No. 08-1681

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JACQUELINE GRAY, and
WINDOVER,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
Judge E. Richard Webber

BRIEF OF WASHINGTON LEGAL FOUNDATION; U.S. REPRESENTATIVES BRIAN BILBRAY, STEVE KING, AND LAMAR SMITH; AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF APPELLEE, SEEKING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Washington Legal Foundation (WLF) and the Allied Educational Foundation (AEF) state that they are corporations organized under § 501(c)(3) of the Internal Revenue Code. Neither has a parent corporation and or stock owned by a publicly owned company.

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IDENTITY AND INTERESTS OF *AMICI CURIAE*

The interests of *amici curiae* are set out more fully in the accompanying motion for leave to file this brief.

In brief, the Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center based in Washington, D.C., with members and supporters in all 50 States, including many in Missouri. WLF has appeared in courts across the country to ensure that governments at all levels possess the resources to combat illegal immigration and to prevent aliens from seeking to vote illegally. *See, e.g., Lozano v. City of Hazleton*, No. 07-3531 (3d Cir., dec. pending).

U.S. Rep. Lamar Smith (Texas) is the former Chairman of the Immigration and Claims Subcommittee and currently the ranking Republican on the Judiciary Committee. U.S. Rep. Brian Bilbray (California) is Chairman of the Immigration Reform Caucus. U.S. Rep. Steve King (Iowa) is ranking member of the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law. All three believe that Congress has never sought to bar State and local governments from adopting immigration-related enforcement legislation.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964,

AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this court on a number of occasions.

Amici believe that state and local government have an important role to play in enforcing our Nation's immigration laws and support efforts by cities such as Valley Park to assist in the enforcement effort. *Amici* also believe that federal constitutional issues such as those raised by Appellants are most appropriately adjudicated within the federal court system.

STATEMENT OF THE CASE

This lawsuit challenges an ordinance adopted by the City of Valley Park, Missouri for the purpose of preventing illegal aliens from being employed within the City.[1] Section Four.A of the Ordinance makes it unlawful for "any business entity to recruit, hire for employment, or instruct any person who is an unlawful

[1] The challenged ordinance was initially adopted on February 14, 2007 as Ordinance No. 1722. After Plaintiffs raised questions about the effective date of Ordinance No. 1722, the City's Board of Aldermen adopted Ordinance No. 1736 at a special meeting held on August 9, 2007, and re-adopted Ordinance No. 1736 at a regularly scheduled meeting on August 20, 2008. Ordinance No. 1736 re-adopted the text of Ordinance No. 1722 in its entirety and clarified that the ordinance was immediately enforceable. The challenged employment-related ordinance will be referred to herein as "the Ordinance" or "Ordinance No. 1722."

worker to perform work in whole or in part within the City."[2]

Section Four.B specifies enforcement mechanisms, including an investigation by the City's Code Enforcement Office whenever it receives a valid complaint that a local business is violating the Ordinance by retaining unlawful workers. Upon request from the Code Enforcement Office, businesses are required to provide the Office with identity information regarding anyone alleged in the complaint to be an unlawful worker. Section Four.B(3). If the alleged unlawful worker is alleged to be an unauthorized/illegal alien, the Code Enforcement Office is required to verify the worker's immigration status with federal immigration authorities and to take no further enforcement action until those authorities have verified whether the worker is authorized to work in this country. Section Four.B(5). If the business ultimately is determined to have retained an unlawful worker, penalties specified in the Ordinance include temporary suspension of the offender's business license and mandatory reporting of the offender to federal immigration authorities. Section Four.B(7).

Appellant Jacqueline Gray is a Missouri resident and the sole owner of

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[2] Section Four.A also requires all business entities that apply for business licenses to submit affidavits affirming that they do not knowingly employ unlawful workers. However, that provision is not at issue in this case, because Appellants' business is such that they are exempt from the City's business license requirement.

Appellant Windhover, Inc., a corporation that owns and rents two residential housing units located in Valley Park. Accordingly, Windhover qualifies as a "business entity" subject to the requirements of Ordinance No. 1722.

Gray and Windhover filed suit against Appellee Valley Park on March 14, 2007 in the Circuit Court of St. Louis County, Missouri, seeking invalidation of both Ordinance No. 1722 and Ordinance No. 1721, an ordinance adopted in February 2007 (but later repealed) that sought to restrict leasing of residential housing to illegal immigrants.[3] The complaint alleged that adoption of Ordinance No. 1722 exceeded Valley Park's powers as a fourth-class city under Missouri law, was preempted by federal immigration law, and violated Appellants' federal constitutional rights to due process and equal protection of the laws.

On May 1, 2007, Valley Park removed the case to U.S. District Court for the Eastern District of Missouri. On May 4, 2007, Appellants filed a motion to remand the case to state court on two grounds: (1) the removal petition was untimely; and (2) there were "practical reasons" for a remand, given that parallel litigation was already pending in state court – a challenge brought by Appellants

[3] Following the July 2007 repeal of Ordinance No. 1721, the parties agreed that all issues with respect to that ordinance were moot. Accordingly, this appeal does not raise issues with respect to the repealed ordinance.

and others to immigration-related ordinances adopted by Valley Park in 2006.[4] The remand motion did not mention the word "standing" and did not assert that Appellants lacked Article III standing sufficient to maintain a federal court challenge to Ordinance Nos. 1721 and 1722. In a May 15 reply brief in support of the remand motion, Appellants stated explicitly that Gray had standing to bring suit in her own name and added, "We agree that this matter is ripe for judicial review."

On May 21, 2007, the district court denied the motion to remand. The court: (1) noted that Appellants did not contest ripeness; (2) held that the removal petition was timely filed; and (3) rejected a claim (raised for the first time in Appellants' reply brief) that the issues raised in the complaint were not ones "arising under" the U.S. Constitution.[5] Thereafter, Appellants filed their Second Amended Complaint (SAC) on August 27, 2007. The SAC alleged that Plaintiffs "have legally protected interests that are threatened or violated by" Ordinance No. 1722, SAC ¶ 11, and that the Ordinance "would require the

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[4] The 2006 Valley Park ordinances, Ordinance Nos. 1708 and 1715, also covered employment and housing for illegal aliens. The latter ordinance largely replaced Ordinance No. 1708 in September 2006 and in turn was repealed in February 2007 at the time that Ordinance Nos. 1721 and 1722 were adopted.

[5] In this appeal, Appellants do not raise either the timeliness-of-removal issue or the "arising under" issue.

Plaintiffs to investigate and determine the immigration status of any person [Windhover] hires or contracts to perform work on its properties, and, because Plaintiffs do not know how to determine a person's immigration status, would subject them to the enforcement provisions of Ordinance No. 1722." SAC ¶ 10.

On January 31, 2008, the district court denied Appellants' motion for summary judgment and granted Valley Park's motion for summary judgment. Appellants' Addendum ("Add.") 1-58. The court rejected Appellants' claim that, in light of a state court judgment enjoining enforcement of Ordinance Nos. 1708 and 1715, Valley Park was collaterally estopped from asserting the validity of Ordinance No. 1722. The court held that issue preclusion was inapplicable because the issues decided in the state-court proceedings were not "identical" to those raised by this case. Add. 8-13.

The court next rejected Appellants' claims that the Ordinance is preempted by federal law and thus invalid under the Supremacy Clause of the U.S. Constitution. Add. 14-33. The court held that the Ordinance was not expressly preempted by 8 U.S.C. § 1324a(h)(2), a statute adopted by Congress in 1986, because that statute explicitly permits State and local governments to use their business licensing laws to impose civil sanctions on those who employ illegal aliens. Add. 16-21. Nor should Congress be deemed to have impliedly

preempted such laws, because there was no evidence that Congress had intended to "occupy the field" of immigration enforcement or that Ordinance No. 1722 would stand as an obstacle to the accomplishment of any congressional objective, the court ruled. Add. 21-33.

The court held that Appellants lacked standing to assert that the Ordinance violated the Fourteenth Amendment's Equal Protection Clause by discriminating against individuals of Hispanic origin on the basis of their race/ethnicity. Add. 33-47. The court held that Appellants could not base their standing claim on injuries suffered by others. Add. 38-40. The court held that the equal protection claim also failed on its merits because there was no evidence of state action – any feared racial/ethnic discrimination would be the result of the actions of private individuals, and not of any acts taken by Valley Park. Add. 40-47. The court rejected Appellants' due process challenge on the grounds that the Ordinance provided sufficient notice regarding what was required of them, and provided sufficient "process" before imposing any sanctions on an employer. Add. 47-54.

Finally, the court rejected Appellants' state-law claim, finding that Valley Park did not exceed its powers as a fourth-class Missouri city in adopting Ordinance No. 1722. Add. 54-56. The court entered a judgment on January 31,

2008, dismissing Appellants' claims with prejudice. Add. 58.

In their appeal, Appellants have reversed course 180 degrees. They now assert that they never had Article III standing to challenge the Ordinance, or alternatively that they lost their standing following the July 2007 repeal of Ordinance No. 1721 (which addressed rental housing for illegal aliens). They further assert that the proper disposition of this case is not the dismissal of their appeal and vacation of the district court's decision, but rather an order directing the district court to remand these proceedings to state court. Appellants argue alternatively that should the Court reject their standing argument, it should reach the merits and rule in their favor on the grounds that issue preclusion bars Valley Park from asserting that adoption of Ordinance 1722 did not exceed its powers under Missouri law. Their brief is silent on other merits issues, including preemption, equal protection, and due process.

SUMMARY OF ARGUMENT

Amici curiae agree with Valley Park that Appellants' newly minted challenge to their own standing not only is without merit but also suggests a results-driven willingness to adopt whatever position serves their immediate tactical needs. Appellants' district court position was the correct one: the adoption of Ordinance No. 1722 has caused them sufficient injury-in-fact to

provide them with Article III standing to challenge the Ordinance. Because Valley Park has thoroughly briefed the issue of Appellants' standing, *amici* will not touch on it further.

However, even if the Court were to agree with Appellants that they lack standing, under no set of circumstances are they entitled to a remand to the state court, the relief they request in their brief. Rather, under those circumstances, the proper disposition would be to vacate the decision below with directions that the district court dismiss the complaint for lack of standing.

Because the complaint raised questions arising under the U.S. Constitution, Valley Park was entitled to remove the case to federal court under 28 U.S.C. § 1441(a). If a removing defendant complies with all removal procedures, a subsequent remand to state court is proper only if it appears that the district court lacks "subject matter jurisdiction" over the case, 28 U.S.C. § 1447(c); *i.e.,* only if the case does not fall within one of the categories of cases which Congress has authorized lower federal courts to hear.[6] A defendant who properly removes a case to federal court does not risk being penalized by having

[6] The principal categories of cases over which district courts are granted subject matter jurisdiction are, of course, cases raising federal questions, 28 U.S.C. § 1331, and diversity-of-citizenship cases where the amount at issue exceeds $75,000. 28 U.S.C. § 1332.

the case remanded to state court simply because he later points out jurisdictional deficiencies in the complaint – *e.g.,* the plaintiff lacks standing or has failed to comply with a jurisdictional filing deadline; or the case is either unripe, moot, or raises a nonjusticiable political question. Rather, when a district court discovers a jurisdictional deficiency of that sort, the proper response is dismissal of the complaint, not remand. That congressional preference for dismissal over remand in those circumstances is made plain by the U.S. Supreme Court's recent decision in *DaimlerChrysler Corp. v. Cuno ,* 547 U.S. 332 (2006).

Appellants argue alternatively that, should they lose on the standing question, the Court should address the merits and determine that the doctrine of issue preclusion requires the federal courts to determine that Ordinance No. 1722 was adopted in violation of Missouri law. But as Valley Park points out in its brief, the issue preclusion claim is no longer viable in light of recent events – particularly the June 2008 Missouri state court decision declaring moot the earlier state court decision on which Appellants base their issue preclusion claim. Accordingly, in anticipation of the likelihood that Appellants will seek to revive their appeals from other merits-based portions of the district court decision, *amici* briefly touch on the preemption issue.

Appellants' express preemption claim is based on 8 U.S.C. § 1324a(h)(2),

a provision included within a 1986 federal statute that sought to prevent the employment of illegal aliens within the United States. Although the provision imposed some limits on the authority of State and local governments to impose civil or criminal sanctions on employers that hire illegal aliens, it expressly exempted from those limitations sanctions imposed "through licensing and similar laws." Because Ordinance No. 1722 quite clearly qualifies as a "licensing law" – the principal sanction for violating the Ordinance is the suspension of a business license – it is not subject to express preemption under § 1324a(h)(2). Nor is the Ordinance impliedly preempted by federal immigration law; as the district court cogently explained, nothing in the Ordinance stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress with respect to immigration.

ARGUMENT

I. UNDER NO SET OF CIRCUMSTANCES ARE APPELLANTS ENTITLED TO A REMAND TO STATE COURT

As set out in detail in the Statement of the Case, not until they arrived in this Court did Appellants begin to challenge their own standing. In the district court, they quite plausibly insisted that Ordinance No. 1722 was causing them injury-in-fact.

The reason for Appellants' change of heart is readily apparent: they are unhappy with the district court's decision to uphold the Ordinance, and they have reason to suspect (based on their victory on state-law issues in prior litigation) that they might receive a more sympathetic hearing if they can get this case remanded back to state court. Of course, Appellants' less-than-pure motives are of limited relevance in resolving the standing issue, because it is well established that federal courts lack jurisdiction under Article III of the Constitution to decide a case in which the plaintiffs lack standing. But, as Valley Park's brief establishes in considerable detail, Appellants' district court position was the correct one: Appellants meet each of the prerequisites for standing.

Amici write separately in order to emphasize that, regardless how the Court resolves the standing issue, under no set of circumstances would it be appropriate to remand this case to state court. This case was properly removed from state court as one arising under the U.S. Constitution, and the propriety of removal is unaffected by whether Appellants lack standing to proceed. If the court were to determine that Appellants lack standing, the proper disposition would be to vacate the decision below with directions that the district court dismiss the complaint for lack of standing. Appellants should not be rewarded

for their efforts to deep-six their own case by providing them with a remedy – remand – to which they are not entitled.

A. The Case Was Properly Removed Under 28 U.S.C. § 1441(a)

Congress has provided that a defendant may remove "any civil action" from state court to federal court, so long as it is "one of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a). Congress has granted the district courts original jurisdiction over several categories of cases; the two principal categories are cases raising federal questions[7] and those between citizens of different States where the amount in controversy exceeds $75,000.[8]

Supreme Court case law is clear that a defendant may remove cases falling within these categories without regard to whether the federal district court actually possesses sufficient jurisdiction to render a decision on the merits.[9] The only relevant issue in determining removability is whether the subject matter of the suit fits into one of the categories designated by Congress. *See, e.g., Grable*

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[7] 28 U.S.C. § 1331.

[8] 28 U.S.C. § 1332(a)(1).

[9] In other words, a defendant may remove a case to federal court even if it believes that the plaintiff lacks standing or missed a jurisdictional filing deadline, or that the case is unripe, moot, or raises a nonjusticiable political question.

& Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 312 (2005) ("Darue was entitled to remove the quiet title action if Grable could have brought it in federal district court originally, 28 U.S.C. § 1441(a), as a civil action 'arising under the Constitution, laws, or treaties of the United States,' § 1331."); *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 163 (1997); *Caterpillar, Inc. v. Williams,* 482 U.S. 386, 392 (1987) ("Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant. Absent diversity of citizenship, federal question jurisdiction is required.").

Decisions from this Court are similarly clear that the existence of federal question jurisdiction is sufficient to permit any defendant to remove a case to federal court. *See, e.g., Williams v. Ragnone*, 147 F.3d 700, 702 (8th Cir. 1998) ("When a federal question is present in the face of the complaint, the district court has original jurisdiction and the action may be removed to federal court."); *Range Oil Supply Co. v. Chicago, Rock Island and Pac. Ry. Co.*, 248 F.2d 477, 479 (8th Cir. 1957) (28 U.S.C. § 1441(a) provides for removal to federal court of any case over which federal district courts have "original jurisdiction" under 28 U.S.C. § 1331).

Accordingly, there can be no dispute that Valley Park acted in compliance

with 28 U.S.C. § 1441(a) when it removed this case to federal court. The complaint filed by Appellants in state court sought injunctive relief based on their contentions that Valley Park, by adopting Ordinance Nos. 1721 and 1722, violated a variety of their federal constitutional rights. Congress has provided that all such complaints are removable to federal court, without regard to whatever deficiencies may exist within the complaints.

B. 28 U.S.C. § 1447(c) Does Not Require Remand, Even if the Court Determines That Appellants Lack Standing

Although they do not dispute the propriety of the initial removal petition, Appellants insist that remand is required, pursuant to 28 U.S.C. § 1447(c), now that it has become apparent (Appellants allege) that they lack Article III standing. That argument is based on a fundamental misunderstanding of the removal statutes adopted by Congress.

Nothing in the language of § 1447(c) supports Appellants' assertion that Congress intended to establish inconsistent rules covering removal and remand. It simply is not plausible that Congress would authorize removal to federal court of all cases raising federal questions, but then require the immediate remand of all such cases in which the plaintiff could not sustain jurisdiction – whether because of untimeliness, unripeness, mootness, lack of standing, etc. Indeed,

such a rule would effectively require defendants contemplating removal to abandon any assertion of such jurisdictional defenses if they desire to exercise their rights to a federal forum.

Section 1447(c) provides in relevant part, "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."[10] The relevant question, therefore, is: what did Congress intend to include within the phrase "subject matter jurisdiction?" Appellants would have the Court believe that Congress intended that phrase to encompass all issues that could be deemed jurisdictional in nature. But if so, there would have been no reason to include the words "subject matter" within the phrase. The far more plausible interpretation is that Congress intended § 1447(c) to be read in harmony with § 1441(a), such that a federal court is deemed to lack "subject matter jurisdiction" if matters at issue in the suit are determined not fit within the categories of cases made removable under § 1441(a) – diversity cases and cases raising federal questions.

Amici recognize that "jurisdiction" and "subject matter jurisdiction" are often bandied about loosely and do not necessarily have uniformly accepted

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[10] Section 1447(c) further provides that any other objections to removal, "other than lack of subject matter jurisdiction," must be raised within 30 days of removal.

definitions. As the Supreme Court has repeatedly cautioned, "'Jurisdiction' is 'a word of many, too many meanings.'" *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 127 S. Ct. 1397, 1405 (2007) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998)). But in general, Congress and the Supreme Court have defined the phrase "subject matter jurisdiction" less expansively than the word "jurisdiction"; the former generally is viewed as a subset of the latter. An element of a case is deemed "jurisdictional" any time a court lacks power to proceed with the case if that element is not established; *i.e.,* if a challenge to the existence of that element cannot be waived by the opposing party. *See, e.g., Steel Co.*, 523 U.S. at 110 ("We must conclude that respondent lacks standing to maintain this suit, and that we and the lower courts lack jurisdiction to hear it.").[11]

In contrast, the Supreme Court on several occasions has used the phrase "subject matter jurisdiction" to denote the categories of cases that Congress has determined may be heard by the lower federal courts. For example, earlier this year Justice Alito stated, "Only Congress may determine a lower federal court's subject-matter jurisdiction." *Greenlaw v. United States*, 128 S. Ct. 2559, 2572

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[11] In discussing the consequences of the plaintiffs' failure to establish standing, the Supreme Court in *Steel Co.* referred repeatedly to its lack of "jurisdiction," never to its lack of "subject matter jurisdiction."

(2008) (Alito, J., dissenting) (quoting *Kontrick v. Ryan*, 540 U.S. 443, 452 (2004)). Because Congress is not empowered to grant the federal courts jurisdiction to hear cases in which the plaintiff lacks standing (such grants are barred by Article III of the Constitution), the reference to "subject matter jurisdiction" must be understood to refer merely to the categories of cases (*e.g.*, diversity and federal-question cases) over which Congress has empowered the lower federal courts to rule. Similarly, in *Kontrick*, the Court instructed lower courts and litigants to use the term "subject-matter jurisdiction" only when "delineating the classes of cases . . . falling within a court's adjudicating authority." *Kontrick*, 540 U.S. at 454.

This Court has not had occasion to rule on the scope of the phrase "subject matter jurisdiction" as used in 28 U.S.C. § 1447(c). The issue arose recently when a litigant sought to appeal from a § 1447(c) remand order based on a finding that the plaintiff lacked Article III standing. However, the Court declined to rule on the issue because it determined that the remand order was not appealable and thus "must stand whether erroneous or not." *Roberts v. BJC Health Servs.*, 452 F.3d 737, 739 (8th Cir. 2006).[12]

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[12] Appellants cite several Eighth Circuit decisions in support of their remand argument. Appellants Br. 2, 29. None of those cases is apposite. Most do not involve remand orders. Others involve remand orders based on a finding that the case did not

Nonetheless, a recent Supreme Court decision provides a strong indication that the Supreme Court believes that remand under § 1447(c) is *not* warranted following a determination that the plaintiff in a removed case lacks Article III standing. In *DaimlerChrysler Corp v. Cuno*, 547 U.S. 332 (2006), a group of Ohio taxpayers filed suit in Ohio state court, challenging a tax credit offered by the State of Ohio and local governments to induce corporations to locate their manufacturing facilities in Ohio. After the defendants removed the case to federal court on the basis of federal-question jurisdiction, a federal appeals court ruled that the tax credit violated the Commerce Clause of the U.S. Constitution. The Supreme Court reversed and ordered dismissal on the grounds that the taxpayers lacked Article III standing to raise the Commerce Clause issue.

Although the Court provided no explanation regarding why it ordered dismissal instead of remand to state court (and thus its decision that § 1447(c) did not require remand cannot be deemed to be part of the Court's holding), its decision makes clear that the Court was aware of the dismissal-versus-remand issue. Indeed, the Court noted that in the district court the plaintiffs had sought remand to state court because they had "substantial doubts about their ability to

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involve diverse parties or did not raise a substantial federal question, not based on a finding that the plaintiff lacked Article III standing. *See, e.g., Magee v. Exxon Corp.,* 135 F.3d 599 (8th Cir. 1998).

satisfy either the constitutional or the prudential limitations on standing in the federal court." *Id.* at 339. In the absence of controlling precedent to the contrary, *Cuno* provides strong evidence that § 1447(c) should be read in parallel with § 1441(a) and thus should be understood not to require remand of a properly removed case simply because the plaintiff is later determined to lack Article III standing.

Finally, Appellants argue that remand to state court is appropriate because even though they contend that they are uninjured by Ordinance No. 1722 and thus lack Article III standing, they might be able to establish standing under Missouri state law. Appellants Br. 18, 31. *Amici* note initially that Appellants provide no case support for their rather far-fetched notion that they might have standing to challenge Ordinance No. 1722 in state court despite their adamant contention that the Ordinance has absolutely no effect on them.

More importantly, Valley Park's right to have this federal constitutional claim decided in federal court is not dependent on a showing that Appellants could not have proceeded in state court. Sections 1331 and 1441(a) are strong indications of Congress's preference that cases raising issues of federal law be adjudicated in federal court, when at least one of the parties prefers a federal forum. Indeed, Congress amended § 1331 in 1980 to eliminate the jurisdictional

amount in federal-question cases based largely on its belief that federal-question cases belong in federal court. *See* S. Rep. 96-827, 96th Cong., 2d Sess. at 1 (June 20, 1980) ("[P]rinciples of sound federalism mandate that the federal courts should bear the responsibility of deciding federal law."). If Appellants lack the prerequisites for prevailing on their federal claims in a federal forum, there is no indication that Congress intended to permit them to insist that their federal claims be heard a second time in a state court. As this Court recently explained, if litigants want to ensure that their claims remain in state court, they should limit themselves to state-law claims: "By raising claims that arise under federal law, [the plaintiff] subjected himself to the possibility that the defendants would remove the case to federal court." *Williams*, 147 F.3d at 703.

II. ORDINANCE NO. 1722 IS NOT PREEMPTED BY FEDERAL LAW

Perhaps sensing the shortcomings of their standing argument, Appellants (in their opening brief) also address one merits-based issue. They assert that the doctrine of issue preclusion requires the federal courts to determine that Ordinance No. 1722 was adopted in violation of Missouri law. But as Valley Park points out in its brief, the issue preclusion claim is no longer viable in light of recent events. In particular, the Missouri Court of Appeals ruled on June 3, 2008 that the challenge to Ordinance Nos. 1708 and 1715 had become moot

before the Circuit Court issued its March 12, 2007 ruling finding that those ordinances were adopted in violation of Missouri law – and thus that the March 12 ruling was null and void. Because Appellants' claim of issue preclusion is premised on the March 12 ruling, that claim is no longer even plausible.

It is further undermined by changes in state law: in July 2008, Missouri adopted the Missouri Illegal Immigration Act, which largely mirrors Ordinance No. 1722 at the State level. For the reasons explained in Valley Park's brief, Appellants may seek in their reply brief to revive their federal preemption claim, as a means of challenging the new Missouri statute and its implicit endorsement of Ordinance No. 1722. Accordingly, *amici* briefly touch on the preemption issue; we respectfully submit that the Ordinance is neither expressly preempted by a federal preemption provision, nor impliedly preempted on the grounds that it in some way conflicts with the enforcement of federal immigration law.

A. The Ordinance Is a Licensing Law and Thus Is Not Expressly Preempted by 8 U.S.C. § 1324a(h)(2)

Although the federal government has sought to limit immigration for many years, prior to 1986 it made little effort to restrict employment in this country by aliens who had entered the country in violation of the immigration laws. In that year, Congress adopted the Immigration Reform and Control Act

of 1986 (IRCA), P.L. 99-603, 100 Stat. 3359, 8 U.S.C. § 1324a-1324b, which among other things prohibited the employment of illegal aliens. The IRCA authorized imposition of sanctions on employers that knowingly hire illegal aliens and established an adjudication process for determining whether sanctions are warranted. The IRCA also limited to some extent the authority of State and local governments to sanction businesses for employing illegal aliens. The IRCA's preemption provision reads as follows:

> The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.

8 U.S.C. § 1324a(h)(2).

The district court correctly rejected Appellants' assertion that § 1324a(h)(2) expressly preempts the Ordinance. Under any common understanding of the word "license," the Ordinance falls within § 1324a(h)(2)'s exception for "licensing and similar laws," and thus is expressly exempted from preemption. The only significant sanction authorized by the Ordinance is the temporary suspension of a business's license for either: (1) failing to provide Code Enforcement Office with information about an employee alleged in a valid complaint to be an unlawful worker; or (2) failing to correct a violation of the

Ordinance within three days of notification by the Code Enforcement Office that the business is in violation of the Ordinance. Section Four.B(3)-(7).[13] Accordingly, when Valley Park imposes "civil . . . sanctions" on businesses that hire illegal aliens, it does so only through its licensing laws.

The Ordinance thus differs significantly from a Hazleton, Pennsylvania ordinance that was recently determined by a federal district judge to be expressly preempted by § 1324a(h)(2). The civil sanctions that Hazleton was attempting to impose were not limited to suspensions of business licenses. Hazleton also sought to create a private right of action against any employer that hired illegal aliens, which could be brought by U.S. citizens and resident aliens claiming to have been injured by an employer's violation of the Hazleton ordinance. *See Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007).

Tellingly, Appellants (in their arguments before the district court) never explained what local laws imposing civil sanctions on employers that hire illegal aliens would, in their view, qualify as permissible "licensing and similar laws." If the Ordinance does not so qualify, despite limiting sanctions on violators to temporary suspension of a business license, then it is difficult to imagine *any*

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[13] The only other potential sanction is the notification of "the appropriate federal enforcement office" of the details regarding any suspension resulting from employment of an unlawful worker. Section Four.B(7).

local law that could qualify under Appellants' understanding of § 1324a(h)(2). The result would be to read the "licensing and similar laws" exception completely out of § 1324a(h)(2).

Appellants contend that their interpretation of § 1324a(h)(2) is supported by a report issued by the House Judiciary Committee prior to adoption of the IRCA. The report included the following language regarding preemption:

> The penalties contained in this legislation are intended to specifically preempt any state or local laws providing civil fines and/or criminal sanctions on the hiring, recruitment or referral of undocumented aliens. They are not intended to preempt or prevent lawful state or local processes concerning the suspension, revocation or refusal to reissue a license to any person who has been found to have violated the sanctions provisions of this legislation.

H.R. Rep. 99-682(1), at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662. Appellants assert that the second sentence of the excerpts supports their argument that § 1324a(h)(2) permits sanctions to be imposed by local governments against a business only after the federal government has made a determination that the business violated the IRCA.

Appellants' argument was correctly rejected by the court below as well as by a district court in Arizona in a similar challenge to a local law designed to control illegal immigration. First, nothing in the text of the statute itself supports a only-after-a-federal-finding-of-violation interpretation of § 1324a(h)(2)'s

savings clause. A report from one committee of one legislative branch might on occasion properly be used to assist in clearing up an ambiguity in a statute; but in this instance, there is no ambiguity in the statute. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.,* 545 U.S. 546, 569 (2005) ("The authoritative statement is the statutory text, not the legislative history.")[14]

Second, the report does not, in fact, bear the weight Appellants seek to impose on it. The second quoted sentence merely states that local immigration statutes would not be preempted under certain circumstances. It says nothing about when local immigration statutes *would* be preempted, and the sentence cannot reasonably be read as suggesting that such statutes would be preempted in all circumstances other than the one mentioned in the sentence.

Moreover, the first sentence from the report strongly supports Valley

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[14] It is worth noting the U.S. Supreme Court's description of this particular committee report. The Court described the report as a "single Committee Report from one House of a politically divided Congress" and described reliance on the report as "a rather slender reed." *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 150 (2002). The federal district court in Arizona noted that H.R. Rep. No. 99-682(I) was one of only six reports issued in connection with what was to become the IRCA: four House committee reports, one Senate committee report, and the conference committee report. None of the other five included any discussion of the preemption provision. *Arizona Contractors Ass'n, Inc. v. Candelaria*, 534 F. Supp.2d 1036, 1047 (D. Ariz. 2008). The Senate adopted its version of the IRCA long before H.R. Rep. No. 99-682(I) was written and thus Senators would not have had a chance to read it at the time they voted. *Id.*

Park's position that there is no preemption. The sentence states that the penalties contained in the IRCA are intended to preempt "any state or local laws providing civil fines and/or criminal sanctions" on the hiring of illegal aliens. But, of course, the Ordinance does *not* impose any civil "fines" on those found to have violated the Ordinance; rather, it provides that violators are to have their business licenses suspended. Accordingly, the first sentence from the report suggests that the Ordinance is not among those laws that Congress intended to preempt.

B. The Ordinance Does Not Conflict with Federal Immigration Law and Thus Is Not Impliedly Preempted

Appellants also argued below that the Ordinance is impliedly preempted by federal immigration law, both because the Ordinance conflicts with federal law and because Congress intended to occupy the entire field of immigration control. That argument is without merit.

When, as here, Congress has not stated *expressly* that a challenged local law is preempted, it is still possible to infer that Congress harbored such an intent. In making such a determination, "courts must consider whether the federal statute's structure and purpose, or nonspecific statutory language, nonetheless reveal a clear, but implicit, preemptive intent." *Barnett Bank of*

Marion County, N.A. v. Nelson, 517 U.S. 25, 30 (1996). Findings of such "clear, but implicit, preemptive intent" have generally been grouped into two categories: (1) field preemption; and (2) conflict preemption. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995).

Field preemption is said to occur:

> [I]f a scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," if "the Act of Congress . . . touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or if the goals "sought to be obtained" and the "obligations imposed" reveal a purpose to preclude state authority. *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947).

Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 605 (1991).

Conflict preemption is said to occur:

> [T]o the extent that state and federal law actually conflict. Such a conflict arises when compliance with both federal and state regulation is a physical impossibility, . . . or when a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Id.

Appellants' field preemption argument is foreclosed by *De Canas v. Bica*, 424 U.S. 351 (1976), which explicitly held that Congress has not intended to bar all State and local laws that attempt to regulate illegal immigration. *De Canas* rejected a field preemption challenge to a California statute that made it a crime

to knowingly employ an alien who was not entitled to lawful residence in the United States. While there have been some changes in federal immigration laws since *De Canas* was decided in 1976, in general those changes have been in the direction of encouraging *more* involvement from State and local governments in assisting in enforcing the immigration laws.

Appellants' conflict preemption argument also lacks merit. In asserting the existence of a conflict, Appellants focus on E-Verify, the federal system that allows employers to access a federal database to determine whether an individual is authorized to work in this country. Appellants contend that federal law makes employer participation in E-Verify voluntary in most instances, while the Ordinance effectively forces employers to participate. As the district court pointed out, that argument is a misreading of the Ordinance. Add. 30. The Ordinance does include a "safe harbor" provision whereby employers determined to have hired an unlawful worker can avoid suspension of their business licenses by demonstrating that, prior to hiring the worker, they verified his/her work authorization using the E-Verify system. Section Four.B(5). But including a "safe harbor" provision is hardly the same as mandating use of E-Verify. Indeed, those employers who have not used E-Verify can still avoid suspension of their business licenses by correcting the violation within three

days of a notification of violation from the Code Enforcement Office. Ordinance § Four.B(4).[15]

Appellants also argue that the Ordinance's enforcement mechanism conflicts in some way with the federal government's enforcement mechanism. That argument is not well taken. It is important to note that the Ordinance does not authorize Valley Park to determine on its own that any employee is an illegal alien not authorized to work in this country. Rather, if Valley Park receives a valid complaint regarding a specific employee, the City's authority under the Ordinance to take enforcement action is dependent on a determination by the federal government itself that the employee is not authorized to work. There can be no possible conflict between the Ordinance and federal immigration law when: (1) the Ordinance relies solely on federal authorities to determine whether a challenged employee is authorized to work; and (2) sanctions against employers who retain a worker found by the federal government to be unauthorized to work is limited to suspension of a local business license, an area of concern that the IRCA makes clear is not subject to any federal preemption.

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[15] Moreover, there is little reason to conclude that the federal government, although it has not yet made participation in E-Verify mandatory among all employers, opposes efforts by local governments to mandate participation by employers in their areas. The Court need not address that issue, however, because the Ordinance so clearly does not mandate participation.

In sum, if the Court reaches the preemption issue decided by the district court – an issue not raised by Appellants in their opening brief – it should affirm the district court's determination that the Ordinance is neither expressly nor impliedly preempted by federal immigration law.

CONCLUSION

Amici curiae respectfully request that the judgment below be affirmed. If the Court determines that Appellants lack standing to maintain this action, then the case should be dismissed; *amici curiae* submit that under no set of circumstances would it be proper to order this case remanded back to the Missouri state court.

Respectfully submitted,

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Counsel wish to thank Britton Douglas and Brandon Durrett, students at Texas Tech University School of Law, for their assistance in drafting this brief.

CERTIFICATE OF COMPLIANCE

I am an attorney for *amici curiae* Washington Legal Foundation, *et al.* (WLF). Pursuant to Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing brief of WLF is in 14-point, proportionately spaced CG Times type. According to the word processing system used to prepare this brief (WordPerfect 12.0), the word count of the brief is 6,957, not including the corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance.

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I certify that the information on this form is true and correct to the best of my knowledge and belief formed after reasonable inquiry.

/s/ Richard A. Samp
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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of August, 2008, two copies of the brief of *amici curiae* WLF, *et al.,* in support of Defendant-Appellee were placed in the U.S. Mail, first-class postage prepaid, addressed as follows:

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Also this day, all counsel were provided by email an electronic copy of the brief, identical to the copy submitted by email to the court.

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