United States Court of Appeals
For the Eighth Circuit

No. 15-3216

American Family Insurance; Liberty Mutual Insurance

Plaintiffs - Appellants

v.

City of Minneapolis

Defendant - Appellee

Appeal from United States District Court
for the District of Minnesota - Minneapolis

Submitted: June 15, 2016
Filed: September 6, 2016

Before MURPHY and SHEPHERD, Circuit Judges, and PERRY[1], District Judge.

SHEPHERD, Circuit Judge.

American Family Insurance ("American Family") and Liberty Mutual Insurance ("Liberty Mutual") brought suit against the City of Minneapolis ("the City") following

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[1]The Honorable Catherine D. Perry, United States District Judge for the Eastern District of Missouri, sitting by designation.

a water-main break in Minneapolis, Minnesota. The district court[2] granted summary judgment in favor of the City on each asserted claim. American Family and Liberty Mutual (together, "Appellants") appeal the district court's decision on their Equal Protection Clause claim, federal takings claim, and state takings claim. Having jurisdiction under 28 U.S.C. § 1291, we affirm.

I.

A water main in Minneapolis broke on October 20, 2013, and flooded the basement condominiums and street-level window wells in the nearby Sexton Condominium building ("Sexton building"), which is owned by the Sexton Condominium Association, Inc. ("Sexton"). Although the City repaired the break within twelve hours, the flood caused damage to both uninsured and insured owners in the Sexton building. Two owners, Juliana Koe and Jane Grenell each owned apartments in the Sexton building and insured their apartments with Liberty Mutual. American Family insured Sexton. For damage associated with the water-main break, Liberty Mutual paid $25,900 to Koe and $20,800 to Grenell. American Family paid $1.37 million to Sexton for the damage associated with the water-main break.

Several entities and individuals submitted claims for damages associated with the water-main break to the City. The City settled thirteen claims made by natural persons who were tenants of the Sexton building and one claim made by Sexton for the portion of its damages that was not covered by its insurance. The City paid these fourteen claims without requiring evidence or admitting that the water-main break resulted from the City's negligence. Appellants, along with another insurance company not a party to the present case, submitted several claims to the City on behalf

[2]The Honorable Susan Richard Nelson, United States District Judge for the District of Minnesota.

of their insureds. The only claims denied by the City were those submitted by the insurance companies.

Appellants filed a state court action in April 2014, which the City removed to federal court in May 2014. The Amended Complaint asserted five causes of action against the City: negligence, trespass, violation of the Equal Protection Clause, federal law takings, and state law takings. After the parties stipulated to the dismissal of the negligence claim, the City filed a motion for summary judgment on each of the remaining claims. The district court granted the City's motion for summary judgment on all remaining claims, dismissing with prejudice the trespass and Equal Protection claims and dismissing without prejudice the federal and state takings claims. Specifically, the district court concluded that no evidence existed that the City displayed the requisite intent for the water main to break as would be required for a trespass claim, that the City made settlement decisions based on the nature of the loss – insured versus uninsured – and therefore did not treat similarly situated persons differently as would be required for an Equal Protection claim, and that the state takings claim was procedurally defective so the federal takings claim was not ripe for review. American Family and Liberty Mutual now appeal the district court's grant of summary judgment on the Equal Protection and takings claims.

II.

Appellants first claim the district court erred in granting the City's motion for summary judgment on their Equal Protection claim. "We review the district court's grant of summary judgment de novo, viewing the record and drawing all reasonable inferences in the light most favorable to the nonmoving party." Life Investors Ins. Co. of Am. v. Corrado, 804 F.3d 908, 912 (8th Cir. 2015) (citing Shrable v. Eaton Corp., 695 F.3d 768, 770 (8th Cir. 2012)). If no dispute of material fact exists, summary judgment is appropriate. Id. at 770-71.

As subrogating insurance carriers, Appellants argue they assume the rights of their insureds and are therefore similarly situated to the uninsured claimants whose claims the City settled and paid. Appellants cite Medica, Inc. v. Atl. Mut. Ins. Co., 566 N.W.2d 74, 76-77 (Minn. 1997) and contend that because the insurer "stands in the shoes of the insured and acquires all of the rights the insured may have against a third party," the insurance companies have assumed their insured's right to bring a claim against responsible third parties. According to Appellants, because both the insured and uninsured property owners suffered property damage as a result of the water-main break, they are similarly situated with respect to their causes of action against the City. Upon that foundation, Appellants argue that because they "stand in the shoes" of the insured owners – Sexton, Koe, and Grenell – they are similarly situated to the uninsured tenants in the Sexton building, thus the City should have settled Appellants' claims in the same manner it settled the fourteen claims from uninsured claimants. Finally, Appellants note that both American Family and Liberty Mutual are "mutual" insurance companies, meaning casualty losses as well as subrogation recoveries are passed on to policyholders in the form of premium rate changes, so the policyholders will ultimately pay the cost of the City's denial of the insurance companies' claims.

The Equal Protection Clause requires state actors to treat similarly situated persons alike, but state actors do not run afoul of the Equal Protection Clause if they treat dissimilarly situated persons dissimilarly. Ganley v. Minneapolis Park & Recreation Bd., 491 F.3d 743, 747 (8th Cir. 2007) (internal quotations and citations omitted). Appellants must show the City treated them differently than similarly situated claimants. "[B]ecause the appellants are not members of a suspect class and their claims do not involve a fundamental right, their federal equal protection claim is subject to rational basis review." Id. (citing Koscielski v. City of Minneapolis, 435 F.3d 898, 901 (8th Cir. 2006). Under rational basis review, the classification must only be rationally related to a legitimate government interest. Gallagher v. City of Clayton, 699 F.3d 1013, 1019 (8th Cir. 2012) (internal citations omitted); Friends of

the Lake View Sch. Dist. Incorp. No. 25 v. Beebe, 578 F.3d 753, 762 (8th Cir. 2009) (internal quotations and citations omitted).

Here, the City distinguished between two classifications of claimants: (1) those made by claimants, both natural persons and business entities, where insurance did not cover the loss; and (2) claims made by insurance companies based on losses suffered by their insureds. The City paid claims to the first classification of claimants but denied claims made by the second classification of claimants.

While Appellants contend that they are similarly situated to the first classification of claimants, we recognize several significant differences between the two groups. First, the Appellants are insurance companies in the business of assuming risks of loss on behalf of their insureds. Both American Family and Liberty Mutual utilize detailed calculations and analysis to compute risks of each insured individual or entity, then charge policyholders premium rates to assume those risks. Conversely, the uninsured owners in the Sexton building are not in the business of assuming the risk of loss on behalf of them. Second, while American Family and Liberty Mutual each received premium payments, intended to cover the risk of loss, from their insureds in the Sexton building, the uninsured claimants received no premium payments from others. This difference in the nature of the losses between the two groups greatly distinguishes them. The uninsured tenants suffered personal property damage and needed temporary housing, while Sexton suffered property damage to the Sexton building, which is its primary asset and revenue source. The insurance companies, on the other hand, suffered only the loss of the payments made to their insureds, for which they had already been compensated through the premium payments from those same insureds. Finally, the losses suffered by the first classification of claimants were real and immediate losses to personal property caused by the flood. The losses suffered by Appellants were monetary sums that they were legally bound to pay pursuant to insurance contracts with their insureds. Due to these significant differences between the two classifications of claimants and the losses they

incurred, we conclude the insurance companies are not similarly situated to the uninsured property owners for purposes of an Equal Protection Clause claim. Carter v. Arkansas, 392 F.3d 965, 968-69 (8th Cir. 2004) (rejecting equal protection challenge because plaintiff public school employees failed to show they were similarly situated "in all relevant respects" to state employees who received different treatment); Bogren v. Minnesota, 236 F.3d 399, 408 (8th Cir. 2000) ("State actors may, however, treat dissimilarly situated people dissimilarly without running afoul of the protections afforded by the [Equal Protection Clause]."); Klinger v. Dep't of Corr., 31 F.3d 727, 733 (8th Cir. 1994) (holding that plaintiffs, who were not similarly situated to others who received different treatment than the plaintiffs, did not suffer equal protection violations).

Even if Appellants could demonstrate that they are similarly situated to the uninsured claimants, they must also show the City's differential treatment between the classes of claimants is not rationally related to a legitimate government interest. See True v. Nebraska, 612 F.3d 676, 683-84 (8th Cir. 2010). The City claims it has a legitimate interest in protecting the health, safety, and welfare of persons within its jurisdiction. Because the welfare of its citizens was threatened by the flooding of the Sexton building, the City contends that it agreed to pay the claims for the uninsured losses in order to compensate the injured persons quickly and minimize the time that the uninsured claimants were without housing and suffering uncompensated damage. On the other hand, the City argues that the losses suffered by the insurance companies – monetary damages only – were not related to the health, safety, and welfare of its citizens. Appellants argue the City settled and paid the claims of the uninsured claimants based on litigation risks and potential sympathy by a jury toward the uninsured claimants as opposed to an insurance company. Sympathy, according to Appellants, cannot serve as the rational basis for a distinction made by a state actor because it is subjective and does not serve the City's role of protecting its citizens.

We are satisfied that the reasons proffered by the City, including protecting the welfare of its citizens by minimizing the time claimants were without housing and suffering uncompensated damages, as well as minimizing its own costs and litigation risks, demonstrate that its settlement decisions were rationally related to legitimate, government interests. See Stevenson v. Blytheville Sch. Dist. #5, 800 F.3d 955, 972-73 (8th Cir. 2015) (rejecting an equal protection claim where the defendant, a school district, had "at least a rational basis" for its differential treatment of dissimilarly situated students); Kansas City Taxi Cab Drivers Ass'n, LLC v. City of Kansas City, Mo., 742 F.3d 807, 810-11 (8th Cir. 2013) (denying an equal protection claim where the plaintiffs failed to meet "the burden of negating every conceivable basis which might support the classification at issue") (internal quotations omitted); Weems v. Little Rock Police Dep't, 453 F.3d 1010, 1015 (8th Cir. 2006) (recognizing a legitimate government interest in protecting the health, safety, and welfare of its citizens). Accordingly, we conclude the district court did not err in granting summary judgment in favor of the City on Appellants' Equal Protection Clause claim.

III.

We now turn to Appellants' claims regarding both state and federal law takings. We apply the same de novo review to the district court's decision to grant summary judgment on the takings claims as we applied to the Equal Protection Clause claim. See Life Investors Ins. Co. of Am., 804 F.3d at 912 (internal citation omitted). Private property may not be taken without just compensation under either federal law or the applicable state law. U.S. Const. amend. V; Minn. Const. art. I § 13. Under both Supreme Court and Eighth Circuit precedent, a property owner's federal takings claim is not ripe until the property owner has exhausted any available state procedure for seeking just compensation and been denied. Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 195 (1985) (holding that "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause [of the United States

Constitution] until it has used the procedure and been denied just compensation"); Dahlen v. Shelter House, 598 F.3d 1007, 1010 (8th Cir. 2010) (holding that a federal claim is not ripe where the property owner failed to seek just compensation through any available state procedure); Snaza v. City of Saint Paul, 548 F.3d 1178, 1181-82 (8th Cir. 2008) (same).

In Minnesota, a property owner has a cause of action for inverse condemnation when the government has taken property without formally invoking its eminent-domain powers. Nolan & Nolan v. City of Eagan, 673 N.W.2d 487, 492 (Minn. Ct. App. 2003) (internal citation omitted). Under Minnesota law, a property owner must bring an action for inverse condemnation in state court through a mandamus action. Id. The parties agree that Appellants did not bring such an inverse condemnation claim through an action for mandamus in Minnesota state court. Appellants allege that pursuit of a state court mandamus action would have been futile in this case, so they should be permitted to bring takings claims in this federal action. Appellants reason that because they used the City's formal claims process to submit their claims and the City subsequently denied their claims, a mandamus action in state court would be futile. However, a Minnesota state court hearing such a mandamus action has the ability not only to determine whether a taking occurred under the state constitution, but also to determine the monetary value of the harm inflicted by the taking. City of Minneapolis v. Meldahl, 607 N.W.2d 168, 172 (Minn. Ct. App. 2000). Such a remedy can hardly be considered futile.

Appellants further contend that they can pursue a state takings claim directly under the Minnesota Constitution because private property was *damaged* by the water-main break. In support, Appellants cite only Wegner v. Milwaukee Mut. Ins. Co., 479 N.W.2d 38 (Minn. 1991) for the proposition that the Minnesota Supreme Court has permitted a takings action to proceed without requiring the property owner to file a mandamus action. We first note that Appellants fail to call to our attention, and we are independently unable to find, any later case citing Wegner for this

proposition. The Wegner court neither discussed the procedure by which the takings claims were asserted therein, nor addressed the issue of mandamus. We also recognize that Wegner specifically notes that a "significant restriction on recovery under [Article I, section 13 of the Minnesota Constitution] is the requirement that the taking or damaging must be for a public use." 479 N.W.2d at 40. Unlike the damage in Wegner, here the damage caused by the water-main break was clearly not for a public use. See Wegner, 479 N.W.2d at 40-41 (recognizing that police officers damaged the appellant's house during the course of apprehending a suspected felon and concluding that such a purpose was a public use). Thus, we conclude that Appellants' reliance on Wegner is misplaced, and a state takings claim, under these facts, may not be pursued directly under the Minnesota Constitution in federal court. Because Appellants failed to pursue the available mandamus action in state court, both the state and federal takings claims are not ripe for review by the federal district court.

IV.

For the foregoing reasons, we affirm the district court's grant of summary judgment in favor of the City.

MURPHY, Circuit Judge, concurring.

I respectfully disagree with the majority's conclusion that appellants' state takings claim was not "ripe for review" by the federal district court due to their failure to first pursue it through a mandamus action in state court. I do not see why Minnesota's mandamus requirement for inverse condemnation claims would preclude such claims from proceeding in the federal courts when there is a basis for federal jurisdiction. See, e.g., SK Finance SA v. La Plata Cty., Bd. of Cty. Comm'rs, 126 F.3d 1272, 1276 (10th Cir. 1997) (rejecting argument that state inverse condemnation claim must be brought through Colorado's "special judicial procedure for

condemnation claims" where federal diversity jurisdiction existed); see also White v. Cty. of Newberry, S.C., 985 F.2d 168, 172 (4th Cir. 1993) (exercising supplemental jurisdiction over state takings claim brought in conjunction with federal CERCLA claim).

Other circuit courts have recognized that federal courts may exercise jurisdiction over state law inverse condemnation claims even when a related federal takings claim is unripe. See SK Finance, 126 F.3d at 1276; Vulcan Materials Co. v. City of Tehuacana, 238 F.3d 382, 385–86 (5th Cir. 2001) (diversity jurisdiction). I see no reason to adopt a different rule in this case; the Minnesota cases on which the majority relies address state court procedural requirements and have no bearing on the issue of federal jurisdiction. See Nolan & Nolan v. City of Eagan, 673 N.W.2d 487 (Minn. Ct. App. 2003); City of Minneapolis v. Meldahl, 607 N.W.2d 168 (Minn. Ct. App. 2000). Accordingly, while I agree with the majority that appellants' federal takings claim is not ripe for review, I do not agree that this conclusion extends to their related state claim.

I nonetheless concur in the judgment because appellants have not advanced any arguments showing federal jurisdiction over their inverse condemnation claim. Contrary to appellants' assertions, the district court need not have exercised supplemental jurisdiction over their state takings claim since the related federal claims were properly dismissed. See, e.g., Hervey v. Cty. of Koochiching, 527 F.3d 711, 726–27 (8th Cir. 2008) (when federal claims correctly dismissed, pendent state claims should be dismissed without prejudice). Further, while appellants' complaint alleges that the parties are diverse, they argue on appeal only that the district court should have exercised supplemental jurisdiction over their state takings claim (they did not raise diversity jurisdiction as in SK Finance and Vulcan Materials). I would therefore not reverse the district court on this basis. See, e.g., U.S. ex rel. Ramseyer v. Century Healthcare Corp., 90 F.3d 1514, 1518 n.2 (10th Cir. 1996) ("Our duty to consider unargued obstacles to subject matter jurisdiction does not affect our discretion to

decline to consider waived arguments that might have supported such jurisdiction.") (emphasis in original). I therefore concur in the court's judgment affirming the district court's grant of summary judgment to the City.

United States Court of Appeals
For The Eighth Circuit
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September 06, 2016

Mr. Steven L. Theesfeld
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RE: 15-3216 American Family Insurance, et al v. City of Minneapolis

Dear Counsel:

The court has issued an opinion in this case. Judgment has been entered in accordance with the opinion. The opinion will be released to the public at 10:00 a.m. today. Please hold the opinion in confidence until that time.

Please review Federal Rules of Appellate Procedure and the Eighth Circuit Rules on post-submission procedure to ensure that any contemplated filing is timely and in compliance with the rules. Note particularly that petitions for rehearing and petitions for rehearing en banc must be received in the clerk's office within 14 days of the date of the entry of judgment. Counsel-filed petitions must be filed electronically in CM/ECF. Paper copies are not required. No grace period for mailing is allowed, and the date of the postmark is irrelevant for pro-se-filed petitions. Any petition for rehearing or petition for rehearing en banc which is not received within the 14 day period for filing permitted by FRAP 40 may be denied as untimely.

Michael E. Gans
Clerk of Court

CMD

Enclosure(s)

cc: Mr. Lawrence M. Baill
Mr. Brian Scott Carter
Mr. Gregory P. Sautter
Mr. Richard Sletten

District Court/Agency Case Number(s): 0:14-cv-01428-SRN

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September 06, 2016

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RE: 15-3216 American Family Insurance, et al v. City of Minneapolis

Dear Sirs:

A published opinion was filed today in the above case.

Counsel who presented argument on behalf of the appellant was Steven L. Theesfeld, of Minneapolis, MN. The following attorney(s) appeared on the appellant brief; Lawrence M. Baill, of Minneapolis, MN.

Counsel who presented argument on behalf of the appellee was Brian Scott Carter, of Minneapolis, MN. The following attorney(s) appeared on the appellee brief; Gregory P. Sautter, of Minneapolis, MN.

The judge who heard the case in the district court was Honorable Susan Richard Nelson. The judgment of the district court was entered on September 10, 2015.

If you have any questions concerning this case, please call this office.

Michael E. Gans
Clerk of Court

CMD

Enclosure(s)

cc: MO Lawyers Weekly

District Court/Agency Case Number(s): 0:14-cv-01428-SRN

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 15-3216

American Family Insurance
and Liberty Mutual Insurance,

Appellants,

vs.

City of Minneapolis,

Appellee.

Appeal from the United States District Court for the District of Minnesota
Case No. 14-01428 SRN-SER
Judgment Date: 10 September 2015

APPELLANT'S BRIEF

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SUMMARY OF CASE AND REQUEST FOR ORAL ARGUMENT

This appeal involves a Minneapolis water main break and subsequent flood damage to the nearby Sexton Condominium building. The City of Minneapolis reimbursed all uninsured property owners for water damage, but rejected all claims for reimbursement from insured property owners and their subrogated insurance carriers because they were considered less sympathetic.

Oral argument of at least 20 minutes is warranted because this case raises two constitutional issues in a context which has yet to be addressed by this Court:

First, this Court is asked to consider whether Minneapolis' decision to discriminate between the uninsured and insured claimants violates the U.S. Constitution's Equal Protection Clause.

Second, this Court is asked to determine whether a state mandamus action is a necessary prerequisite for asserting takings claims in this context under both federal and state constitutions.

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JURISDICTIONAL STATEMENT

This appeal seeks review of the district court's September 8, 2015 summary judgment dismissal of American Family Insurance ("American Family") and Liberty Mutual Insurance's ("Liberty") action against the City of Minneapolis ("Minneapolis"). American Family and Liberty filed a Notice of Appeal from said final judgment on October 5, 2015. The City of Minneapolis did not cross-appeal.

The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1332 (d). Jurisdiction is founded upon diversity of citizenship pursuant to 28 U.S.C. § 1332 and federal question pursuant to 28 U.S.C. § 1331.

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Did Minneapolis violate the Equal Protection Clause by treating uninsured and insured claimants differently on the basis that a city worker found uninsured claimants to be more sympathetic?

   Apposite Cases:

   RAM Mut. Ins. Co. v. Rohde, 820 N.W.2d 1, 5-6 (Minn. 2012)

2. Can American Family and Liberty pursue a direct cause of action for takings claims or must they first bring a futile mandamus action in state court?

   Apposite Cases:

   N. States Power Co. v. Minn. Metro. Council, 684 N.W.2d 485, 491 (Minn.2004)

   Uckun v. Minnesota State Bd. of Med. Practice, 733 N.W.2d 778, 786 (Minn. Ct. App. 2007)

   Wegner v. Milwaukee Mut. Ins. Co., 479 N.W.2d 38, 40 (Minn. 1991.)

STATEMENT OF THE CASE

I. BACKGROUND FACTS

A. The Subject Water Main.

On October 20, 2013, a Minneapolis water main broke and flooded the nearby Sexton Condominium building, causing damage to uninsured and insured owners. (Add. 002; Order p. 2.) [1]

Minneapolis knew this water main was beyond its operable lifespan but chose to wait until it broke to make repairs. Minneapolis' Superintendent of Water Distribution testified:

> 15 Q After the loss, which is the subject of this lawsuit,
> 16 it's my understanding that the subject water main was
> 17 relined, structurally relined. Do you know that?
> 18 A Yes.
> ****
> 25 Q Who made that decision?
> 26 A I did in conjunction with my staff.
> 27 Q Why, what was the reason for making that decision? I
> 28 assume you had scarce financial resources, so you have to
> 29 decide whether this main is going to get lined or another
> 30 main is going to get lined. So why was that line chosen
> at that period of time?
> 2 A As part of a combination of factors, being the history of
> 3 leaks in the area, the potential for development with the
> 4 stadium, and the consequence of failure, we changed - our
> 5 program last year focused on the downtown area and the

[1] Citations to the Addendum are as follows: "Add.____." Citations to the Joint Appendix are as follows: "Apx. __."

6 area in the vicinity of the stadium.
****
18 Q And is there any reason why these factors wouldn't have
19 called for the subject main to have been lined before the
20 loss occurred, which is the subject of this lawsuit? In
21 other words, why was it done afterwards, not before?
22 A The Vikings stadium.
****
13 Q Can you see the water main on this map that is the
14 subject of this lawsuit?
****
19 You can see it was produced where Portland Avenue is in
20 the area of the subject leak?
21 A Yes
****
26 Q Fair to say that there's quite a few red stars
27 running along on the pipe that runs down Portland Avenue?
28 A There are a number, but bear in mind this is a history of
29 40 years.
30 Q But it'd be hard pressed to find a lot of water mains
1 that have more stars than that one does, and each star
2 represents a leak, correct?
3 A Correct.
****
21 Q Do you know what the useful life of a 12 inch cast iron
22 water main is?
23 A A hundred years.
24 Q Do you know how old the oldest water main - cast iron
25 water main service in the Twin Cities is - or for
26 Minneapolis?
27 A In Minneapolis, I believe I've seen water mains that date
28 to the early 1870s.
29 Q Now the subject water main was installed in 1879. Would
30 that make it one of the older water mains in the city?
1 A Yes.
****
16 Q Showing you what's been marked as Exhibit 6, do you
17 recognize what this document is?
18 A Yes.

19 Q At least it starts with some water leak records?
20 A Yes.
****
28 Q This is for a leak in December of 1984?
29 A Correct.
****
18 Q Okay. So this is in reasonably close proximity to the
19 subject water leak of October, 2013, right? It's on the
20 same block.
21 A It's on the same block, but that doesn't necessarily mean
22 anything.
23 Q Looks pretty close, to me, from what we've got drawn
24 here, but, all right. Then it says, "Type of Break, 3.5
25 foot window blowout." What does that mean?
26 A That means that if - the main was corroded at that
27 location and there was a hole that blew the side of the
28 pipe out.
****
6 Q As blowout goes, is that a big blowout?
7 A Yes.
8 Q Now, at Probable Cause of Break, it says,
9 "Electrolysis-Pipe was pitted even on the good part of
10 the main."
****
26 Q And it's an early indication of failure, of a failure
27 mode?
28 A Correct.

(Apx. 138-141, Asgian Depo p. 11-12, 14-15, 19, 25-27.)

B. Minneapolis Admits it Discriminated Between Uninsured and Insured Property Owners.

American Family insured the Sexton Condominium Association and Liberty insured condo owners Juliana Koe and Jane Grenell. (Add. 002, Order p. 2.) Both carriers paid for property damage caused by the water main break and, along with

several uninsured condo owners, filed claims with Minneapolis for reimbursement. Minneapolis paid all the uninsured claimants without requiring any proof of negligence, but refused to pay any of the similarly situated insured claims. (Add. 002, Order p. 2.) Minneapolis' Director of Risk Management and Claims testified:

> 19 Q With respect to all of the uninsured claims that were
> 20 submitted in connection with the October 20, 2013 loss,
> 21 they were all paid except for the one claim where no
> 22 damage documentation was provided?
> 23 A Mr. Spencer.
> 24 Q Is that correct?
> 25 A And that is correct.
> ****
> 2 Q So, again, what insured claims were paid with respect to
> 3 the Sexton loss?
> 4 A None that I know of, except for maybe the Sexton
> 5 Condominium Association.
> 6 Q But that was for their deductible loss, their uninsured
> 7 claim, isn't that correct?
> 8 A $10,000 for the deductible. But then $11,000 for the
> 9 emergency housing and Hyatt and Best Western.
> 10 Q But again, those were all for uninsured losses and not
> 11 insured losses, correct?
> 12 A To my understanding.

(Apx. 159-160, Deposition Testimony of Ellen Velasco-Thompson p. 44, 47.]

Minneapolis has stipulated:

> 4) With regard to claims deriving from, or related to, the water main break described in the Amended Complaint in this matter, Defendant City of Minneapolis treated the insured losses asserted by the subrogating insurance carriers differently than it treated the uninsured losses…

(Apx. 073, Minneapolis Carter Decl. Ex. 4-Stipulation.)

Minneapolis admits the reason it treated the claims of the uninsured property owners differently from the insured property owners was because it felt the uninsured were the more sympathetic:

> The decision to settle claims here is rationally related to reducing litigation risks by settling with the more sympathetic claimants while denying the claims of less sympathetic claimants.

[Apx. 023, Memorandum in Support of Motion for Summary Judgment, p. 19.]

Minneapolis' Director of Risk Management and Claims used the following anecdote to explain this "sympathy" factor:

> 19 A In one of these specific cases, I had an elderly person
> 20 who was hearing-impaired and speech-impaired, and she was
> 21 taking care of a 96 year old mom who also had dementia.
> 22 It was in the middle of winter, and they had five feet of
> 23 water in their basement apartment. I needed to make a
> 24 decision that night what to do with them.
> 25 I am not asserting immunity, I am taking
> 26 care of temporary housing needs that are imminent and
> 27 vital to the safety of the residents.

(Apx. 078, Deposition Testimony of Ellen Velasco-Thompson p.72.)

American Family and Liberty are both mutual insurance companies, meaning they are owned by their policyholders. (Apx.168, Gribble Affd. ¶2, Apx. 268, Litke Affd. ¶3,4.) Because subrogation recoveries are factored into premium costs, the policy holders are directly affected when their carriers' claims for reimbursement are denied. (Id.)

C. Minneapolis Administratively Denied, with Finality, American Family and Liberty's Claims for Reimbursement.

On January 8, 2014, after receiving repeated claims for reimbursement from American Family and Liberty, Minneapolis finally agreed to consider such claims if submitted through the city's formal claims process. (Apx. 179, 1/8/14 Email from Minneapolis.) On January 9, 2014, Minneapolis acknowledged receipt of the same into its formal claims process. (Apx. 182, 1/9/14 Email Response from Minneapolis.) On March 27, 2014, Minneapolis denied said claim. (Apx.184, 3/27/14 Email Response from Minneapolis.)

A state court action was begun, and thereafter Minneapolis removed the action to federal court. (Add.004, Order p. 4.) Thereafter, American Family and Liberty asked Minneapolis to agree to an amendment of the complaint so they could assert constitutional takings claims, but Minneapolis rejected this request, calling it "frivolous." (Apx. 195, 7/17/14 Email from Minneapolis.)

II. PROCEDURAL BACKGROUND

On April 17, 2014, American Family and Liberty brought a state court action against Minneapolis. That action was removed by Minneapolis to federal court. (Add.004, Order p. 4.)

At the time Minneapolis filed its Motion for Summary Judgment, American Family and Liberty had dismissed their negligence claims and were only pursing

claims for: Count II-Trespass, Count III-Violation of the Equal Protection Clause, and Counts IV and V-Federal and State Takings Claims. (Add.004, Order p. 4.)

On September 8, 2015, the Honorable U.S. District Judge Susan Richard Nelson granted Minneapolis' motion for summary judgment and dismissed with prejudice Count II–Trespass and Count III-Equal Protection. (Add. 014, Order p. 14.) Judge Nelson further dismissed without prejudice Count IV–Federal Takings and Count V–State Takings. (Id.)

American Family and Liberty appeal dismissal of Counts: III, IV and V of the Amended Complaint. They do not appeal dismissal of Count II–Trespass.

SUMMARY OF ARGUMENT

I. Minneapolis Violated the Equal Protection Clause because its Differential Treatment of Uninsured and Insured Losses was not Rationally Related to a Legitimate Government Interest.

The district court held that Minneapolis had not violated the Equal Protection Clause because American Family and Liberty failed to show that they were similarly situated to the uninsured claimants. (Add.010, Order p. 10.) Further, the District Court reasoned that even if American Family and Liberty Mutual had met such showing, Minneapolis' claim that its actions were taken for the safety and welfare of its citizens met the rationally related legitimate government standard. (Id.) There are two flaws in the district court's reasoning.

First, American Family and Liberty are similarly situated to the uninsured claimants, because under Minnesota subrogation law, American Family and Liberty can only assert the rights of their insureds. Moreover, as mutual companies, American Family and Liberty are owned by such insureds.

In addition, both the uninsured and insured condo owners were similarly situated with respect to losses incurred as a result of the burst water main, in that each suffered damages as a result of the pipe break, the only difference being that the paid claimants were self insured and the denied claimants had insurance.

Second, paying claims based on a city worker's subjective determination of which claimants are sympathetic is not a rational means to serve Minneapolis' claimed legitimate interest in the welfare of all citizens.

II. American Family and Liberty do not have to Further Exhaust Administrative Remedies to Pursue their Takings Claims.

The district court held that American Family and Liberty's takings claims were not properly before the court because they had failed to first pursue the remedy of a state court mandamus action. (Add.012, Order p. 12.) This is incorrect for two reasons.

First, a party is not required to exhaust remedies where doing so would be futile. Here, a mandamus action forcing Minneapolis to act on American Family

and Liberty's claims for reimbursement would be futile since Minneapolis has already denied such claims.

Second, the Minnesota Supreme Court recognized a right of direct action under the Minnesota Constitution's takings clause in *Wegner v. Milwaukee Mut. Ins. Co*., 479 N.W.2d 38, 40 (Minn. 1991.)

ARGUMENT

I. Standard of Review

This Court reviews the district court's grant of summary judgment *de novo*. *Randolph v. Rogers*, 170 F.3d 850, 856 (8th Cir. 1999) Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. (Id.)

II. Minneapolis Violated the Equal Protection Clause Because its Differential Treatment of Uninsured and Insured Losses was not Rationally Related to a Legitimate Government Interest.

The United States Constitution provides:

> [N]o State shall… deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

The district court held that Minneapolis did not violate this clause by reimbursing only uninsured claimants because American Family and Liberty were not similarly situated claimants. (Add.010, Order p. 10.) Further, even if American

Family and Liberty were similarly situated, the district court reasoned that Minneapolis' decision to compensate only the uninsured claimants was rationally related to the legitimate purpose of protecting the safety and welfare of Minneapolis citizens. (Add.010, Order p. 10.) Both conclusions are erroneous.

A. Under Minnesota Subrogation Law, American Family and Liberty Assume the Rights of their Insureds and thus are Similarly Situated to the Uninsured Claimants.

The district court concludes that because American Family and Liberty are insurance companies they cannot be similarly situated to the human uninsured property owner claimants. (Add.010, Order p. 10.)

Yet, under Minnesota law, a subrogating insurance carrier has no rights of its own, but can only assert the rights of its insured:

> Subrogation involves the substitution of an insurer (subrogee) to the rights of the insured (subrogor). …The insurer stands in the shoes of the insured and acquires all of the rights the insured may have against a third party.

Medica, Inc. v. Atl. Mut. Ins. Co., 566 N.W.2d 74, 76-77 (Minn. 1997)(citations omitted). More specifically, the subrogating carrier assumes the insured's right to bring a claim against any responsible third parties:

> Upon payment of a loss, the insurer is subrogated in a corresponding amount to the insured's right of action against any third party whose wrongful conduct caused the loss.

RAM Mut. Ins. Co. v. Rohde, 820 N.W.2d 1, 5-6 (Minn. 2012)(citations omitted). Minnesota strongly supports this right of subrogation because it has a public policy of holding tortfeasors accountable for their actions. (Id. p. 13.)

It is undisputed that both uninsured and insured Sexton Condominium property owners sustained property damage as a result of Minneapolis' broken water main. As such, both the uninsured and insured property owners are "similarly situated" with respect to their rights of action against Minneapolis. Accordingly, pursuant to Minnesota subrogation law, American Family and Liberty "step into their insured's shoes" and assume their similarly situated status.

Furthermore, American Family and Liberty are "mutual" insurance companies which are entirely made up of individual, human insureds. They too, just like the uninsured claimants, experience harm when insured claims are not reimbursed because this causes their premiums to increase. (Apx. 168, Gribble Affd. ¶2, Apx. 268, Litke Affd. ¶3,4.)

For these reasons, American Family and Liberty, through their insureds, are similarly situated to the uninsured claimants, and it was error for the district court to conclude otherwise.

B. The Decision by a Minneapolis City Worker to Discriminate Between Claimants on the Basis of Sympathy was Neither Rational nor Related to the Proffered Objective of Promoting Citizen Welfare.

The district court concludes that Minneapolis "made its payment decisions based on concerns of the safety and welfare of its citizens" and that this passes scrutiny under the rational basis standard. (Add.012, Order p. 10)

The problem with this conclusion is that it ignores the fact that Minneapolis admits it determined which claimants' welfare was worth protecting and which claims might cost more to litigate by judging whether a claimant showed sufficient sympathy. [Apx. 14-15, 23, Memorandum in Support of Motion for Summary Judgment] However, sympathy is not a rational basis on which to discriminate.

Whether someone is sympathetic is in the "eye of the beholder." It is a subjective determination, and thus cannot be rational because it is prone to the whims and prejudices of the person making the determination. For example, a city worker might consider a claimant "sympathetic," because that person was elderly and uninsured. However, what if that elderly person was uninsured because she was extremely wealthy and thus chose to self-insure? Would such person still qualify as a sympathetic claimant?

Minneapolis explains that its sympathy determination was done to control costs. [Apx. 14-15, 23, Memorandum in Support of Motion for Summary

Judgment] Minneapolis cites no authority, study or evidence to support this claim, nor does it state what investigation was done or what factors it reviewed to make such determination.

More problematic, if Minneapolis is allowed to discriminate on the basis of whether a jury might like or dislike a claimant, this creates a slippery slope which could justify discrimination based on: race, gender, sexual orientation or any other group. Thus, subjectively judging a claimant's sympathy to a jury is not a rational basis for discrimination.

Moreover, even if sympathy were a rational basis for discrimination, it does not relate to or foster the alleged objective of protecting citizens. An insured property owner is also a citizen, and thus equally entitled to protection, whether "sympathetic" or not. Minneapolis does not meet its objective of protecting its citizens by ignoring the majority of those citizens who are deemed "unsympathetic" by Minneapolis simply because they purchased insurance.

Indeed, nowhere else in the law do tortfeasors escape liability simply because the person they harmed had insurance. To do so would penalize the responsible party who purchases insurance to protect themselves from risks that in many cases are beyond their control by saddling them with inflated premiums because the unforeseen loss falls on their insurance carrier instead of the at-fault party. If buying insurance is going to be a basis for granting tortfeasors immunity,

this effectively would destroy the right of subrogation in Minnesota, which would, in turn, raise premiums and throw the insurance market into turmoil.

For these reasons, Minneapolis' discrimination between insured and uninsured claimants based on their sympathy was neither rational nor related to the objective of promoting citizen welfare, and the district court's conclusion to the contrary was erroneous.

III. American Family and Liberty do not have to Further Exhaust Administrative Remedies to Pursue their Takings Claims.

The district court concluded that American Family and Liberty's takings claims could not proceed because they had to first pursue a state court judicial remedy in the form of a mandamus action. (Add.012, Order p. 12.) This is incorrect because such state court mandamus action would be futile, and a direct takings action is allowed under the Minnesota Constitution.

A. American Family and Liberty do not have to Pursue a State Court Mandamus Action because to do so would be Futile.

The district court claims that American Family and Liberty must exhaust their administrative remedies by pursuing a mandamus action in state court. (Add.013, Order p. 13). It notes that when a governmental entity takes property without formally using its eminent-domain power, the property owner has a cause of action for inverse condemnation. (citing *Alevizos v. Metro. Airports Comm'n of Minneapolis and St. Paul*, 298 Minn. 471, 477, 216 N.W.2d 651, 657 (1974)(Id.)

The district court then stresses that "actions for inverse condemnation must be brought to the court through an action in mandamus." (citing, *Nolan and Nolan v. City of Eagan*, 673 N.W.2d 487, 492 (Minn.App.2003), review denied (Minn. Mar. 16, 2004)) (Id.)

However, "[m]andamus is an extraordinary remedy that is available only to compel a duty clearly required by law." *N. States Power Co. v. Minn. Metro. Council*, 684 N.W.2d 485, 491 (Minn.2004) (citation omitted). "In order to obtain mandamus relief, a petitioner must show among other things that the defendant: failed to perform an official duty clearly imposed by law." (Id.)

As set forth above, the City of Minneapolis performed its official duty and considered American Family and Liberty's claims for reimbursement and denied the same with finality. The district court concludes that nevertheless a state court must decide if the City of Minneapolis has failed to perform such duty. (Add.013, Order p. 13)

While generally a party must exhaust its administrative remedies before seeking judicial relief, it may ask a court for redress if such action would be futile. *Amcon Corp. v. City of Eagan*, 348 N.W.2d 66, 71 (Minn.1984). The Minnesota Court of Appeals has explained:

> The doctrine of exhaustion of administrative remedies is not applicable where it would be futile to seek such redress. In such cases,

> a party may ask the courts for redress. The issue of exhaustion and futility generally present legal issues…

Uckun v. Minnesota State Bd. of Med. Practice, 733 N.W.2d 778, 786 (Minn. Ct. App. 2007)(citations omitted).

The U.S. Supreme Court, in considering an argument under a similar §1983 action, held that judicially imposed exhaustion of remedies is not warranted unless it is consistent with congressional intent. *Patsy v. Bd. of Regents*, 457 U.S. 496, 513 (1982). (Id. 513). No such intent is found related to the Takings Clause of the Fifth Amendment to the US Constitution.

Moreover, Justice White has warned that exhaustion or "the ripeness requirement" for a takings claim in Federal Court is satisfied upon a showing of futility. *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 353 n.8. *See also* Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 CAL. W. L. REV. 1, 48 (1992)

If Minneapolis had refused to allow American Family or Liberty to use its formal claims process to make claims, or if Minneapolis had refused to consider such claims, then a mandamus action would make sense. The record is undisputed that Minneapolis did its official duty. It allowed the claims to be made, and it denied the same. To force American Family and Liberty to pursue a further

mandamus action in state court to see if a state court would agree that Minneapolis performed such official duties would be futile.

The District Court has discretion to accept supplemental jurisdiction as set forth in 28 U.S.C. § 1367(a), which provides:

> [I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

(Id.)

For the reasons above, the district court erred when it decided that American Family and Liberty had to pursue a state mandamus action. Because such further exhaustion of remedies would be futile, this matter should be remanded to the district court for a determination of whether Minneapolis' decision to deny American Family and Liberty's reimbursement claims qualifies as a taking under either or both the United States and Minnesota Constitutions.

B. American Family and Liberty can Pursue State Takings Claim Directly under the Minnesota Constitution.

It is important to note that the Minnesota Constitution's Takings Clause not only provides protection from permanent takings, but also from *damage* to property:

> Sec. 13. Private property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured.

Minn. Const. art. I, § 13. It requires that the property owner be compensated and "made whole" for such loss. *See Adams v. Chicago, B. & N. R. Co.*, 39 Minn. 286, 290, 39 N.W. 629, 631 (1888) (stating that "just compensation" must be construed liberally to give effect to its purpose). This liberal construction to give effect to such purpose is found in the Minnesota Supreme Court's decision in *Wegner v. Milwaukee Mut. Ins. Co.*, 479 N.W.2d 38, 40 (Minn. 1991.)

In *Wegner*, the Minnesota Supreme Court considered whether a homeowner could pursue a takings claim under the Minnesota Constitution against the City of Minneapolis for damage done by police officers who fired tear gas into the plaintiff's home in an attempt to capture criminal fugitives. The Minnesota Supreme Court held that in such context a direct takings claim under the Minnesota Constitution could proceed because it did not involve the use of eminent domain powers by the City of Minneapolis:

> The City argues that Wegner and Milwaukee Mutual are confusing the concept of police power and eminent domain. We agree that this is not an eminent domain action and should not be analyzed as such. This action is based on the plain meaning of the language of Minn. Const. art I, § 13, which requires compensation when property is damaged for a public use. Consequently, the issue in this case is not the reasonableness of the use of chemical munitions to extricate the barricaded suspect but rather whether the exercise of the city's admittedly legitimate police power resulted in a "taking".

The district court in this case concluded that *Wegner* was not authoritative because it did not address mandamus or state the procedure by which a direct takings claims could be asserted. (Add.014, Order p. 14) However, this ignores the quoted section above and the fact that the Minnesota Supreme Court allowed the takings action to proceed without the need to file a mandamus action.

Here, Minneapolis refused to reimburse American Family and Liberty for damage done by its burst water main. This is not a traditional eminent domain case where a city has permanently taken private property for public use. American Family and Liberty's insureds still possess their property. Rather, the current case is exactly like that of *Wegner*, where the City of Minneapolis damaged personal property, and thus, under the Minnesota Constitution, must pay for such damage.

Accordingly, the district court erred when it refused to consider American Family's and Liberty's takings claim for damage under the Minnesota Constitution, and this matter should be remanded to the district court for further proceedings.

CONCLUSION

For the reasons stated above, the district court's grant of summary judgment to Minneapolis should be reversed and the case remanded for proceedings consistent with this Court's opinion.

Dated: November 16, 2015

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CERTIFICATE OF COMPLIANCE

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,658 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: November 16, 2015

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No. 15-3216

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

American Family Insurance and Liberty Mutual Insurance,

Appellants,

vs.

City of Minneapolis,

Appellee.

On Appeal from the United States District Court for the District of Minnesota, Civ. No. 14-1428 (SRN/SER)

APPELLEE'S BRIEF

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SUMMARY OF THE CASE

This appeal involves Equal Protection and takings claims arising from a water main break and attendant flooding of the Sexton Condominium building in October 2013. Appellants claim that Appellee City of Minneapolis violated the Equal Protection clause of the Fourteenth Amendment when it paid claims arising out of the water main break for *uninsured losses* but refused to pay claims for *insured losses*. Appellants' Equal Protection claim fails because Appellants are insurers and are not similarly situated to the natural and corporate persons who suffered uninsured losses and because Appellee's claims decisions pass rational basis review. Appellant's federal and state takings claims fail on procedural grounds. The federal takings claim is not ripe because Appellants did not exhaust state remedies and the state claim fails because it was not brought as a mandamus action. Accordingly, the district court did not err by dismissing Appellants' Equal Protection and takings claims.

Given the clear and well-settled law compelling the dismissal of Appellants' claims, fifteen minutes of oral argument per side would be more than sufficient if the Court concludes that oral argument is necessary.

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STATEMENT OF ISSUES

1. Appellants' Equal Protection claim requires (1) that they are similarly situated to persons whose claims Minneapolis denied; and (2) that the decision to deny their claims was not rationally related to a legitimate government purpose. Appellants are insurers asserting subrogation claims for insured losses associated with flooding from a water main rupture, while the claims Appellee City of Minneapolis ("Minneapolis") paid were those made by persons who suffered uninsured flooding losses. Did the district court err in dismissing Appellants' Equal Protection claim?

Apposite Authority:

Ganley v. Minneapolis Park & Recreation Bd., 491 F.3d 743, (8th Cir. 2007).

2. Appellants' federal takings claim is only ripe once they have exhausted state proceedings. A final determination on Appellants' state takings claim has not been made by a state court. Did the district court err in holding that Appellants' federal takings claim was not ripe.

Apposite Authority:

Snaza v. City of Saint Paul, 548 F.3d 1178 (8th Cir. 2008).

3. Appellants' state takings claim is only actionable via a mandamus action. Appellants did not bring their takings claims as a mandamus action. Did the district court err by dismissing their state takings claim without prejudice?

Apposite Authority:

City of Minneapolis v. Meldahl, 607 N.W.2d 168 (Minn. Ct. App. 2000).

STATEMENT OF THE CASE AND FACTS

On October 20, 2013, the water main under Portland Ave. S. between Seventh St. S. and Eighth St. S. in Minneapolis ruptured unexpectedly. (ADD.1-2.) After the water main broke, water flowed into the Sexton building's street-level window wells. (*Id.*) The water flooded the Sexton Condominium building ("the Sexton Building"), including apartments owned by Juliana Koe and Jane Grenell. (*Id.* at ADD.2) Minneapolis responded to the water-main break and fixed it, restoring water service, within twelve hours. (APX.38.)

Appellants allege that Sexton Condominium Association, Inc., ("Sexton"), which owns the Sexton building, Juliana Koe, and Jane Grenell suffered damages in excess of $1.3 million, $25 thousand, and $20 thousand, respectively. Sexton's insurer, Appellant American Family Insurance ("American Family"), alleges that it paid $1.37 million to Sexton for damage associated with the water-main break. (APX.43.) Koe's insurer, Appellant Liberty Mutual Insurance ("Liberty Mutual"), allegedly paid her $25.9 thousand for damage associated with the water-main break, and Grenell's insurer, also Liberty Mutual, allegedly paid her $20.8 thousand for damage associated with the water-main break. (*Id.*) American Family

and Liberty Mutual ("Appellants") asserted subrogation claims on behalf of their insureds, Sexton, Koe, and Grenell. Specifically, Appellants asserted negligence, trespass, and takings claims in subrogation.

Appellants also asserted an Equal Protection claim against Minneapolis. Sexton, tenants of the Sexton building, and insurance companies made claims to Minneapolis for damages associated with the break. (APX.49-51.) Minneapolis negotiated and settled claims brought by persons, both natural and corporate, for losses where insurance for such losses was not known to exist. (*Id.*) Minneapolis paid thirteen claims made by tenants of the Sexton building, all of whom were natural persons, for water damage losses that were not known to be insured. (*Id.*) Minneapolis also paid one claim of $21.1 thousand, to a business entity, Sexton, for the portion of its damages that were not covered by its insurance with American Family. (APX.50.) Appellants, and another insurance company, State Farm, submitted several claims on behalf of their insureds. (APX.49-51.) Minneapolis denied all claims submitted by insurance companies for losses associated with the water-main break. (*Id.*) On the basis of this distinction, Appellants asserted an Equal Protection claim under the Fourteenth Amendment of the United States Constitution.

Aside from being irrelevant to the issues presented in this appeal, Appellants' assertion that "Minneapolis knew this water main was beyond its operable lifespan but chose to wait until it broke to make repairs," (Appellants' Br. 1), is also unsupported by the record. First, Minneapolis does not merely wait until pipes burst "to make repairs." Instead, decisions to repair and replace water mains are based on resources and available data, which includes leak density and age. The repair and replacement decision making process was described by Marie Asgian, Minneapolis's Superintendent of Water Distribution:

> We look at where there is a leak history, we look at what else is going on in the area in terms of development, we allocate our resources according to what money we have for that year and prioritize based on the needs of the overall program, which includes other aspects other than replacement.

(APX.303.) Asgian explained further:

> The type of capital improvement projects we do are not a repair. That is not a capital investment. And so, obviously, the past plays into where we go with our money. But it isn't, "This is broke so I'm fixing it[r]ight now. I'm going to go rip up the street and put in a new water main."

(APX.304.) Three factors that Minneapolis uses in determining where to use its scarce structural lining and replacement dollars are leak density, coordination with other construction projects, and improvement of system

reliability prior to new development. (APX.99.) "Each pipe replacement project candidate is evaluated for its cost/benefit." (*Id.*) Typically, 10% to 20% of Minneapolis's annually approved Water Distribution Improvement funds are allocated to replacement or structurally lining of water mains. (*Id.*)

Second, Minneapolis had no indication that the main here would burst and flood the Sexton building. Appellants mischaracterize the record when they suggest that the water main here was "beyond its operable lifespan." (Appellants' Br. 1.) Appellants misinterpret Asgian's testimony and the evidence. Asgian testified that *generally speaking* the useful life of a pipe is one-hundred years. (APX.309.) In a 2011 report, written more than two years prior to the break, Asgian explained further:

> One common misconception is that old pipe is bad pipe and that age should be the primary factor in scheduling water main replacement. While age plays a role, other factors are far more influential in predicting water main failure. The biggest influence on longevity of cast and ductile iron pipe is pipe bedding.
>
> [P]ipe that has been in the ground for well over 100 years can be in excellent structural condition. . . .
>
> How long can a cast or ductile iron pipe last? There is no definitive answer when installed in the right environment. The physical properties of the pipe do not change with age . . . . The

> oldest known iron water main in active service was installed at the Versailles Palace, France in 1684 to supply the outdoor fountains.

(APX.92.) Without other factors present, there is no reason to suspect impending failure of a 100 year old pipe. Age may be one factor in failure, but there are others, such as chronic annual leak history and bedding material, which are far more important in determining whether a water main needs to be replaced. (*Id.*) "Although Minneapolis has one of the lowest water main break rates in the country (around 45 breaks per 1,000 miles of main), there are location[s] where the pipe is bedded in poor soil and segments have had multiple leaks." (APX.99.) Appellants point to nothing in the record suggesting that the bedding around the relevant main here was poor, or otherwise suspect.

Finally, the record does not support the conclusion that the leak history in the area of the Sexton building was excessive. Asgian stated that water main here "was not a [main with] a chronic annual leak history. There are [other] areas of Minneapolis where there have been those." (APX.306.) When analyzing the leak density map used to make replacement or lining decisions, Asgian noted "I guess I see other mains that have a density of stars [leaks] greater or equal [to the subject main]. Q.

Where do you see that? . . . A. That, I believe, is Washington Avenue." (APX.308.) Appellants selectively excluded these answers from their quotation of Asgian's testimony.

The record contains evidence of only three leaks under Portland Ave. between 7th and 8th Sts. in the more than 100 years the main has been in the ground before the leak at issue here. (APX.297-301.) The three leaks are not enough to suggest that replacement of the main was necessary or even desired. In 1979, a minor leak occurred at a discontinued tap 125 feet north of 8th Street. (APX.298.) In 1984, 133 feet south of 7th Street, the main ruptured and nine feet of pipe was replaced. (APX.297.) In 1996, 25 feet north of 8th Street, the main leaked due to frost loading. (APX.301.) In each case, the lines were repaired, leaving no known compromised pipe in the ground. (APX.297-301, APX.313-14.) Only the 1984 break is known to have caused any property damage. (APX.297-301.) The break here was not foreseeable, and neither was it foreseeable that a break would cause damage to the Sexton building.

Appellants' negligence claim was dismissed with prejudice based on the parties' stipulation, and Minneapolis moved for summary judgment on the remaining claims. The district court dismissed the trespass claim,

holding the record contained no evidence of the requisite intent. (ADD.8.) The court also dismissed the equal protection claim, holding that Appellants were not similarly situated to persons who suffered uninsured losses, and, even if they were, Minneapolis's claims process passed rational basis review. (ADD.8-11.) Finally, the court dismissed Appellants' takings claims, holding that the federal claim was not ripe and the state claim was not properly before the court because Appellants had not brought it as a mandamus action. (ADD.11-14.) Appellants appeal from the dismissal of their Equal Protection and takings claims; they have not appealed from the dismissal of their trespass claim.

SUMMARY OF ARGUMENT

Appellants' equal protection claim fails because (1) Appellants, insurance companies paying out on insured losses, were not similarly situated to persons who suffered uninsured losses; and (2) Minneapolis's decision to settle and pay claims for uninsured losses but deny those for insured losses passes rational basis review.

Appellants' federal takings claim fails because it is not ripe. A federal takings claim is only ripe once a plaintiff has exhausted a state takings claim. Appellants have not exhausted state judicial procedures regarding their state takings claim. Thus, their federal claim is not ripe and the district court did not err in dismissing it.

Appellants' state takings claim must be brought as a mandamus action. Appellants did not bring a mandamus action. Thus, their state claim was procedurally defective and the district court was correct to dismiss it.

ARGUMENT

I. The District Court Properly Dismissed Appellants' Equal Protection Claim.

The district court dismissed Appellants' equal protection claim because (1) Appellants, insurance companies paying out insured losses, were not similarly situated to persons who suffered uninsured losses; and (2) Minneapolis's decision to settle and pay claims for uninsured losses but deny those for insured losses passes rational basis review. The district court's holding on these issues should be affirmed.

"'The Equal Protection Clause of the Fourteenth Amendment commands that no State shall deny to any person within its jurisdiction the equal protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike.'" [1] *True v. Nebraska*, 612 F.3d 676, 683 (8th Cir. 2010), *citing Exec. Air Taxi Corp. v. City of Bismarck*, 518 F.3d 562, 566 (8th Cir. 2008), *quoting City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). "State actors may, however, treat dissimilarly situated people dissimilarly without running afoul of the protections afforded by the clause." *Ganley v. Minneapolis Park & Recreation Bd.*, 491 F.3d 743, 747

[1] Appellants have not asserted an Equal Protection claim based on the Minnesota constitution.

(8th Cir. 2007) (internal quotation marks omitted). If a state's classification or distinction neither burdens a fundamental right nor targets a suspect class, it is subject to rational basis review. *Id.* Appellants do not contest that rational basis review applies here. (Appellants' Br. 12-13.)

A. Appellants are not similarly situated to persons with uninsured losses.

The touchstone of Equal Protection is a directive to state and local governments that all persons similarly situated should be treated alike. *See Ganley*, 491 F.3d at 747. The Eighth Circuit has held that Appellants must "as a threshold matter" demonstrate that they have been treated differently than others who are similarly situated. *Id.* To succeed on their Equal Protection claims, Appellants must establish that they are similarly situated to the uninsured natural and corporate persons who received settlements from Minneapolis prior to the onset of litigation.

Minneapolis's treatment of claims can be characterized by splitting the claims into two categories: (1) claims made by persons, both natural and corporation, where insurance was not known to have covered the claimed loss; and (2) claims made by insurance companies based on losses suffered by their insureds. Minneapolis paid claims falling under the first

group and denied claims falling under the second. Importantly, all of the claims in the second group were made by insurance companies, who, based on insurance contracts and the receipt of premium payments, paid claims to their insureds and subsequently made claims to Minneapolis. To succeed with their Equal Protection claim, then, Appellants must establish that insurance companies who have paid their insureds pursuant to insurance contracts are similarly situated to natural and corporate persons who suffered uninsured damages and losses associated with the water-main break.

Appellants can do no such thing. While Appellants, as insurers, may have had some pecuniary outlay based on the losses suffered by their insureds, they differ from uninsured persons in several crucial respects. As a general matter, insurers, including Appellants, are in the business of assuming the risks of their insureds. They have entered into contracts with their insureds to assume this risk, and in consideration of this obligation, Appellants receive premium payments from their insureds. No doubt, Appellants, like all insurance companies, use detailed calculations, analysis, and actuarial tables to determine the premium rates that they charge and receive. (*See* APX.268-69.) The persons who suffered uninsured

losses, however, were neither in the business of assuming others' risk of loss nor had they received any payments for their claimed losses before Minneapolis paid their claims.

The nature of the losses and damages suffered also supports the conclusion that Appellants were not similarly situated with those persons who suffered uninsured losses. All of the persons who suffered uninsured losses experienced property damage from the flooding of the Sexton building. Sexton, for example, suffered property damage to its primary asset and revenue source, the Sexton building. The individual tenants suffered damage to their personal property and many tenants were forced to seek temporary housing. These types of damages, and the attendant personal distress, are dramatically different from the payment of a claim by an insurer pursuant to an insurance contract.

Ellen Valesco-Thompson, Minneapolis's Director of Risk Management and Claims, described an anecdotal example that captures the essence of this difference in damages:

> . . . I had an elderly person who was hearing-impaired and speech-impaired, and she was taking care of a 96 year old mom who also had dementia. It was in the middle of winter, and they had five feet of water in their basement apartment. I needed to make a decision that night what to do with them.

> I am not asserting immunity[.] I am taking care of temporary housing needs that are imminent and vital to the safety of the residents.

(APX.166.) Like in Ms. Velasco-Thompson's example, the residents and the Sexton, suffered real and immediate loss due to the flood. Appellants, as insurers, only suffered monetary damages created by contracts which, they wrote and entered into as a means of doing business. Appellant insurers are not similarly situated to their insured who suffered actual physical damages and displacement.

Appellants' only rejoinder to these arguments is that, under state law, a subrogating insurer assumes the rights of its insureds and stands in their shoes. (Appellants' Br. 10.) Appellants' argument fails for at least two reasons. First, the argument amounts to the proposition that Minnesota insurance subrogation law controls the Fourteenth Amendment's Equal Protection clause. Appellant cites no authority for this radical proposition—no authority suggests that the state must close its eyes to the nature of a subrogating insurance company for Equal Protection purposes merely because state law allows a subrogating insurance company to assert its insurer's rights. Second, even if Appellants were correct, their insureds

are not similarly situated to those persons who suffered uninsured losses. As discussed above, uninsured losses are dramatically different from insured losses and persons who suffered the former are not similarly situated to those who suffered the latter. "Treatment of dissimilarly situated persons in a dissimilar manner by the government does not violate the Equal Protection Clause." *Keevan v. Smith*, 100 F.3d 644, 648 (8th Cir. 1996). Appellants' Equal Protection claim therefore fails.

B. Minneapolis's decision to pay claims for uninsured losses and deny claims made by insurers was rationally related to protecting persons within its jurisdiction, cost savings, and efficient allocation of resources.

Minneapolis's decisions about Appellants' claims pass rational basis review. "'Where no suspect classification is involved . . . the State need only show that the differential treatment is rationally related to a legitimate state interest.'" *True*, 612 F.3d at 684. "Under rational basis review, challenged statutory classifications are accorded a strong presumption of validity, which is overcome only if the party challenging them negates every conceivable basis which might support it." *Id.* 684 (internal quotation marks and citations omitted). Thus, Appellants must show that any differential treatment of them vis-a-vis those persons with uninsured

losses has no conceivable, rational relationship to a legitimate government interest. Minneapolis's decision to negotiate and settle claims submitted by persons with uninsured losses was rationally related to legitimate government purposes.

First, Minneapolis has an undeniable legitimate interest in protecting the health, safety, and welfare of persons within its jurisdiction. *Gallagher v. City of Clayton*, 699 F.3d 1013, 1019-20 (8th Cir. 2012). As discussed above, the flooding of the Sexton building created a significant threat to the welfare of those persons directly damaged by the flooding. In addition to the damage to personal property, several residents of the Sexton building were temporarily displaced from their housing, and Sexton suffered damage to what is, presumably, its primary asset and income source. As such, the flooding had the potential to threaten the welfare of the residents of the Sexton building and Sexton itself. By agreeing to pay the claims for uninsured losses, Minneapolis was able to quickly compensate injured persons, thereby minimizing the time that those persons were without housing and suffering uncompensated damage.

The distinction here, between insurers and persons who suffered direct uninsured losses, is rationally related to protecting the health, safety,

and welfare of persons within its jurisdiction. Any losses suffered by insurers were related to the payment of claims pursuant to insurance contracts. Of course, insurers are in the business of assuming risks of loss like those associated with this water-main break, whereas the persons directly injured by the water-main break are certainly not in the business of suffering losses from water-main breaks. It is also worth noting that insurers almost certainly factor in the possibility of losses caused by water-main breaks and the near certainty that subrogation claims against municipalities for such losses would fail. For example, in *Besser v. City of Chanhassen*, the court dismissed the plaintiff's claim arising from damages associated with a water-main break. No. A12-0687, 2013 WL 491553, at *3 (Minn. Ct. App. Feb. 11, 2013). The court reasoned that decisions regarding the maintenance of the water main system were discretionary in nature and the city was therefore entitled to immunity. *Id.* Appellants, both sophisticated and successful insurance companies, almost certainly factor in the likelihood of not being able to recover on subrogated water-main break claims against cities when they calculate the premiums they will charge.

Second, Minneapolis's claims decisions were rationally related to the legitimate government interest of minimizing the costs and litigation risks associated with the water-main break. Minneapolis is entitled to exercise its judgment to limit public expenditures. In *Minnesota Senior Federation, Metropolitan Region v. United States*, this Court held that the federal government's Medicare+Choice program did not violate Equal Protection because it was designed in part to reduce costs, and cost reduction is a legitimate government interest. 273 F.3d 805, 809 (8th Cir. 2001). Moreover, the United States Supreme Court has held that reducing "administrative costs" is a legitimate government purpose. *See Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2081 (2012).

Minneapolis's decision to pay certain claims was a litigation strategy that was rationally related to saving costs and expenditures by reducing the risks associated with litigation. Persons with uninsured losses are a greater risk in litigation because they are particularly sympathetic; an individual with an uninsured loss has yet to be made whole. On the other hand, insurers asserting subrogation claims have only suffered losses pursuant to their insurance contracts part and parcel of their for-profit business as insurers. The decision to settle claims here is rationally related

to reducing litigation risk by settling with the more sympathetic claimants while denying the claims of less sympathetic claimants.

Minneapolis's decision to settle claims for uninsured losses also reduced the costs of and increased the efficiency of litigating the claims arising from the water-main break. Minneapolis received claims from thirteen natural persons and Sexton for uninsured losses totally approximately $120 thousand. The other claims were from three insurers: Appellants and State Farm. The claims by the three insurers totaled approximately $1.45 million. By settling the claims from the persons with uninsured losses, Minneapolis settled with fourteen out of seventeen claimants , yet preserved its ability to contest 92% of the claimed losses. This strategy then reduced the costs of the potential litigation by dramatically reducing the number of potential plaintiffs while simultaneously maintaining the city's ability to contest the lion's share of the claimed losses.

In a case involving the decision to offer settlement to some parties but not others, the Western District of North Carolina determined that the plaintiffs were not entitled to pre-litigation settlements to satisfy Equal Protection. *See Froland v. Coble*, No. 3:05 CV 280 H, 2006 WL 181968, at *3

(W.D.N.C. Jan. 23, 2006). "Although [Plaintiffs] certainly may have hoped that the Defendant[] would offer a settlement without the necessity of having to file a lawsuit, [their] expectation does not rise to the level of a constitutional right or entitlement sufficient to establish [an] equal protection claim." *Id.* at *3. As an additional point of persuasive authority, Minnesota case law also supports dismissal of Appellants' Equal Protection claim. In *Besser*, the Minnesota Court of Appeals rejected a similar Equal Protection claim:

> Besser bases her equal-protection claim on the fact that the city settled another resident's water-main-break damage claim for $2,500 but did not settle with Besser. Besser's argument lacks merit.
>
> The Fourteenth Amendment to the United States Constitution and the Minnesota Constitution both "mandate that all similarly situated individuals shall be treated alike." "Similarly situated groups must be alike in all relevant respects." . . .
>
> In this case, Besser and the other resident were not similarly situated individuals. The assistant city manager, who worked on the settlement with the other resident, explained in her affidavit that the city settled with the other resident because he was "agreeable and reasonable" and the city believed that the $2,500 settlement was preferable to incurring the expense and facing the uncertainty of litigation. By comparison, Besser "never expressed any desire to compromise her claim," maintaining "her position that the [city] should reimburse [her for] an entire new driveway." Besser does not dispute the

> assistant city manager's statement. We conclude that the district court did not err by dismissing Besser's equal-protection claim.

Besser, 2013 WL 491553, at *4 (alterations in original) (citations omitted). If a decision to settle one claim over another may be based on claimants' relative agreeableness and reasonableness, then the decisions to settle with the uninsured persons described above must likewise comport with Equal Protection. Because Minneapolis's determination to pay only uninsured claims was rationally related to the legitimate government interests of cost savings and efficient allocation of government resources, Appellants' Equal Protection claim founders.

Appellants' response to these rational bases is to mischaracterize Minneapolis's rationale for making its claims decisions. Appellants assert that Minneapolis made its claims decisions based only on its judgment of how sympathetic claimants were and that such a judgment cannot be rational because "[i]t is a subjective determination." (Appellants' Br. 12.) Appellants' argument fails for multiple reasons. First, Appellants cite no case law for the proposition that a rational basis may only be established with objective criteria. Second, Appellants' argument reduces to an assertion that Minneapolis's claims decisions fail rational basis because the

decision criteria were not perfectly tailored to the legitimate government interest. (Appellants Br. 12.) (Appellants do not contest that Minneapolis's interests of protecting persons within its jurisdiction, cost savings, and efficient allocation of resources were legitimate government interests.) The problem with Appellants' argument is that rational basis review does not require the precision upon which their argument is based. Finally, Appellants completely ignore the fact that uninsured losses are dramatically different than insured losses. A citizen who suffers uninsured property damage and a concomitant loss of housing is in a more tenuous situation than a citizen who is insured. Minneapolis based its claims decisions on this fact, and those decisions were therefore rationally related to the legitimate government interest of protecting the welfare of persons within its jurisdiction.

II. The District Court Properly Dismissed Appellants' Federal and State Takings Claims Because the Federal Claim Was Not Ripe, and the State Claim Was Not Brought as a Mandamus Action.

Appellants' taking claims fail because the federal claim is not ripe, and the state claim is procedurally defective. Thus, the district court did not err when it dismissed these claims without prejudice.

A. Appellants' federal takings claim was properly dismissed because they did not exhaust state remedies.

"[A] property owner may not bring a federal claim for violation of the Just Compensation Clause until it has exhausted any available state procedure for seeking just compensation and been denied it." *Snaza v. City of Saint Paul*, 548 F.3d 1178, 1181-82 (8th Cir. 2008). In *Snaza*, the plaintiff brought federal and state takings claims in state district court and the defendant then removed the case to federal district court. The Eighth Circuit reasoned:

> Although [the plaintiff] brought an inverse condemnation claim in state court, her federal takings claim will not be ripe unless and until she is denied just compensation on that state claim. The district court did not err by concluding that [the plaintiff's] federal takings claim was not ripe or by dismissing that claim without prejudice.

Id. at 1182. Appellants' federal takings claim is not ripe, the district court did have jurisdiction over it, and it was properly dismissed without prejudice.

Appellant do not attempt to distinguish *Snaza* from this case—indeed, they do not even cite *Snaza*. *Snaza* is on all fours with this case and controls the outcome here. This Court determined that the federal takings

claim in *Snaza* was not ripe and the district court did not err in dismissing it without prejudice. The same is true here.

Appellants' only argument regarding the ripeness of their federal takings claim is that the district court erred by holding that they "must exhaust administrative remedies" because doing so would be futile. (Appellants' Br. 14.) Appellants either misconstrue or misunderstand both the district court's order and *Snaza*. The district court based its dismissal on the conclusion that Appellants must exhaust *state remedies*, which includes both administrative *and* judicial procedures. (ADD.13.) *Snaza* stands for this same proposition. *Snaza*, 548 F.3d at 1182 (holding that federal takings claim was not ripe because the plaintiff's *state court* inverse condemnation claim had not yet been denied). The cases relied on by Plaintiffs do not stand for a contrary proposition. The cases cited by Appellants to support their futility argument relate to the exhaustion of administrative remedies before a cause of action is ripe for judicial review. These cases are inapposite because the issue here and in *Snaza* is whether a state law takings claim has been exhausted by seeking *judicial relief* from the state. The exhaustion of administrative remedies as a requisite to bringing an action in court was not the issue *Snaza* and it is not the issue here.

Moreover, Appellants' argument fails because pursing an inverse condemnation claim in state court would not be futile. Appellants suggest that bringing a mandamus action for inverse condemnation would be futile because Minneapolis already reviewed their claims and rejected them. This argument fails because a successful mandamus action could result in (1) Minneapolis being ordered to conduct condemnation proceedings; and (2) a determination of damages *by the state district court*. *City of Minneapolis v. Meldahl*, 607 N.W.2d 168, 172 (Minn. Ct. App. 2000). Accordingly, mandamus action would not be futile, *Snaza* controls, and Appellants' federal takings claim is not ripe and was properly dismissed.

B. Appellants' state takings claim was correctly dismissed because it is only actionable as a mandamus action.

When the government has allegedly taken property without formally using its eminent domain powers, the property owner's potential claim is for inverse condemnation. *Meldahl*, 607 N.W.2d at 172. Appellants make no claim that Minneapolis exercised its eminent domain powers, so their takings claim is an inverse condemnation claim. But "'mandamus is the proper vehicle to assert a claim for inverse condemnation.'" *Id.* Minnesota takings claims based on intermittent flooding, such as this one, are inverse

condemnation actions, and the procedural vehicle to bring them is mandamus. *See Nolan & Nolan v. City of Eagan*, 673 N.W.2d 487, 493 (Minn. Ct. App. 2003); *see also Vern Reynolds Constr., Inc. v. City of Champlin*, 539 N.W.2d 614, 619 (Minn. App. 1995), *abrogated on other grounds by DeCook v. Rochester Int'l Airport Joint Zoning Bd.*, 811 N.W.2d 610, 614 (Minn. 2012). "Because [Plaintiffs] did not bring a mandamus action, their taking claim was not properly before the district court," and the takings claim should therefore be dismissed. *See Northland Racquetball, Inc. v. Bemidji State Univ.*, No. CX-94-1621, 1995 WL 81413, at *4 (Minn. Ct. App. Feb. 28, 1995).

Appellants' only argument regarding the requirement that they bring their state-law takings claim by mandamus is their suggestion that *Wegner v. Milwaukee Mut. Ins. Co.*, 479 N.W.2d 38, 40 (Minn. 1991), stands for the proposition that a state-law takings claim can be brought by direct action in district court rather than by writ of mandamus. (Appellants' Br. 18-19.) *Wegner* does not stand for this proposition. In *Wegner*, the plaintiff sought compensation from Minneapolis on both trespass and constitutional takings grounds. *See* 479 N.W.2d at 38. However, the court neither addressed the issue of mandamus nor specified the procedure by which the claims were asserted. *See id.* at 38–40. As the district court reasoned,

"because 'a petitioner is permitted to simultaneously pursue an inverse condemnation claim by way of a petition for mandamus, and alternatively, tort claims,' *Nolan & Nolan*, 673 N.W.2d at 495, Plaintiffs' inference [regarding *Wegner*] is without merit." (ADD.14.) Appellants were required to bring their state takings as a mandamus action and the district court was therefore correct to dismiss it.

CONCLUSION

For the foregoing reasons, Appellee respectfully request that this Court affirm the district court's grant of summary judgment in its favor.

Dated: December 15, 2015

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)
OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify that this brief is typed in Microsoft Word 2010 using 14-point type and "Book Antiqua" proportionally-spaced font. The length of this brief is 5210 words, excluding the table of contents, table of citations, summary of the case and statement with respect to oral argument, and certificates of counsel.

I further certify that the electronic versions of this brief provided to the Court and parties has been scanned with Symantec Endpoint Protection and has been found to be virus-free.

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CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 15-3216

American Family Insurance
and Liberty Mutual Insurance,

Appellants,

vs.

City of Minneapolis,

Appellee.

Appeal from the United States District Court for the District of Minnesota
Case No. 14-01428 SRN-SER
Judgment Date: 10 September 2015

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REPLY ARGUMENT

I. Liberty and American Family are Similarly Situated to the Uninsured Claimants Because Liberty and American Family Assume and Assert the Rights of their Insureds and are Mutual Companies.

In its Response Brief, Minneapolis asserts that Liberty and American Family cannot maintain a Fourteenth Amendment Equal Protection Claim because neither was "similarly situated" to the uninsured condo owners.

Specifically, on page 15 of its Response Brief, Minneapolis stresses that for purposes of Fourteenth Amendment analysis American Family and Liberty must be characterized as dissimilar corporations asserting their own rights and not as subrogating carriers asserting the rights of their insured condo owners, otherwise subrogation law will "control" the Fourteenth Amendment. The flaw in this argument is two-fold.

First, it contradicts long-held subrogation precedent that subrogating insurance carriers can only assert the legal rights and claims of their insureds and not any corporate or self-held claims.

The United States Supreme Court in *US Airways, Inc. v. McCutchen*, 133 S. Ct. 1537, 1546, 185 L. Ed. 2d 654, n.5 (2013) noted that,

> "Subrogation simply means substitution of one person for another; that is, one person is allowed to stand in the shoes of another and assert that person's rights against" a third party.

(Id.)(citations omitted)

Likewise, in *Standard Marine Ins. Co. v. Scottish Metro. Assur. Co.*, 283 U.S. 284, 287, 51 S. Ct. 371, 372, 75 L. Ed. 1037 (1931), the Supreme Court held that when two carriers brought subrogation actions for the loss of insured grain, the carriers could only assert those rights possessed by their insured and no other rights.

Further, this Court in *Janssen v. Minneapolis Auto Dealers Ben. Fund*, 447 F.3d 1109, 1114 (8th Cir. 2006), recognized that a subrogating carrier can only assert the legal claims of its insured:

> [U]nder subrogation principles, the Plan stands in the shoes of the Janssens and has no greater rights than the Janssens have. Accordingly, the Plan does not have a general right of recovery against the Janssens. Rather, the Plan has only the same rights as the Janssens to pursue claims for medical expenses.

(Id.) *See also, Kahler v. Liberty Mut. Ins. Co.*, 204 F.2d 804, 806 (8th Cir. 1953) (As the insurance company is maintaining this action as subrogee of its insured, Remington Arms, its rights are such only as accrued to Remington Arms.)

As previously set forth on pages 10-11 of Liberty and American Family's initial Brief, the Minnesota Supreme Court has also recognized that under Minnesota law a subrogating insurance carrier has no rights of its own, but can only assert the claims of its insureds. *Medica, Inc. v. Atl. Mut.*

Ins. Co., 566 N.W.2d 74, 76-77 (Minn. 1997) *RAM Mut. Ins. Co. v. Rohde*, 820 N.W.2d 1, 5-6 (Minn. 2012).

Accordingly, in this context, rather than undermine the Fourteenth Amendment, subrogation precedent simply requires that the rights to be analyzed are those of the carriers' insured condo owners and the uninsured condo owners. Doing so, it is clear that the insured condo owners were similarly situated to the uninsured condo owners, in that both sustained damage as result of Minneapolis' water-main break and both made claims for reimbursement of such damage.

The second flaw in Minneapolis' argument is that even if subrogation precedent is disregarded and Liberty and American Family are viewed as only asserting self-held corporate rights, they nevertheless are "similarly situated" to the uninsured condo owner claimants because both are "mutual" insurance companies. This means Liberty and American Family are both owned by their insureds, and as such are merely a collection of insureds so that when the "mutual" claims for reimbursement were denied, their individual insureds suffered harm. (Apx.168, Gribble Affd. ¶2, Apx. 268, Litke Affd. ¶3,4.) Thus, Liberty and American Family are similarly situated to the uninsured condo owners in that all suffer harm if their claims for reimbursement are denied.

Minneapolis however challenges this assertion of harm on page 18 of its Response Brief. There, Minneapolis claims that because Liberty and American Family are sophisticated insurance companies, they have avoided such harm by increasing their premiums for insureds in the city because they know they will not be able to recover subrogation against the city a water-main breaks. There are two problems with this assertion.[1]

First, Minneapolis fails to cite to any support in the record for its claim. Thus, its claim is mere assertion and speculation without foundation, and as such, it must be ignored.

Second, Minneapolis' claim is directly contradicted by the record. Both Liberty and American Family testified that subrogation recoveries are, in fact, factored into reducing premiums, and if they are not achieved, harm is suffered. (Apx.168, Gribble Affd. ¶2, Apx. 268, Litke Affd. ¶3,4.). Moreover, American Family specifically stressed that because the City of

[1] Minneapolis cites the unpublished case of *Besser v. City of Chanhassen*, No. A12-0687, 2013 WL 491553 (Minn. Ct. App. Feb. 11, 2013) but failed to provide a copy, so it is unlikely this Court will consider the same. Nevertheless, *Besser* is distinguishable. First, it only recognized immunity for tort claims against the City, not constitutional claims, as have been alleged here by Liberty and American Family. Second, with respect to Besser's equal protection claim, the court found she was not similarly situated as other claimants because she refused to consider compromising or settling her claim. Here, it is Minneapolis which has refused to engage in settlement discussions of Liberty and American Family's claims.

Minneapolis has a history of paying for damage it causes, premiums are, in fact, reduced in the City:

> When a government entity, such as the City of Minneapolis has a history of paying uninsured individuals for damages it causes, American Family Mutual Insurance Company expects that its policyholder members will be treated in equal fashion and sets the premium for that risk accordingly.

(Apx.168, Gribble Affd. ¶4).

The above establishes that Liberty and American Family were either similarly situated with the uninsured condo owners via assertion of their insured's claims and/or assertion of their own corporate rights, and as such, it was an error for the District Court to dismiss their Fourteenth Amendment Claims for Equal Protection.

A. Minneapolis' Discrimination Between Claimants on the Basis of Sympathy was Neither Rational nor Related to the Proffered Objectives of Promoting Citizen Welfare and Controlling Costs.

In its Response Brief, Minneapolis offers three reasons why it was rational to discriminate on the basis of sympathy when it came to paying claims. First, on page 14 of its Response Brief, Minneapolis asserts that it was rational to consider the uninsureds more sympathetic because they suffered "personal distress." Second, on page 17 of its Response Brief, Minneapolis claims the uninsured were also more sympathetic because they were "temporarily displaced from their housing," whereas the insureds

simply suffered "property damage to its primary asset and revenue source." (Id.) Third, on page 19 of its Response Brief, Minneapolis claims the uninsured would be more sympathetic in front of a jury. None of these assertions are supported by a citation to the record, and some simply are not logical.

American Family insured the Sexton Condominium Association and Liberty insured condo owners Juliana Koe and Jane Grenell. (Add. 002, Order p. 2.) With respect to Minneapolis' first assertion that only the uninsured are sympathetic because only they suffered personal distress as a result of flooding, this statement is incorrect and illogical. The Sexton Condominium Association is an association of condo owners who collectively banded together to form the Sexton Condominium Association and Juliana Koe and Jane Grenell as condo owners were equally subjected to such distress when their property was flooded.

As for Minneapolis' second assertion that only the uninsured condo owners were temporarily displaced and the insured condo owners simply suffered property damage in the form of lost revenue, this also is incorrect and illogical. Repair records show the insureds too were displaced from their units due to extensive and lengthy demolition and restoration work. (Apx. 199-236). Further, the Sexton Condominiums are condos not apartments.

Thus, there was no loss of revenue in the form of lost rents or otherwise as a result of the flooding.

Similarly, with respect to Minneapolis' assertion that a jury would find the uninsured condo owners more sympathetic, there simply is no support in the record for such claim. Minneapolis actually knows nothing about the personal situations of any of the uninsured claimants it paid. There is nothing in the record which shows they were poor or were suffering any more than the insured condo owners. Minneapolis just assumes the uninsured condo owners are more sympathetic than the insured owners. But what if an uninsured condo owner was uninsured because they were very wealthy and chose to self-insure? Would a jury still find them more sympathetic than the working class insured condo owner? Given the lack of support in the record and the flaws in logic, it was not rational for Minneapolis to pay claims on the basis of sympathy.

Alternatively, even if it were held that Minneapolis' guesses about claimant sympathy were a rational basis upon which to pay claims, doing so was not related to and did not foster Minneapolis' proffered objectives of citizen welfare and cost control.

If Minneapolis is truly worried about the welfare of its citizens, this would by necessity include all citizens, not just the uninsured. Covering the

cost of damages or even just temporary housing for one group of citizens but not the other does not promote full citizen welfare. In effect, Minneapolis is punishing the victim for having the forethought to purchase insurance. And if the welfare of citizens is Minneapolis' concern, shouldn't Minneapolis want to promote the purchase of insurance? Isn't that why the government makes people who live in flood plains purchase insurance -- to protect citizens?

Likewise, if Minneapolis truly wanted to control litigation costs based on whether a jury might consider the particular personal characteristics of a claimant sympathetic, it would at least commission a study or cite statistics which reached a conclusion that a jury could be predicted to make a certain award in a certain context, given the characteristics of a particular claimant. Here, Minneapolis relies on pure speculation and guesses. The government objective of cost control is not supported by speculation and guess-work. Consequently, Minneapolis' discrimination between claimants on the basis of sympathy was neither rational nor related to the objectives of citizen welfare and cost control.

On page 20 of its Response Brief, Minneapolis attempts to downplay its use of sympathy in making payment decisions by now claiming that the real reason it denied the insurance carriers' subrogation claims was so it

could contest the bulk of 92% of the claimed losses. This is an argument raised for the first time on appeal, and thus should not be considered. *See Court. Alexander v. Pathfinder, Inc.*, 189 F.3d 735, 742 (8th Cir.1999) ("[W]e will not consider arguments raised for the first time on appeal.")

Nevertheless, even if one of the reasons for denial of the insurance carrier claims was to preserve the right to litigate 92% of the claims, this does not change the fact that Minneapolis has admitted it also discriminated against Liberty and American Family on the basis that it found them to be unsympathetic. This is the basis for Liberty and American Family's claim and the basis of the appeal. The fact that there may be a new secondary reason for denial does not erase Minneapolis' admitted discrimination nor should it prevent Liberty and American Family from continuing to pursue their Fourteenth Amendment equal protection claims.

II. Forcing American Family and Liberty to File an Additional State Court Action before Pursuing their Takings Claims would be Futile Because Condemnation is not Appropriate in this Context.

As set forth on pages 14-17 of Liberty and American Family's initial Brief, it is established that Minneapolis has already denied the carriers' takings claims, and thus it would be futile to force them to pursue an additional prerequisite mandamus action for condemnation in the state court.

In response, Minneapolis offers three arguments. First, on pages 24-25 of its Response Brief, Minneapolis cites the case of *Snaza v. City of Saint Paul*, 548 F.3rd 1178, 1181-82 (8th Cir. 2008) and asserts that under its analysis, Liberty and American Family's takings claims are not ripe. Second, on pages 25-26 of its Response Brief, Minneapolis asserts that the state court must condemn the Sexton Condominium property and determine damages before a federal takings claim can proceed. Third, on page 27 of its Response Brief, Minneapolis argues that any takings claim under the Minnesota Constitution requires a prerequisite mandamus action. All three arguments fail.

Minneapolis' first argument is wrong because *Snaza* is clearly distinguishable from the present case. In *Snaza*, a property owner sought a conditional use permit to use her property for an auto sales lot. The City denied the permit. Snaza brought suit asserting that the government had, through the denial, so limited the use of her property that it had rendered it worthless, and on this basis she asserted federal and state takings claims. However, the district court decided that the takings claims were not ripe because Snaza had not first sought and been denied just compensation in a state court inverse condemnation action. *Snaza Supra*., 548 F.3d at 1181.

In contrast, here the unconstitutional taking is based not on permanent limitation of use through the denial of a conditional use permit, but simple damage to property. Thus, the nature of damages in the two cases are distinct.

Furthermore, unlike *Snaza,* here Liberty and American Family have already been "denied just compensation" because the record shows Minneapolis clearly denied their claims for reimbursement of damages. As such, *Snaza* is not applicable in this context.

Minneapolis' second argument that a state court must condemn the Sexton complex and determine damages also fails for the same reason. This is not a takings claim where the government has permanently limited the use of property or taken it for some other higher use, such as a roadway or school. Here, the Sexton complex was damaged by Minneapolis, but after months the damage was repaired and there are now people again living in their units. Thus, it is impractical for Liberty and American Family to seek to have the condo owners kicked out and the complex condemned as Minneapolis suggests.

Further, there is no need to have a state court determine damages from condemnation of property, because here damages are based on repair and restoration costs and those documented damages were already provided to

Minneapolis and already rejected for payment through the formal Minneapolis claim procedure. Thus, further state court action would not be practical.

Minneapolis' third argument that a takings claim under the Minnesota Constitution requires a mandamus action as a prerequisite is also flawed. As set forth in pages 17-19 of Liberty and American Family's initial Brief, the Minnesota Constitution allows a direct action for unconstitutional taking based solely on damage. While the Minnesota Constitution also allows for a takings claims based on permanent government limitation of property -- that is not what is sought here.

Minneapolis fails to grasp this important distinction, as the two[2] cases it relies upon are cases seeking a Minnesota Constitutional taking based on permanent government limitation of property. *See Nolan & Nolan v. City of Eagan*, 673 N.W.2d 487, 491 (Minn. Ct. App. 2003) (Minnesota Constitutional taking sought for permanent limitation of property caused by flooding alleged to be permanent and continuing into the future.); *Vern Reynolds Const., Inc. v. City of Champlin*, 539 N.W.2d 614, 616 (Minn. Ct.

[2] Minneapolis also relies upon the unpublished case of *Northland Racquetball, Inc. v. Bemidji State Univ.*, No. CX-94-1621, 1995 WL 81413, at *1 (Minn. Ct. App. Feb. 28, 1995) but failed to provide a copy, so it is unlikely this Court will consider the same. Nevertheless should this Court do so, the taking in *Northland* was also based on a permanent limitation to property as appellants had been forced to close their business.

App. 1995) abrogated by *DeCook v. Rochester Int'l Airport Joint Zoning Bd.*, 811 N.W.2d 610 (Minn. 2012)(Minnesota Constitutional taking based on permanent limitation of property caused by permanent underground and topical land drainage easements.)

Because the takings claims here are based on damage caused to property, Liberty and American Family should be allowed to pursue their Minnesota Constitutional takings claim without further district court mandamus condemnation action.

CONCLUSION

The arguments offered by Minneapolis in its Response Brief are flawed, and based on the above and the arguments set forth in their initial Brief, Appellants respectfully request that the District Court's grant of Summary Judgment be reversed.

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CERTIFICATE OF COMPLIANCE

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