23(a) would have instituted the right of the citizens of Minneapolis to bring about initiatives:

> Notwithstanding any provisions of the Minneapolis City Charter to the contrary, upon the filing with the City Clerk of petitions signed by more than 5,000 registered voters of the City demanding that a proposed ordinance, described in said petitions, be submitted to the electorate for approval or disapproval, the City Council shall order a special election for that purpose to be held not later than 120 days from the date of the filing of said petitions with the City Clerk.

HRA, 198 N.W.2d at 533-34. No party argued that this section was improper or illegal. Thus, having decided that this provision was legal, the *HRA* Court moved to the next step in the analysis: "If 23(a) is severable, there appears to be no reason why it is not proper for adoption." *Id.* at 536. This provision was the only part of the proposed amendment which was held to be legally valid and material to the question of whether severance is proper.

Section 23(b) provided that, "…upon the filing with the City Clerk of petitions signed by more than 5,000 registered voters of the City demanding that *any action*, described in said petitions, which has been taken by the City Council within 90 days of the filing of said petitions be submitted to the electorate for approval or disapproval…" *Id.* at 534 (emphasis added). Had it been approved by Minneapolis voters, the *HRA* Court held, this "broad referendum right not only appears to be without statutory authority under Minn. Stat. § 410.20 but, as the trial court suggests, might well create 'a chaotic situation' in city government." *Id.* at 536-37. The Court went on to explain that this unlimited referendum power to force an election on *any action* undertaken by the city council is inconsistent with Minn. Stat. § 410.20, which "express[es] a legislative intent to limit referendum to ordinances, without granting the sweeping authority which 23(b) purports to confer." *Id.* Accordingly, this provision was held to be invalid and could not be placed on the ballot.

The third and final substantive provision in the *HRA* amendment is 23(c). Under this provision, "no urban renewal project heretofore proposed or to be proposed in the future may be initiated or undertaken without approval by a majority vote of residents in the area to be redeveloped." *Id.* at 537. In other words, if passed by the voters, a special election would have been required *any time* the city council sought to spend taxpayer money in specific neighborhoods, and then only the residents of those areas would have been allowed to vote in said election. *Id.* The *HRA* Court detailed at length why this was illegal, and held that this provision, too, was not constitutionally proper for placement on the ballot. *Id.*

The fourth provision, which was strictly procedural, read as follows: "23(d). The provisions of Section 23 shall be severable and the invalidity of any one provision shall not affect the validity of the remainder of Section 23." *Id.* at 534. This severability clause was held to "apply only to challenges to the validity of § 23 which occur *after the adoption of the amendment.*" *Id.* at 538 (emphasis added). Thus, the existence of a severability clause in a *proposed* amendment is not relevant to whether parts of the proposed amendment can be severed *before* a question is presented to voters. It is only relevant to the potential severability of provisions in the amendment after its passage.[2]

After the Court threw out two of the three substantive provisions that would have changed how Minneapolis' government operated, what remained bore little resemblance

[2] This is a critical distinction in light of the case at bar, and it underscores the importance of recognizing the difference between qualifying a city charter amendment for the ballot, and its ultimate potential passage into law.

to the original measure. Thus, the Court held that the proposed amendment had been "substantially emasculated" and should not be placed on the ballot at all. *Id.* at 538. But even so, the Court based its decision on "judicial policy"—indicating that, as a policy matter, there could be scenarios in which the Court finds that proposed amendments containing unlawful language would *not* be substantially emasculated if the offending language were severed, and thus the remainder may properly be placed on a ballot.

Even so, two dissenting opinions in the *HRA* case disagreed with the Court's policy decision. The dissenting justices argued, in relevant part, that (1) there is no injury to the people of Minneapolis to be faced with the portion of the amendment which is obviously valid, *id.* at 539 (Peterson, J., dissenting), and (2) the Court should adopt a restrictive construction which could save the amendment if possible to do so, the same as with any legislative act, *id.* at 540 (Kelly, J., dissenting).[3]

B. This case presents the corollary to the *HRA* amendment, and severance of Section 4.08 would not "substantially emasculate" the remaining provisions of the Charter Amendment.

Briefly, and as laid out in the facts section above, there are four provisions in the Charter Amendment at issue. The first three, sections 4.02, 4.04, and 4.07, would return Bloomington to a traditional primary-then-two-candidates municipal election method and would end the use of RCV. The fourth provision, section 4.08, provides a legally questionable mechanism for returning Bloomington to RCV, if the voters so choose at a

[3] Given that citizens who lead a petition and sign it are acting in a legislative capacity, Justice Kelly's point has particular force, especially where the vast majority of a proposed enactment is not "substantially emasculated."

subsequent election. Therefore, sections 4.02, 4.04, and 4.07 work together to substantively change Bloomington's method of electing individuals to municipal office. Section 4.08, in sharp contrast, provides a procedural method to reverse the implementation of sections 4.02, 4.04, and 4.07. It does not affect any of those provisions' substance, and it is "dormant" until a subsequent proposed charter amendment, if one ever arises again, seeks to reinstate RCV. Thus, it has important substantive and temporal distinctions from the other three sections.

The severance of section 4.08 cannot, therefore, "emasculate" sections 4.02, 4.04, or 4.07, because the primary purpose of the measure would remain intact. In fact, its removal would not affect these remaining sections at all. The result of severing the fourth provision and allowing the first three provisions is to repeal RCV, return Bloomington to traditional elections, and allow voters to reinstate RCV at a future date if they so choose. The City's particular opposition to this practice is curious—their position is that they will not allow the first three provisions to go on the ballot this year, but they would allow the *exact same three provisions* to be proposed a year from now. This is a waste of time and resources.

Placing the meat of the Charter Amendment on the ballot while excising the fat would not prejudice anyone who signed the petition to place it on the ballot, either. The simple fact is that if anyone actually exists who conditioned approval of this measure on the offending provision (unlikely), then a "no" vote at the ballot box is the ready solution. There is no harm in placing the first three sections of this Charter Amendment on the ballot. Rejection is always an option for voters.

Further, the reason that city councils and counties are allowed to reject ballot questions proposed by voters despite the language of the Minnesota Constitution and Minn. Stat. § 410.12 is to prevent a waste of judicial resources where the ballot question is likely to be struck down after passage. But this Court routinely severs portions of an ordinance if doing so would not destroy the *purpose* of the rest of the law. Index #1, Petition ¶¶ 43-44; *In re Welfare of A.J.B.*, 929 N.W.2d 840, 856 (Minn. 2019) and *Minn. Sands, LLC v. Cty. of Winona*, 940 N.W.2d 183, 197 (Minn. 2020)). This is no different than refusing to sever portions of a proposed charter amendment where doing so would *substantially emasculate* the measure.

When this Court considers constitutional challenges to statutes, it

> presume[s] unconstitutional language is severable unless the valid provisions of the statute are so 'essentially and inseparably connected with' the void provisions that the Legislature would not have enacted the valid provisions without the void language, or where (after severance) the remaining valid language would be 'incomplete and . . . incapable of being executed.'"

In re Welfare of A.J.B., 929 N.W.2d at 856. The first three provisions of the Charter Amendment are not so entwined with the fourth that a reviewing court, after passage, could not sever it. In fact, a reviewing court unquestionably would sever section 4.08 from the rest if it agreed with the district court in this case that section 4.08 is illegal. And sections 4.02, 4.04, and 4.07 are fully self-executing without section 4.08. This is the heart of the "substantially emasculated" test—it reflects the normal practice of severing offending provisions in law where the remainder can sensibly be retained. In this case, sections 4.02, 4.04, and 4.07 easily stand on their own. The Court should so hold and order Bloomington to hold a special election to place sections 4.02, 4.04, and 4.07 on the ballot pursuant to

Minn. Stat. § 204B.44.[4]

III. The District Court's Decision and the Respondents Misunderstand the *HRA* Court's Concern About Determining the Intent of the Signers of the Petition Initiating a Charter Amendment.

As discussed above, the application of *HRA* to this case is straightforward. But it is also important to note serious problems with the district court and Respondents' interpretations of the language in the *HRA* decision. Simply put, their position is that one error in a potentially lengthy proposed charter amendment bars the entire amendment from the ballot. This is both unreasonable and irreconcilable with the doctrine of severance, which is something the district court held was conferred by the Court in *HRA*. No ordinance, law, contract, or statute is ever subject to that sort of standard of perfection. It cannot be that if "one jot or one tittle"[5] of a proposed amendment is in error, that the entire proposal falls. That, however, is the self-contradictory standard advanced by the district court and the Respondents.

The district court took the following language from the *HRA* Court out of context:

> We cannot search the minds of those who signed the petition to ascertain their intent. In the absence of such prescience, we feel compelled to hold that the proposal which would be submitted to the voters is not the one which the petitioners sought to have adopted.

[4] Given that the language will not be able to be placed on the November 2022 ballot, ordering "appropriate relief" under Minn. Stat. § 204B.44 requires a special election or, at very least, placement on the next municipal election ballot. *See* Index #1, Petition pp. 13-14.

[5] Such a standard is reserved for divine claims of inerrancy, like those of Jesus of Nazareth in the Sermon on the Mount. Matthew 5:17-18 (KJV). A "jot" is the smallest letter in the Hebrew alphabet. A "tittle" is a small mark that distinguishes between two Hebrew letters. *E.g.,* https://www.gotquestions.org/jot-tittle.html.

Misinterpreting this language, the district court refused to sever § 4.08 on the notion that the measure which would be presented to the voters at the ballot box *after* severance of the unlawful provision would not be the *identical* Charter Amendment that was presented to the voters when they signed the petition under Minn. Stat. § 410.12. It held that "Minn. Stat. § 410.12 subdivision 1 requires that the text of a proposed charter amendment be attached *in full* to the signature sheets," and therefore the language is immutable. Add. 11 (emphasis added). While the district court paid lip service to the availability of severance as a remedy under *HRA*, this real-world application of *HRA* would *never* allow for severance of an unlawful provision—not one jot or one tittle.

Because the *HRA* Court did contemplate severance, the nuanced language in the *HRA* holding could not have meant what the district court thought it meant. Understanding this passage from *HRA* is crucially important, however, and its context reveals what it means. It also explains the reason that both the Respondents and the district court got it wrong. Because the Court contemplated that removal of unlawful language is possible as long as the original amendment has not been "substantially emasculated" by the severance, this language refers to the *objective purpose and meaning* of the proposed amendment, and expressly not the signers' *subjective intent*.

To that point, again, the original amendment in *HRA* sought to establish three citizen-led procedures: the power of initiative, referendum on *any city action*, and the requirement that a special election be held prior to redevelopment of any neighborhood in the City of Minneapolis. *HRA*, 198 N.W.2d at 533-34. What remained of the *HRA*

amendment after the Court held two of the three substantive sections to be illegal can only be described as substantially emasculated. There is no objective primary purpose or meaning to an amendment where its original form contained three different procedures to implement. Put another way, any one of the three changes to city government sought to be achieved in the *HRA* amendment could have been seen as "the one which petitioners sought to have adopted." *Id.* at 538.

So, the real reason the *HRA* Court was lamenting the inability to read the minds of those who signed the petition is because determining the main purpose behind the measure was impossible, and not because severing an unlawful provision would run afoul of an expectation that a petition signer would be presented with precisely the same language at the ballot box, lest that signer be somehow disenfranchised. If the court were able to read the mind of the signers, it could determine which provisions may properly be severed as extraneous – those provisions which would not "substantially emasculate" the charter amendment. Because the *HRA* Court contemplated severance in an appropriate circumstance, like this one, the "signers' minds" passage could not have meant that every signer has an unshakeable right to the exact language of the petition signed on the ballot.[6] Rather, as with any contract, statute, or ordinance subject to judicial review, the focus is on the primary purpose of the provision and what those proposing the amendment

[6] There is no voter disenfranchisement countenanced by severance of manifestly unconstitutional language. On the other hand, the City's refusal to allow plainly legal proposals on a ballot has already disenfranchised the thousands of Bloomington voters who signed the petitions indicating their desire to repeal RCV in this election.

objectively meant.

Here, the primary purpose of the Charter Amendment is to repeal RCV and reinstitute the traditional primary voting system. No searching of minds is necessary because sections 4.02, 4.04, and 4.07 make this absolutely clear. The individual, subjective intent of every petition signer as to why he or she signed the petition is wholly irrelevant when diving the main purpose is unnecessary, unlike the measure in *HRA*.[7] No other interpretation is reconcilable with the doctrine of severability, which the *HRA* Court plainly recognized.

IV. Allowing Severance of Proposed Charter Amendments Is Consistent With Bloomington's Own Practice of the City Council Modifying Citizen-Led Initiatives and That of Many Other Cities and States.

Bloomington and several other charter cities in Minnesota allow, as part of their own charter, modification of citizen-led ballot questions after signatures are collected and before the provisions are placed on the ballot. Bloomington's objection to severance here is self-contradictory at best.[8] The Court should reaffirm, consistent with *HRA*, that severance is a legitimate implicit power held by city councils just like their explicit uses of modification power in other citizen-led ballot proposals.

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[7] Likewise, Appellants note that the subjective intent or motivation of any legislator when sponsoring a proposed bill in St. Paul is meaningless if the bill is amended by their colleagues. However, they retain the right to vote "yea" or "nay" on the final bill.

[8] Notable again is the fact that, in 2020, the City Council itself proposed the adoption of RCV by amendment, and it passed by the slimmest of margins—51.19%, when 51.00% was required for passage. https://electionresults.sos.state.mn.us/results/Index?ErsElectionId=136&scenario=LocalRacesInCounty&CountyId=27&show=Go (City Question 3 (Bloomington)) (last accessed Sept. 29, 2022).

A. Minnesota cities regularly allow for modification of ballot measures after signature collection is complete.

As discussed earlier, the district court claimed, and Respondents claimed below, that the language presented to voters when signing the petition required by Minn. Stat. § 410.12 must be identical to that which later appears on the ballot. But not even the City of Bloomington believes that. In fact, several Minnesota cities including Bloomington already recognize the power of city councils to not only sever unlawful provisions from a proposed ballot measure, but to *add new language after the gathering of signatures is complete*. It is simply disingenuous for Bloomington to refuse to sever § 4.08 from the Charter Amendment based on the concept that its language is immutable after signatures are gathered.

Section 5.01 of the Bloomington Charter reserves for its people the powers of initiative, referendum, and recall.[9] Section 5.07 of the Bloomington City Charter outlines the actions a council may take upon receipt of a procedurally valid ballot initiative,[10] brought about by the gathering of signatures by a committee of five persons[11] of "ten percent of the total number of votes cast at the last preceding regular municipal election."[12]

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[9] *Available at* https://codelibrary.amlegal.com/codes/bloomington/latest/bloomington_mn/0-0-0-43728, last accessed September 28, 2022.

[10] An initiative would have the same legal effect as a city ordinance after approval by voters.

[11] This is identical to the five-member committee required by § 410.12.

[12] Minn. Stat. § 410.12 only requires signatures of "five percent of the total votes cast in the city at the last state general election." *Id.*

As in Minn. Stat. § 410.12, the City Charter at § 5.07 requires a certificate of sufficiency from the City Clerk once the signature threshold is met. *Id.*

Chapter 5 of the Bloomington City Charter then provides a timeline for action and public meeting requirement, and allows the council to either pass an ordinance identical to the initiative, refuse to pass such an ordinance, or pass an ordinance which amends the initiative. Charter § 5.07. The Charter provides: "If the council fails to pass the proposed ordinance, or passes it in a form different from that in the petition and is unsatisfactory to the petitioners…," it must then submit it for a vote. *Id.* The power to add language *after* signatures are received is explicitly reserved later in the provision: "If the council passes the proposed ordinance *with amendments* and at least 4/5 of the committee of petitioners do not express their objection with the amended form…," then the initiative need not be presented to the voters—it is adopted as amended by the council. *Id.* (emphasis added).

Bloomington is not alone in recognizing the power to modify a ballot measure in this way. Brooklyn Park's City Charter includes the following language at § 6.06: "The Council shall not pass an amended or revised version of the proposed ordinance that is unsatisfactory to the sponsoring committee….[, but] if the Council passes the proposed ordinance with amendments and at least four-fifths of the sponsoring committee do not express their dissatisfaction with such amended form," then the measure need not be submitted to the voters.[13] Plymouth allows that "The council may adopt the proposed

[13] *Available at*: https://www.brooklynpark.org/wp-content/uploads/2022/01/City-Charter-with-May-2022-Update.pdf, last accessed September 29, 2022.

initiated ordinance *with changes in substance* with the approval of four of the committee members…,"[14] and the Saint Cloud City Charter at 5.22.A.2 provides for passage of a proposed initiative which has already met the signature threshold "*in an altered form*, pending its acceptance by the sponsoring committee members as satisfactory," which means that if no more than one member of the sponsoring committee objects, the amended initiative need not be presented to voters.[15]

As applied to the Charter Amendment at bar, this Court's interpretation of Minn. Stat. § 410.12 clearly recognizes city councils' implicit power to refuse to place a "manifestly unconstitutional" measure on a ballot. *See, e.g., Jennissen v. City of Bloomington*, 938 N.W.2d 808, 816 (Minn. 2020). Consistently, nothing in Minn. Stat. § 410.12 prohibits a *partial* refusal to place illegal language on the ballot while retaining the legal language. Doing so is no different in kind than pre-election review of citizen-initiated legislation, which is decidedly not a novel concept. Moreover, not only is this a more equitable reading of a right guaranteed to charter city voters under the Constitution, but it also comes with the circumstantial guarantees that the measure will be legal and that it will still reflect the original intention of the 5-member committee of petitioners, among other things. This Court should allow severance of § 4.08 and order placement of §§ 4.02, 4.04, and 4.07 on the ballot.

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[14] *Available at*: https://library.municode.com/mn/plymouth/codes/code_of_ordinances?nodeId=CHTR_CH_CH5INRE, last accessed September 29, 2022 (emphasis added).

[15] *Available at*: https://www.ci.stcloud.mn.us/DocumentCenter/View/581/charter?bidId=, last accessed September 29, 2022 (emphasis added).

B. Minnesota should adopt Alaska's common-sense test related to the severability of portions of charter amendments advanced by citizens under Minn. Stat. § 410.12.

While Minnesota does not have statewide initiative and referendum authority, many other states do, and the ability to modify language in a proposed ballot measure after the signature-gathering process has been validated time and again in those states. Some of these states, like Alaska, have specifically recognized the propriety of severance of an impermissible portion of a proposed law. Appellants suggest that the Alaska Supreme Court's test for whether to allow severance of a proposed law after the requisite number of signatures are collected is robust and workable, similar to this Court's existing precedent on severability, would encourage a better working relationship between citizens and their government, and would result in fewer lawsuits like this one.

In *McAlpine v. Univ. of Alaska*, 762 P.2d 81, 94-95 (Alaska 1988), the Alaska Supreme Court held:

> the duty of a court in conducting a pre-election review of an initiative is similar to the court's duty when reviewing an enacted law. In particular, when the requisite number of voters have already subscribed to an initiative, a reviewing court should sever an impermissible portion of the proposed bill when the following conditions are met:
>
> (1) standing alone, the remainder of the proposed bill can be given legal effect;
>
> (2) deleting the impermissible portion would not substantially change the spirit of the measure; and
>
> (3) it is evident from the content of the measure and the circumstances surrounding its proposal that the sponsors and subscribers would prefer the measure to stand as altered, rather than to be invalidated in its entirety.

This three-part test is consistent with this Court's existing jurisprudence on severability as it relates to already-enacted ordinances and statutes. *E.g., In re Welfare of A.J.B.*, 929 N.W.2d at 856. And it encapsulates the "substantially emasculated" test in a workable manner.

In *McAlpine*, that court faced a voter initiative which would establish a community college system in Alaska, but it also specified that "[t]he amount of the property transferred shall be commensurate with that occupied and operated by the Community Colleges on November 1, 1986." *McAlpine* 762 P.2d 81, 83 (Alaska 1988). This was the third sentence out of four in the initiative. The Alaska Supreme Court held that this sentence was problematic because it amounted to an appropriation, which was impermissible via a citizen initiative. *Id.* at 91. However, the court adopted the above test, held that severance was appropriate, and ordered the placement of the following measure on the ballot, minus the just-quoted sentence:

> BE IT ENACTED BY THE PEOPLE OF THE STATE OF ALASKA:
> There shall be established a separate independent Community College System in the State of Alaska. The University of Alaska shall transfer to the Community College System of Alaska such real and personal property as is necessary to the independent operation and maintenance of the Community College System. Properties created for the purpose of joint use by the University and Community College System shall continue to be jointly used.

Id. at 96.

To support its decision, the court reasoned:

> Striking the entire initiative on the ground that one sentence of secondary importance is constitutionally invalid would be strong medicine. Such a decision forces the sponsors to choose between abandoning their efforts altogether and submitting a new application and expending, for the second time, the significant time and effort required to generate public enthusiasm

> and gather the requisite number of signatures. This would seriously impede the ability of the people to initiate laws, particularly when, as is often the case, the sponsors of an initiative are grass roots groups with limited resources

Id. at 93.

All of these policy reasons behind allowing severance apply here, and Appellants would easily meet the *McAlpine* test. In *McAlpine*, "the primary goal of the sponsors and subscribers of the community college initiative is to reorganize what is presently the University so the community colleges will be administered separately from the other programs." *Id.* at 95. This was obvious from the language of the proposed initiative, and just because the *procedure* for funding community colleges would be left to the legislature, and not immediately provided for, did not affect the *substance* of what the petitioners were trying to achieve. *Id.* The court expressly noted:

> While the sponsors and subscribers also desired to specify the level of assets at which the new community college system would be funded, we have little doubt that they would be content to leave that decision to the legislature, rather than to have their proposal invalidated in its entirety.

Id. There is no question that the "sponsors and subscribers" here would also be content to place only Sections 4.02, 4.04, and 4.07—the substance of the RCV repeal—on the November 2022 ballot, and leave the procedure to the Legislature in Minn. Stat. § 410.12. After all, that is one of the alternative forms of relief prayed for in the Petition for Correction of Ballot Error, Index #1, Petition 13-14, and Appellants are specifically asking this Court for that exact relief.

In addition to Alaska, other states likewise recognize the possibility of severing

voter initiatives, including Arizona,[16] California,[17] Colorado,[18] Nevada,[19] and Oklahoma.[20] The Court should adopt the Alaska test here, which has a robust set of factors consistent with this Court's common-law severability analysis and the *HRA* "substantially emasculated" test. To do otherwise is unfair to grassroots activists like Appellants, and such "strong medicine" should be avoided, and collaboration encouraged.

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[16] *Fann v. State*, 251 Ariz. 425, 436 (2021) ("Pursuant to *Randolph*, an unconstitutional provision in a voter initiative may be severed if "the valid portion, considered separately, can operate independently and is enforceable and workable." *Randolph*, 195 Ariz. at 427 ¶ 15.").

[17] *Pala Band of Mission Indians v. Bd. of Supervisors*, 54 Cal. App. 4th 565, 585-86 (1997) ("When an initiative provision is invalid, the void provision must be stricken but the remaining provisions should be given effect if the invalid provision is severable. . . Where, as here, the initiative contains a severability clause, the invalid provision is severable if it can be separated grammatically, functionally, and volitionally."). The California court did not require a severability clause, but found it supported severability. *See id.* While some jurisdictions consider severability clauses in their analysis, such clauses should not be considered mandatory for severability of a provision if, like in California, the remainder can be separated "grammatically, functionally, and volitionally." *Id.*

[18] *City of Colo. Springs v. Bull*, 143 P.3d 1127, 1138 (Colo. Ct. App. 2006) (applying the Alaska rule and severing initiative provisions concerning administrative matters because both State Constitution and City Charter only allow initiatives on legislative matters).

[19] *Nevadans for the Prot. of Prop. Rights, Inc. v. Heller*, 141 P.3d 1235, 1238 (Nev. 2006) ("Because the initiative included a severability clause and facially and unequivocally pertained to a primary subject, eminent domain, the supreme court was compelled to sever sections 1 and 8, which did not pertain to eminent domain, in lieu of removing the entire initiative from the ballot.").

[20] *In re INITIATIVE PETITION NO. 347*, 813 P.2d 1019, 1030-31 (Okla. 1991) ("The alleged fact that a portion of an initiative petition would violate the constitution does not render the petition invalid where the proposed law contains a severability provision and the questioned provisions could be eliminated without impairing the effect of the act.").

V. Good Public Policy Supports Allowing Severance of Illegal Portions of Otherwise Valid, Self-Executing Proposed Charter Amendments.

Case after case featuring disputes between grassroots activists and city councils in Minnesota demonstrate that voter-initiated measures always present a conflict with the will of the city council—thus, these cases arise seemingly every year, especially with Bloomington. *E.g., Samuels v. City of Minneapolis*, 966 N.W.2d 245 (Minn. 2021); *Jennissen v. City of Bloomington*, 938 N.W.2d 808 (Minn. 2020); *Clark v. City of St. Paul*, 934 N.W.2d 334 (Minn. 2019); *Jennissen v. City of Bloomington*, 913 N.W.2d 456 (Minn. 2018); *Bicking v. City of Minneapolis*, 891 N.W.2d 304 (Minn. 2017); *Vasseur v. City of Minneapolis*, 887 N.W.2d 467 (Minn. 2016). If that were not the case, the council itself would simply propose or pass a measure similar to the voters' proposal. *See* Minn. Stat. § 410.12. This friction is a natural part of the legislative process any time the voters propose a ballot measure, and regardless of what this Court decides today, this inherent healthy conflict will not be totally eliminated.

That said, the voters, and specifically the committee of voters who initiate a petition under § 410.12, have a place at the legislative table with the city council. Bloomington does not appear to recognize that, as the Council has repeatedly fought tooth-and-nail with voters to try to keep legitimate petitions off of ballots. *Jennissen II*, 938 N.W.2d 808 (Minn. 2020); *Jennissen I*, 913 N.W.2d 456 (Minn. 2018). The Court should act in this case to remind Bloomington and other charter cities of the rightful place of the voter petition committee in advancing legislative change in charter cities. Reaffirming that city councils may sever truly unlawful portions of petitions while retaining the legal portions would

serve as a reminder that voter petition committees and the people have a say in their government. Where city councils and voters have opportunity to negotiate with one another on how to govern best, greater trust and communication between people and their local government, which is sorely needed today, will result.

A. Petition committees under § 410.12 in home rule charter cities are akin to legislative bodies.

As is the case with many of the 107 home rule charter cities in Minnesota, the voters in Bloomington have coequal legislative authority with their city councils through the powers of initiative, referendum, recall, and charter amendment.[21] The right of a city to govern itself under its own charter was considered important enough to be enshrined in the Minnesota Constitution, and legislation brought by voters in these cities should be treated with the same deference as that brought by any other legislative body, including the city council.

Here, the five-member committee which sponsored the Charter Amendment has more at stake and has demonstrated a civic dedication at least as great as lawmakers at Bloomington City Hall or in Saint Paul. Voters who spend the hundreds or even thousands of hours complying with the process outlined in § 410.12 to bring about legislation are both deeply familiar with the subject matter and more than capable of meeting and negotiating with city government officials with or without representation. The framers of Article XII, Section 4 of the Minnesota Constitution would certainly agree, and this is acutely true

[21] Except as it pertains to the powers to tax and spend.

under the circumstances created by the district court's misinterpretation of *HRA*, where such committees face total rejection by an adverse party in the city council.

B. The procedural protections of Minn. Stat. § 410.12, like the procedures for lawmaking in the Minnesota Constitution and in home-rule charters, allow voters ample time to consider ballot measures before voting on them.

It is true that severance of § 4.08 and any other unlawful portion of a charter amendment would result in a changed ballot measure. That said, the procedural requirements of Minn. Stat. § 410.12 ensure that there is enough time for negotiation on questionable ballot measures. And voter petition committees must submit the language for a proposed amendment "at least 17 weeks before the general election," Minn. Stat. § 410.12, which is a lengthy lead time that ensures that the voters have ample time to inspect the measure in its final form prior to voting on it. And in the event that someone signed a petition for placement of a charter amendment on a municipal ballot because of an illegal clause which is later severed, that person is free to vote against adoption of the new, modified amendment.

Contrast this with legislation created in council chambers or at the Capitol, where modifications routinely take place up to the moment before a vote and citizens have no direct say at all on any given measure. It bears repeating here that the charter amendment process in § 410.12 only ensures placement on the municipal ballot for *consideration* by voters, and not actual passage into law. The dedicated citizens who care enough about their cities to bring about a charter amendment should be considered the legislative body

they actually are, and their power to sit at the same table as the council and its attorney should be reaffirmed.

C. The Court should grant severance of § 4.08 to reinforce the line between qualifying a measure for the municipal ballot and passing it into law.

This Court's holding in *HRA* recognized the distinction between prohibiting a charter amendment from being considered by voters at all, and the severance of a provision that may later be found unlawful. The *HRA* Court noted that "the question of whether a court should enjoin an election is one of judicial propriety." 198 N.W.2d at 536. Since that case was decided, there has been extensive litigation to define what may properly be excluded from municipal ballots as "manifestly unconstitutional," illegal, or simply against public policy. *See, e.g.*, *Winget v. Holm*, 187 Minn. 78, 244 N.W. 331 (1932); *State ex rel. Andrews v. Beach*, 155 Minn. 33, 35, 191 N.W. 1012, 1013 (1923); *Davies v. City of Minneapolis*, 316 N.W.2d 498, 504 (Minn. 1982); *Vasseur v. City of Minneapolis*, 887 N.W.2d 467, 472 (Minn. 2016); *Bicking v. City of Minneapolis,* 891 N.W.2d 304 (Minn. 2017). Regardless of the phrasing used to describe when a ballot question should be struck, where a city stops a voter-led question from being placed on the ballot, there is an inherent infringement on those voters' constitutional rights. Minn. Const. Art. XII, § 5; Minn. Stat. § 410.12. As Justice Kelly warned in his dissent in *HRA*: "The act of denying more than 15,000 people the right to merely propose a law to their fellow citizens is a serious matter." 198 N.W.2d at 540 (Kelly, J., dissenting).

While the appropriate circumstances for rejection of charter amendments prior to their placement on the ballot has been litigated exhaustively, the other possibility

contemplated in HRA – when severance *is* proper – has been untouched in fifty years. This has resulted in a blurring of the line between qualifying a measure for the ballot, and its ultimate passage into law by city voters. One contributing factor is Minnesota courts being put into the difficult position of having to pre-litigate the impact on various parties before the measure is even considered by voters, much less actually passed into law.[22]

In the context of severance, the Court here can reaffirm judicially enforced restraint against city interference with voter-led initiatives. Here, Bloomington has crossed the line beyond what this Court has countenanced in cases directly construing *whole ballot questions* to be manifestly unconstitutional; here, they posit that not only can they throw out bad questions, but they can throw out the good *with* the bad just because they were written in the same petition. Minnesota residents would clearly benefit from a holding reaffirming that severability in charter amendments is proper as contemplated by *HRA*.

D. The authority to sever unlawful language from a charter amendment is beneficial to both city councils and voters.

Finally, at no point in these proceedings has the City expressed an objection to any of the language in §§ 4.02, 4.04, or 4.07. In other words, Bloomington has tacitly acknowledged that it would be required to accept for placement on the ballot each of these provisions in their entirety.

[22] Yet another benefit of recognizing the doctrine of severance is an improvement in judicial efficiency by providing voters and councils an alternative to wholesale rejection of ballot measures, very likely leading to fewer cases in the courts.

Despite this fact, under the City's view of the law, both the City and the voters are punished in different ways. Bloomington is forced to reject the entirety of the Charter Amendment, creating unnecessary strife. The committee sponsoring the petition is forced to resume the arduous signature collection process yet again—hundreds of hours of work and expense. The voters are denied the opportunity to consider a charter amendment at the ballot box that is otherwise valid. The thousands who signed the petition are denied that same opportunity, and they are overwhelmingly likely to agree that the three indisputably legal measures reflect the intention of the original Charter Amendment.

As discussed earlier, city councils are virtually always adverse to voter legislation. And the power to reject a charter amendment in its entirety would not go away with a finding that severance is proper in this context. But, on the off chance that a city council agrees that plainly illegal language can and should be removed in favor of presentation to the voters for consideration, the City's view forbids it from doing so, and everyone loses. This broken system must change.

Endowing a city attorney who represents the adverse party with the power to effectively veto a right that is supposedly enshrined in the Constitution by rejecting the voter measure in its entirety does nothing to enhance or preserve any faith or trust in government institutions, either. The city attorney in these situations is in a very tenuous position—trying to play a detached neutral tasked with evaluating the legal merits of a voter-led ballot measure, while simultaneously advocating for his/her clients in the city council who almost certainly oppose it. This is certainly a conflict, and maybe worse, in any other scenario. A holding for Appellants would endow the city attorney with a tool to

preserve the spirit and meaning behind a charter amendment while still ensuring its legality. Such an opinion would be favorable for all parties involved and would foster an environment that encourages cooperation, trust, and collaboration between city governments and their voters, rather than the acrimony we see playing out across the country.

CONCLUSION

Appellants worked hard to obtain thousands of signatures to place on the November 2022 ballot a question that would allow the voters of Bloomington the opportunity to repeal Ranked Choice Voting to select public officials. The City has denied them that opportunity by throwing out self-executing and valid provisions to which they posed no legal objection. The Court should correct this error by holding that Section 4.08 of the Charter Amendment should have been excised, and by ordering the placement of Sections 4.02, 4.04, and 4.07 on the Bloomington city ballot at a special election to take place as soon as possible, or at least on the next municipal election ballot.

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CERTIFICATE OF COMPLIANCE

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