STATE OF MINNESOTA
IN COURT OF APPEALS
A23-0191

Fletcher Properties, Inc., et al.,
Appellants,

vs.

City of Minneapolis,
Respondent

Poverty & Race Research Action Council, et al.,
Respondents,

HOME Line,
Respondent.

BRIEF OF RESPONDENTS POVERTY & RACE RESEARCH ACTION COUNCIL AND HOUSING JUSTICE CENTER

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STATEMENT OF THE CASE

Appellants have challenged portions of the City of Minneapolis' (Respondent) Civil Rights Ordinance (the "Ordinance"), which prohibits discrimination based on a person's receipt of public assistance, regardless of any requirements of the public assistance program. In particular, Appellants object to having to accept rental applicants with Section 8 vouchers who do not otherwise have an objectionable rental history. While participation by owners of rental housing in the Section 8 program is voluntary under the federal program regulations, the regulations specifically state that program rules are not intended to preempt state and local laws that prohibit discrimination against voucher holders. 24 C.F.R. § 982.53(d)(2022).

Appellants rely on the U.S. Supreme Court decision in *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021) which held that regulations limiting the right of a property owner to exclude others from a business which was not open to the public was a per se physical taking in violation of the U.S. Constitution. But the Court clearly distinguished laws such as the one at issue here, limiting an owner's right to exclude others from businesses which are open to the public.

Appellants assert, in the alternative, that the Ordinance constitutes a regulatory taking. But that argument fails because the Appellants' own expert studies demonstrate that the Ordinance does not have a sufficiently substantial economic effect on Appellants investment backed expectations.

Appellants argue that the Ordinance is preempted by the state Human Rights Act. But the plain language of that Act clearly indicates that neither conflict nor field preemption apply.

Finally, Appellants argue that the District Court abused its discretion in granting leave to participate as amici to the Housing Justice Center (HJC) and Poverty & Race Research Action Council (PRRAC) because the amici submitted their brief at the same time as their motion for leave. Appellants assert that this violates the appellate rules on amicus participation. But those rules do not apply in district court and the fact that the federal appellate rules require submission of the proposed brief at the same time as the request for leave demonstrates that permitting that procedure in district court was not an abuse of discretion.

FACTS

This brief focuses on the legal flaws in Appellants' brief. For the most part, facts relevant to understanding these issues are incorporated in the Legal Arguments below.

These are the Minneapolis Ordinance provisions that are centrally at issue:

> (e) *Discrimination in property rights*. It is an unlawful discriminatory practice for an owner, lessee, sublessee, managing agent, real estate broker, real estate salesperson or other person having the right to sell, rent or lease any property, or any agent or employee of any of these, when . . .status with regard to a public assistance program, or any requirement of a public assistance program is a motivating factor:
> (1) To refuse to sell, rent or lease, or to refuse to offer for sale, rental or lease; or to refuse to negotiate for the sale, rental, or lease of any real property; or to represent that real property is not available for inspection, sale, rental, or lease when in fact it is so available; or to otherwise make unavailable any property or any facilities of real property…

Minneapolis Code of Ordinances, tit. 7, § 139.40(e).

The Minnesota Supreme Court in its 2020 review of this case noted that: "The Ordinance does not prevent landlords from screening prospective tenants based on nondiscriminatory criteria such as credit or rental history". *Fletcher Properties v. City of Minneapolis*, 947 N.W. 2d 1, 8, fn 2 (Minn. 2020).

The only other facts which are critical to the argument are set out in two expert studies commissioned by Appellants. These are described in detail in Section II.A. below where it is most useful to integrate them into the argument.

STANDARD OF REVIEW

Review of a summary judgment is de novo. *Boldt v. Roth*, 618 N.W.2d 393, 296 (Minn. 2000). A party is entitled to summary judgment when there is no genuine issue as to any material fact and the party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03.

Appellants' challenge to the district court order granting lave to submit an amicus brief is review using an abuse of discretion standard. Under an abuse of discretion standard, an appellate court will not overrule the district court unless the court exercised its discretion in an arbitrary or capricious manner or based its ruling on an erroneous interpretation of the law. *State v. R.H.B.*, 821 N.W.2d 817 (Minn. 2012).

LEGAL ARGUMENT

I. The Ordinance does not effect a physical taking.

Appellants' takings claims are brought under the Minnesota Constitution Article I, Section 13. Minnesota courts rely on judicial interpretation of the federal takings clause set out in the Fifth Amendment to interpret the Minnesota Takings Clause. *Minnesota Sands v. County of Winona*, 940 N.W.2d 183, 200 (Minn. 2020).

A. The Supreme Court decision in *Cedar Point Nursery v. Hassid* dictates that the Minneapolis Ordinance does not effect a physical taking.

The Appellants assert that the Minneapolis Ordinance constitutes a per se physical taking in violation of the Minnesota Constitution, and by implication, the U.S. Constitution. The claim is that the ordinance appropriates the owners' right to exclude others from their property. It relies on the recent U.S. Supreme Court decision in *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021). That decision, however, clearly supports the Respondents' position that a physical taking analysis is inappropriate here. In that case, the Supreme Court found a per se taking by a California regulation which permitted union organizers to access farm workers on the nursery site, which was not open to the public. *Id.* at 2072. The Court contrasted two alternative takings analyses. When the government "physically acquires private property for a public use," a simple per se rule is employed: "the government must pay for what it takes." *Id*. at 2071. But when the government instead imposes regulations, which" go too far," restricting an owner's use of the property, the Court balances a number of factors set out in *Penn Central*

Transportation Co. v. New York City. *Id*. at 2072 (citing *Penn Central*, 438 U.S. 104, 124 (1978)). The Court held that the California regulation:

> appropriates a right to invade the growers' property and therefore constitutes a *per se* physical taking. . . . Rather than restraining the growers' use of their own property, the regulation appropriates for the enjoyment of third parties the owners' right to exclude.

Id. Therefore, the simple physical taking, per se rule of liability applied rather than a *Penn Central* analysis.

The Appellants rely on this "right to exclude" language from *Cedar Point Nursery* as the basis for their physical takings claim:

> Rather than restraining the owners' use of their properties, the Ordinance vests a right in Respondent to invade an owner's property and appropriate for the enjoyment of third parties and owner's right to exclude. . . . Under *Cedar Point Nursery*, the Ordinance appropriates a right to invade owner's property and therefore constitutes a per se physical takings.

Appellants' Brief at 31.

But the *Cedar Point Nursery* Court was careful to distinguish the California regulation from those in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) (applying *Penn Central* to a governmental restriction on the owner's right to exclude others), and *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964) (involving short term motel rentals and rejecting claim that the 1964 Civil Rights Act, prohibiting racial discrimination in such public accommodations, effected a taking):

> **Limitations on how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public**.

Cedar Point Nursery, 141 S.Ct. at 2077 (emphasis added) (comparing the nursery to the PruneYard, which was "open to the public;" and citing *Horne v. Dept. of Agriculture*, 576 US. 350, 364 (2015), and *Nollan v. California Coastal Com'n*, 483 U.S. 825, 832, n.1 (1987), both distinguishing *PruneYard* as involving "an already publicly accessible business"). Appellants' rental properties are "generally open to the public" and therefore, under *Cedar Point*, not subject to a per se taking claim. *Id.*

Directly on point is *Yee v. City of Escondido* involving manufactured home park land rentals. 503 U.S. 519 (1992). The manufactured home park in *Yee* was subject to a state law and rent control ordinance which limited the owner's right to evict and to set rent levels. The park owners argued that the combination of the two laws authorized a physical taking of their property. The Supreme Court rejected any allegation that the "right to exclude others" had been taken, noting that the owners "voluntarily rented their land to mobile home owners" and "[p]ut bluntly, no government has required any physical invasion of petitioners' property. Petitioners' tenants were invited by petitioners, not forced upon them by the government." *Id*. at 527, 528.

The Court similarly rejected the owners' argument that limitations imposed by the two laws on the ability of owners to choose incoming tenants constituted a physical taking. *Id.* at 530-31. "Because they voluntarily open their property to occupation by others, petitioners cannot assert a *per se* right to compensation based on their inability to exclude particular individuals." *Id.* at 531 (citing *Heart of Atlanta*, 379 U.S. at 259, 261 ("[A]ppellant has no 'right' to select guests as it sees fit, free from government regulation."), and *PruneYard*, 447 U.S. at 82-84).

The holding from *Yee* is clear, and determinative in this case: "When a landowner decides to rent his land to tenants, the government may place ceilings on the rents the landowner can charge . . . or require the landowner to accept tenants he does not like." *Id.* at 529 (citing *Heart of Atlanta*, 379 U.S. at 261 and *PruneYard*, 447 U.S. at 82-84); *see also Federal Home Loan Mortg. Corp. v. New York State Div. of Hous. & Community Renewal*, 83 F.3d 45, 47-48 (2d Cir. 1996) ("[W]here a property owner offers property for rental housing, the Supreme Court has held that government regulation of the rental relationship does not constitute a physical taking." (citing *Yee*, 503 U.S. at 529)); *335-7 LLC v. City of New York*, 524 F. Supp. 3d 316, 328 (S.D.N.Y. 2021) ("In accordance with *Yee*, courts in this Circuit have long upheld the RSL [Rent Stabilization Law] against facial physical taking challenges because landlords have voluntarily offered their property for rent and, by the express terms of the RSL, landlords can evict unsatisfactory tenants, reclaim or convert units, or exit the market.").

Two recent Second Circuit cases similarly rejected physical takings claims in the rental housing context based on the "business open to the public" rationale set out in *Cedar Point Nursery*. Both involved New York rent control laws.

In *Community Housing Improvement Program v. City of New York*, landlords challenged several aspects of the New York City Rent Stabilization Law as facial physical takings: the requirement that landlords offer tenants renewal leases, limits their ability to evict, and allows transfer of tenancies to successors. 59 F.4th 540, 552 (2d Cir. 2023). The Second Circuit rejected the landlords' claims based on *Cedar Point Nursery* and *Yee*:

> In *Cedar Point*, the Court held that the government may effect a physical occupation of property by granting a third party the right to invade "property closed to the public." That has not occurred here. Rather, the Landlords voluntarily invited third parties to use their properties, and as the Court explained in *Cedar Point*, regulations concerning such properties are "readily distinguishable" from those compelling invasions of properties closed to the public. As the Supreme Court made pellucid in *Yee*, when, as here, "a landowner decides to rent his land to tenants" the States "have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails."

Id. at 551 (citations omitted). The Second Circuit went on to hold that, although the statute placed several limitations on tenant successors, even without such limitations, landlords would have been deprived "only of the ability to decide *who* their incoming tenants are" and that limitation has "nothing to do with whether [a law or regulation] causes a physical taking." *Id.* at 552-53 (emphasis and alterations original) (quoting *Yee*, 503 U.S. at 530-31). The Second Circuit addressed the companion case, involving landlords' as-applied taking claims, in the same way:

> Where—as here—property owners *voluntarily* invite third parties to use their properties, regulations of those properties are "readily distinguishable" from those that compel invasions of property closed to the public.

74 Pinehurst LLC v. New York, 59 F.4th 557, 563 (2d Cir. 2023) (emphasis original) (citing *Cedar Point*, 141 S.Ct. at 2077).

Similarly, under *Cedar Point Nursery* and *Yee*, here the limitations on a landlord's right to reject certain tenants set out in the Minneapolis Ordinance have nothing to do with a physical taking. The Appellants' takings claim in this case must therefore be analyzed as a *Penn Central* regulatory taking.

B. Appellants' efforts to distinguish the *Cedar Point Nursery* principle relating to businesses open to the public are ineffective.

The Appellants make several efforts to distinguish the clear distinction made in *Cedar Point Nursery, Yee*, and *PruneYard* between businesses open to the public and those closed to the public. All of these efforts fail.

First, neither of the Eighth Circuit cases cited by the Appellants at page 33 of their Brief (*301, 712, 2103 and 3151 LLC v. City of Minneapolis* and *Heights Apts., LLC v. Walz*) rebut the distinction between businesses open and those closed to the public set out in *Cedar Point Nursery*, *Yee*, and *PruneYard.*

Appellants cite a somewhat analogous case in which the Eighth Circuit considered whether another Minneapolis ordinance limiting a landlord's ability to screen out tenant applicants constituted a *Cedar Point Nursery* physical taking. *301, 712, 2103 and 3151 LLC v. City of Minneapolis*, 27 F.4th 1377 (8th Cir. 2022). In rhetorically setting up its rejection of the Appellants' physical taking claim, the Eight Circuit hypothesized that an ordinance requiring landlords to rent to individuals they would otherwise reject "might be" a physical taking. *Id.* at 1383. But the Court then rejects the physical taking claim because the ordinance "allows landlords to reject individuals due to undesirable criminal, credit, rental, and other history." *Id.* The Court rejected any per se physical taking argument, concluding that "the ordinance is a restriction on the landlords' ability to use their property, not a physical-invasion taking," holding that the case is therefore to be analyzed under *Penn Central*. *Id.* at 1383, 1384. The ordinance at issue here likewise allows landlords to reject applicants based on undesirable tenant histories and therefore,

if there are any implications of *301* for this case, it is that the case requires a *Penn Central* rather than a physical takings analysis

Appellants also look for support in *Heights Apts., LLC v. Walz*, 30 F.4th 720 (8th Cir. 2022), *petition for rehearing en banc denied*, 39 F.4th 479 (8th Cir. 2022). Appellants' Brief at 32-33. The *Heights* decision, in fact, also favors the appellees in this case. In that case, landlords challenged state law and regulations limiting evictions during the COVID 19 emergency. The Eighth Circuit did not determine whether a physical taking had occurred. Rather, the court reversed the district court's motion to dismiss the appellants' physical takings claim because the "well-pleaded allegations are sufficient to give rise to a plausible *per se* physical takings claim under *Cedar Point Nursery*." *Id.* at 733. The Eighth Circuit did so only by distinguishing *Yee*, which the appellees relied on, from the *Cedar Point Nursery* per se taking because "the landlords in *Yee* sought to exclude future or incoming tenants rather than existing tenants." *Id.* at 733 (citing *Yee*, 503 U.S. at 530-31).[1] This distinction worked in *Heights* because that case involved only existing tenants. But the current case is entirely about limitations on exclusion of incoming tenants, so the *Heights* decision indicates that *Yee* therefore controls. Limitations on excluding rental applicants do not constitute a per se taking.

Appellants further conflate landlords voluntarily opening their property to applications from the public with a "voluntary exchange" principle discussed in *Horne v.*

[1] The Appellants' argument regarding *Heights* at page 33 of their brief is highly misleading, in that it quotes language from *Heights* which immediately precedes this quote, but leaves out the language regarding incoming tenants by which the *Heights* Court actually sought to distinguish *Yee* from the physical taking in *Cedar Point Nursery*.

Department of Agriculture, 576 U.S. 350, 365-66 (2015). Appellants' Brief at 34. *Horne* involved a federal statute permitting Department of Commerce "marketing orders" which often required raisin growers to turn over a percentage of their crop for free. *Id.* at 354. The justification was that the process helped stabilize the market for raisins. The growers argued that the marketing order at issue constituted a physical taking. The government's defense was that the requirement was not a taking because the plaintiffs voluntarily chose to take part in the raisin market, and they received a valuable government benefit in exchange for the marketing order requirement. To avoid the marketing order, the defendants argued, they could simply "plant different crops." *Id*. at 365. The Court rejected this "voluntary exchange" defense and held the market order to be a per se taking. *Id.* at 366-67. But this case is simply irrelevant here. The defendants have made no attempt to raise a "voluntary exchange" defense. There is no need because, for the reasons set out in *Yee*, *PruneYard*, and the distinction made by the *Cedar Point Nursery* Court, there is simply no physical taking involved. The landlord's decision to open their property to public applicants simply has nothing to do with the voluntary exchange principle discussed in *Horne*.

Appellants also argue that the rental housing at issue here is not "open to the public" in the sense meant by the cases described above because rental housing has been held not to be a "public accommodation" as defined by the Minnesota Human Rights Act. Appellants' Brief at 35-36. The Court in *Yee* held that "[b]ecause they voluntarily open their property to occupation by others," the owners of the rental housing at issue "cannot assert a *per se* right to compensation based on their inability to exclude particular

individuals." 503 U.S. at 531 (citing *Heart of Atlanta*, 379 U.S. at 259, 261, and *PruneYard*, 447 U.S. at 82-84). Those cases define what it means for a business to be "open to the public" for constitutional takings purposes. It is irrelevant to constitutional takings principles whether property that is "open to the public" in the sense used in these cases are public accommodations under the Minnesota Human Rights Act.

The appellants' argument asserting a per se taking concludes by stating that "the taking of property must be examined under *Cedar Point Nursery*." Appellants' Brief at 36. We agree and have demonstrated above that under *Cedar Point Nursery*, limitations on the right of businesses open to the public to exclude others are not per se physical takings.

The Appellants assert that any law limiting the right to exclude others constitutes such a per se taking. The "businesses open to the public" distinction is absolutely crucial as a practical matter. Every fair housing law in the country depends, in substantial part, on limitations of rental property owners' rights to exclude others. The failure to take seriously the *Cedar Point Nursery* distinction between properties open and those not open to the public therefore threatens the constitutionality of every one of those laws. The plaintiff/appellant in *Heart of Atlanta* challenged a law which required "appellant to rent available rooms to negroes against its will." 379 U.S. at 244. The Appellant's position in *Heart of Atlanta* indicates exactly where a failure to maintain the "business open to the public" distinction could lead.

II. The Ordinance does not constitute a regulatory taking.

A regulatory taking is analyzed as set out in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). A *Penn Central* analysis generally looks at three factors: economic impact of the regulation, interference with distinct investment-backed expectations; and character of the governmental action. *Id*. at 124. A regulatory taking is especially difficult to prove in a case like this one which involves a facial takings claim, in which a plaintiff can succeed only by showing that every implementation of the ordinance will result in a constitutional violation. This is because a *Penn Central* analysis is essentially ad hoc and fact based. 438 U.S. at 124. Therefore, it is very difficult to demonstrate the effects of every instance of the ordinance.

A. The Appellants' expert study demonstrates that the Ordinance does not have a sufficiently large effect on value to constitute a taking.

The Appellants rely on a "Minneapolis Multifamily Housing Choice Voucher Impact Study," (the 2018 Study) by CBRE dated March 29, 2018 to support their assertion that the Ordinance "has a direct negative affect (sic) on the net operating income of rental property" and on the capitalization rate likely to be applied to such properties on sale and therefore "has a direct negative effect on Value." Appellants' Brief at 38 (citing DOC 35, 1091-93). However, the Study on its face demonstrates that the ordinance does not have a sufficient effect on market value to constitute a regulatory taking under *Penn Central*.

A *Penn Central* taking requires a very substantial diminution in property value. The *Penn Central* factors seek "to identify regulatory actions that are functionally

equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539 (2005). Supreme Court precedent has "long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking." *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 645 (1993) (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926) (involving approximately 75% diminution in value), and *Hodacheck v. Sebastian*, 239 U.S. 394, 405 (1915) (involving 92.5% diminution)). The *Penn Central* court indicated that diminutions of 75% and 87.5% have been held insufficient. 438 U.S. at 131. The Federal Circuit has noted that it is "aware of no case in which a court has found a taking where diminution in value was less than 50 percent." *CCA Assocs. v. United States*, 667 F.3d 1239, 1246 (Fed. Cir. 2011). The Ninth Circuit has noted: "we have observed that diminution in property value because of governmental regulation ranging from 75% to 92.5% does not constitute a taking." *Colony Grove Props, LLC v. City of Carson*, 888 F.3d 445, 441 (9th Cir. 2018) (citing *MHC Financing LP v. City of San Rafael*, 714 F.3d 1118, 1127-28 (9th Cir. 2013)).

Appellants' expert studies do not reach a conclusion regarding the key issue in a regulatory taking – the diminution in value purportedly caused by the defendant's actions. But the conclusions reached in those studies, comparing average income and expenses for properties with and without vouchers, do readily permit an analysis of the diminution in value that would result from those average financial performances. The

analysis which follows uses the studies' worst case numbers to demonstrate that Appellants' expert's findings demonstrate that there has been no taking.

The 2018 CBRE Study compares average gross income and expenses from a sample of "comparable" market rate projects that take vouchers (average shown at DOC-35, 1090) and that do not take vouchers (average shown at DOC-35, 1089). As the Study points out with the formula and example (DOC-35,1085), net operating income (NOI) is equal to annual effective gross income minus annual expenses. Market value is equal to NOI divided by the capitalization rate, which the examples set at 6%. *Id*. The study also finds estimates of the effect on capitalization rate as a result of taking vouchers to increase from 50-150 basis points. DOC-35, 1093. A basis point is .01%. *Id.*

However, having set out the formula for calculating market values, and calculated Net Operating Income for the two sets of average results, the study declines to take the obvious final step and project the effect of voucher usage on market values, settling instead on simply noting that the properties with vouchers had, on average, higher expenses.

Making the calculation relevant for a Penn Central analysis based on Appellants' study is easy to do. It requires no particular expertise, only simple arithmetic following the directions laid out in the study.

Step one, calculate the Net Operating Incomes found for both sets of property. A table compares the average income and expense results. DOC-35, 1091:

	Without vouchers	With vouchers
Gross Effective Income	$10,664	$11,163

Operating Expenses	$4,575	$5,557

As noted above, the Study indicates that Net Operating Income is calculated by subtracting expenses from income:

Net Operating Income:	$6,089	$5,606

As described above, the Study suggests an increase in capitalization rate of 50 to 150 basis points due to acceptance of vouchers. Accepting the maximum 150 basis point increase for purposes of the example, and using the same 6% capitalization rate for the project without vouchers used in the Report's example, the respective market values are: Without vouchers: $6,089/.06 = $101,483; and with vouchers: $5,606/.075 = $74,746.

The data in the study thus demonstrate that the averages in their study indicate a reduction in market value due to voucher usage of $26,736, or 26.3%.

Appellants also site a second CGRE Study dated February 2, 2022, done in the same manner with the same calculations, but using 6 properties instead of 10. DOC-166, Ex. 1(7). This study found the following average incomes and expenses:

	Without vouchers	With vouchers
Gross Effective Income	$10,706	$10,721
Operating Expenses	$4040	$5295

DOC-166(11). This table permits the following Net Operating Income calculation:

Net Operating Income	$6666	$5426

The 2022 Study also reduced the projected increase in capitalization rate to 25 to 100 basis points. DOC-166(13). Using the 100 basis point increase, the market values are: $6666/.06=$111,100 without vouchers and $5426/.07=$77,514 with vouchers. The

Study then would project a market value reduction of about $33,586 or 30.2%. The Appellant confirmed both these calculations in its Opposition to summary judgment. DOC-224, 26.

In light of the cases cited above, this is not nearly a sufficiently significant effect on market value to constitute a *Penn Central* regulatory taking. Thus, the plaintiffs have not only failed to present evidence of a regulatory taking; all of the evidence they have presented on this issue is conclusive evidence that there is no such taking.

Additionally,, every landlord may seek exemption from the ordinance if compliance will impose an undue hardship. Minneapolis Code of Ordinances §§ 139.40(e)(1), 139.20. This provision alone eliminates the possibility of a regulatory taking. Appellants in this case have alleged a facial taking because "they will not suffer damages unless and until the Amended Ordinance is implemented and enforced." 2018 Opposition to Defendant's Motion for Summary Judgment, DOC-62, 7. A plaintiff bringing a constitutional facial challenge to a law "can only succeed by "establish[ing] that no set of circumstances exists under which the Act would be valid." *Minnesota Voters Alliance v. city of Minneapolis,* 766 N.W.2d 683, 688 (2009). But Appellants cannot make that showing because there is no way to establish what future outcomes of landlords' utilization of the exemption procedure.

Appellants' failure to demonstrate a sufficiently serious effect of the Ordinance on market value dictates that there is no taking under the authority set out above. But Appellants arguments on the other two *Penn Central* factors also fail. The Appellants' investment-backed expectations involved operating rental housing, a highly regulated

activity, and their investment-backed expectations cannot extend to freedom from "public programs adjusting the benefits and burdens of economic life to promote the common good." *Elmsford Apartment Associates, LLC v. Cuomo*, 469 F.Supp.3d 148, 167 (S.D.NY. 2020), citing *Penn Central*, 438 U.S. at 124 (holding New York executive order limiting evictions during the COVID 19 crisis not a taking). *See also, Southern California Rental Housing Association v County of San Diego*, 550 F.Supp.3d 853, 866 (S.D. Cal. 2021)(business of renting property is heavily regulated and COVID 19 eviction limitations do not violate owners' investment-backed expectations); *Auracle Homes, LLC v. Lamont*, 478 F.Supp.3d 199, 222 (D. Conn 2020)(one who chooses to engage in publicly regulated business surrenders right to unfettered discretion regarding business conduct) .

As to character of the governmental action, the state Supreme Court in its prior decision in this case held that the objectives of the Ordinance are permissible. *Fletcher Properties v. City of Minneapolis*, 947 N.W. 2d 1, 11-12 (Minn. 2020).

III. The Ordinance is not preempted by Minnesota law.

A. There is no conflict preemption of the ordinance.

The Appellants' conflict preemption claim is premised on the assertion that the Minnesota Human Rights Act (MHRA) "affords owners the right to not participate" in the housing choice voucher program. Appellants Brief at 44. The purported source of this alleged right and therefore of the conflict is the decision in *Edwards v. Hopkins Plaza Ltd. P'ship*, 783 N.W.2d 171 (Minn. App. 2010). There, The Court of Appeals held that "the plain language of Minn. Stat. § 363A.09, subd. 1(1), does not make it unlawful for a

property owner to refuse to rent to Section 8 tenants because the property owners do not want to participate in the program for legitimate business reasons." *Id*. at 178. That holding simply limits the extent of liability under the MHRA's prohibition on discrimination based on status with regard to public assistance. It does not grant any overarching rights to property owners.

The plain language of the MHRA emphasizes that limitation: "Nothing in this chapter shall be interpreted as restricting the implementation of positive action programs to combat discrimination." Minn. Stat. 363A.02, subd. 1(b). Further, the MHRA expressly limits the reach of the provisions of the statute, providing that the statute is exclusive only as to the procedures for "acts declared unfair by sections 363A.08 to 363A.19 and 363A.28, subdivision 10." Minn. Stat. § 363A.04. Under this plain language, the MHRA is not otherwise exclusive. Because the *Edwards* holding quoted above interprets the limits of the reach of the MHRA regarding public assistance discrimination, the *Edwards* holding cannot, pursuant to § 363A.04, have any broader reach. Further, the exclusivity provision only applies while a MHRA procedure is "pending." *Id.* Actions under the Ordinance will not be pending under the MHRA.

Minnesota Courts have repeatedly ruled against exclusivity and preemption by the MHRA when the plaintiff's claim is based on acts not prohibited by the MHRA. In *Daniel v. City of Minneapolis*, the plaintiff brought claims against the city under both the MHRA and Workers Compensation Act. 923 NW2d 637, 650 (Minn. 2019). The Minnesota Supreme Court addressed the fact that both statutes had exclusivity clauses. *Id.* at 643-53. The court concluded that because the acts "do not extend to the

same types of injuries, we find no conflict" in allowing recovery under both acts, even if the underlying facts were the same for both claims. *Id.* at 650. Similarly, the *Edwards* court held that the MHRA does not address the injury that is addressed by the City's ordinance, and there is thus no conflict in this case. *See Edwards*, 783 N.W.2d at 179. The Minnesota Supreme Court held in *Abel v. Northwestern Hospital* that the lower courts' holding of preemption of the plaintiff's negligence claim based on the exclusivity provision of the MHA was "premature" because "[n]o court has yet concluded" that the defendants owed the plaintiff any obligations under the MHRA. 947 N.W.2d 58, 80 (Minn. 2020). Here, given *Edwards*, a defendant violating the city ordinance "for legitimate business reasons" might well owe the plaintiff an obligation under the ordinance but not under the MHRA because such an act was held in *Edwards* not to be unfair under the MHRA, and there would thus be no preemption by the MHRA.

The *Abel* court provided a second argument for why the exclusivity provision does not apply to the City ordinance by noting that "[t]he preemption provision applies only where a Human Rights Act claim is 'pending.'" *Id.* A plaintiff seeking remedy under the City Ordinance would, under *Edwards* (assuming it was correctly decided), have no MHRA claim pending against the defendant and thus there could be no preemption.

The conflict asserted by Appellants is that the MHRA provides rental property owners with a right not to participate in the voucher program if they have business reasons not to do so, whereas the ordinance does not permit business reasons to be used as an excuse for rejecting a voucher holder's rental application based on the applicant's use of a voucher. Appellant claims that the ordinance prohibits what the MHRA permits.

But that is a misstatement of the applicable Minnesota law, which provides that a conflict preemption exists when the ordinance "forbids what the statute *expressly* permits." *Mangold Midwest Co. v. Village of Richfield*, 143 N.W.2d 813, 816 (Minn. 1966), (emphasis added), citing *Power v. Nordstrom*, 184 NW 967,969 (Minn. 1921). The use of the term "expressly permits" is necessary. Otherwise, any failure to prohibit could be characterized as implicit permission. The MHRA clearly does not expressly permit public assistance discrimination based on "legitimate business reasons." Therefore, there is no conflict preemption of the Ordinance by the MHRA.

Nor do the Appellants cite any other Minnesota statutory provisions that expressly permit such discrimination. They cite an argument in *Edwards* that a former tax incentive for owners renting to voucher holders demonstrated that owner participation in the voucher program was voluntary, because there was no other reason for the statute to provide the incentive. Appellants' Brief at 46 (citing *Edwards*, 783 N.W.2d at 176). But section 8 vouchers have a maximum rent limit, and one obvious other reason to provide tax incentives is to permit owners to lower their rents to meet that income limit and thereby permit occupancy by voucher holders.

Appellants also cite the rule of construction that courts are not to read into a statute a provision omitted by the Legislature. Appellants' Brief at 46 (citing *Beardsly v. Garcia*, 753 N.W.2d 735, 740 (Minn. 2008)). But that rule, if it does anything, weighs against the Appellants' position. The MHRA prohibits discrimination based on status with regard to public assistance. The Legislature omitted any exception permitting owners to so discriminate because of a "legitimate business reason."

Appellants argue that the aspect of the Minneapolis Ordinance to which they object is not actually "discrimination" under the MHRA. They cite *City of Minneapolis v. Richardson*, 239 N.W.2d 197, 201 (Minn. 1976), to the effect that "discrimination" under the MHRA means to make a distinction in treatment of "individuals," based on impermissible or irrelevant factors, rather than a distinction in participation in programs. Appellants' Brief at 44-45. But what the Ordinance prohibits *is* discrimination against individuals, based on what the MHRA has clearly indicated is an impermissible factor—the applicants use of public assistance, which is, of course, provided by public "programs."

Appellants argue that the Ordinance "obstructs the purposes" of the MHRA to protect against unfounded charges of discrimination. Appellants Brief at 49. But this would be the case only if the MHRA established a "right" to discriminate against voucher holders for business reasons. But as established above, the MHRA does not provide landlords with a right to discriminate in that manner.

Appellants final futile attempt to argue that the Ordinance conflicts with state law is to assert that the ordinance redefines discrimination "by likening refusal to participate in a program for legitimate business reasons to discrimination against a person." Appellants' Brief at 51. But again, as the Supreme Court held in *Richardson*, to discriminate is to make a distinction in treatment of individuals based on impermissible or irrelevant factors. What the Ordinance does is to prohibit such a distinction by landlords regarding persons who hold a voucher, based on the impermissible and irrelevant factor that the landlord has a purported business reason for doing so.

B. The Ordinance is not preempted because it regulates an area occupied by state law.

Appellants assert field preemption of the ordinance based on the assertion that the MHRA occupies the field "of preventing discriminating against persons." Appellants' Brief at 52-54. But the plain language of the MHRA demonstrates that it does not occupy the field. Contrary to Appellants' assertion, Minnesota Statute Section 363A.02, subd. 1(a), does not declare the MHRA to be " the 'public policy of [Minnesota].'" Appellants' Brief at 52. Rather, that provision declares that "[i]t is the public policy of this state to secure for persons in this state, freedom from discrimination." Minn. Stat. § 363A.02, subd. 1(a).

That this is a far broader policy statement is illustrated by section 363A.02, subdivision 1(b): "Nothing in this chapter shall be interpreted as restricting the implementation of positive action programs to combat discrimination." Nor does the "exclusivity" provision of § 363A.04 demonstrate field preemption. In fact, it demonstrates the opposite, as the plain language of the statute provides that MHRA procedures apply only to a pending MHRA claim and only to acts which the language of the MHRA itself declares unfair. Under *Edwards*, the exclusivity provision does not extend to discrimination by a landlord, claiming legitimate business reasons, against an applicant with a voucher.

The Appellants cite a sentence from *Edwards* to argue that ensuring affordable housing is not a municipal function. Appellants' Brief at 52 (citing *Edwards*, 783 N.W.2d at 179). But in the cited quote, the *Edwards* court says nothing at all about

municipal authority regarding affordable housing. Rather, the court is noting that it is not the *court's* role to promote affordable housing.

The rest of Appellants argument at pages 53-54 is about the adverse consequences of an ordinance subject to field preemption. But that analysis is irrelevant because they fail to make a case that there is field preemption of the Ordinance by state law.

IV. The district court did not err by allowing amicus participation by Poverty & Race Research Action Council and Housing Justice Center.

The Poverty & Race Research Action Council (PRRAC) and Housing Justice Center (HJC) filed a motion on August 15, 2022,[2] for leave to submit an amicus brief in support of Defendant City of Minneapolis' summary judgment motion. DOC-212. The City and Appellants' summary judgment motions had been filed on August 12, 2022. DOC-136 and DOC-164. The Motion for Leave was accompanied by a Memorandum in support of the motion (DOC-213) and the Amicus Brief for which leave was sought (DOC-214). The Memorandum made three arguments: The Cedar Point Nursery decision distinguished properties like those of the Appellants which are open to the public; the MHRA's exclusivity provision demonstrates that the Ordinance is not preempted by state law; and the Appellants' own most recent Expert Report demonstrates that there has been no regulatory taking. DOC-213. The appellants challenge the Court's granting of leave as "arbitrary and capricious and otherwise in error." Appellants' Brief at 54.

[2] The Motion materials were submitted on August 12, the date summary judgment materials were due, but not accepted for filing until August 15.

In particular, Appellants challenge the fact that the Amicus brief was submitted along with the motion for leave and after the Appellant and Respondent had submitted their opening summary judgment motion and memoranda. Appellant asserts that instead, the procedure set out in Minn. R. Civ. App. P. 129 should have been followed. That rule requires leave to be granted prior to submission of an amicus brief. Appellants' argument is in error for several reasons.

There is no formal Minnesota rule governing a district court's acceptance of amicus briefs. Rather, the Minnesota Supreme Court's decision in *State v. Finley*, 64 N.W.2d 769 (Minn. 1954) has been the sole, and unchallenged, authority regarding a district court's exercise of discretion to accept or reject an amicus brief:

> An 'amicus curiae' is one who gives information to the court on some matter of law in respect to which the court is doubtful. The ordinary purpose of an Amicus curiae brief in civil actions is to inform the court as to facts or situations which may have escaped consideration or to remind the court of legal matters which have escaped its notice and regarding which it appears to be in danger of making a wrong interpretation.

Id. at 294-95 (citations omitted); *see, e.g.*, *In re Public Conservatorship of Foster*, 535 N.W.2d 677, 684 (Minn. App. 1995) (citing part of *Finley* quote above to deny motion to strike amicus brief); *Blue Earth County Pork Producers v. County of Blue Earth*, 558 N.W.2d 25, 30 (Minn. App. 1997) (same); *St. Paul Fire & Marine Ins. Co. v. A.P.I., Inc.*, 738 N.W.2d 401, 411 (Minn. App. 2007) (also using part of *Finley* quote and denying motion to strike amicus brief because it "sheds additional light on important issues"). There is similarly no formal rule relating to amicus briefs in federal district courts, and "[a] determination on a request to participate as amicus curiae is discretionary and the

court . . . may grant or refuse leave according as it deems the proffered information timely, useful, or otherwise." *Pavek v. Simon*, 2020 WL 1467008, at *2, *4 (D. Minn. Mar. 26, 2020) (alterations original) (accepting amicus brief as "helpful" despite being submitted late in the briefing cycle).

Appellant does not attempt to argue that the amicus brief submitted by PRRAC and HJC did not meet the *Finley* standard. In fact, as set out in the Amici's Memorandum in Support of their Motion for Leave (DOC-213), the Amicus Memorandum raised legal arguments relating to physical and regulatory takings and preemption, of which the District Court had been unaware in issuing its January 21, 2022, Order continuing an earlier injunction prohibiting enforcement of the Ordinance. DOC-135.

Because the Appellate Rule 129 applies to the appellate courts, not to district court, it is potentially relevant here only to the extent that Appellants cannot demonstrate that the district court's failure to follow that rule was somehow arbitrary and capricious. Appellants cannot do so because the analogous federal rule *requires* that the amicus brief be submitted at the same time as the motion for leave and permits that they may be submitted up to seven days after the party being supported has filed its opening brief. Fed. R. Civ. App. P. 29(a)(3) and (6). The Rule thus contemplates court consideration of the amicus brief itself prior to a decision on whether to grant leave. *See* Notes of Advisory Committee on Rules, 1998 Amendment (noting the change requiring that the brief accompany the motion and that "the relevance of matters asserted by an amicus is ordinarily the most compelling reason for granting leave to file"). Thus the Court's

acceptance and consideration prior to granting leave of the amicus brief, filed at the same time as the motion for leave, and only three days after the Appellant and Respondent submitted their summary judgment material, was not arbitrary or capricious, or otherwise contrary to law and therefore was not an abuse of discretion.

The Appellants' argument for an abuse of discretion fails for yet another reason. A party challenging a discretionary ruling must demonstrate that the ruling resulted in harm or prejudice to their case. *Electric Service Co. of Duluth, Inc. v. Lakehead Electric Co.*, 189 N.W.2d 489, 492 (Minn. 1971). It's difficult to see how that could be the case, given that appellate review of the summary judgment in the district court is de novo. Nor have Appellants have attempted to demonstrate prejudice. They have instead posited a hypothetical party forced to respond to briefing not properly before the district court. From virtually the same time as they received the Respondent's Summary Judgment Memorandum, they were fully aware of the arguments raised in the Amicus Brief, the obvious relevance of those arguments, and that the City had made similar arguments. They have not demonstrated how their case was prejudiced by the procedure used by the district court in this case.

CONCLUSION

For the reasons set out above, the Court should uphold the district court's summary judgment.

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CERTIFICATE OF COMPLIANCE

This brief conforms to the requirements of Minnesota Rules of Civil Appellate Procedure 132.01 Subd. 1.

This brief complies with the word count limit in Rule 132.01 Subd. 3(a0(1) of the Minnesota Rules of Civil Appellate Procedure. It contains 7,668 words.

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