STATE OF MINNESOTA

IN SUPREME COURT

A22-1190

Hennepin County

Anderson, J.
Dissenting, Thissen, J.

Kolten Kranz, et al.,

Appellants,

vs.

Filed: May 24, 2023
Office of Appellate Courts

City of Bloomington, Minnesota, et al.,

Respondents,

Daniel Rogan, in his official capacity as Hennepin County Auditor,

Respondent,

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

Respondent.

Gregory J Joseph, Joseph Law Office PLLC, Waconia, Minnesota; and

Douglas P. Seaton, James V. F. Dickey, Upper Midwest Law Center, Golden Valley, Minnesota, for appellants.

Melissa J. Manderschied, City Attorney, Peter A. Zuniga, Deputy City Attorney, Bloomington, Minnesota; and

Shelley M. Ryan, Hoff Barry, P.A., Eden Prairie, Minnesota, for respondents City of Bloomington, Minnesota, et al.

Mary Moriarty, Hennepin County Attorney, Jeffrey M. Wojciechowski, Assistant County Attorney, Rebecca Lee Stark Holschuh, Senior Assistant County Attorney, Minneapolis, Minnesota, for respondent Daniel Rogan.

Keith Ellison, Attorney General, Allen Cook Barr, Assistant Attorney General, Saint Paul, Minnesota, for respondent Steve Simon.

Susan L. Naughton, Staff Attorney, League of Minnesota Cities, Saint Paul, Minnesota, for amicus curiae League of Minnesota Cities.

S Y L L A B U S

The district court did not err in concluding that an unconstitutional provision in a proposed charter amendment was not severable after signature collection but before presentation to voters, when severing the unconstitutional provision would deprive the amendment of its efficacy or strength, and it could not be ascertained whether signers of the petition would have wanted the remainder to proceed without the unconstitutional portion.

Affirmed.

O P I N I O N

ANDERSON, Justice.

The issue presented in this case is whether manifestly unconstitutional language in a proposed city-charter amendment can be severed and the remaining language placed on the ballot. On August 8, 2022, the Bloomington City Council voted unanimously to reject an entire proposed charter amendment based on the conclusion that one of the four sections, section 4.08, was manifestly unconstitutional. The determination that section 4.08 is unconstitutional is not at issue. What is before the court is the petition to the district court

of appellants Kolten Kranz, David Clark, and Craig Black, asking it, in part, to sever the portion deemed unconstitutional and order the City of Bloomington to submit the rest of the proposed charter amendment to the voters. The district court, finding that the offending provision was integral to the purposes of the proposed charter amendment, denied the petition. Because we conclude that section 4.08 is not severable from the rest of the proposed charter amendment, we affirm.

FACTS

The underlying facts in this case are undisputed. The City of Bloomington is a home-rule charter city organized under the Minnesota Constitution. *See* Minn. Const. art. XII, § 4. Home-rule charters "may provide for any scheme of municipal government not inconsistent with the constitution, and may provide for the establishment and administration of all departments of a city government, and for the regulation of all local municipal functions." Minn. Stat. § 410.07 (2022). Citizens can change their form of city government through charter amendments under the process prescribed by state statute. *See* Minn. Const. art. XII, § 5. One of the permitted methods to amend a city charter is through citizen-initiated petitions to place a proposed amendment on the ballot for a vote. Minn. Stat. § 410.12, subd. 1 (2022). If a group of petitioners collect signatures "equal in number to five percent of the total votes cast at the last previous state general election in the city" and meet all filing and procedural requirements, the amendment "shall be submitted to the qualified voters at a general or special election and published as in the case of the original charter." *Id.*, subds. 1, 4 (2022).

The Bloomington City Charter reserves for its residents the right to propose charter amendments by petition under the process outlined in Minnesota Statutes section 410.12 (2022). *See* Bloomington, Minn., City Charter § 5.09 (2021). "Nevertheless, it is well established in Minnesota that when a proposed charter amendment is manifestly unconstitutional, the city council may refuse to place the proposal on the ballot." *Minneapolis Term Limits Coal. v. Keefe*, 535 N.W.2d 306, 308 (Minn. 1995).

To amend a city charter, section 410.12, subdivision 2, requires that "five electors of the city . . . as a committee of the petitioners" be "responsible for the circulation and filing of the petition." In the spring of 2022, appellants, who are residents and registered voters in Bloomington, started the petition process to amend the Bloomington City Charter to repeal the use of ranked-choice voting in the City. Specifically, the charter-amendment petition, entitled "Ballot Question–Petition For Charter Amendment to Repeal Ranked-Choice Voting in Bloomington," had the stated purpose "to repeal ranked-choice voting in the City of Bloomington, restore free and fair elections to their prior form, and ensure public approval before any potential future adoption of ranked-choice voting."

The petition contained four sections that would amend Bloomington's city-charter provisions on nominations and elections. These sections read in whole as follows:

> § 4.02 PRIMARY ELECTIONS.
>
> > On the second Tuesday in August before the regular municipal election there must be a primary election to select two nominees for each elective office at the regular municipal election, unless two nominees or fewer file for each elective office.

§ 4.04 FILING OF CANDIDATES.

> An eligible person who desires to be elected to any elected office must file an affidavit with the city clerk not more than 84 days nor less than 70 days before the primary election, paying to the clerk a fee of $50.00. The city clerk must prepare and print at city expense the necessary ballots or other material required for an election. The ballots or other material must not contain political party designation of any candidate.

§ 4.07 PROCEDURES AT ELECTIONS.

> The council can adopt rules and regulations by ordinance that it considers necessary or desirable to regulate the conduct of elections subject to this charter and Minnesota Statutes as applicable.

§ 4.08 RANKED-CHOICE VOTING METHOD PROHIBITED.

> Unless first approved by two-thirds of the voters in a regular municipal election, the City of Bloomington shall not use the Ranked-Choice Voting method to elect any candidate to any municipal office. Ranked-Choice Voting is defined as any election method by which voters rank candidates for an office in order of their preference.

Appellants submitted the petition to the City Clerk on June 21, 2022, for presentation to voters in the November 2022 general election. It is undisputed that the petition was procedurally proper. On August 8, 2022, the Bloomington City Council considered the text of the petition, explained that section 4.08 was unconstitutional, and unanimously adopted Resolution No. 2022-146, which stated:

> 1. The Petition is rejected as manifestly unconstitutional and inconsistent and in conflict with the Minnesota Constitution and Minnesota Statutes; and
> 2. A question for the Petition cannot be placed on the November 2022 general election ballot; and
> 3. The City Clerk is directed to retain this Resolution along with the Petition as an official record of the City of Bloomington; and
> 4. City staff are authorized and directed to take all necessary and appropriate steps to carry out the intent of this Resolution.

On August 18, 2022, appellants filed a petition in the district court for the correction of a ballot error under Minnesota Statutes section 204B.44 (2022). Appellants sought declaratory and injunctive relief to require the City to place the charter amendment on the ballot or to sever section 4.08 from the proposal and submit the remaining valid provisions to the voters.

After holding an emergency hearing, the district court denied the petition. The district court concluded that section 4.08 of the proposed charter amendment is unconstitutional. Specifically, it determined that section 4.08 impermissibly conflicts with Minnesota Statutes section 410.12 and therefore is unconstitutional and cannot be placed on the ballot.[1] The district court also concluded that it would be improper to sever section 4.08 from the rest of the proposed charter amendment because it is "integral to" the purpose of the proposed amendment. As a result, the district court determined that the City properly declined to place the entirety of the proposed charter amendment on the ballot.

Appellants appealed to the court of appeals and then filed a petition for accelerated review. In their petition for accelerated review, appellants did not argue that section 4.08 is constitutional. Nor have the parties disputed the constitutionality of sections 4.02, 4.04, and 4.07. Instead, they only challenged the district court's conclusions that the

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[1] The district court reasoned that Minnesota Statutes section 410.12 preempts section 4.08 of the proposed charter amendment because section 4.08 would require the approval of voters to reinstate ranked-choice voting at only a *regular* election, rather than at "a general or special election" as the statute allows. *See* Minn. Stat. § 410.12, subd. 4. Moreover, the district court ruled that section 4.08's requirement that "two-thirds of the voters in a regular municipal election" vote to amend the city charter to return to the use of ranked-choice voting was preempted by the statutory requirement that a charter amendment pass "[i]f 51 percent of the votes cast on any amendment are in favor of its adoption." *Id.*

unconstitutional provision, section 4.08, could not be severed from the proposed charter amendment and that the City should not be required to place the rest of the proposed amendment on the ballot. We granted the petition for accelerated review.[2]

ANALYSIS

We are presented here with the question of whether unconstitutional language in a proposed city-charter amendment can be severed so that the remaining language can be placed on the ballot. This is a legal question which we review de novo. *See Vasseur v. City of Minneapolis*, 887 N.W.2d 467, 469–70 (Minn. 2016).

The Minnesota Constitution expressly provides that "[h]ome rule charter amendments may be proposed . . . by a petition of five percent of the voters of the local government unit as determined by law and shall not become effective until approved by the voters by the majority required by law." Minn. Const. art. XII, § 5. The Minnesota Legislature has set out the specific process for amending city charters by citizen-initiated petitions, as in this case. Minn. Stat. § 410.12, subds. 1–4.

Nearly a century ago in *State ex rel. Andrews v. Beach*, we determined that city councils have a duty to submit proposed charter amendments for consideration by voters. *See* 191 N.W. 1012, 1012 (Minn. 1932). We held that, if a proposed city-charter amendment merely lacked some clarity in its wording or effect, "[n]either the city council nor the courts have any supervisory or veto powers" and that Minnesota law "is mandatory

[2] The Hennepin County Auditor and the Minnesota Secretary of State have not participated in our consideration of the merits of this appeal and have filed no briefs before our court.

and declares that, upon the delivery of the draft of a charter, the council . . . shall cause the proposed charter to be submitted." *Id.* at 1013 (citing Minn. Gen. Stat. § 1348 (1913)). "Proposed amendments," moreover, "shall be submitted as in the case of the original charter," and "[t]here is no room for argument about the duty of the council in either case." *Id.* (citing Minn. Gen. Stat. § 1350 (1913)). Although the question was not before us at the time, we expressly cautioned that "[w]e do not hold that an amendment to a charter must be submitted, even though it is manifestly unconstitutional." *Id.*

Nearly 5 decades later, precisely such a question came before us in *Housing & Redevelopment Authority of Minneapolis v. City of Minneapolis*, 198 N.W.2d 531 (Minn. 1972) [hereinafter *HRA*]. In *HRA*, residents of Minneapolis and the Housing and Redevelopment Authority of Minneapolis sued the City of Minneapolis and Minneapolis City Council members to prevent them "from submitting to the voters a proposed charter amendment or for a declaratory judgment holding the proposed amendment unconstitutional." *Id.* at 533. In deciding "whether a court of equity is authorized to enjoin an election on what is essentially a legislative matter," we urged that "the entry of the Court into any stage of the electoral process is a step to be taken only with the utmost caution." *Id.* at 535–36 (internal quotation marks omitted) (quoting *Holmes v. Leadbetter*, 294 F. Supp. 991, 993 (E.D. Mich. 1968)). Nonetheless, because "the proposed amendment [was] manifestly unconstitutional," we held that the trial court properly enjoined the election, "rather than permit the administration and the voters of the city of Minneapolis to experience the frustration and expense of setting up election machinery and going to the polls in a process which was ultimately destined to be futile." *Id.* at 536.

We have since affirmed this holding in several decisions and concluded that cities are not required to place manifestly unconstitutional charter-amendment proposals on the ballot. *See Davies v. City of Minneapolis*, 316 N.W.2d 498, 499 (Minn. 1982) (holding that the city was not required to present a proposed charter amendment to voters when the amendment addressed the repayment of bonds because the amendment would have been an unconstitutional impairment to bondholders' contracts); *Keefe*, 535 N.W.2d at 307 (holding that the city was not required to place on the ballot a proposed charter amendment addressing how long a person could serve as mayor because it conflicted with Article VII, Section 6, of the Minnesota Constitution); *Vasseur*, 887 N.W.2d at 474 (holding that the city was not required to place a proposed charter amendment on the ballot when the amendment would have established a local minimum-wage standard because it would have been an impermissible exercise of general legislative authority); *Bicking v. City of Minneapolis*, 891 N.W.2d 304, 306 (Minn. 2017) (holding that the city was not required to place a proposed charter amendment on the ballot when the amendment would have required police officers to carry liability insurance because the provision would have conflicted with state law).[3]

[3] This is not to say that home-rule charter cities are required to act, or should act, as the arbiters of constitutionality when presented with proposed city-charter amendments. Although "when a proposed charter amendment is manifestly unconstitutional, the city council *may* refuse to place the proposal on the ballot," *Keefe*, 535 N.W.2d at 308 (emphasis added), the courts ultimately have jurisdiction to determine whether a city has exceeded its power in declining to place a proposed amendment on the ballot, *see Bicking*, 891 N.W.2d at 308–09 (holding that "a dispute between adverse parties that claim a legal right to control the decision to place a proposed charter amendment before City voters in the form of a ballot question . . . present[s] a concrete, genuine, justiciable controversy

Notably, the proposed charter amendment in *HRA* consisted of four provisions, sections 23(a)–(d), but only two of the four sections were unconstitutional. 198 N.W.2d at 536–38. The parties did not dispute that one of the substantive provisions, section 23(a), was valid, nor did they appear to dispute that the severability provision, section 23(d), was constitutional. *Id.* at 536, 538. Thus, "[t]here remain[ed] the question of whether provision 23(a) is severable from provisions 23(b) and 23(c) for purposes of submitting 23(a) separately to the voters for approval." *Id.* at 538. "If 23(a) is severable," we explained, "there appears to be no reason why it is not proper for adoption." *Id.* at 536.

In analyzing the severability provision of the proposed amendment, we concluded that it did not support severance because it applied "only to challenges to the validity of [section] 23 which occur *after* the adoption of the amendment." *Id.* at 538 (emphasis added). Unable to determine the intent of those who signed the petition, "we fe[lt] compelled to hold that the proposal which would [have been] submitted to the voters is not the one which the petitioners sought to have adopted." *Id.* "[T]he better rule," we determined, was "to prevent an election directed only at a proposal which has been substantially emasculated." *Id.* As a result, we held section 23(a) was not severable "and the entire proposal must therefore fail." *Id.*

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regarding the City's authority to refuse to place a citizen-initiated proposed charter amendment on the ballot"); *see also* Minn. Stat. § 204B.44(a) (allowing an individual to file a petition seeking the correction of any error or omission in the preparation or printing of a ballot for an election, including "any wrongful act, omission, or error of . . . any . . . individual charged with any duty concerning an election").

Although appellants acknowledge that there is no clear constitutional or statutory authority to support pre-enactment severance of portions of proposed charter amendments, appellants argue that our decision in *HRA* established that pre-enactment severability—after the collection of signatures is complete but before presentation to voters—of portions of proposed charter amendments is permissible under Minnesota law. Appellants urge that *HRA* permits severance when severance would not "substantially emasculate[]" the rest of the proposed amendment. *Id.* We need not decide now, however, whether *HRA* implicitly recognized independent authority to sever unlawful portions of a proposed charter amendment. Assuming without deciding that we have this power under our constitution, the proposed charter amendment here fails to satisfy the high bar required to establish that severance is appropriate.

According to appellants, section 4.08 is unrelated to the rest of the proposed amendment because it is different both substantively and in terms of the timing of its applicability compared to the rest of the proposal. Appellants contend that section 4.08 aims to impose a higher voter threshold to reinstate ranked-choice voting in the future if another proposed amendment arises, whereas the other sections of the proposed amendment seek simply to repeal the ranked-choice voting system currently present in the Bloomington City Charter. Because section 4.08 is "dormant" until a later proposed charter amendment arises, if ever, appellants argue that severing section 4.08 would not affect the remaining sections and could not "substantially emasculate[]" the proposed charter amendment. *See HRA*, 198 N.W.2d at 538. We disagree.

We take this opportunity to provide greater clarity to the standard we announced in *HRA*. We conclude that severance, if permissible, is not appropriate if a proposed charter amendment is deprived of its efficacy or strength after severance. In *HRA*, we did not look merely at what would have remained of the proposed amendment after severing the unconstitutional portions to determine whether the *remainder* was deprived of efficacy or strength; rather, we compared the *entirety* of the original proposal with what would have remained of the proposal if the impermissible portions were severed in light of the intent of "those who signed the petition." *Id.*

Here, we decline to hold that section 4.08 can properly be severed from the proposed city-charter amendment. Section 4.08 of the proposed charter amendment is the only section that mentions ranked-choice voting explicitly. And although sections 4.02, 4.04, and 4.07 would effectively repeal ranked-choice voting in Bloomington even without section 4.08, the purpose of the proposed amendment is clearly twofold: the petitioners sought to both repeal ranked-choice voting *and* prevent it from being reinstated in future elections through section 4.08, which required a supermajority of voters to approve the use of ranked-choice voting in future elections. Section 4.08, therefore, clearly provides a substantial portion of the efficacy or strength of the proposal.

Notably, the inclusion of a severability clause in the proposed charter amendment in *HRA* suggested that the proposal's supporters intended each provision to be able to stand alone. *See id.* at 541 (Kelly, J., dissenting). Nonetheless, considering the intent of voters "who signed the petition," we were unable to conclude "that the proposal which would [have been] submitted to the voters is . . . the one which the petitioners sought to have

adopted." *Id.* at 538. Given the evident importance of section 4.08 in the proposed amendment here, we are similarly unable to conclude that the residents of Bloomington who decided to support and sign the petition to place this proposed charter amendment on the ballot would do so if the proposal were deprived of its efficacy or strength by severing section 4.08.

In sum, we conclude that section 4.08 is not severable from the rest of the proposed charter amendment, and we affirm the district court.

CONCLUSION

For the forgoing reasons, we affirm the decision of the district court.

Affirmed.

D I S S E N T

THISSEN, Justice (dissenting).

In 2020, voters in the City of Bloomington approved an amendment to the city charter to require the use of ranked-choice voting for election of city officials. In 2022, appellants, Bloomington residents who wanted to change the method for electing city officials from a ranked-choice voting system to a primary and general election system, collected sufficient signatures to place a charter-amendment proposal on the ballot. The charter-amendment proposal repealed language authorizing ranked-choice voting, replaced it with language requiring a primary and general election system, and set a high bar (a vote of two-thirds of Bloomington electors) before ranked-choice voting could be reinstituted in the City. Appellants did everything required under state law to place their proposed charter language on the ballot. *See* Minn. Stat. § 410.12, subds. 1–3 (2022) (setting forth the requirements for placing a charter-amendment proposal on the ballot).

But appellants made one mistake: the final section of their proposed charter amendment—section 4.08, which required that ranked-choice voting could not be adopted in the future unless two-thirds of the voters in a regular municipal election approved the change—violated Minnesota law. Minnesota Statutes section 410.12, subdivision 4 (2022), provides that charter amendments require only 51 percent of the votes cast. *See also* Minn. Const. art. XII, § 5 (providing that charter amendments "may be proposed and adopted in any other manner provided by law"). Based on the fact that charter amendment section 4.08 is manifestly unconstitutional, inconsistent with, and in conflict with the Minnesota Constitution and Minnesota Statutes (a fact which is not in dispute here), the

Bloomington City Council refused to place any part of the proposed charter amendment on the ballot for the November 2022 election. Notably, it is undisputed in this case that the remaining three sections of the proposed charter amendment—provisions that repealed ranked-choice voting, replaced it with a primary and general election system, and made other conforming changes—are valid and that the city council would have had no authority to keep those three sections off the ballot had section 4.08 not also have been included in the petition.

We are left to decide whether the Bloomington City Council was required to place the indisputably valid sections of the charter amendment on the ballot. I conclude that the three valid sections stand on their own and that the Bloomington voters who signed the petition would have signed the petition even if proposed charter amendment section 4.08 had not been included. For those reasons, and based on my belief that we should interfere as little as possible with the *constitutional right* of residents of Minnesota municipalities to govern themselves under municipal charters of their choice, I would hold that the city council was required to place the three valid sections of the charter-amendment proposal on the ballot. Therefore, I respectfully dissent.

A.

It is impossible to understand what appellants were trying to achieve with the proposed charter amendment without first reviewing the provisions in the current charter. Chapter 4 of the current charter provides in relevant part:

§ 4.02 RESERVED.

§ 4.04 FILING OF CANDIDATES.

An eligible person who desires to be elected to any elected municipal office must file an affidavit of candidacy for a municipal general election with the city clerk according to the applicable filing schedule for that election and pay the clerk the $50 fee. Each position on the council is a separate office that must be designated by the candidate. The city clerk must prepare and print at city expense the necessary ballots or other material required for an election. The ballots or other material must not contain political party designation of any candidate.

§ 4.07 CITY CANDIDATE ELECTIONS AND VOTING METHODS AND PROCEDURES.

The voters shall elect the mayor and city council members by the Ranked-Choice Voting method. Ranked-Choice Voting means an election method by which voters rank candidates for an office in order of their preference, until the voters elect a candidate by the method established by ordinance. The council must adopt rules and regulations by ordinance that it considers necessary or desirable to regulate the conduct of elections and the method of counting votes for the mayor and council members, subject to this charter and Minnesota Statutes as applicable.

§ 4.08 [No existing provision]

The proposed charter amendment would replace those current sections as follows:

§ 4.02 PRIMARY ELECTIONS.

On the second Tuesday in August before the regular municipal election there must be a primary election to select two nominees for each elective office at the regular municipal election, unless two nominees or fewer file for each elective office.

§ 4.04 FILING OF CANDIDATES.

An eligible person who desires to be elected to any elected office must file an affidavit with the city clerk not more than 84 days nor less than 70 days before the primary election, paying to the clerk a fee of $50.00. The city clerk must prepare and print at city expense the necessary ballots or other material required for an election. The ballots or other material must not contain political party designation of any candidate.

§ 4.07 PROCEDURES AT ELECTIONS.

> The council can adopt rules and regulations by ordinance that it considers necessary or desirable to regulate the conduct of elections subject to this charter and Minnesota Statutes as applicable.

§ 4.08 RANKED-CHOICE VOTING METHOD PROHIBITED.

> Unless first approved by two-thirds of the voters in a regular municipal election, the City of Bloomington shall not use the Ranked-Choice Voting method to elect any candidate to any municipal office. Ranked-Choice Voting is defined as any election method by which voters rank candidates for an office in order of their preference.

Review of the current charter and the proposed charter amendment reveals several things. First, the amendment is intended to replace the ranked-choice voting system with a primary and general election system. It does so explicitly by eliminating the language authorizing the use of ranked-choice voting set forth in current charter section 4.07 and adding language in charter section 4.02 requiring a primary election to narrow the number of candidates to two on the general election ballot.[1] The charter-amendment proposal also

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[1] In a ranked-choice (or instant runoff) voting system, all candidates who filed for office are listed on the general election ballot. Voters can rank multiple candidates in order of preference. Candidates with the fewest number of votes are sequentially eliminated. The votes of those who supported the eliminated candidates are reallocated to the candidate with next highest preference rank expressed by the voter. The process continues until one candidate receives the necessary threshold of votes to win. *See generally Minn. Voters All. v. City of Minneapolis*, 766 N.W.2d 683, 686–87 (Minn. 2009) (describing the process of instant runoff voting in a municipal single-seat election).

In the more traditional primary and general election system as used in a nonpartisan race like a municipal election, all candidates who filed for office are listed on a primary ballot. The two candidates with the highest number of votes in the primary election go on to the general election and the other candidates are eliminated from the general election ballot. The candidate with the greater number of votes in the general election is elected. *See id.* at 685. Of course, I express no opinion on which approach is better as a matter of policy.

makes conforming changes to charter section 4.04. Second, as discussed above, section 4.08 of the charter amendment proposes to require that, in a future election seeking to restore ranked-choice voting in Bloomington, two-thirds of voters must approve the change.

B.

As the court properly observed, for more than 90 years, we have recognized that city councils have a mandatory obligation to place charter amendments before the voters. *State ex rel. Andrews v. Beach*, 191 N.W. 1012, 1012 (Minn. 1932). In the same decision, we stated that we (courts) lack "any supervisory or veto powers" over charter amendments. *Id.* at 1013. This holding makes sense because the right of the citizens of a municipality to adopt a city charter and set the rules by which their municipality is governed (rather than being forced to govern themselves under the general rules enacted by the Legislature) is enshrined in our constitution. Minn. Const. art. XII, §§ 4–5. We left open one potential narrow exception to the mandatory duty to submit proposed charter amendments to the voters: municipalities and courts may refuse to submit a charter amendment to the voters if it is "manifestly unconstitutional." *Beach*, 191 N.W. at 1013. In later cases, we expressly recognized the authority of cities to refuse to submit charter amendments to voters under the manifestly unconstitutional standard. *See Hous. & Redevelopment Auth. of Minneapolis v. City of Minneapolis*, 198 N.W.2d 531, 536 (Minn. 1972) [hereinafter *HRA*].

In *HRA*, we also addressed the question raised in this case: Under what circumstances is it proper for a city council to refuse to submit *all* proposed charter amendments included in a petition when only *some* of the proposed amendments are

manifestly unconstitutional and the remainder are unquestionably valid? We framed our answer as a question of severability and held that manifestly unconstitutional proposed charter amendments are not severable from valid proposed charter amendments when the valid charter amendments are "substantially emasculated" by the absence of the manifestly unconstitutional charter amendments. *Id.* at 538.

The "substantially emasculated" test is a paradigmatic example of a standardless standard. It is impossible to pin down what it means and it provides no guidance whatsoever. The court, recognizing this lack of substance, correctly attempts to put meat on the bones. The court reformulates the "substantially emasculated" standard as "deprived of . . . efficacy or strength." *Supra* at 12.

The court then explains that the substantially-deprived-of-efficacy-or-strength standard is *not* simply an assessment of the efficacy or strength of the valid amendments after the manifestly unconstitutional amendments are excised. Instead, a court is required to "compare[] the entirety of the original proposal with what would have remained of the proposal if the impermissible portions were severed *in light of the intent of 'those who signed the petition.'* " *Supra* at 12 (emphasis added). In other words, we ask whether the remaining portions continue to have substantial efficacy or strength from the perspective of those who signed the petition. From all this, as well as the court's analysis of severability in this case, I understand the practical test of severability articulated by the court to be: Would the people who signed the petition have signed the petition even if the manifestly unconstitutional parts of the petition had not been included? Or, as pertinent to

this case, would the residents of Bloomington who signed the petition on ranked-choice voting have signed it even if charter amendment section 4.08 had not been included?

This test is generally consistent with the gist of *HRA*. In *HRA*, the proposed charter amendment sought three distinct substantive changes: (1) authorizing a process by which a petition signed by 5,000 registered voters proposing a change to a city ordinance must be submitted to the voters for approval; (2) authorizing a process by which a petition signed by 5,000 registered voters demanding that "any action" taken by the city council within 90 days of the filing of the petition be submitted to the voters for approval or disapproval; and (3) prohibiting state or federally financed urban renewal projects from being initiated, undertaken, and/or constructed until a special election is held in the area to be redeveloped and a majority of voters in that area approve the proposed project. 198 N.W.2d at 533–34. A fourth provision in the petition stated that each of the other three provisions "shall be severable and the invalidity of any one provision shall not affect the validity of the remainder of [the provisions]." *Id.* at 534. Stated more simply, the three substantive proposals did three quite different things: the first proposal allowed for referendum on proposed changes to city ordinances; the second proposal allowed for referendum on "any action" taken by the city council; and the third proposal required the approval by the neighborhood affected by a proposed urban redevelopment project before the project could proceed.

We found the first proposal to be entirely proper as it merely implemented a right conferred by the Minnesota Constitution and Minnesota Statutes. *Id.* at 536. We determined that the second proposal was invalid because it was "without statutory

authority" and thus unconstitutional because it was not "in accordance with th[e] constitution and the laws" as required by the state constitution. *Id.* at 536–37 (citation omitted) (internal quotation marks omitted). We also held that the third proposal was invalid because it was unconstitutionally vague and impermissibly limited voting to the residents of the immediate area affected. *Id.* at 537.

Having reached these conclusions, we turned to the question of severability. We refused to sever the valid first proposed amendment from the second and third invalid proposed amendments. We reasoned:

> We cannot search the minds of those who signed the petition to ascertain their intent. In the absence of such prescience, we feel compelled to hold that the proposal which would be submitted to the voters is not the one which the petitioners sought to have adopted. We recognize [the first proposed amendment] is the least controversial of the provisions. . . . Nevertheless, as a matter of judicial policy, we think the better rule is to prevent an election directed only at a proposal which has been substantially emasculated.

Id. at 538.

The court's more robust articulation of the standard in this case—does elimination of the manifestly unconstitutional portions of the proposed charter amendment substantially deprive the amendment, when viewed as a whole, of its efficacy or strength from the perspective of the people who signed the petition?—is in line with this reasoning. And, indeed, because the proposed charter amendments in *HRA* were distinct and dealt with quite different topics, we properly refused to conclude in that case that a person who signed on to the petition that included all three amendments would have signed the petition had only the valid amendment been included. There was a good chance that some of the

signatories were motivated to sign on, for instance, in order to block urban redevelopment projects and had little interest in more generally allowing referenda on ordinance changes.

I am struck by how similar the test articulated by the court is to the test we apply when assessing whether we can sever an unconstitutional part of a statute from the rest of a statute. In the context of statutes, we apply the following test:

> Severing unconstitutional provisions is permissible unless we conclude that one of two exceptions applies. First, a statute cannot be severed if we determine that the valid provisions are so essentially and inseparably connected with, and so dependent upon, *the void provisions that the Legislature would not have enacted the valid provisions without the voided language*. Second, we are not to sever a statute if the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

In re Welfare of A.J.B., 929 N.W.2d 840, 848 (Minn. 2019) (emphasis added) (citations omitted).[2]

Acknowledging that our statutory severance test is partially grounded in Minn. Stat. § 645.20 (2022),[3] I see no reason that the same test—which strongly echoes the test adopted by the court in this case—should not apply when assessing whether portions of the charter amendment are severable. In the context of statutory severance, we ask a similar question to that adopted by the court today: whether the Legislature would have enacted the remaining part of the statute "had it known that a provision of the law was invalid."

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[2] The second part of this test also makes sense in the context of severability of parts of proposed charter amendments and should be applied in appropriate cases. There is no question in this case that sections 4.02, 4.03, and 4.07 of the proposed charter amendment are complete and are capable of being executed in the absence of section 4.08.

[3] *See, e.g.*, *Stevenson v. St. Clair*, 201 N.W. 629, 629–30 (Minn. 1925) (applying statutory severance doctrine under the common law before enactment of section 645.20).

A.J.B., 929 N.W.2d at 848 (citation omitted) (internal quotation marks omitted). Further, our familiarity with considering severability in the context of statutes—where our task is precisely, through review of textual and other clues, to search the mind of the Legislature to determine whether it would have enacted the valid part of the statute without the invalid part had it known that it was invalid—demonstrates that courts are equipped to handle that task. Moreover, such a standard is consistent with the approach adopted in other states in the context of charter amendments proposed for submission to the voters. *See McAlpine v. Univ. of Alaska*, 762 P.2d 81, 94–95 (Alaska 1998) (stating that severance of part of a proposed voter initiative was proper when "(1) standing alone, the remainder of the proposed bill can be given legal effect; (2) deleting the impermissible portion would not substantially change the spirit of the measure; and (3) it is evident from the content of the measure and the circumstances surrounding its proposal that the sponsors and subscribers would prefer the measure to stand as altered, rather than to be invalidated in its entirety").

In addition, I also believe that, as in the case of statutory severance, a court should *presume* that a valid portion of a proposed charter amendment is severable. *See A.J.B.*, 929 N.W.2d at 848 (stating that we "presume that statutes are severable unless the Legislature has specifically stated otherwise" (citation omitted) (internal quotation marks omitted)). Indeed, our framing in *HRA* that we do not sever when the charter-amendment proposal has been *substantially* emasculated says that we may sever when the "emasculation" is not substantial. *HRA*, 198 N.W.2d at 538.

More fundamentally, the separation of powers deference concerns that support a presumption of validity in the context of statutes apply just as strongly in the context of

charter-amendment proposals. A presumption that a valid portion of a proposed charter amendment is severable is consistent with the constitution and the structure of our government; indeed, it is more consistent with the constitution and structure of our government than the opposite presumption. The Minnesota Constitution invests the voters who live in a city the power to structure a city charter through adoption of, and amendment of, the rules by which their city will operate. Minn. Const. art XII, §§ 4–5 (providing that a local government unit may adopt a home-rule charter for its government if approved by a majority of the voters of the local government unit, and providing that amendments to the charter may be proposed by a petition of five percent of the voters of the local government unit and become effective when approved by the majority of the voters). We are and should be very reluctant to interfere with that power granted to the people. *See Beach*, 191 N.W at 1013 (observing in the context of charter amendments that "the people of Mankato have all the legislative power possessed by the Legislature of the state, save as such powers are expressly or impliedly withheld" and noting that the city council and the courts lack "supervisory or veto powers" over the submissions of charter amendments to a vote of the electorate (citation omitted) (internal quotation marks omitted)). In *HRA*, we held as a matter of "judicial propriety" that we could intervene before an election and stop the submission of manifestly unconstitutional charter-amendment proposals in order to allow city officials and voters to avoid the "frustration and expense of setting up election machinery and going to the polls in a process which was ultimately destined to be futile." 198 N.W.2d at 536. We also cautioned that such intervention should only be taken with "the utmost caution." *Id.* (citation omitted) (internal quotation marks omitted).

Whether that was the correct approach is, for now, water under the bridge. *Compare id.*, *with id.* at 539 (Peterson, J., dissenting), *and id.* at 539–41 (Kelly, J., dissenting). But we should not *compound* the problem of allowing city councils and courts to interfere with the power granted to the people in the constitution to govern themselves by easily allowing city councils and courts to deprive voters in a city of the right to approve perfectly valid stand-alone charter-amendment proposals.[4] That flips the constitutional structure on its head. *See McAlpine*, 762 P.2d at 94 (observing that separation of powers principles require that "courts are obligated to avoid interfering with the lawmaking process any more than is necessary"). It places *more power* in the hands of city councils and courts than it places in the people when a primary purpose of charters and charter amendments is to place the power in the hands of the people rather than the hands of city councils and courts.

Moreover, the same equitable concerns about cost and inconvenience that undergird the power we took to invalidate charter-amendment proposals pre-election apply with equal force in the opposite direction when the question is whether indisputably valid

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[4] One practical result of making it harder to sever valid charter-amendment proposals from flawed charter-amendment proposals is to empower a city council to delay a vote on, and adoption of, the valid charter-amendment proposals for another election cycle. That provides significant power to a body that is not actually vested with *any* power to declare a charter amendment unconstitutional. Relatedly, because pre-election invalidation of a proposed charter amendment is a matter of judicial propriety and equity, *HRA*, 198 N.W.2d at 536, we could in our discretion choose to allow the election on the entire charter-amendment proposal to go forward and address whether section 4.08 is contrary to law after the election. We lose nothing by waiting. Further, the proposed charter amendment at issue here would have been placed on the ballot for the November 2022 general election. It is not clear that the inconveniences upon which the court relied in *HRA* are as significant in this case. 198 N.W.2d at 535 (noting that the cost of holding a *special election* on the charter-amendment proposals would cost the city $42,420).

charter-amendment proposals may be kept off the ballot. Striking an entire charter amendment:

> forces the sponsors to choose between abandoning their efforts altogether and submitting a new [petition] and expending, for the second time the significant time and effort required to generate public enthusiasm and gather the requisite number of signatures. This would seriously impede the ability of the people to [amend city charters], particularly when, as is often the case, the sponsors of [a charter amendment] are grass roots groups with limited resources.

McAlpine, 762 P.2d at 93. For all these reasons, I conclude that it makes constitutional and prudential sense for us to presume severability.

In short, I would hold that the court should presume that valid charter amendments are severable. The court should ask the following straightforward questions to ascertain whether the presumption of severability is overcome: (1) whether the valid provisions of the proposed charter amendments are so essentially and inseparably connected with, and so dependent upon, the void provisions that the people who signed the charter amendment petition would not have submitted the valid charter-amendment proposals without the manifestly unconstitutional charter-amendment proposals (a question that is very similar, if not the same, as the question the court holds that we should ask); and (2) whether the remaining valid charter-amendment proposals, standing alone, are complete and capable of being executed if the manifestly unconstitutional provisions are excised. *Cf. A.J.B.*, 929 N.W.2d at 848 (asking similar questions in the context of statutory severance).

C.

I now turn to the question of whether the City of Bloomington should have allowed charter amendment sections 4.02, 4.03, and 4.07 to be placed on the ballot. My answer to that question is, "Yes."

First, there is no dispute that charter amendment sections 4.02, 4.03, and 4.07 are valid. Accordingly, the presumption should be that the voters should get a chance to vote on them.

Second, there is little reason to think that the Bloomington voters who signed the petition to place the proposed constitutional amendments on the ballot would have refused to sign the petition if charter amendment section 4.08 had not been included. Indeed, common sense tells me the opposite conclusion is far more reasonable. The point of all these charter amendments was to replace ranked-choice voting with a primary and general election system. The first three sections accomplish that directly and expressly. The fourth section—section 4.08—would have made it harder for the people of Bloomington to backtrack on a decision to get rid of ranked-choice voting and revert in the future to a ranked-choice voting system. It seems to me beyond question that someone who supports charter amendment section 4.08 (making it harder for city voters to reverse a decision to adopt the first three sections) also supports the adoption of the first three sections standing alone and would have signed the petition even if section 4.08 had not been included. This stands in contrast to the logrolling situation in *HRA*, where it is much easier to imagine that people who signed the petition because they supported local neighborhood veto power over

urban redevelopment projects would not have signed the petition if the ordinance referendum provision had been the only item included in the petition.[5]

Third, charter amendment sections 4.02, 4.03, and 4.07 are complete and capable of being executed in the absence of section 4.08.

Accordingly, I dissent.

[5] For these same reasons, I would conclude that sections 4.02, 4.03, and 4.07 are severable under the test articulated by the court.