No. 06-1681

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JACQUELINE GRAY; WINDHOVER, INC.

Plaintiffs-Appellants,

v.

CITY OF VALLEY PARK, MISSOURI.

Defendant-Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

BRIEF OF PLAINTIFFS-APPELLANTS

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SUMMARY OF CASE AND REQUEST FOR ORAL ARGUMENT

This case arises from Plaintiffs-Appellants' ("Plaintiffs") challenge to Municipal Ordinance No. 1721 and Municipal Ordinance No. 1722 of the City of Valley Park, Missouri, which purport(ed) to regulate the housing and employment of "illegal aliens." Plaintiffs initiated this action in state court under the Missouri Declaratory Judgment Act, in part because the United States District Court for the Eastern District of Missouri had held that an earlier challenge to predecessor immigration ordinances did not present a case or controversy sufficient to give rise to federal subject-matter jurisdiction under the Federal Declaratory Judgment Act. The earlier case was remanded to Missouri state court where it proceeded to judgment under the Missouri Declaratory Judgment Act.

The City of Valley Park removed this case to the United States District Court, and, on May 21, 2007, the district court denied the Plaintiffs' motion to remand the case to state court. On January 31, 2008, the district court entered an order denying the Plaintiffs' motion for summary judgment and granting Valley Park's motion for summary judgment, and entered judgment against the Plaintiffs, dismissing the Plaintiffs' Second Amended Complaint in its entirety. The Plaintiffs seek an order from this Court vacating the district court's judgment because it lacked subject-matter jurisdiction to hear this case.

Appellants request the opportunity for 15 minutes of oral argument.

CORPORATE DISCLOSURE STATEMENT

In accordance with FRAP 26.1 and 8th Cir. R. 26.1A, counsel of record for Plaintiff-Appellant Windhover, Inc. hereby states that it has no parent corporation, and thus there is no publicly held corporation that owns 10% or more of its stock.

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JURISDICTIONAL STATEMENT

Plaintiffs-Appellants (hereafter, "Plaintiffs") argue in this appeal that the district court lacked subject-matter jurisdiction to adjudicate this case. Plaintiffs initiated this action in state court under the Missouri Declaratory Judgment Act, Mo.R.S. § 527.020, challenging the validity of Municipal Ordinances No. 1721 and No. 1722 of the Defendant-Appellee City of Valley Park, Missouri (hereafter, "Defendant" or "Valley Park"). (R. 1-3.)[1] The Defendant removed the case to federal district court, and the district court denied the Plaintiffs' motion to remand the matter to state court. (R. 27.)

The district court entered its final judgment on January 31, 2008. (R. 131.) Plaintiffs timely filed their notice of appeal on February 29, 2008. (R. 132.) This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the district court erred in not remanding this matter to state court based on the absence of a case or controversy sufficient to give rise to subject-matter jurisdiction under Article III of the United States Constitution, where there was no imminent threat of enforcement of Municipal Ordinances No. 1721 and No. 1722 against the Plaintiffs, including the following sub-issues:

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[1] "R. _" refers to entries on the district court's docket sheet. "A __" refers to pages in the separately bound Appendix. "Add. _" refers to pages in the Addendum bound with this Brief.

a. whether the district court erred in denying Plaintiffs' motion to remand the matter to state court; and

b. whether the district court erred in not subsequently remanding the matter to state court *sua sponte* after Ordinance No. 1721 had been repealed.

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)

Russell v. Burris, 146 F.3d 563 (8th Cir. 1998)

Magee v. Exxon Corp., 135 F.3d 599 (8th Cir. 1998)

Rock Island Millwork Co. v. Hedges-Gough Lumber Co., 337 F.2d 24 (8th Cir. 1964)

U.S Const., art. III

2. In the alternative, whether the district court erred in denying Plaintiffs' motion for summary judgment based on the preclusive effect of a prior state court judgment by the Circuit Court of St. Louis County, Missouri, holding that the same penalty provision that is contained in Valley Park Municipal Ordinance No. 1722 is invalid under state law.

Liberty Mutual Ins. Co. v. FAG Bearings Corp., 335 F.3d 752 (8th Cir. 2003)

Woods v. Mehlville Chrysler-Plymouth, Inc., 198 S.W.3d 165 (Mo. Ct. App. 2006)

State ex rel. Johns v. Kays, 181 S.W.3d 565 (Mo. 2006)

James v. Paul, 49 S.W.3d 678 (Mo. 2001)

Full Faith and Credit Act, 28 U.S.C. § 1738

STATEMENT OF THE CASE

Plaintiffs filed their original Petition in this matter against Defendant City of Valley Park, Missouri, on March 14, 2007 in the Circuit Court of St. Louis County, Missouri. (R. 1-3.) The Petition sought the invalidation of Valley Park Ordinances No. 1721 and No. 1722, which purported to regulate the housing and employment, respectively, of "illegal" immigrants in Valley Park. (*Id.*) On April 12, 2007, Plaintiffs filed an Amended Petition in the Circuit Court of St. Louis County, and on April 19, 2007, Plaintiffs filed a motion for preliminary injunction in the Circuit Court. (R. 1-2, 1-3.) On May 1, 2007, the Defendant removed the case to the United States District Court for the Eastern District of Missouri. (R. 1.)

On May 4, 2007, Plaintiffs moved to remand the case to state court. (R. 11.) The district court denied that motion on May 21, 2007. (R. 27.) On August 10, 2007, the Defendant moved for summary judgment on all counts of the Amended Petition (R. 53-55) and on August 29, 2007, Plaintiffs cross-moved for summary judgment based on the preclusive effect of a prior state-court judgment against the Defendant. (R. 73-75.) On January 31, 2008, the district court entered an order denying Plaintiffs' motion for summary judgment and granting Defendant's

motion for summary judgment, and entered a judgment dismissing the Second Amended Complaint with prejudice.[2]

STATEMENT OF FACTS

Plaintiff Jacqueline Gray is the sole owner of Plaintiff Windhover, Inc. ("Windhover"). Windhover is a landlord that owns a duplex with two rental units in Valley Park, Missouri. (A83, ¶ 2; A261, ¶ 2.) From time to time, Plaintiffs hire independent contractors to perform maintenance on their rental property. (A84, ¶ 4; A261-62, ¶ 4.) Defendant City of Valley Park is a fourth-class city under Missouri law and is located in St. Louis County, Missouri.

Predecessor Immigration Ordinances and Related Litigation

On July 17, 2006, the City of Valley Park enacted Ordinance No. 1708 ("Ordinance 1708"), which contained a "landlord" and an "employer" provision, and which penalized any landlord who permitted an "illegal alien" to occupy a dwelling unit and penalized any business that employed or contracted an "illegal alien" to work. (A21-23.) A violation of Ordinance 1708 by a landlord was punishable by fine of not less than $500. (A22, Sec. Three B.) A violation by an employer was punishable by denial of the approval or renewal of a business permit for a period of not less than five years. (A21, Sec. Two.)

[2] The January 31, 2008 Memorandum and Order and January 31, 2008 Judgment are bound with this Brief in the Addendum.

On September 22, 2006, Plaintiff Jacqueline Gray and other plaintiffs filed suit in the Missouri Circuit Court, County of St. Louis, alleging that Ordinance 1708 violated state and federal law. *Reynolds v. City of Valley Park*, Case No. 06-CC-3802 in Division No. 13 (hereafter, "*Reynolds I*"). On September 26, 2006, after the state court entered a Temporary Restraining Order enjoining enforcement of Ordinance 1708, Valley Park repealed portions of Ordinance 1708 and enacted Ordinance No. 1715 ("Ordinance 1715"), which addressed the same subject matter that Ordinance 1708 addressed, including a "landlord" and an "employer" provision. (A24-31.) A violation of the "landlord" provisions of Ordinance 1715 was punishable by suspension of the occupancy permit for the relevant dwelling unit, and, for a second or subsequent violation, a fine of $250 for each separate violation. (A30-31.) A violation of the "employer" provisions of Ordinance 1715 was punishable by suspension of the employer's business license. (A27, Sec. Four B.(3).) On September 27, 2006, the state court entered an Amended Temporary Restraining Order enjoining the enforcement of Ordinance 1715. (R. 1-3, Amended Petition ¶ 16.)

On October 10, 2006, Valley Park removed the *Reynolds I* suit to the United States District Court for the Eastern District of Missouri. *Reynolds v. Valley Park,* Case No. 06-CV-01487, 2006 U.S. Dist. LEXIS 83210, at *3 (E.D. Mo. Nov. 15, 2006). The plaintiffs in that case, including Plaintiffs Gray and Windhover moved

to remand the matter back to state court. *Id.* On November 15, 2006, District Judge Webber (the same district judge who presided over the judgment being appealed in this proceeding) granted the motion to remand. *Id.* at *33. Judge Webber granted the motion to remand based on his determination that: (1) the matter was not sufficiently ripe to give rise to a case or controversy under the Federal Declaratory Judgment Act, *id.* at *27; (2) in a declaratory judgment action it is the threatened action -- which in that case was a threatened action by Valley Park to enforce a city ordinance, not a federal law -- that is determinative of federal question jurisdiction, *id.* at *22-23; and (3) the case did not necessarily involve a federal question because complete relief could be obtained on solely state law grounds. *Id.* at *29-30. Judge Webber held that the matter was not sufficiently ripe because there was "no evidence that the ordinance ha[d] been enforced, or that there was a specific threat of enforcement against any of the Plaintiffs." *Id.* at *25.

The *Reynolds I* matter thus proceeded in state court (the Circuit Court of St. Louis County), and on March 12, 2007, the Circuit Court entered an order permanently enjoining the enforcement of both Ordinance 1708 and Ordinance 1715. (A75-82.) Among other things, the Circuit Court held that the penalty to be imposed under Ordinance 1715 for the employment of unauthorized workers was invalid under Mo.R.S. § 79.470, which limits the penalties that a fourth-class city can impose for a violation of an ordinance to no more than $500 and/or 90 days

imprisonment. (A77, ¶ 12.) The penalty provision in Ordinance 1715 for violations by employers provided as follows:

> The Valley Park Code Enforcement Office shall suspend the business license of any business entity which fails to correct a violation of this section within three (3) business days after notification of the violation by the Valley Park Code Enforcement Office.

(A27, Sec. Four B.(3).) The Circuit Court held that the foregoing penalty provision conflicted with Mo.R.S. § 79.470 because the penalty for a violation of its provisions forced a business to forego a business permit (thereby imposing a penalty not authorized by Mo.R.S. § 79.470 and that would exceed $500). (A80-81, ¶¶ 8, 10, 13.)

Background of Ordinance Nos. 1721 and 1722

On February 14, 2007, prior to the entry of the March 12, 2007 judgment in *Reynolds I,* the City enacted Valley Park Ordinance No. 1721 ("Ordinance 1721") and Valley Park Ordinance No. 1722 ("Ordinance 1722"). Those Ordinances essentially separated Ordinance 1715 into two ordinances. Ordinance 1721 was a "landlord" ordinance and sought to regulate immigration by prohibiting the rental of dwellings to aliens unlawfully present in the United States. (A32-37.) Ordinance 1722 incorporated the "employer" provisions of Ordinance 1715 and sought to regulate immigration by making it "unlawful for any business entity to recruit, hire for employment, or continue to employ, or to permit, dispatch, or

instruct any person who is an unlawful worker to perform work in whole or in part within the City." (A40, Sec. Four A.)

Ordinance 1721, the "landlord" ordinance, differed from the portion of Ordinance 1715 applicable to landlords, in relevant respect, in that its enforcement was now based on a "permit model" rather than a "penalty model," that is, it was enforced by requiring a landlord to obtain an occupancy permit before renting to a new tenant, and denying an occupancy permit in the event it was determined that a prospective tenant was an "alien unlawfully present in the United States." (A32, Sec. Two (a).)

In contrast, the penalty provision contained in Ordinance 1722 did not change but is identical to the penalty provision applicable to employers in Ordinance 1715:

> The Valley Park Code Enforcement Office shall suspend the business license of any business entity which fails to correct a violation of this section within three (3) business days after notification of the violation by the Valley Park Code Enforcement Office.

(A41, Sec. Four B.(4).)

Ordinance 1722 (as amended by Ordinance No. 1724) also contained a provision stating that the ordinance would become effective only "upon the termination of any restraining orders or injunctions [then] in force in Cause No. 06CC-3802 [then] pending in St. Louis County, Missouri, in Division 13." (A45.)

On March 14, 2007, after the state court entered final judgment permanently enjoining the enforcement of Ordinances 1708 and 1715, Plaintiffs initiated this action in state court by filing a Petition for Declaratory and Injunctive Relief under the Missouri Declaratory Judgment Act, challenging Ordinances 1721 and 1722.[3]

Defendant's Removal and Plaintiffs' Motion to Remand

Valley Park removed the case on May 1, 2007 to the United States District Court for the Eastern District of Missouri. (R. 1.) The matter was assigned to the same District Judge who presided over the *Reynolds I* matter, Judge Webber. (R. 16.) Plaintiffs moved to remand the case to state court, primarily on the ground that the Defendant's notice of removal was not timely, but also on the ground that the district court lacked subject-matter jurisdiction. (A87 - 111.) Plaintiffs based the latter assertion on Judge Webber's determination in remanding the *Reynolds I* matter that the challenged ordinances had not yet been enforced, and that there was no specific threat of their enforcement against these Plaintiffs. (A105.) It was on that basis, at least in part, that Judge Webber had determined that there was no case or controversy in *Reynolds I* sufficient to give rise to subject-matter jurisdiction

[3] On April 4, 2007, Stephanie Reynolds and other plaintiffs from the *Reynolds I* case also filed a second lawsuit, *Reynolds v. City of Valley Park,* 07-CC-1420 (*Reynolds II*), which challenged only Ordinance 1721.

under the Federal Declaratory Judgment Act. *Reynolds I,* 2006 U.S. Dist. LEXIS 83210 at *23-27.[4]

On May 21, 2007, Judge Webber issued a Memorandum and Order denying the Plaintiffs' motion to remand the matter to state court. (A148-159.) Judge Webber did not find that either Ordinance 1721 or Ordinance 1722 had been enforced against any individual, or that there was any specific threat of either ordinance's enforcement against the Plaintiffs. But the district court concluded that it had subject-matter jurisdiction in this case because: (1) Ordinance 1721, rather than providing for enforcement based on citizen complaints against a landlord, as Ordinances 1708 and 1715 did, required landlords to apply for an occupancy permit prior to renting a housing unit to a new tenant, which would be issued only after Valley Park officials purported to determine the immigration status of the prospective tenant; and (2) Ordinance 1722, in addition to providing for an enforcement action to be triggered by a citizen complaint, requires business entities that apply for a business permit to sign an affidavit affirming that they will not hire any person who is an unlawful worker. (A154.) The district court concluded that those purported distinctions rendered Ordinances 1721 and 1722

[4] In light of the holding in *Reynolds I* that there was no subject-matter jurisdiction under the Federal Declaratory Judgment Act, Plaintiffs here sought to proceed in state court under the Missouri Declaratory Judgment Act, which they understood to be broader than the Federal Declaratory Judgment Act and to permit parties to seek judicial opinions that would be considered "advisory opinions" in federal court.

"immediately enforceable; [because] the ordinances require action by a landlord when faced with prospective tenants, and requires affidavits of compliance from all employers." (A159.)

With regard to the Plaintiffs here, Ordinance 1721 did not impose an immediate requirement on them to apply for an occupancy permit. Both of Plaintiffs' rental units were occupied by tenants at the time the Plaintiffs initiated their suit and at the time Plaintiffs' motion to remand was pending. (A83, ¶ 3.) There is nothing in the record to suggest that at that time or any other relevant time either tenant intended not to renew their lease, or that Plaintiffs had a specific expectation that they would be required to accept applications from prospective new tenants in the imminent future. Accordingly, there was no immediate prospect that the Plaintiffs would be required to apply for an occupancy permit.

With regard to the requirement under Ordinance 1722 that business entities applying for a business permit sign an affidavit, precisely the same requirement was imposed by Ordinance 1715, the predecessor to Ordinance 1722, on businesses applying for a permit. (A27, Sec. Four A.; A40, Sec. Four A.)

In addition, Plaintiffs are not required to have a business permit in order to rent-out housing units in Valley Park. (A261, ¶ 3.) Plaintiffs therefore do not, and did not at the time of initiating this suit or at the time their motion to remand was pending, have a business permit or intend to apply for one. (*Id.*) Accordingly,

there was no prospect that Plaintiffs would be required to sign an affidavit pursuant to Section Four A. of Ordinance 1722.

At the time the district court entered its Order denying the Plaintiffs' motion to remand, Ordinance 1722 was by its own terms not effective or enforceable until such time as the permanent injunction in *Reynolds I* might be terminated by a state appellate court. (A45.) Accordingly, there was no imminent prospect of Ordinance 1722 being enforced against the Plaintiffs at that time.

The Repeal of Ordinance 1721

On July 16, 2007, Valley Park enacted Ordinance No. 1735, which effectively repealed Ordinance 1721. (A160-163.) On August 9, 2007, the district court granted the parties' stipulation for voluntary dismissal of Plaintiffs' claims related to Ordinance 1721. (R. 58.)

At that point it appeared to the Plaintiffs that the matter was moot because Ordinance 1721 had been repealed and Ordinance 1722 was by its own terms not effective unless and until the permanent injunction in *Reynolds I* was terminated by the state appellate court. On August 9, 2007, the same day the district court granted the parties' stipulation of dismissal of claims relating to Ordinance 1721, Plaintiffs filed a Motion for a Declaration that Valley Park Ordinance No. 1722 is Inoperative. (R. 50.) Valley Park then proceeded to moot that motion by amending Ordinance 1722 to make it immediately effective.

The Amendment to Ordinance 1722

In the evening of August 9, 2007, the Valley Park Board of Aldermen convened an "emergency" board meeting to enact Valley Park Ordinance No. 1736 ("Ordinance 1736"), which purported, among other things, to restate and amend Ordinance 1722 to make it immediately effective. (A164-169.)

In response to Plaintiffs' challenge under the Missouri Sunshine Law to the Defendant's "emergency" enactment of Ordinance 1736, the Valley Park Board of Aldermen "re-enacted" Ordinance 1736 at a regularly scheduled meeting of the Board of Aldermen on August 20, 2007. (A170-177.) As amended by Ordinance 1736, Ordinance 1722 thus purported to become effective on August 20, 2007. Ordinance 1736 further amended Ordinance 1722 by providing that "the enforcement of the provisions contained within Sections Two, Three, Four, Five and Six shall be stayed and no complaints thereunder shall be accepted by the City of Valley Park until December 1, 2007." (A177.)

Accordingly, as of August 20, 2007, the Plaintiffs' relationship with Ordinance 1722 (as amended by Ordinance 1736[5]) was as follows: Plaintiffs were not required to sign the affidavit described in Section Four.A. of the Ordinance because they did not have a business permit and did not intend to apply for a

[5] Ordinance 1736 purports to completely restate Ordinance 1722. However, in an effort to avoid confusion, we will continue to refer to the "employer" ordinance that remains at issue in this matter as "Ordinance 1722."

business permit. (A261, ¶ 3.) There was no specific threat of an enforcement action against the Plaintiffs under Ordinance 1722, because no enforcement action could occur under Ordinance 1722 until after December 1, 2007. After December 1, 2007, an enforcement action under Ordinance 1722 could be taken against the Plaintiffs if: (1) Plaintiffs contracted a worker to perform maintenance on their rental property; (2) the City of Valley Park received a complaint that the Plaintiffs had contracted an unlawful worker; (3) the City of Valley Park deemed the complaint to be "valid;" and (4) the City requested "identity information" from the Plaintiffs regarding any persons alleged to be unlawful workers. (A174.)

The Parties' Motions for Summary Judgment

On August 10, 2007, the day after Valley Park first purported to enact Ordinance 1736 to activate Ordinance 1722, Valley Park filed a Motion for Summary Judgment with respect to all of the claims contained in Plaintiffs' Amended Petition, including their claims under state law. (R. 53-55.) On August 29, 2007, Plaintiffs filed a cross-motion for summary judgment that Ordinance 1722 is invalid under state law, based on the preclusive effect of the state court's ruling in *Reynolds I.* (R.73-75.) Nevertheless, in their summary judgment briefing, Plaintiffs continued to raise the issue of whether there was a justiciable case or controversy sufficient to give rise to subject-matter jurisdiction in federal court. (R. 115-1.)

Plaintiffs' Motion for a Stay Pending State Court Action

In response to Valley Park's enactment of Ordinance 1736, and thus the activation of Ordinance 1722, the plaintiffs in the *Reynolds I* matter filed a contempt motion in state court, contending that Ordinance 1722 was substantially the same as the enjoined Ordinance 1715 and therefore that the enactment of Ordinance 1736 to activate Ordinance 1722 was in violation of the state court's permanent injunction. (A178-182.) The Plaintiffs in this case then moved for a stay of this matter pending the state court's ruling on the contempt motion in *Reynolds I.* In their motion, the Plaintiffs invoked the district court's words from its decision in remanding the *Reynolds I* matter to state court:

> It would not be the place of this Court, through original or removal jurisdiction, to declare a state statute unconstitutional or in violation of federal law, before the statute had been enforced against any individual, and before the state court had had the opportunity to address the legality of the statute.

Reynolds, 2006 U.S. Dist. LEXIS 83210 at *27. On October 5, 2007, the district court denied Plaintiffs' motion for a stay, stating "[t]he Court will not further delay the proceeding of this case pending the outcome of the state court matter." (A236.)

Summary Judgment Rulings

On November 19, 2007, the district court heard oral argument on, among other things, the parties' motions for summary judgment. (R. 124.) One of the Defendant's arguments in its summary judgment motion was that Plaintiffs did not

have Article III standing to assert a claim under the Equal Protection Clause because any injury was speculative and Plaintiffs did not satisfy the requirement that any injury be "actual or imminent, not conjectural or hypothetical." (A219-223.) Plaintiffs responded in their briefing that the Defendant should not be permitted to have it both ways; that the facts upon which the Defendant based its argument that any equal protection injury under Ordinance 1722 was too speculative to confer Article III standing should lead to the same conclusion with regard to Plaintiffs' challenge to Ordinance 1722 generally. (A239-240.)

At oral argument, the Plaintiffs advised the district court of facts that would be relevant to the question of whether an Article III case or controversy existed with them in regard to Ordinance 1722: Plaintiffs are employers only in the sense that they from time to time hire independent contractors to perform maintenance on their rental property. (A238-239 at 76:14-77:20.) As such, Plaintiffs are not expressly required to do anything under Ordinance 1722 unless and until they are notified by officials of Valley Park that someone has filed a valid complaint against them alleging that they have hired an unlawful worker. (A239 at 77:16-20.)

On January 31, 2008, the district court entered its Memorandum and Order denying Plaintiffs' Motion for Summary Judgment that the state court judgment in *Reynolds I* compelled judgment for the Plaintiffs in this case, and granting

Defendant's Motion for Summary Judgment on the substantive federal and state issues. (Add. 1-57, Jan. 31, 2008 Mem. and Order.) In holding that the Plaintiffs lack either Article III standing or prudential standing to assert an equal protection claim, the district court held that the burden of compliance with the Ordinance was not sufficient to satisfy the "injury-in-fact" requirement for Article III standing. (Add. 35-37.) The district court further stated that "[i]t is undisputed that up until this point in time, no action has been taken to enforce the ordinance against any individuals or businesses." (Add. 34.)

SUMMARY OF ARGUMENT

The district court did not have subject-matter jurisdiction to decide this case. There was no justiciable case or controversy under Article III of the United States Constitution because there is no actual or imminent injury-in-fact. Ordinance 1722 (the "employer" ordinance) has not been enforced against the Plaintiffs, and there was and is no imminent threat that the Ordinance will be enforced against them. Moreover, Plaintiffs are not currently required to do anything to comply with the Ordinance, nor is there any specific requirement that Plaintiffs do anything in the imminent future to comply with the Ordinance, given that they do not intend to apply for a business permit. Indeed, because Plaintiffs are not required to have a business permit, Ordinance 1722 is not enforceable against the Plaintiffs at all

because the only sanction it prescribes for non-compliance is suspension of a business permit.

Even if there were any means of enforcing Ordinance 1722 against the Plaintiffs, any enforcement action under the Ordinance against the Plaintiffs would occur only if: (1) Plaintiffs contract a worker to perform maintenance or repairs on their rental property; (2) a resident or official of Valley Park files a complaint that the Plaintiffs are employing an unlawful worker; (3) officials of Valley Park determine that the complaint is "valid"; and (4) officials of Valley Park require the Plaintiffs to submit "identity information" regarding the person alleged to be an unlawful worker. Even the *first* link of that chain of events is not currently imminent.

Accordingly, the district court erred in denying Plaintiffs' motion to remand the matter to state court. At minimum, after Ordinance 1721 (the "landlord" ordinance) was repealed, the district court should have determined that it lacked subject-matter jurisdiction and remanded the matter to state court. Though Plaintiffs believe they have standing to seek relief under the Missouri Declaratory Judgment Act, there is no case or controversy sufficient to give rise to subject-matter jurisdiction under the Federal Declaratory Judgment Act.

In the alternative, the district should have deferred to the decision of the Missouri state court that the same penalty provision that appears both in the

enjoined Ordinance 1715, as it applies to employers, and Ordinance 1722 is invalid under state law. The district court misconstrued the question to be whether the two *ordinances* are identical rather than whether the *penalty provisions* in each Ordinance are identical. Under principles of issue-preclusion, a court should give effect to a prior judgment where: (1) the issue decided in the prior action was identical to the issue raised in the current action; (2) the prior adjudication resulted in a judgment on the merits; and (3) the party against whom issue preclusion is asserted was a party in the prior action. There is no dispute that the Missouri state court's decision that the penalty provision in Ordinance 1715 relating to employers was invalid resulted in a judgment against Valley Park on the merits, or that Valley Park was a party to that action. Nor can there be any genuine dispute that the issue to be decided in this case is identical to the issue decided in the prior state action: the validity of the employer-penalty provision in Ordinance 1715, which was incorporated verbatim into Ordinance 1722.

ARGUMENT

This matter should be remanded to the district court with instructions to vacate its January 31, 2008 Memorandum and Order and its January 31, 2008 Judgment, and to remand the matter to state court. The district court erred in denying Plaintiffs' motion to remand the matter to state court based on lack of federal subject-matter jurisdiction. At minimum, after Ordinance 1721 was

repealed, the district court should have determined that it lacked federal subject-matter jurisdiction and remanded the matter to state court. In the alternative, this matter should be remanded to the district court with instructions to enter summary judgment in favor of the Plaintiffs, under principles of issue preclusion, that the penalty provision contained in Ordinance 1722 is invalid under state law.

I. THE DISTRICT COURT'S JUDGMENT SHOULD BE VACATED BECAUSE PLAINTIFFS LACKED ARTICLE III STENDING AND THE DISTRICT COURT, THEREFORE, LACKED FEDERAL SUBJECT-MATTER JURISDICTION.

The Plaintiffs lack Article III standing to challenge Ordinance 1722 in federal court, and, therefore, the district court lacked subject-matter jurisdiction to adjudicate this case. "The question of Article III standing is a question of subject matter jurisdiction [to be resolved] as a matter of law." *Wilkinson v. U.S.*, 440 F.3d 970, 977 (8th Cir. 2006). Further, "a federal district court may not dismiss a case on the merits by hypothesizing subject-matter jurisdiction." *Crawford v. F. Hoffman-La Roche Ltd.*, 267 F.3d 760, 764 (8th Cir. 2001). The standard of review in determining whether the district court had subject-matter jurisdiction in this case is *de novo. Wilkinson,* 440 F.3d at 977.

It is the defendant's burden to establish federal subject-matter jurisdiction in response to a motion to remand. *In re Business Men's Assurance Co. of America,* 992 F.2d 181, 183 (8th Cir. 1993); *Hatridge v. Aetna Cas. & Sur. Co.*, 415 F.2d 809, 814 (8th Cir. 1969); *Perry v. Willis*, 110 F. Supp. 2d 1197, 1198 (E.D. Mo.

2000). A court must "resolve all doubts about federal jurisdiction in favor of remand." *In re Business Men's,* 992 F.2d at 183; *see also Transit Cas. Co. v. Certain Underwriters at Lloyd's of London*, 119 F.3d 619, 625 (8th Cir. 1997), *cert. denied*, 522 U.S. 1075 (1998) (same). The standard of review with regard to a motion to remand is *de novo*. *County of St. Charles, Mo. v. Missouri Family Health Council,* 107 F.3d 682, 684 (8th Cir. 1997).

Standing sufficient to satisfy Article III of the Constitution requires: (1) that the plaintiff have suffered an "injury in fact" that is concrete and particularized; (2) that the injury is fairly traceable to the challenged action of the defendant, and not the result of the independent action of a third party; and (3) that it is likely that the injury can be redressed by a favorable court decision. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992); *Eckles v. City of Corydon,* 341 F.3d 762, 767 (8th Cir. 2003); *Russell v. Burris*, 146 F.3d 563, 566 (8th Cir. 1998). The injury in fact must be actual or imminent, not conjectural or hypothetical. *Lujan,* 504 U.S. at 560; *Eckles,* 341 F.3d at 767.

The challenged provisions of a statute must be applied or applicable to plaintiffs in order to confer standing upon them. *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 233-34 (1990). Though a plaintiff may have standing to challenge a statute where there is a "credible threat of present or future prosecution," that threat must not be merely speculative. *Russell,* 146 F.3d at 566. The mere presence of an

unconstitutional statute in the absence of a credible threat of enforcement does not confer standing to sue. *Winsness v. Yocom*, 433 F.3d 727, 732 (10th Cir. 2006). The statute must be immediately enforceable upon the plaintiff for the plaintiff to have an "injury in fact" that is concrete and particularized, as is required for Article III standing. *See Mosby v. Ligon*, 418 F.3d 927 (8th Cir. 2005) (finding that where a future violation of the law that would result in disciplinary action is only speculative, an injunction preventing the enforcement of the law cannot be sought in federal court for lack of Article III standing).

Here, Ordinances 1721 and 1722 were not immediately enforceable against the Plaintiffs. Ordinance 1721 was repealed even before the Defendant filed its motion for summary judgment. (A160-63.) Ordinance 1722 is, under its own terms, not enforceable against the Plaintiffs at all, because the only sanction it prescribes for non-compliance is suspension of business permit (A41) and the Plaintiffs neither have nor need a business permit. (A261.)

Even if there were a means of enforcing Ordinance 1722 against the Plaintiffs, the threat of any enforcement action would be merely speculative. For an enforcement action to be triggered: (1) Plaintiffs would have to contract a worker to perform maintenance or repairs on their rental property; (2) a resident or official of Valley Park would have to lodge a complaint that the Plaintiffs are employing an unlawful worker; (3) officials of Valley Park would have to

determine that the complaint is "valid"; and (4) officials of Valley Park would have to require that the Plaintiffs submit "identity information" regarding the person alleged to be an unlawful worker. Because Plaintiff Windhover is a landlord owning only one rental property in Valley Park (A261), there is no reason to conclude that even the first event in that series of events is imminent.

Moreover, Ordinance 1722 does not even require the Plaintiffs to do anything in the immediate future. Ordinance 1722 requires business entities to sign an affidavit of compliance when applying for or seeking to renew a business permit, but Plaintiffs are exempt from that requirement because they are not required to obtain a business permit to do business as a landlord. (A261; A269 at 7:9-17.)

Because neither Ordinance 1721 nor Ordinance 1722 was immediately enforceable against the Plaintiffs at the time the Defendant removed the matter to federal court, the district court should have granted the Plaintiffs' motion to remand this matter to state court. At minimum, after Ordinance 1721 (the landlord ordinance) was repealed, the district court should have *sua sponte* remanded the matter to state court based on the absence of subject-matter jurisdiction.

A. The District Court Erred In Denying Plaintiffs' Motion To Remand Because The Court Lacked Subject-Matter Jurisdiction At The Time The Plaintiffs' Motion to Remand Was Denied.

Ordinances 1721 and 1722 were not immediately enforceable against the Plaintiffs at the time their motion to remand was denied. In denying Plaintiffs' motion to remand, the district court inexplicably concluded that Ordinances 1721 and 1722 were "immediately enforceable." (A159.) The district court stated:

> [Ordinance 1721] requires landlords to seek an occupancy permit prior to renting out a unit, which includes attesting to the legal residency status of the prospective tenant. [Ordinance 1722], as with the enjoined ordinance provides penalties for hiring undocumented workers, but unlike the repealed ordinances, also requires employers to sign an affidavit when seeking a business license or renewal of a business license, that they will not hire undocumented workers.

(A154.) Setting aside the inaccuracies in that characterization of the ordinances,[6] the district court did not explain how those supposed differences between the repealed ordinances and Ordinances 1721 and 1722 rendered the latter ordinances "immediately enforceable" against the Plaintiffs. As discussed below, neither ordinance required immediate action on the part of the Plaintiffs.

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[6] Ordinance 1721 did not require landlords to attest to the "legal residency status" of prospective tenants. Rather, it required landlords to submit identifying information regarding the prospective tenant, with which Valley Park officials would attempt to determine the immigration status of the prospective tenant. (A32, Sec. Two (a).) Ordinance 1722's requirement that business entities applying for a business permit sign an affidavit does not differentiate Ordinance 1722 from the repealed ordinances, but is identical to the requirement in repealed Ordinance 1715 that business entities seeking a business permit sign an affidavit. (A27, Sec. Four A.; A40, Sec. Four A.)

Ordinance 1721 did not require any action by a landlord until such time as a landlord sought to rent a dwelling unit to a new tenant. (A33, Sec. Two (c).) With regard to the Plaintiffs, they own a duplex with two rental units. (A83, ¶ 2; A261, ¶ 2.) As of the time the motion to remand was pending (May 2007), one of the tenants was a long-time resident with respect to whom there was no expectation that they would vacate the unit in the foreseeable future. (A83, ¶ 3.) The other tenant's lease was set to expire on June 30, 2007 (*id.*), but there was nothing to suggest that the tenant would not renew his lease. Accordingly, there was no specific expectation that the Plaintiffs would be required under Ordinance 1721 to apply for an occupancy permit, much less that they would be subject in the immediate future to an enforcement action under Ordinance 1721.[7]

Ordinance 1722 (the employer ordinance) was not immediately enforceable against the Plaintiffs because: (1) it only requires action when a business applies for or seeks to renew a business permit, and (2) the ordinance would become effective only in the event the permanent injunction issued by the state court were terminated.

First, Ordinance 1722 did not require all businesses, not even all licensed businesses, to immediately sign an affidavit. Rather, it required business entities to

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[7] Valley Park's counsel made the erroneous representation at oral argument that the Plaintiffs had a vacancy and thus were under an immediate obligation to seek an occupancy permit for a new tenant. (A143 at 32:3-6.) To the extent the district court relied on that representation, it was in error.

sign an affidavit when *applying* for a business permit.[8] There was no evidence before the court (nor could there have been) that the Plaintiffs would imminently, if ever, be applying for a business permit, thus subjecting themselves to the requirement of signing an affidavit. Nor was there any evidence that the Plaintiffs planned imminently to hire an independent contractor to perform work on the rental property, thus subjecting themselves to a potential enforcement action if a complaint was lodged against them alleging a violation of the ordinance. Where a plaintiff has not shown any intention of engaging in conduct that is governed by a challenged law, the plaintiff does not have standing to challenge that law. *Russell,* 146 F.3d at 566-67.[9]

Second, under its own terms, Ordinance 1722 was not in force as of May 2007, and would not become effective, if ever, until and unless at some future time the permanent injunction issued by the state court judge in *Reynolds I* were to be terminated. Accordingly, even if the Plaintiffs had an intent to engage in conduct

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[8] Again, at oral argument on the motion to remand, Valley Park's counsel suggested that the requirement of signing an affidavit upon applying for a business permit did not appear in Ordinance 1715 (A129-131 at 18:14-20:5; A135 at 24:1-25; A142-145 at 31:2-34:3) which the district court had held in *Reynolds I* was not immediately enforceable. That suggestion was incorrect.

[9] This Court has observed that where "plaintiffs allege an intention to engage in a course of conduct arguably affected with a constitutional interest which is clearly proscribed by statute, courts have found standing to challenge the statute, even absent a specific threat of enforcement." *Russell*, 146 F.3d at 566-67 (quoting *United Foods & Commercial Workers Int'l Union v. IBP, Inc.,* 857 F.2d 422, 428 (8th Cir. 1988)). Here, however, Plaintiffs did not allege an intent to apply for a business permit.

that would otherwise subject them to the requirements of Ordinance 1722, Ordinance 1722 was not in effect and there was no imminent prospect that it would become effective.

In summary, as of the time the district court decided the Plaintiffs' motion to remand, neither Ordinance 1721 nor Ordinance 1722 was being enforced against them, nor was there any threat of enforcement, much less an *imminent* threat of enforcement. Ordinance 1722 was not even in effect, and would only become effective, if ever, at such time as the permanent injunction in the *Reynolds I* matter might be terminated. The district court's order denying Plaintiffs' motion to remand should be reversed and the matter should be remanded to the district court with instructions to vacate the judgment against the Plaintiffs and to remand the matter to the Missouri state court.

B. The District Court Should Have Remanded This Matter To State Court After The Repeal Of Ordinance 1721 Based On The Absence Of Federal Subject-Matter Jurisdiction.

Even if this Court were to conclude that there was a case or controversy sufficient to satisfy Article III at the time the district court ruled on the Plaintiffs' motion to remand, by the time the Defendant's motion for summary judgment was submitted to the district court, there was an undeniable basis for the district court to determine that it lacked subject matter jurisdiction and to remand the matter to state court. Ordinance 1721 had been repealed, so any potential injury based on

Plaintiffs' status as a landlord was, and is, no longer relevant. With respect to Ordinance 1722, it had by then become clear that the Plaintiffs are not required to have a business permit under Valley Park municipal law, had no intent of applying for a business permit, and thus would not be required to sign an affidavit of compliance. It also had become clear that the prospect of any enforcement action against the Plaintiffs was purely hypothetical. Under the express terms of the Ordinance, there was no means of enforcing it against the Plaintiffs. The only expressly prescribed sanction for a violation of the Ordinance is suspension of a business license. But, as noted, Plaintiffs do not have, and are not required to have, a business license.[10] Moreover, even if there were a mechanism for enforcing the Ordinance against the Plaintiffs, the probability that all the events necessary to trigger an enforcement action would occur in the near future is remote.

"A federal court bears the burden of examining standing at all stages of litigation[.]" *Harmon v. City of Kansas City, Mo.,* 197 F.3d 321, 327 (8th Cir. 1999). Lack of subject matter jurisdiction cannot be waived by the parties, nor can

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[10] Indeed, a question had been raised as to whether the Plaintiffs even fall within the class of persons or entities to which Ordinance 1722 is applicable. Valley Park asserted in its briefing that the term "business entity" within the meaning of Ordinance 1722 was limited to "business entities that require a business license, unless expressly exempted by law." (A210.) Plaintiffs are neither required to have a business permit under Valley Park ordinances, nor are they *expressly* exempted by law. Accordingly, under the Defendant's interpretation, Ordinance 1722 is entirely inapplicable to the Plaintiffs.

it be ignored by the court at any stage of the litigation. *Sadler v. Green Tree Servicing, LLC,* 466 F.3d 623, 625 (8th Cir. 2006); *Magee v. Exxon Corp.,* 135 F.3d 599, 601 (8th Cir. 1998); *Rock Island Millwork Co. v. Hedges-Gough Lumber Co.,* 337 F.2d 24, 27 (8th Cir. 1964). The *Rock Island* court stated:

> If jurisdiction is lacking the trial court should, on its own motion, decline to proceed in the case, and if the court tries a case where jurisdiction is lacking the jurisdiction of the appellate court on review is limited to correcting the error of the trial court in entertaining the action. The appellate court must satisfy itself not only of its own jurisdiction but also of that of the district court[.]

Id. at 27 (internal citations omitted). In the case before it, the *Rock Island* court held that the district court lacked federal jurisdiction, and therefore vacated the district court judgment and remanded the matter to the district court with directions to dismiss the complaint.

In *Magee,* the Eighth Circuit Court of Appeals vacated the district court's order for lack of subject matter jurisdiction even though the plaintiffs had never moved to remand the matter to state court. *Magee,* 135 F.3d at 601. Plaintiffs had brought suit in state court, and Exxon had removed the case to federal court. The plaintiffs never moved to remand the matter, nor did they question federal jurisdiction on appeal. The Court of Appeals nevertheless determined that there was no federal subject-matter jurisdiction, vacated the district court's order entering summary judgment in favor of Exxon, and remanded the case to the district court with directions to remand it to state court. *Magee,* 135 F.3d at 602.

This Court acknowledged that the plaintiffs had never challenged subject-matter jurisdiction, but stated: "Lack of federal subject-matter jurisdiction, however, cannot be waived, and we may raise the issue ourselves even if the parties do not." *Id.* at 601.

Here, there has been no failure by the Plaintiffs to raise the issue of subject-matter jurisdiction. Plaintiffs did, unsuccessfully, move to remand the matter to state court. After Ordinance 1721 was repealed, the Plaintiffs filed their Motion for a Declaration that Valley Park Ordinance No. 1722 is Inoperative, based on the fact that Ordinance 1722 was at that time not in effect under its own terms. Had that motion been granted, Plaintiffs would have voluntarily dismissed the lawsuit on mootness grounds.

In briefing Valley Park's motion for summary judgment, Plaintiffs raised the issue of whether Ordinance 1722 (by that time re-activated by Ordinance 1736) applied to them, based on the Defendant's assertion that the term "business entity" under the Ordinance encompassed only entities that are required to have a permit or are expressly exempted by law from being required to have a business permit. Plaintiffs are neither required to have a business permit nor are they expressly exempted from such a requirement.

In response to Valley Park's argument in its summary judgment briefs that the Plaintiffs lacked Article III standing to bring their equal protection claim,

Plaintiffs argued that Valley Park should not be able to have it both ways; Plaintiffs either faced a sufficiently imminent injury to confer standing to challenge the Ordinance or they did not. Plaintiffs raised the issue of subject-matter jurisdiction again at the November 19, 2007 oral argument on the parties' summary judgment motions. (A238-239 at 76:14-77:20.)

It bears repeating, however, that subject-matter jurisdiction is not waivable. The district court had the responsibility at all times to ensure that it had subject-matter jurisdiction. It did not. The district court's judgment in this matter should be vacated, and the matter should be remanded to the district court with directions to remand the matter to state court, where the Plaintiffs may proceed under the Missouri Declaratory Judgment Act.

II. IN THE ALTERNATIVE, THE DISTRICT COURT SHOULD HAVE GIVEN FULL FAITH AND CREDIT TO THE STATE COURT'S JUDGMENT THAT THE PENALTY PROVISION THAT APPEARS IN ORDINANCE 1722 IS INVALID UNDER STATE LAW.

The district court erred in denying the Plaintiffs' motion for summary judgment that the Defendant is precluded from re-litigating the state court's ruling that the same penalty provision that is contained in Ordinance 1722 is invalid under state law. "The Full Faith and Credit Act, 28 U.S.C. § 1738, . . . requires the federal court to 'give the same preclusive effect to a state-court judgment as another court of that State would give.'" *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 293 (2005) (*quoting Parsons Steel, Inc. v. First*

Alabama Bank, 474 U.S. 518, 523 (1986)). "This deference 'promote[s] the comity between state and federal courts that has been recognized as a bulwark of the federal system.'" *Simmons v. O'Brien*, 77 F.3d 1093 (8th Cir. 1996) (internal citations omitted). "Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so." *Allen v. McCurry*, 449 U.S. 90, 96 (1980).

Under the doctrine of issue preclusion, "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the same parties, whether on the same or a different claim." *Liberty Mutual Ins. Co. v. FAG Bearings Corp.*, 335 F.3d 752, 758 (8th Cir. 2003) (quoting Restatement (Second) of Judgments § 27 (1982)). The underlying purpose of issue preclusion is to "promote judicial economy and finality of litigation." *Liberty Mutual Ins.*, 335 F.3d at 758. The standard of review in this Court is *de novo*. *Roeder v. Metropolitan Ins. & Annuity Co.*, 236 F.3d 433, 436 (8th Cir. 2001) (citing *Salve Regina Coll. v. Russell*, 499 U.S. 225, 331 (1991)).

Under Missouri law, the doctrine of issue preclusion bars a party from raising an issue in a subsequent proceeding if: (1) the issue decided in a prior

action was identical to the issue raised in the current action; (2) the prior adjudication resulted in a judgment on the merits; (3) the party against whom issue preclusion is asserted was a party in the prior action; and (4) the party against whom issue preclusion is asserted had a full and fair opportunity to litigate the issue in the prior action. *Woods v. Mehlville Chrysler-Plymouth, Inc.*, 198 S.W.3d 165, 168 (Mo. Ct. App. 2006); *State ex rel. Johns v. Kays*, 181 S.W.3d 565, 566 (Mo. 2006). Where the plaintiff and defendant in the subsequent proceeding were both actual parties in the prior proceeding, the requirement of a "full and fair opportunity to litigate" does not apply. *James v. Paul*, 49 S.W.3d 678, 684 (Mo. 2001). Rather, a full-and-fair opportunity to litigate "is a shorthand description of the analysis required to determine if non-mutual collateral estoppel should be applied[,]" *id.*, that is, where "the party asserting collateral estoppel was not a party to the prior case." *Id.* (citation omitted).

Here, there is no dispute that the prior state court ruling that the penalty provision in Ordinance 1715 is invalid resulted in a judgment on the merits. The state court ruled, in pertinent part, that the penalty imposed by Ordinance 1715 with respect to employers, revocation of a business license, exceeds what a fourth-class city is permitted to impose as a penalty for violation of an ordinance under

Mo.R.S § 79.470. (A75-82.)[11] The state court held that the invalidity of the penalty provision rendered Ordinance 1715 unenforceable and therefore void in its entirety as a matter of state law. *Id.*

There also is no dispute that the Defendant was a party to the prior litigation, or that the Plaintiffs also were parties in the prior litigation, therefore obviating any consideration of whether the Defendant had a "full and fair opportunity" to litigate the issue of the penalty provision's validity in the prior proceeding. That said, the Defendant did have a full and fair opportunity to litigate the issue. The plaintiffs in *Reynolds I* filed a Motion for Judgment on the Pleadings alleging, among other things, that the portions of Ordinance 1715 directed at businesses were repugnant to Missouri law, specifically Mo.R.S. § 79.470. (R. 94-2.) The plaintiffs' Trial Brief in the *Reynolds I* case also directly addressed the issue. (R. 94-3.) The state court held a hearing on the Motion on February 26, 2007, and another hearing on March 1, 2007. (A46-74.) After the briefing and the hearings, the *Reynolds I* court entered judgment in favor of plaintiffs on precisely this issue. (A80-81.) Thus, the Defendant had a full and fair opportunity to respond to the arguments that the penalty provision that appears in both Ordinance 1715 and Ordinance 1722 is invalid under state law.

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[11] Subsequent to entry of the district court's judgment in this case, the Defendant's appeal from the decision of the state court was dismissed as moot. *Reynolds v. City of Valley Park*, No. ED89659, 2008 WL 2246895 (Mo. App. E.D. June 03, 2008).

Accordingly, the only disputed matter is whether the issue decided in the state court case was identical to the issue raised in this case. The penalty provisions in Ordinance 1715 and Ordinance 1722 as they relate to employers are identical. Therefore, the issue of whether those penalty provisions violate Mo.R.S. § 79.470 is also identical.[12] The penalty provisions in Ordinance 1722 are exactly the same as the penalty provisions applying to employers in Ordinance 1715. The state court found that Valley Park exceeded its authority by penalizing violators of an ordinance with suspension of a business license. Both Ordinance 1715 and Ordinance 1722 suspend the business licenses of those thought to violate the ordinance. What is more, the penalty provisions use exactly the same words.

The penalty provisions of Ordinance 1715 applicable to employers are:

> (4) The Valley Park Code Enforcement Office shall suspend the business license of any business entity which fails to correct a violation of this section within three (3) business days after notification of the violation by the Valley Park Code Enforcement Office.
>
> ...
>
> (6) The suspension shall terminate one (1) business day after a legal representative of the business entity submits, at a City office designated by the City Attorney, a sworn affidavit stating that the violation has ended.
>
> ...
>
> (7) For a second or subsequent violation, the Valley Park Code Enforcement Office shall suspend the business permit of a business entity for a period of twenty (20) days. After the end of the

[12] Valley Park is a fourth-class city. Fourth-class cities can enact and enforce ordinances only if they are, *inter alia.*, "not repugnant to the constitution and laws of [Missouri]..." Mo.R.S. § 79.110.

suspension period, and upon receipt of the prescribed affidavit, the Valley Park Code Enforcement Office shall reinstate the business permit....

(A27-28.)

The penalty provisions of Ordinance 1722 are:

> (4) The Valley Park Code Enforcement Office shall suspend the business license of any business entity which fails to correct a violation of this section within three (3) business days after notification of the violation by the Valley Park Code Enforcement Office.
>
> ...
>
> (6) The suspension shall terminate one (1) business day after a legal representative of the business entity submits, at a City office designated by the City Attorney, a sworn affidavit stating that the violation has ended.
>
> ...
>
> (7) For a second or subsequent violation, the Valley Park Code Enforcement Office shall suspend the business permit of a business entity for a period of twenty (20) days. After the end of the suspension period, and upon receipt of the prescribed affidavit, the Valley Park Code Enforcement Office shall reinstate the business permit....

(A41-42.)[13] The provisions are identical and impose the identical sanction, namely, the suspension of a business license. Thus the issue decided in the prior case -- that the penalty provision providing for suspension of a business license was invalid under state law -- was identical to the issue to be decided by the district court in this case, namely, whether the identical penalty provision contained in Ordinance 1722 is invalid under state law.

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[13] Although these recitations contain ellipses that exclude verbiage not directly imposing penalties, the omitted language is also identical.

The district court determined that the issue decided by the state court was *not* identical to the issue before the district court by misconstruing what the state court decided in the earlier proceeding. (Add. 8-13.) Referencing the monetary sanction that was contained in Ordinance 1708, but was not contained in Ordinance 1715, the district court concluded that "the monetary penalty provision is not found in the statute at issue before this Court." (*Id.* at 13.) That is true, but the state court invalidated *two* distinct ordinances, No. 1708 and No. 1715. While Ordinance 1708 did include monetary penalties, Ordinance 1715 did not as to employers. The state court invalided both ordinances. It is the state court's ruling with respect to Ordinance 1715 that Plaintiffs assert is preclusive in this proceeding. There is no difference between the penalties imposed on employers by Ordinance 1715 -- found by the state court to violate state law -- and the penalties imposed by Ordinance 1722.

Understandably, the district court appears to have been confused by the long succession of similar ordinances passed by the City of Valley Park. When Plaintiffs' counsel in the state court proceeding referred to "old" and "new" ordinances, the "old" ordinance was No. 1708 and the "new" ordinance was No. 1715. The district court's belief -- that Plaintiffs' counsel in the state court proceeding was referring to a distinction between Ordinance 1722 and *both* ordinances invalidated in the state court proceeding -- is simply mistaken. The

district court did not mention Ordinance 1715 or its penalty provisions in its analysis of whether the issue decided in the state court proceeding was identical to the state law issue raised in this proceeding.

The invalidity of the penalty provision in Ordinance 1722 should necessarily result in the entire Ordinance being found invalid. The state court held that the invalidity of the penalty provision in Ordinance 1715 left "the remaining provisions ineffectual due to lack of any means of redress." (A81.) It therefore held Ordinance 1715 "void in [its] entirety." *Id.* For precisely the same reason, Ordinance 1722 should be held void in its entirety.

In the district court, the Defendant urged that Ordinance 1722 was significantly different from Ordinance 1715. But the changes embodied in Ordinance 1722 cannot save it from being rendered void by the invalidity of its penalty provision. The changes had nothing to do with the penalty provisions that the state court found violated state law. Sections Two, Three, and Four of both ordinances (the substantive and penalty provisions) are virtually identical. The Defendant eventually added the word "knowingly" to the first line of Section Four,[14] but Ordinance 1715 had the *same scienter* requirement, which appeared in the second sentence and required every employer seeking a permit to sign an affidavit affirming they do not "knowingly" utilize unauthorized workers.

[14] *See* Ordinance 1736. (A167; A173.)

Likewise, changes that made the operation of the Ordinance prospective-only and establishing a post-suspension appeal process do nothing to make the Ordinance enforceable in the absence of a penalty provision.[15] Therefore, Ordinance 1722 should be held void in its entirety.

This Court should reverse the district court's order denying Plaintiffs' motion for summary judgment and remand with directions to enter summary judgment in favor of the Plaintiffs on Count IV (Preclusion) of the Second Amended Complaint and to enter an order declaring that Ordinance 1722 is invalid, void and unenforceable. Further, this Court should reverse and vacate in its entirety the district court's judgment entered in favor of the Defendant.

In the alternative, and assuming, *arguendo*, that this Court determines that the district court had subject-matter jurisdiction and affirms its denial of Plaintiffs' motion for summary judgment, the district court should have either remanded Plaintiffs' state-law claims to the state court or dismissed them without prejudice. Instead, the district court reached the merits of Plaintiffs' claim that the ordinance

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[15] In the earlier state court proceedings, the Defendants acknowledged that the differences between Ordinance 1715 and Ordinance 1722 were not substantial. In addressing whether Ordinance 1722 was sufficiently different from Ordinance 1715 that the repeal of Ordinance 1715 rendered the matter moot, one of the Defendant's attorneys admitted that Ordinance 1722 was "virtually identical" to Ordinance 1715. (A62 at 49:8-17.) Another attorney for the Defendant acknowledged: "The employment provisions have not been changed in any of the statutes and I would not represent to the Court that there is a substantial change in the employment provisions." (A53 at 14:17-23.)

was repugnant to Mo.R.S. § 79.470 and reached, in essence, exactly the opposite conclusion that the state court had. When state and federal claims are joined and all federal claims dismissed on a motion for summary judgment, the state claims should be "dismissed without prejudice to avoid '[n]eedless decisions of state law ... as a matter of comity.'" *Birchen v. Knights of Columbus*, 116 F.3d 310, 314 (8th Cir. 1997) (quoting *Ivy v. Kimbrough*, 115 F.3d 550, 553 (8th Cir. 1997)).

Accordingly, in the alternative, the district court's judgment in favor of the Defendant should be reversed and vacated, and the matter remanded with instructions to remand Plaintiffs' state law counts to the Circuit Court for St. Louis County or to dismiss the state law claims without prejudice.

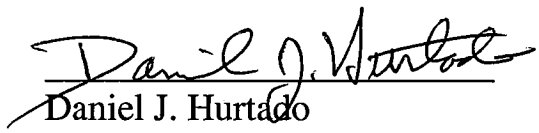
CONCLUSION

For the foregoing reasons, this Court should vacate the district court's judgment in favor of Valley Park because the district court lacked subject-matter jurisdiction, and remand the matter to the district court with directions to remand the matter to state court. In the alternative, this Court should reverse and vacate the district court's summary judgment in favor of Valley Park, and remand the matter to the district court with directions to enter summary judgment in favor of the Plaintiffs based on the preclusive effect of the state court's judgment that the penalty provision that is contained in Ordinance 1722 is invalid under state law. Further in the alternative, the district court's judgment in favor of Valley Park

should be reversed and vacated, and the matter remanded with instructions to remand Plaintiffs' state law claims to the Circuit Court for St. Louis County or to dismiss the state law claims without prejudice.

Dated: June 16, 2008

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

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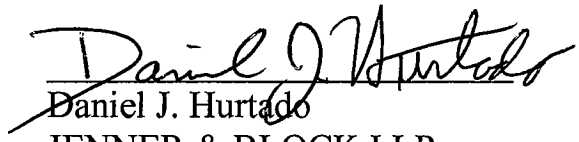

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 16th day of June 2008, a true and correct copy of the foregoing has been furnished by overnight UPS delivery on the following parties:

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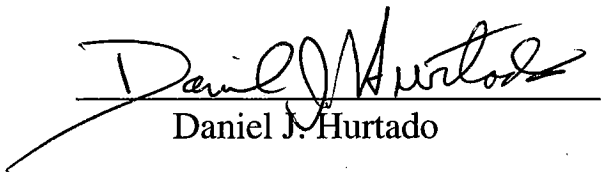

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