IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

NEW MEXICANS FOR FREE ENTERPRISE, et al.,

Plaintiffs-Appellants,

vs **No. 25,073**

CITY OF SANTA FE,

Defendant-Appellee.

Appeal from the First Judicial District Court, Santa Fe County, New Mexico
The Honorable Daniel A. Sanchez, Judge

BRIEF *AMICUS CURIAE* OF THE NEW MEXICO MUNICIPAL LEAGUE, THE CITY OF ALBUQUERQUE, AND LAW PROFESSORS CONCERNED ABOUT STATE AND LOCAL GOVERNMENT LAW (LISTED ON INSIDE COVER)

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INTEREST OF *AMICI CURIAE*

The New Mexico Municipal League, the City of Albuquerque and a group of legal scholars from law schools across the United States join together to submit this brief *amicus curiae* in support of the holding by the court below that cities in New Mexico enjoy the legal authority to adopt local minimum wage ordinances.

Amicus the New Mexico Municipal League is a nonprofit, nonpartisan association whose member cities comprise 100% of the state's one hundred and two incorporated municipalities. The League's purpose is to assist its members in meeting the needs of their communities by promoting effective local self-governance in New Mexico. The League conducts research, provides legal opinions, and publishes reports to help local officials make decisions in the performance of their many duties. In addition, the League files legal briefs in court cases such as this that affect New Mexico's cities and towns.

Amicus the City of Albuquerque is New Mexico's largest community. Through its City Council and Mayor, Albuquerque's residents and civic leaders are actively engaged in working to ensure that their municipal government meets the complex and changing needs of the Albuquerque community. Although the City of Albuquerque has not enacted a local minimum wage ordinance, the city frequently exercises its home rule powers to adopt local ordinances establishing new policies or protections to meet local needs.

The New Mexico Municipal League and the City of Albuquerque share an interest in ensuring that New Mexico's home rule powers are properly construed so as to afford municipalities broad authority and flexibility to adopt ordinances that local elected officials find are necessary to protect the health, safety and welfare of their communities. Specifically, they have an interest in

ensuring that cities in the state retain the authority to adopt local minimum wage ordinances where localities determine that such measures are appropriate for their communities. This brief addresses that question of the authority of local governments to adopt such measures.

Amici law professors are a group of twenty-eight legal scholars from law schools across the United States. All are legal academics with expertise in the field of state and local government law, or in other fields that relate to the allocation of power among governmental entities or the use of law to address social and economic issues.

The following twenty-two *amici* teach and write in the field of state and local government law and have written numerous articles and texts on the subject: Professor Keith Aoki, University of Oregon School of Law; Professor Carlos Ball, Pennsylvania State University-Dickinson School of Law; Professor David Barron, Harvard Law School; Professor Richard Briffault, Columbia University School of Law; Professor David L. Callies, University of Hawaii School of Law; Professor Sheryll D. Cashin, Georgetown University Law Center; Professor Lee Anne Fennell, University of Illinois College of Law; Professor Richard Thompson Ford, Stanford Law School; Professor Gerald E. Frug, Harvard Law School; Professor James A. Gardner, State University of New York at Buffalo School of Law; Professor Clayton P. Gillette, New York University School of Law; Professor Janice C. Griffith, Georgia State University College of Law, Professor Roderick M. Hills, Jr., University of Michigan Law School; Professor Michael T. Iglesias, University of San Francisco School of Law; Professor Daniel R. Mandelker, Washington University School of Law; Professor Audrey G. McFarlane, University of Baltimore School of Law; Professor Wendell E. Pritchett, University of Pennsylvania Law School, Professor Laurie L. Reynolds, University of Illinois College of Law; Professor Mark D. Rosen, Chicago-Kent College of Law; Professor Patricia

Salkin, Albany Law School; Professor Peter W. Salsich, Saint Louis University School of Law; Professor Richard C. Schragger, University of Virginia School of Law.

The following *amici* teach and write in fields that relate to the allocation of power among governmental entities or the use of law to address social and economic issues: Professor Richard Abel, University of California at Los Angeles School of Law; Professor Erwin Chemerinsky, Duke Law School; Professor Kenneth (Kip) Bobroff, University of New Mexico School of Law; Professor Emerita Ruth Kovnat, University of New Mexico School of Law; Professor April Land, University of New Mexico School of Law; and Acting Professor of Law Noah Zatz, University of California at Los Angeles School of Law.

Amici have no financial interest in the outcome of the case nor are they affiliated with any of the parties. While *amici* are employed by various law schools, they do not speak for or represent their institutions in this matter; their affiliations are listed for identification only. Through their research, teaching and writing of casebooks, books, and scholarly articles in the above fields, *amici* have an interest in the proper development of state and local government law and in the evolution of sound and balanced legal rules for state and local relations. *Amici*'s interest is significantly implicated in this case, which concerns whether local governments' home rule powers should be construed to permit communities to adopt local minimum wage laws higher than the state minimum wage as a means of addressing local social and economic conditions.

SUMMARY OF ARGUMENT

This case involves a noteworthy effort by a local government to use its home rule powers to undertake an innovative local approach to the health and well-being of the community. The authority of local governments to adopt minimum wage requirements that are higher than those set

by state law, and apply them to a broad range of local firms, is a question of growing importance in cities around the country. *Amici* believe that under a proper understanding of home rule principles the Santa Fe Living Wage Ordinance falls well within the scope of a municipality's authority to legislate concerning the health and welfare of its community. It is, thus, a public law, and not a private law within the New Mexico Constitution's "private or civil law" restriction. It is certainly a law enacted incident to the exercise of the independent municipal power to promote the local general welfare. So, too, in the absence of any state law expressly denying local governments the power to set a minimum wage higher than that provided by the state's Minimum Wage Act, it is not preempted by the state law.

ARGUMENT

I. The Santa Fe Living Wage Ordinance Exemplifies the Role of Home Rule in Empowering Grass-Roots Democracy, Enabling Local Communities to Adopt Programs that Respond to Local Concerns, and Promoting Policy Innovation

As the Utah Supreme Court has observed, "the history of our political institutions is founded in large measure on the concept at least in theory if not in practice that the more local the unit of government is that can deal with a political problem, the more effective and efficient the exercise of power is likely to be." *State v. Hutchinson*, 624 P.2d 1116, 1121 (Ut. 1980). "[E]ffective local self-government" is "an important constituent part of our system of government." *Id.* at 1120.

Local self-government enables the people to govern themselves at the level of government that is literally closest to home. Local government provides citizens with opportunities for participation in public decision making that are simply unavailable in larger units of government. As the most famous observer of American government, Alexis de Tocqueville, explained nearly two

centuries ago, "the strength of free peoples resides in the local community. Local institutions are to liberty what primary schools are to science; they put it within the people's reach; they teach people to appreciate its peaceful enjoyment and accustom them to make use of it. Without local institutions a nation may give itself a free government but it has not got the spirit of liberty." *Alexis de Tocqueville, Democracy in America 62-63 (J.P. Mayer ed. 1969).* The need for local democracy has, if anything, grown since de Tocqueville's time, as the federal and state governments have become larger and more complex and access to them for ordinary citizens has become more difficult.

By empowering communities at the grass-roots level, home rule allows the people to tailor public services and regulations to local needs and circumstances and endorses the diversity of viewpoint concerning what makes good public policy that has long been characteristic of American life. This diversity of local policy making "is one of the basic justifications" for home rule. Gary T. Schwartz, *The Logic of Home Rule and the Private Law Exception*, 20 U.C.L.A. L. Rev. 671, 747 (1973).

Local self-government also promotes policy innovation and experimentation. Much as federalism facilitates state-level innovation, local autonomy permits local governments to serve as "laboratories of democracy" and "try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).* Indeed, as one Oregon court found,"municipalities tend to be the proving grounds – in terms of both need and public acceptance – for nondiscrimination policies that later are adopted at state and national levels." *Sims v. Besaw's Café*, 165 Or. App. 180, 200 n.3, 997 P.2d 201, 213 n.3 (2000).

To be sure, as the Utah Supreme Court acknowledged in *Hutchinson*, there has often been a gap between our formal commitment to local democracy, and the traditional limits on local power.

For many years, judicial doctrines like Dillon's Rule curtailed local autonomy, as courts interpreted local powers narrowly and forced local governments to turn to their states for express, detailed, and often limited, grants of authority. The adoption of home rule changed all that. As Professor Schwartz explained, "[i]n lawyer's language, home rule 'inverts the presumption' or 'shifts the burden' on the authority issue; in common language, home rule converts city authority from a question of 'why' into a question of 'why not'?" *The Logic of Home Rule, supra*, *20 U.C.L.A. L. Rev. at 678*.

The New Mexico constitution embraced this expansion of local authority in 1970 when the people amended it to provide for municipal home rule. The constitution provides that a municipality that adopts a home rule charter "may exercise *all* legislative powers and perform all functions" subject to two limitations discussed more fully below. *N.M. Const., Art. X., § 6(D)* (emphasis supplied). The constitution underscores the democratic thrust of home rule when it also states that "[t]he purpose of this section is to provide for maximum local self-government." *N.M. Const., Art. X, § 6(E)*. Moreover, the constitution also recognizes that in order for home rule to succeed Dillon's Rule's crabbed interpretation of local powers must be reversed and "[a] liberal construction shall be given to the powers of municipalities." *Id.* As the New Mexico Supreme Court has stated, the home rule amendment was adopted

> "to enable municipalities to conduct their own business and control their own affairs, to the fullest possible extent in their own way. It was enacted upon the principle the municipality itself knew better what it wanted and needed than did the state at large, and to give that municipality the exclusive privilege and right to enact direct legislation which would carry out and satisfy its wants and needs."

Apodaca v. Wilson, 86 N.M. 516, 520, 525 P.2d 876, 880 (1974). *Accord, City of Albuquerque v. New Mexico Public Regulation Comm.,* 134 N.M. 472, 79 P.3d 297 (2003).

The Santa Fe Living Wage Ordinance exemplifies the vigorous local democratic problem-

solving that home rule was intended to promote. As the district court found, Santa Fe first applied its Living Wage Ordinance only to municipal employees and entities doing business with or receiving grants from the city. The Santa Fe City Council, concerned that this would not do enough to alleviate the problems low-wage employment causes the community, called for a study of whether the ordinance ought to be extended to private firms. The council created a "Living Wage Roundtable" to seek input from both business and labor concerning the extension of the living wage requirement. The Roundtable held public hearings attended by community leaders, collected evidence, and ultimately recommended in favor of applying the living wage to private firms with ten or more employees. The council then considered the matter in committee meetings, in public hearings, and in full council hearings. A wide range of community leaders, religious leaders, labor leaders, business owners, and workers from within the community, as well as academic experts from outside the community, gave testimony and participated in these discussions. Altogether, more than two hundred people testified either before council committees or the full council. The council itself engaged in extensive deliberations concerning the proposed ordinance, and modified it in several respects. As a result of the community-wide political process, the living wage requirement was limited to firms with 25 workers or more. The ordinance was amended to allow employers to credit the value of any employer-provided health or child care benefits toward payment of the living wage. The effective date of the ordinance was delayed, as was the phase-in of subsequent increases in the living wage. The council also required the city to conduct an independent review of the ordinance's social and economic effects. This extended exercise in local participation, information-gathering, and deliberation culminated in a council vote approving the Living Wage Ordinance. *See District Court's Findings of Fact and Conclusions of Law, June 24, 2004, Findings of Fact ¶¶ 18-*

37.

The Santa Fe Living Wage Ordinance also reflects a concerted local effort to respond to particular local conditions. The council determined that average earnings per job in Santa Fe County are 23% below the national average, while the cost of living is 18% higher than the national average. City of Santa Fe, Ordinance No, 2003-8, Sec.1, amending Sec. 28-1.2, Santa Fe City Charter § 28-1.2 E. The council also found that "[h]ousing costs in Santa Fe are much higher than in most other parts of New Mexico," *see id. at 28-1.2 F*, that "12.3% of the Santa Fe community lives below the poverty level," and that "23.5% of Santa Feans who are employed in the non-governmental sector earn hourly wages of $10.50 per hour or less." *Id. at 28-1.2 J,K.* The Santa Fe City Council, in effect, determined that Santa Fe's particular economic circumstances require a distinctive solution. Policy analysts may disagree as to whether raising the minimum wage is the best response to the community problems posed by low-wage poverty. But enabling local governments to tackle their distinctive local concerns is a central purpose of home rule. As the New Jersey Supreme Court once observed in upholding municipal authority to act under home rule, "a problem may exist in some municipalities and be trivial or nonexistent in others." *Inganamort v. Borough of Fort Lee*, 62 N.J. 521, 528, 303 A.2d 298, 302 (1973). *Accord, State v. Hutchinson, supra*, 624 P.2d at 1126 ("Several counties in this State . . . currently confront large and serious problems caused by accelerated urban growth. The same problems are not so acute in many other counties. . . . The problems that must be solved by these counties are to some extent unique to them.").

Finally, the Santa Fe ordinance demonstrates the importance of local experimentation to the broader state and national communities. The declining real value of both federal and state minimum wages, which have not risen with inflation or the cost of living, *see RUI One Corp. v. City of*

Berkeley, 371 F.3d 1137 (9th Cir. 2004), has sparked a national debate. Some labor, civic, religious and other groups, concerned about the increasing inability of many low-wage workers to take care of their families, particularly in high-cost urban areas, have called for increases in the minimum wage. Others, particularly business groups, have contended that compulsory wage increases will burden businesses, increase product costs, and result in lay-offs, so that the working poor will ultimately be no better off and may be worse off. Municipal initiatives, like the Santa Fe Living Wage Ordinance – which includes a mandatory outside review of the social and economic effects of the Ordinance, Santa Fe City Code § 28-1.12 – will provide valuable information to policy-makers, at the city, state, and national levels, concerning the costs and benefits of a minimum wage increase.

Home rule, of course, is not a blank check to municipalities to adopt any policies they please. Municipalities, like federal and state governments, remain subject to the constitutional constraints that apply to all governments. *Hutchinson, supra*, 624 P.2d at 1121 ("A state cannot empower local governments to do that which the state itself does not have the authority to do.") Moreover, the New Mexico Constitution places additional constraints on home rule to assure that local measures do not conflict with state policies, impose on outsiders, or create undue burdens on individuals, organizations, or firms active in multiple localities.

First, a municipality may not exercise any legislative power or perform any function "expressly denied by general law." *N.M. Const., Art. X, § 6(D).* This empowers the state legislature to protect state policies, safeguard outsiders from the external effects of local laws, and preclude the burdens that can result when multiple localities adopt different laws on the same subject. But, as the constitution states, the legislature must do so *expressly*. The state's mere adoption of a law on a

subject does not deny municipalities the authority to adopt laws on the same subject. Given the scope of state legislative action, such an approach would choke the life out of home rule. State and local laws on the same subject can coexist. As the New Mexico Constitution requires, both local home rule and ultimate state power are best protected by the requirement that any state legislative denial of local power to act must be express,

Second, the constitution provides that the grant of home rule powers "shall not include the power to enact private or civil laws governing civil relationships except as an incident to the exercise of an independent municipal power." *N.M. Const., Art. X, § 6(D)*. The meaning of this provision is ambiguous, but, as *amici* will indicate below, the best reading of this provision is that it, too, is aimed at preventing local measures that conflict with basic provisions of state law, have undue external effects, or create unacceptable degrees of interlocal variation.

The Santa Fe Living Wage Ordinance does not implicate either of these restrictions or their underlying concerns. The Living Wage Ordinance is a public law and an exercise of a core municipal power. It is aimed at an issue of considerable public importance – the impact of the wages paid by large employers on the health and welfare of the community. No provision of New Mexico law – and certainly not the New Mexico Minimum Wage Act, N.M.S.A., 1978 § 50-4-19 *et seq.* – expressly denies to local governments the power to raise the minimum wage for local firms. The Living Wage Ordinance imposes no burdens on firms outside Santa Fe. Varying local minimum wages would create no greater difficulties for firms operating in multiple municipalities than do the many other local regulations – like zoning requirements, building codes or fire prevention codes – that also affect businesses and vary from one municipality to another. Nor is a local minimum wage in conflict with state policy. Rather, as discussed more fully below, it supplements and

reinforces state policy. The Santa Fe Living Wage Ordinance lives up to the promise of local home rule by enabling people at the grassroots level to address a pressing local economic and social problem in a way that may be instructive for other New Mexicans, and for Americans more generally.

II. The Santa Fe Living Wage Ordinance Is a Public Law Aimed at a Matter of Municipal Public Importance – the Impact of the Wages Paid by Large Firms on the Health and Welfare of the Community – and, Thus, Is Not Subject to the "Private or Civil Law" Exception

The New Mexico Constitution's provision dealing with "private or civil laws governing civil relationships" can be traced to a provision added to the American Municipal Association's *Model Constitutional Provisions for Municipal Home Rule* in 1953, *see Jefferson B. Fordham, Home Rule – AMA Model, 44 Nat'l Civ. Rev. 137 (1955)*, and then adopted in the sixth edition of the National Municipal League's Model State Constitution in 1963. *See Terrance Sandalow*, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 Minn. L. Rev. 643, 676 (1964). But the idea that some aspects of "private law" are beyond the scope of municipal authority goes back almost to the inception of home rule. In the first book-length treatment of home rule, published in 1916, Professor McBain concluded that

> "[b]y common understanding such general subjects as crimes, domestic relations, wills and administration, mortgages, trusts, contracts, real and personal property, insurance, banking, corporations, and many others have never been regarded by any one, least of all by the cities themselves, as appropriate subjects of local control."

H.McBain, *The Law and Practice of Home Rule* 673-74 (1916).

Similarly in 1929, Benjamin Cardozo, then Chief Judge of the New York Court of Appeals, observed that some affairs are "exclusively those of the state, such as the law of domestic relations,

of wills, of inheritance, of contracts, of crimes not essentially local (for example larceny or forgery), the organization of courts, the procedure therein." *Adler v. Deegan*, 167 N.E. 705, 713 (N.Y. 1929) *(Cardozo, C.J., concurring).* Relying on Cardozo's statement, Chief Judge Arthur Vanderbilt of the New Jersey Supreme Court also concluded that some matters "are inherently reserved for the State alone." *Wagner v. Mayor & Municipal Council of Newark*, 132 A.2d 794, 800-01 (N.J. 1957).

Despite this lengthy and distinguished pedigree, the nature and scope of the "private or civil law" exception is profoundly uncertain. Dean Fordham, the principal author of the AMA language, acknowledged that this "is a phase of home rule which has not generally been adequately considered." *Home Rule – AMA Model*, *supra*, *44 Nat'l Civ. Rev. at 142.* Dean Sandalow agreed that "the meaning of these provisions is not altogether clear." *Municipal Power Under Home Rule, supra, 48 Minn. L. Rev. at 674-75.* Although domestic relations and wills and estates appear on all "private law" lists, beyond these matters there is considerable disagreement as to what constitutes private or civil laws concerning civil relationships.

At the heart of the difficulty is the interpenetration in practice of public and private law. As Dean Sandalow has explained, "[p]ublic and private laws are not . . . separated by a clear line of division." *48 Minn L. Rev. at 674.* Courts and scholars alike have consistently recognized that many widely-accepted local laws affect private or civil relationships. Local zoning changes the rights of property owners, municipal health and safety ordinances have been used to determine standards of care in negligence litigation, and municipal housing codes affect the rights and duties of landlords and tenants. *See Schwartz, supra, 20 U.C.L.A. L. Rev. at 697-707, Sandalow, supra, 48 Minn. L. Rev. at 674* ("It is, for example, common practice for a court to refer to a municipal safety regulation, enacted under the police power, as a standard for determining whether an individual is

guilty of negligence."). *See, e.g., Olson v. Chuck, 199 Or. 90, 259 P.2d 128 (1953)* (city ordinance requiring property owner to maintain abutting sidewalk held basis of tort liability to injured pedestrian); *Birkenfield v. City of Berkeley*, 17 Cal.3d 129, 142-43, 550 P.2d 1001, 1011 (1976) (the fact that a local ordinance "necessarily affects private civil relationships by no means makes it unique among city police regulations").

As one Illinois court wisely concluded, given the pervasiveness of the overlap of public and private laws, "the distinction is one of emphasis and viewpoint." Even if a local law has an impact on private rights, it will be considered a public law if it "has as its focus and thrust a protection of the public interest." *City of Evanston v. Create, Inc.*, 84 Ill. App.2d 752, 757,405 N.E.2d 1350, 1354 (1980). Indeed, the recognition that a private or civil law will be valid when it promotes the public interest is underscored by the New Mexico Constitution's proviso that even laws affecting civil relationships are within the scope of municipal home rule if "incident to the exercise of an independent municipal power." Most home rule states, including New Mexico, have granted their home rule municipalities the police power and the power to act broadly to promote the general welfare. The "incident" clause protects these powers even though the exercise of these powers also bears on private or civil relationships.

In the most comprehensive and thoughtful academic consideration of the origins and meaning of the private or civil law exception, Professor Gary Schwartz concluded that as local government actions regularly affect private rights and civil relationships, the "private or civil law" exception is most apposite only when localities actually seek to create their own alternatives to core common law property, tort or contract rules, *20 U.C.L.A. L. Rev. at 728*; impose considerable external effects; *id. at 728-39*, or cause "undue burdens and extreme inefficiency" on individuals

or organizations present in multiple localities, *id. at 750.*

Thus, local ordinances substituting local rules for such core private or civil law doctrines as the Rule Against Perpetuities, the choice of comparative negligence versus contributory negligence, or the terms of the parol evidence rule are beyond the scope of home rule in part because municipal ordinances on these subjects are likely to come into conflict with state laws. *Id. at 728.*

Similarly, given the large number of municipalities in any state and the regular movement of people from one municipality to another, often crossing thorough other municipalities, during their daily activities, local rules in such core private law areas as intestate succession, divorce, the liabilities of drivers to their guests, the survivability of claims, etc, would inevitably affect outsiders. It would often be enormously difficult for outsiders to learn about and comply with the local laws arguably applicable to them. *Id. at 749-50.* Moreover, as Professor Schwartz points out, if cities were empowered to create law governing these basic aspects of private rights and duties, the "choice-of-law problems would be staggering." *Id. at 759.*

For these reasons core private law matters – like intestate succession, the law of divorce, the rules of contract formation, or the determination of whether strict liability, comparative negligence, or contributory negligence applies to tort claims – are beyond the scope of home rule. Yet there are many local ordinances that address local public concerns and also affect private rights that do not conflict with state laws or impose undue burdens on outsiders. Such frequent subjects of local action as building codes, health and safety regulation, and anti-discrimination laws regularly blur the public-private line without triggering the central concerns of municipal regulation of civil relationships. These are either treated as public laws, notwithstanding the impact on private relationships, or they fall within the "incident" exception as exercises of the "independent"

municipal power to promote the public welfare.

Like other municipalities, Santa Fe has enacted many public ordinances that touch on private rights and duties in the course of addressing public concerns. Santa Fe's Uniform Building Code regulates the construction, use, and maintenance of buildings within the city, thereby affecting property rights. Santa Fe City Code §7-1. et seq. The city's Fair Housing Ordinance precludes discrimination in the sale or rental of housing, thereby affecting private property and contract rights. Santa Fe City Code §7-14, et seq. The Weed Ordinance establishes that the unchecked growing of weeds is a nuisance, thereby modifying grounds for liability in tort, Santa Fe City Code §10-3, et seq. The Smoking Pollution Control Ordinance extends the New Mexico State Clean Indoor Air Act by prohibiting smoking in public areas within privately owned buildings in addition to the state's regulation of smoking in buildings owned by the government. Santa Fe City Code §10-6, et seq. It, thus, affects the rights of property owners. Moreover, the smoking ordinance regulates employment relationships by requiring employers to provide a smoke-free workplace and to adopt a written smoking policy. Santa Fe City Code §10-6.6(A).

Nor is Santa Fe the only New Mexico municipality that has regulated business and contractual relationships in a wide range of spheres in order to safeguard the public health, safety and welfare. For instance, Albuquerque's Human Rights Ordinance, in place for at least 27 years, regulates the employer-employee relationship, the landlord-tenant relationship, and various other business transactions by prohibiting discrimination on a wide range of grounds. *See* Alb. Code of Ord. § 11-3-7. Albuquerque also restricts the use of tobacco in the workplace. *See* Alb. Code of Ord. § 9-5-5-6. Both cities regulate in other ways business practices in a variety of industries including hotels and motels, *Alb. Code of Ord. § 9-14*, pawnbrokers, Santa Fe City Code § 18-4, and

towing services, Santa Fe City Code § 20-21.

Like the Living Wage Ordinance, these measures affect private rights to a limited degree but their central concern is the public welfare of the community. Measures like these are widely accepted as legitimate exercises of local authority. Within the terms of the New Mexico Constitution, such local measures are either public laws or they are saved from the "private or civil law" limitation by the proviso protecting home rule measures incident to the exercise of the independent municipal power to promote the general welfare.

As these other local measures indicate, the Santa Fe Living Wage Ordinance is not excluded by the "private or civil law" restriction on home rule authority. The ordinance advances an important public goal. It is closely connected to other local powers. It has a minimal burden on private rights. It has no extralocal effects. And it deals with a subject – the minimum wage – which has historically been treated as a matter of public concern.

First, the Living Wage Ordinance deals with a matter of great public importance – the impact of the low wages paid by larger employers on the health and well-being of the community. The ordinance applies only to businesses employing 25 or more workers that are required to have a business license or business registration from the city of Santa Fe. Santa Fe City Code § 28-1.5 These are the businesses which the city has the greatest interest in regulating. The 25-worker threshold limits the ordinance to the top 10% of firms in the city, but these firms employ nearly 60% of the workforce. These are the firms that set the social and economic tone for the city, affect the wage rates for most low-income workers, and thereby determine the impact of wage rates on the well-being of the city as a whole.

The Santa Fe City Council found the low wages paid by these firms impair the "civic life"

of the community by forcing low-wage workers to work longer hours and thus denying them the time to participate in civic life as well as to pursue educational, cultural, and recreational opportunities. Santa Fe City Code § 28-1.2 C. The council found that the low wages paid by large firms also affect the municipal budget by forcing the city to devote more local taxes to social services, including homeless shelters, soup kitchens, and health care for the uninsured who cannot afford to buy insurance from their limited wages. Santa Fe City Code § 28-1.2 H. The council determined that this has forced the city to divert tax dollars to both public and not-for-profit programs to provide affordable housing, pay for after-school and summer recreation programs, and support "an array of human services and children and youth services, all of which are needed by very low-income residents and their families." *Id.*

While the council's conclusion that raising the minimum wage will alleviate these problems is surely debatable, the council's findings effectively demonstrate that there is a nexus between low *private* wages and a range of *public* problems. The public concern with low wages is further underscored by the fact that the Living Wage Ordinance is subject to administrative enforcement by the City Manager, and that a person violating the Ordinance is guilty of a misdemeanor and subject to fines and imprisonment. Public enforcement and public penalties are inherently public laws, are classic means of advancing important public goals, *see* Schwartz, *supra*, 20 U.C.L.A. L. Rev. at 718-19. They confirm that the Living Wage Ordinance is a public law. The additional provision of a private enforcement remedy does not change this, but merely allows the underpaid employee as well as the city to vindicate the public commitment to a living wage. As with federal antitrust law, the existence of a private action does not make the public law any less public.

Second, minimum wage regulation is directly connected to the specific municipal public

power to adopt ordinances "for the purpose of . . . providing for the safety, preserving the health, promoting the prosperity and improving the morals, order, comfort and convenience of the municipality and its inhabitants." N.M.S.A. 1978, § 3-17-1(B). The Santa Fe City Council concluded that by raising wages the Living Wage Ordinance would directly promote the health and prosperity of low-wage city workers who would receive wage increases, and that by attacking poverty the ordinance directly improves the morals, order, comfort and convenience of the community. *See also Findings of Fact and Conclusions of Law, Conclusions of Law 11-14.*

Appellants contend that, given the impact on private rights, the general welfare power provided by N.M.S.A. 1978, § 3-17-1(B) is somehow too broad or general to support the city minimum's wage regulation. But to turn the very breadth of the state's grant of authority to its municipalities against the existence of authority is both perverse and inconsistent with the central purpose of home rule, which is to reverse Dillon's Rule, that is, the traditional pre-home rule requirement that localities obtain specific grants of power before they can act. Indeed, as the Utah Supreme Court concluded when it rejected a similar argument that the grant of general welfare power to the state's counties should be narrowly or strictly construed, the general welfare clause's "breadth of language demands the opposite conclusion." *Hutchinson, 624 P.2d at 1122.* Other courts have concluded that similarly broad grants of general welfare or police power to promote local health, comfort, safety, convenience and welfare are sufficient to sustain municipal ordinances banning race discrimination in public accommodations or private employment despite the direct impact on private or civil relationships. *See, e.g. Hutchinson Human Relations Comm. v. Midland Credit Management, Inc.*, 213 Kan. 308, 312, 317 P.2d 158, 162 (1973); *Commonwealth v. Beasy*, 386 S.W.2d 444 (Ky. 1965); Marshal v. Kansas City. 355 S.W.2d 877, 883 (Mo. 1962).

Third, the impact of the ordinance on private rights is quite limited. The ordinance simply raises the minimum wage. There already is a minimum wage in effect in New Mexico, as in every other state. As a result, this aspect of the employer-employee relationship is no longer a purely private matter. The Ordinance, thus, goes no further than a matter which is already subject to regulation. It does not set a wage scale, but merely sets a floor necessary to protect the living standards of Santa Fe's most vulnerable workers. It does not limit the ability of firms to pass on the increase in the minimum wage to their customers. It does not limit the ability of employers to determine the work, shape the tasks, or generally set the terms and conditions of employment of their employees. It does not affect the ability of employers to hire and fire workers, to lay them off, or to reduce the size of their workforce. In other words all the central features of the employer-employee relationship are left undisturbed, except that the one feature already subject to extensive public regulation is modified - and even then the freedom of employers to respond to that modification by raising prices, cutting the workforce or changing the work required is preserved.

Fourth, the ordinance has no direct external effects. It regulates only wage rates in Santa Fe, not outside. The only firms subject to the ordinance are those that have chosen to come into the City and obtain a license or register a business there. No one will be taken by surprise by the ordinance. There is no danger of multiple inconsistent local laws applying to the same firm. A business operating in Santa Fe can be subject to the Santa Fe Living Wage Ordinance only, not to the wage rules of any other city. Although a firm with outlets in Santa Fe and other cities would have to pay different minimum wages in different cities, that is no different from having to pay different property tax rates, submit to different zoning and building code rules, abide by different speed limits – or deal with the economic consequences of having to operate in different wage markets. Different local

wage rules would not create undue burdens or extreme inefficiency.

Finally, the history and development of regulation of the workplace in general and of minimum wages in particular demonstrates that these have become public matters. At least since the New Deal federal and state governments have repeatedly determined that the minimum wage is a matter of public concern, subject to public control. *See, e.g., West Coast Hotel Co. v. Parrish*, *300 U.S. 379 (1937); Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U.S.C. § 201 et seq.* Indeed, a host of other federal, state and local laws – concerning wages and hours, collective bargaining, prohibiting discrimination in hiring or promotion, addressing workplace health and safety, and protecting retirement and other work-related benefits – demonstrate broad public concern with certain aspects of the employer-employee relationship. Taken together, these laws have to a considerable degree replaced the private or civil law of contract with the public law of employment relations. These laws leave alone the private core of that relationship -- which is the employer's ability to determine the tasks performed by its employees -- while vindicating the public concern with such public values as nondiscrimination, worker health and safety, and the community-wide social costs of low-wage work. So, too, the history of employment regulation indicates that the minimum wages paid by firms, particularly larger firms, are a matter of public importance subject to public regulation in the name of the public interest.

As a matter of history and practice, then, Santa Fe's Living Wage Ordinance is a public law whose "focus and thrust" is the " protection of the public interest." *City of Evanston v. Create, Inc., supra, 405 N.E.2d at 1354,* and, thus, outside the New Mexico Constitution's exclusion of "private or civil laws."

This reading of the New Mexico Constitution is consistent with case law from other

jurisdictions. Although a handful of decisions in Massachusetts and Indiana have read their states' "private or civil law" exclusions broadly, none of those cases addressed the employment relationship. Rather, all those decisions dealt with rent control, the conversion of rental units to condominiums, or landlord-tenant relations generally. *See Bannerman v. City of Fall River, 391 Mass. 328, 461 N.E.2d 793 (1984)* (conversion of rental apartments to condominiums)*; CHR General, Inc. v. City of Newton, 387 Mass. 351, 439 N.E.2d 788 (1982)* (same)*; Marshal House, Inc. v. Rent Review & Grievance Board of Brookline, 357 Mass. 709, 260 N.E.2d 200 (1970)* (rent control)*; City of Bloomington v. Cuckney, 331 N.E.2d 780 (Ind. App. 1975)* (detailed landlord-tenant code). There may well be significant differences between the landlord-tenant relationship and the employment relationship. Moreover, the Massachusetts and Indiana ordinances were more intrusive into the private relationship in question. *See, e.g., CHR General, supra* (ordinance restricted evictions, limited owner freedom of choice as to buyers of converted units; required extensions of leases; gave tenants a right to purchase; imposed other duties on landlords); *City of Bloomington, supra* (detailed code regulated, inter alia, tenant right to entertain guests, landlord right to enter tenant premises). By contrast, the Living Wage Ordinance is tightly targeted on the minimum wage only.

Most importantly, these Massachusetts and Indiana cases reflect a crabbed approach to home rule which fails to recognize the private law consequences of many public regulations. These cases have been sharply criticized as "opaque" and "garbled,*" see Schwartz, supra, 20 U.C.L.A. L. Rev. at 694, 695* (discussing *Marshal House*), for their failure to distinguish the ordinances in question from other local ordinances affecting private property rights that have been upheld. Indeed, courts in other states have upheld the authority of home rule municipalities to adopt comparable landlord-

tenant codes and rent regulation despite the implications for private rights. *See, e.g., City of Evanston v. Create, Inc., supra* (Illinois appellate court upholds local landlord-tenant code); *Inganamort v. Borough of Fort Lee, supra* (New Jersey Supreme Court upholds local rent control ordinance). *Cf. Birkenfeld v. City of Berkeley, supra* (California Supreme Court upholds local authority to adopt rent control, but finds charter amendment's particular provision for fixing maximum rents constitutionally defective).

No court has ever held that a local government lacks the authority to adopt its own minimum wage ordinance because such an ordinance affects private or civil relationships. Maryland's highest court upheld Baltimore's minimum wage law, relying on the "general proposition that Baltimore, as a municipal corporation, had the authority under its police powers to establish by ordinance minimum wage regulations." *Mayor & Council of Baltimore v. Sitnick*, 254 Md. 303, 309-10, 255 A.2d 376, 378 (1969). *Cf. RUI, One, Inc. supra* (rejecting federal constitutional challenges to City of Berkeley's Living Wage Ordinance). When the Louisiana Supreme Court recently invalidated the living wage ordinance adopted by New Orleans, the court relied entirely on a state statute expressly denying local governments power to adopt their own minimum wage; the Louisiana district court had found that the minimum wage ordinance was not precluded by that state's "private or civil law" exclusion. *New Orleans Campaign for a Living Wage v. City of New Orleans, 825 So.2d 1098 (La. 2002)*. Similarly, when the New York Court of Appeals forty years ago invalidated New York City's minimum wage law, the court relied entirely on a conflict with the state's minimum wage law. *Wholesale Laundry Board of Trade, Inc. v. City of New York,* 12 N.Y. 998, 189 N.E. 2d 623 (1963), *aff'g Wholesale Laundry Board of Trade, Inc. v City of New York*, 17 A.D.2d 327, 234 N.Y.S.2d 862 (1st Dep't 1962). Three members of the seven-member court expressly found that "New York City

had power to pass the local law before us under its police power, enacted as it was to eliminate the threat to the health, welfare and safety of the city's inhabitants from conditions peculiar to the city, stemming from inadequate wage rates," *Id.* at 1000-01 (Fuld, J., dissenting), and, as will be discussed in the next section of this brief, the New York Court of Appeals ultimately repudiated *Wholesale Laundry*'s approach to preemption.

In short, the Santa Fe Living Wage Ordinance is a public law, grounded in the city's power to promote the general welfare, that addresses a matter of pressing public concern. Consistent with the New Mexico Constitution's call that a "liberal construction shall be given to the powers of municipalities," the Living Wage Ordinance does not fall within the exclusion of "private or civil laws governing civil relationships."

III. The Local Power to Adopt a Living Wage Ordinance is Not Expressly Denied by the New Mexico Minimum Wage Act and, Thus, Is Not Preempted by State Law

Apart from the "private or civil law" provision, the New Mexico Constitution limits municipal home rule power if, but only if, local power to act is "expressly denied by general law" of the state. This reflects two basic goals of the model of home rule, put forward by the American Municipal Association ("AMA") in 1953, embraced by the National Municipal League ("NML") in 1968, and adopted by the New Mexico voters in 1970. First, reacting to concerns that other forms of home rule had been eroded by narrow judicial constructions of local powers, the constitution vests the power to limit local authority in the *legislature*. As Dean Sandalow has explained, "reliance is placed exclusively upon the legislature to curb abuses of municipal power." *See Sandalow, supra, 48 Minn. L. Rev. at 690.* Second, and consistent with the constitution's liberal construction of home rule powers, the legislature's denial of local authority must be *express.* This gives necessary

breathing room for local autonomy. It reinforces the constitutional mandate that only the legislature can preempt municipal ordinances by instructing the courts not to imply state legislative preemption but to displace local regulation only when there is a clear state legislative directive to do so.

Under the rule of express denial, the mere fact that the state has adopted a law on a subject does not by itself preclude further local regulation that adds to or supplements the state's regulation. The state's regulatory floor is not a ceiling. Given widespread state regulation, any other approach would suffocate municipal home rule.

Indeed, courts around the country have agreed with respect to a host of subjects that a state minimum regulation does not preempt additional local regulation. Thus, state speed limits do not preclude lower local speed limits; state rules limiting the hours of certain activities do not preclude local rules narrowing the hours further; and state criminal laws do not preclude tougher local laws on the same subject. *See, e.g., Miller v. Fabius Township, 114 N.W.2d 205 (Mich. 1962); City of Portland v. Jackson, 316 Or. 143, 850 P.2d 1093 (Ore. 1993).*

Although the general rule is that a local government cannot permit something that state law forbids or that the local government cannot forbid something the state permits, what the state "permits" in this setting is not simply what the state has not forbidden. If that were the rule, then, once a state enters a field of regulation, all local requirements, other than those that simply reiterate state law, would be preempted. That would be the death of home rule. Rather, what the state "permits" is only activity that the state affirmatively protects, as by the grant of a permit or license, or through some other action indicating an intention to preclude further local regulation.

As the Oregon Supreme Court explained in upholding a municipal ordinance that went further than state law in prohibiting indecent exposure,

> "if the criminal statutes of Oregon are interpreted to permit all conduct not prohibited [by state law], that interpretation would swallow [home rule] for it would bar all local governments from legislation in the area of criminal law unless the local legislation was identical to its State counterpart. . . . We cannot simply assume that, *by its silence* , the legislature intended to permit conduct made punishable under an ordinance. The state constitutional rights granted to the citizens of a municipality are not so easily discarded. When a local criminal ordinance prohibits conduct, unless the legislature has permitted the same conduct, either expressly or under circumstances in which the legislative intent to permit that conduct is otherwise apparent, the ordinance is not in conflict with state criminal law."

City of Portland v. Jackson, supra, 316 Or. at 146, 149; 850 P.2d at 1094 1096 (emphasis in original). Accord, Mayor & Council of Baltimore v. Sitnick, supra, 254 Md. At 317; 255 A.2d at 382 ("the States' prohibition of certain activity in a field does not impliedly guarantee that all other activity shall be free from local regulation").

This has been the consistent approach of the New Mexico Supreme Court. In *Apodaca v. Wilson*, the court determined that "the words 'expressly denied' must be given some meaning, and we take it to mean that some express statement of the authority or power denied must be contained" in the assertedly preemptive general law. *86 N.M. 516, 521; 525 P.2d 876, 881.* As a result, the court concluded that state laws providing that a city's rates for use of its water and sewer system are to be based on covering system costs and paying debt service did not preclude the city from applying some of the system's revenues to the city's general fund. As the court noted, the state statute "contains no express denial of authority to the City to fix water and sewer rates based only on the criteria provided by those statutes." *Id. at 524, 884*. Even more strikingly, in *State ex rel Haynes v. Bonem, 114 N.M. 627, 845 P.2d 150 (1992)*, the court held that state laws specifying that city commission governments would be composed of five commissioners did not preclude a local government for adopting an eight-member commission. "We see in neither of [the relevant sections of state law] a limitation that the number of commissioners be set at *only* a stated number." *Id. at*

635; 158. Bonem is particularly significant because the court noted that the constitutionally required express denial need not be stated "*in haec verba. . .* ; words or expressions which are tantamount to such a negation are equally effective." *Id. at 634; 157.* Even so, the court found that the state's provision for five-member commissions did not deny to local governments the power to create eight-member commissions.

Every time the New Mexico Supreme Court has found a local ordinance to be expressly denied by state law, the local measure either flew in the face of clear state policy or was in direct conflict with state law. In *ACLU of New Mexico v. City of Albuquerque*, 128 N.M. 315, 992 P.2d 866 (1999), the local ordinance providing for criminal punishments of juveniles who violated the local curfew was flatly inconsistent with the "explicitly articulated purpose" of the state law requiring that underage offenders be treated as juveniles and not as criminals. *Id. at 320, 871*. In *Casuse v. City of Gallup, 106 N.M. 571, 746 P.2d 1103 (1987)*, the local effort to hold at-large elections for the city council was expressly denied by the state law requiring single-member district elections as an at-large council would violate the state's directive to elect members through districts and undermine the state's policy of preventing the use of at-large elections to dilute minority voting power. The statutory grant to the New Mexico State Corporation Commission to regulate cable television so effectively precluded regulation by other governmental bodies that it was "equivalent to an express denial." *In re Generic Investigation into Cable TV Services*, 103 N.M. 345, 350, 707 P.2d 1155, 1160 (1985). In *Chapman v. Luna*, the statutory prohibition on local imposition of fees on motor vehicles subject to registration "clearly and expressly" precluded a local registration fee to finance a local motor vehicle emissions inspection program. 101 N.M. 59, 62, 678 P.2d 687, 690 (1984). Similarly, in *Westgate Families v. County Clerk of the Incorporated County of Los Alamos*,

100 N.M. 146, 667 P.2d 453 (1983), the Zoning Enabling Act's requirement that a local zoning ordinance "shall be passed *only* by a majority vote of all the members" of the local legislative body and repealed in only the same way expressly denied the locality the authority to permit nullification of a zoning ordinance by a referendum.

The New Mexico case law clearly demonstrates that the Living Wage Ordinance is not preempted by the state Minimum Wage Act. Unlike the ban on local motor vehicle registration fees in *Chapman*, the Minimum Wage Act does not expressly deny local governments the power to adopt a minimum wage law. Unlike the Zoning Enabling Act at issue in *Westgate*, the Minimum Wage Act does not say that the state minimum wage is to be the "only" minimum wage in the state. Unlike the conflict between the single-member district statute and the local at-large measure in *Casuse*, there is no conflict between the state and local laws. The Santa Fe employer who complies with the Santa Fe ordinance is also in compliance with the state statute. Unlike *In re Generic Investigation into Cable TV Services*, the state legislature has not committed minimum wage-setting authority to another government agency.

Moreover, unlike the local application of criminal penalties to juveniles in *ACLU*, the Living Wage Ordinance is not inconsistent with any state policy. The state's minimum wage policy, as expressly declared in the Minimum Wage Act itself is

> "(1)to establish minimum wage and overtime compensation standards for all workers at levels consistent with their health, efficiency, and well-being, and (2) to safeguard existing minimum wage and overtime compensation standards which are adequate to maintain the health, efficiency and general well-being of workers against the unfair competition of wage and hours standards which do not provide adequate standards of living."

N.M.S.A. 1978, § 50-4-19. That is also the policy of the Santa Fe Living Wage Ordinance – to establish a minimum wage consistent with the "health, efficiency and general well-being" of Santa

Fe's workers, and to protect against wage and hours standards that "do not provide adequate standards of living." There is nothing in the Minimum Wage Act expressing any policy of holding down the minimum wage or protecting the interests of employers. Although the Santa Fe Living Wage Ordinance goes further than the New Mexico Minimum Wage Act, the policy goals of the two are the same. Nor is there anything in the Minimum Wage Act that requires that there be a single minimum wage throughout the state. Indeed, the Act itself contemplates that there may be minimum wages higher than the one specified in the Act. N.M.S.A. 1978, § 50-4-29.

Three other state courts have considered whether state minimum wage laws preclude higher local minimum wage laws. In *Mayor & Council of Baltimore v. Sitnick*, Maryland's highest court found that the Maryland minimum wage did not bar Baltimore from adopting a higher minimum wage. *254 Md. 303, 255 A.2d 376 (1969).* In *New Orleans Campaign for a Living Wage v. City of New Orleans*, the Louisiana Supreme Court held that a New Orleans minimum wage was preempted by state law only because the state law expressly stated that "no local governmental subdivision shall establish a minimum wage rate which a private employer would be required to pay employees." 825 So.2d at 1105. Given the absence of any comparable express denial in the New Mexico Minimum Wage Act, the New Orleans decision is irrelevant to the Santa Fe case.

The only case in which a state court found that a state minimum wage law, without an express denial of local power to adopt a minimum wage, precluded a higher local measure is *Wholesale Laundry Board of Trade, Inc. v. City of New York, 12 N.Y.2d 998, 1989 N.E. 2d 623 (1963). Wholesale Laundry* is arguably distinguishable because the New York state law enabled the state's industrial commissioner to fix different minimum wages for different localities, *see 17 A.D.2d 327, 329; 234 N.Y.S.2d 862, 864*, a power which New Mexico has not given to any state official or

agency. This both obviated some of the need for local action and strengthened the claim that the state intended to preclude local action. Moreover, the *Wholesale Laundry* theory that the state regulatory floor is also a ceiling, was not only rejected by three of the seven members of the state court of appeals, but was ultimately repudiated by the court as a whole, which now regularly permits local governments to supplement state statutory requirements.

Thus, in *People v. Cook, 34 N.Y.2d 100, 109, 312 N.E. 2d 452, 461 (1974)*, the New York court rejected the argument that "a locality may not 'enact a local law which prohibits conduct which is permitted by State law.' This statement of the law is much too broad. If this were the rule, the power of local governments to regulate would be illusory." *Id. at 109.* Similarly, in *New York State Club Ass'n, Inc. v. City of New York, 69 N.Y.2d 211, 216, 505 N.E. 2d 915, 920 (1987),* the court upheld a municipal anti-discrimination ordinance that went beyond state law, rejecting the argument that a local ordinance should be preempted "because activity which arguably would be permitted under State decisional law is prohibited by the local law." *Id. at 221.* Relying on *Cook*, the court limited preemption to situations where the legislature has "evidenced a desire that its regulations should preempt the possibility of varying local regulations" or when the state "specifically protects the conduct prohibited at the local level." *Id. at 221-22. Accord, Jancyn Manufacturing Corp. v. County of Suffolk, 71 N.Y.2d 91, 95-96, 518 N.E. 2d 903, 907-908 (1987).*

There is nothing in the nature of the minimum wage that requires there to be a single minimum wage statewide. The federal minimum wage law contemplates higher municipal minimum wages. *Fair Labor Standards Act, 29 U.S.C. § 218(c).* Labor costs, housing costs, and other costs differ from market to market throughout the state, as do wages. It, thus, reasonable for the minimum wage to vary in light of local economic conditions. Moreover, the consequences of the minimum

wage increase are borne largely, if not entirely, within Santa Fe. Critics of raising the minimum wage have contended that such action will drive out businesses and ultimate reduce employment opportunities within the locality. But those negative effects, should they occur, will be felt *within* Santa Fe – and will provide the necessary incentive for Santa Fe to change its policy. Other communities will not be harmed. Indeed, if the critics are right other communities could benefit if Santa Fe firms relocate to more business friendly settings.

Nor would the adoption of other living wage ordinances by other New Mexico municipalities create unacceptable burdens or inefficiencies for firms operating in more than one municipality. One and only one wage requirement would apply to any particular workplace, and the firm would know exactly which municipality's law applies. It would be no more difficult for a firm to adapt to the different wage rates of the different municipalities in which it operates than it would be to comply with different local zoning, building codes, property tax rates, or different economic conditions in different markets.

To be sure, *amici*, like the City of Santa Fe, could be mistaken about the extent of the external effects of the Living Wage Ordinance. Conceivably, the ordinance could affect other municipalities or the state economy as a whole. However, under the New Mexico constitution, the *state legislature* is the proper body to consider these complex issues and determine both the extent of any external effects and the appropriate balance of respect for local home rule with concern for the rest of the state. The state constitution guarantees the authority of the legislature to act by a general law expressly denying local power to act. Should it find that a local measure has unacceptable external effects or conflicts with state policy, the legislature is free to ban local minimum wage ordinances at any time.

The New Mexico legislature, however, has not so acted. It has not expressly preempted local authority to set minimum wages. Unless and until the legislature does act to expressly deny municipal home rule authority in this area, the Santa Fe Living Wage Ordinance is not preempted by state law.

CONCLUSION

The Santa Fe Living Wage Ordinance exemplifies the power that home rule gives to citizens acting at the grass-roots level through their municipal governments to adopt measures that reflect local preferences and respond to distinctive local concerns. The Living Wage Ordinance is a public law that addresses a matter of great local public importance but whose effects are limited entirely to the City of Santa Fe. The New Mexico Minimum Wage Act does not expressly deny local governments the power to adopt minimum wage requirements higher than the floor set by the state. As neither the "private or civil law" exception nor the "express denial" limitation on home rule authority apply, the court should affirm the decision of the district court and hold that the Santa Fe Living Wage Ordinance is a legitimate exercise of municipal authority under the Home Rule Amendment.

Respectfully submitted

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