IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

WINDHOVER, INC. AND JACQUELINE GRAY,	)	
Plaintiffs,	)	Cause No. 07-cv-881 ERW
v.	)	
CITY OF VALLEY PARK, MISSOURI,	)	
Defendant.	)	

PLAINTIFFS' RESPONSE MEMORANDUM IN OPPOSITION
TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs initiated this action in March 2007 challenging two anti-immigrant ordinances (Ordinances 1721 and 1722) that had been enacted by the Defendant City of Valley Park ("City"). Those ordinances replaced two predecessor ordinances that purported to penalize landlords for renting to "illegal aliens" and to penalize businesses for employing "unlawful workers." The predecessor ordinances had been permanently enjoined by the Missouri state court. Ordinance 1721 replaced and amended the portions of the predecessor ordinances directed to landlords. Ordinance 1722 incorporated wholesale the portion of the predecessor ordinances that was directed to businesses and that had been held invalid. Because Ordinance 1722 contained the same provisions that had been enjoined, it would not by its own terms become effective unless and until the existing state-court injunction was terminated.

In July 2007, the City effectively repealed Ordinance 1721, leaving only Ordinance 1722 in place, which Plaintiffs believed was inoperative under its own terms. Plaintiffs endeavored to clarify the status of Ordinance 1722 by moving this Court for a declaration that it was inoperative. The City responded by purporting to amend Ordinance 1722 to make it immediately effective, and by filing the current motion for summary judgment, asserting that the Court should determine as a matter of law that Ordinance 1722 is not invalid under the Supremacy Clause, the Equal Protection Clause, the Due Process Clause or state law. Plaintiffs have cross-moved for summary judgment that the earlier state-court judgment invalidating the penalty provision that appears in Ordinance 1722 is preclusive in this proceeding and supports summary judgment for the Plaintiffs.

It is Plaintiffs' position that this Court should defer to the state court by first considering whether the state court's ruling is preclusive in this proceeding.[1] In the event the Court considers

[1] In addition, as noted elsewhere, plaintiffs in the state-court action, including the Plaintiffs in this action, have filed motions in state court for an order to show cause why the recent activation of Ordinance 1722

the City's motion for summary judgment, the motion should be denied because Ordinance 1722 is preempted under the Supremacy Clause, and because, at minimum, there are genuine issues of material fact precluding summary judgment regarding the validity of Ordinance 1722 under the Equal Protection and Due Process Clauses.

BACKGROUND

On July 17, 2006, the City enacted Ordinance No. 1708 ("Ordinance 1708"), which purported to penalize any landlord who permitted an "illegal alien" to occupy a dwelling unit and to penalize any business that employed or contracted an "illegal alien" to work. (Ex. D.)[2]

On September 22, 2006, Plaintiff Jacqueline Gray and other plaintiffs filed suit in the Missouri Circuit Court, County of St. Louis, alleging that Ordinance 1708 violated state and federal law.[3] On September 26, 2006, after the court entered a Temporary Restraining Order enjoining enforcement of Ordinance 1708, the City enacted Ordinance No. 1715 ("Ordinance 1715") (Ex. E), which amended Ordinance 1708 in certain respects, but nevertheless purported to penalize any landlord who leased property to an "illegal alien" or any business that employed an "unlawful worker." On September 27, 2006, the Circuit Court entered an Amended Temporary Restraining Order enjoining the enforcement of Ordinance 1715. On March 12, 2007, the Circuit Court entered an order permanently enjoining the enforcement of Ordinance 1708 and Ordinance 1715. (Ex. A.) Among other things, the Circuit Court held that the penalty provision in the employer portion of Ordinance 1715 was invalid under state law. (*Id.* at 6-7.)

Meanwhile, on February 14, 2007, the City enacted Ordinance 1721 and Ordinance 1722. Those Ordinances essentially separated Ordinance 1715 into two ordinances. Ordinance 1721

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does not violate the existing permanent injunction. A hearing on that motion is scheduled for September 20, 2007.

[2] Unless otherwise indicated, all exhibits cited herein are attached to the accompanying Statement of Material Facts.

[3] The case was captioned *Reynolds, et al., v. City of Valley Park, et al.*, (hereafter *Reynolds I*), Cause No. 06-CC-3802 in Division No. 13.

sought to regulate immigration by prohibiting the rental of dwellings to aliens unlawfully present in the United States. Ordinance 1722, as passed by the City Board of Aldermen on February 5, 2007, and signed by the Mayor on February 14, 2007, sought to regulate immigration by making it "unlawful for any business entity to recruit, hire for employment, or continue to employ, or to permit, dispatch, or instruct any person who is an unlawful worker to perform work in whole or in part in the City." (Ex. F § 4A.)

On February 11, 2007, the City passed Ordinance No. 1724 (Ex. G), which amended Ordinance 1722 so that it would not become effective until "the termination of any restraining orders or injunctions which [were then] in force in Cause No. 06-CC-3802[.]" (*Id.*)

On March 14, 2007, the Plaintiffs initiated this action challenging Ordinances 1721 and 1722 by filing a Petition for Declaratory and Injunctive Relief in the Missouri Circuit Court.[4] Plaintiffs included a challenge to Ordinance 1722 just in case the City tried to enforce it despite the injunction in *Reynolds I.* Plaintiffs filed an Amended Petition on April 12, 2007, and a Motion for Preliminary Injunction on April 19, 2007. The City removed the matter to this Court on May 1, 2007, and the Court denied Plaintiffs' motion to remand.

On July 16, 2007, the City enacted Ordinance No. 1735, which repealed certain disputed provisions from Ordinance 1721. On August 9, 2007, this Court granted the parties' stipulation for voluntary dismissal of Plaintiffs' claims related to Ordinance 1721. (Doc. No. 58.)

At that point it appeared to the Plaintiffs that this matter may be moot, or at least should be stayed pending the outcome of the appeals in *Reynolds I.* Only Ordinance 1722 was still at issue, and it was by its own terms not effective unless and until the permanent injunction in *Reynolds I* is terminated by a state appellate court. To confirm that Ordinance 1722 was not

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

operative, Plaintiffs filed a Motion for a Declaration that Valley Park Ordinance No. 1722 is Inoperative. (Doc. No. 50-1.)

On August 10, 2007, City responded to the Motion for Declaration (or, more precisely, to Plaintiffs' having raised the issue many weeks earlier), by filing the current Motion for Summary Judgment, with which it contended that it had the night before amended Ordinance 1722 to make it immediately effective. Plaintiffs questioned whether Ordinance 1722 had been amended in accordance with the Missouri Open Meetings Act (*see* Doc. Nos. 64, 65), and on August 20, 2007, the City purported to re-enact Ordinance No. 1736 ("Ordinance 1736"), which "restated" Ordinance 1722 and purported to make it effective immediately, although not enforceable until after December 1, 2007. (Ex. H.)

On August 27, 2007, Plaintiffs moved this Court for leave to file a Second Amended Complaint (Doc. No. 71) based on Ordinance 1722 as amended by Ordinance 1736, which this Court granted on September 4, 2007. On August 29, 2007, Plaintiffs filed a cross-motion for summary judgment that Ordinance 1722 is invalid under state law, based on the preclusive effect of the court's ruling in *Reynolds I*. (Doc. Nos. 73, 74, 75.)

ARGUMENT

Plaintiffs submit that this Court should first address Plaintiffs' Motion for Summary Judgment and determine whether the Missouri state court has already ruled on the validity of the penalty provision that appears in Ordinance 1722. In the event the Court considers the City's Motion, it should be denied because: (1) Ordinance 1722 is preempted under the Supremacy Clause; (2) there are genuine issues of material fact supporting an inference that the enactment of Ordinance 1722 was motivated by racial bias toward persons of Hispanic origin and will have a discriminatory effect, rendering it invalid under the Equal Protection Clause; (3) there are genuine issues of material fact supporting a finding that Ordinance 1722 violates the Due Process Clause; (4) the Missouri state court has already held that the penalty provision that appears in

Ordinance 1722 violates state law, and that ruling is preclusive in this Court; and (5), even if this Court were to revisit the state-law issue, the state court's ruling is correct as a matter of law and should be followed.

I. Ordinance 1722 Is Preempted Under The Supremacy Clause.

The City argues that Ordinance 1722 does not violate the Supremacy Clause of the United States Constitution, but rather constitutes permissible concurrent regulation of immigration. (Def.'s Mem. at 12-14.) The City's position was recently rejected by the District Court of the Middle District of Pennsylvania. *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 2007 WL 2163093 (M.D. Pa. July 26, 2007) (copy attached for the Court's convenience as Exhibit 1). The *Hazleton* ordinance, like Ordinance 1722, sought to impose a sanction of business permit revocation for employment of unauthorized workers and to mandate participation by certain employers in the otherwise voluntary federal Basic Pilot Program. The *Hazleton* court correctly concluded that such an ordinance was preempted by federal law. *See id.* at 42-56. Plaintiffs respectfully submit that this Court should follow the sound reasoning of the *Hazleton* court.

As the City acknowledges, the Supreme Court has recognized three types of preemption in the immigration context: (1) constitutional preemption, under which the attempt to regulate immigration, which is "unquestionably exclusively a federal power," is preempted by the Constitution even in the absence of federal legislation; (2) field preemption, under which state or local laws are preempted because they attempt to legislate in a field occupied by the federal government, either expressly or impliedly; and (3) conflict preemption, in which state or local laws are preempted because they "burden[] or conflict[] in any manner with any federal laws or treaties," or "[stand] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *See De Canas v. Bica*, 424 U.S. 351, 354, 362, 358 (1976) (describing

the three types of preemption).[5] Although Ordinance 1722 is flawed in each of those respects, in this Memorandum Plaintiffs address only the second two forms of preemption identified in the *De Canas* case: express field preemption and conflict preemption.[6]

Plaintiffs note at the outset that the City's assertion that a "presumption against preemption" applies in this case is incorrect because it fails to take account of the exceptionally strong federal interests in the area of immigration and the history of federal legislation directly addressing the same topic as Ordinance 1722. *See United States v. Locke*, 529 U.S. 89, 108 (2000) ("an 'assumption' of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence"). The power over immigration matters is federal both as a matter of tradition and of constitutional mandate. The federal power over immigration is necessarily exclusive because of the special need for nationwide consistency in matters affecting foreign nationals, given the "explicit constitutional requirement of uniformity[,]" *Graham v. Richardson*, 403 U.S. 365, 382 (1971), in immigration matters and the myriad problems that would result for citizens and non-citizens alike if each of the 50 states -- or, as in this case, each of the thousands of localities like Valley Park across the 50 states -- adopted its own rules for the treatment of aliens. *See Graham*, 403 U.S. at 382; *see also Zadvydas v. Davis*, 533 U.S. 678, 700 (2001) (recognizing "the Nation's need 'to speak with one voice' in immigration matters").

[5] The City chastises Plaintiffs for using the term "constitutional" preemption to refer to the first type of preemption set forth in *De Canas* because "*all* preemption claims are constitutional preemption claims." (Def.'s Mem. at 3, emphasis in original.) Of course, all preemption claims are "constitutional" in the sense that they are rooted in the Constitution's Supremacy Clause. But the term "constitutional preemption" is commonly used as short-hand because under that type of preemption the state or local law is directly preempted by the Constitution even in the absence of federal legislation in the field. The other types of preemption exist only where there is relevant federal legislation.

[6] Plaintiffs nevertheless reserve the right to assert the other bases of preemption, including constitutional preemption, as set forth in their memoranda in support of their motion for a preliminary injunction. (Doc. Nos. 1-2 and 42.)

In any event, any such presumption would readily be overcome in this case, where Ordinance 1722 is expressly preempted under federal law, and impliedly preempted for the additional reason that it affirmatively conflicts with federal law.

A. The Ordinance is Expressly Preempted by Federal Law.

Ordinance 1722 is expressly preempted by the Immigration Reform and Control Act ("IRCA"):

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

8 U.S.C. § 1324a(h)(2). *See Hazleton*, 2007 WL 2163093, at 44-45.

Raising an argument that was wholly rejected in *Hazleton*, the City asserts that Ordinance 1722 falls within the parenthetical exception to IRCA's express preemption provision. The City argues that because the Ordinance penalizes businesses by denying, suspending, or revoking their business licenses, it is a "licensing [or] similar law," and therefore not preempted.

The City is wrong because: (1) Ordinance 1722 is not a "licensing or similar law"; and (2) even if it were, the exception refers only to suspension of a license to a person who has been found to violate IRCA.

As the *Hazleton* court properly recognized, the City's reading does violence to the language of the statute and effectively negates Congress' intent in enacting IRCA:

> Under [Defendant's] interpretation of the provision, a state or local municipality properly can impose any rule they choose on employers with regard to hiring illegal aliens as long as the sanction imposed is to force the employer out of business by suspending its business permit-what we could call the "ultimate sanction." This interpretation is at odds with the plain language of the express pre-emption provision, which is concerned with state and local municipalities creating civil and criminal sanctions against employers. It would not make sense for Congress in limiting the state's authority to allow states and municipalities the opportunity to provide the ultimate sanction, but no lesser penalty. Such an interpretation renders the express preemption clause nearly meaningless.

Hazleton, 2007 WL 2163093, at 44.

In the City's view, by means of a parenthetical clause Congress exempted schemes like Ordinance 1722 that impose the enormous penalty of entirely shuttering a business on the basis of a finding that the business has violated a state or local immigration statute, even though the thrust of Section 1324a(h)(2) is to preempt any civil or criminal employer sanctions scheme, no matter how slight the penalties. Thus, that cannot be the meaning of "licensing law."

The City's interpretation is also contrary to the legislative history. The statute's reference to "licensing and similar laws" encompasses "lawful state or local processes concerning the suspension, revocation or refusal to reissue a license to any person who *has been found to have violated the sanctions provisions in this legislation*[,]" H.R. Rep. 99-682(I), 1986 U.S.C.C.A.N. 5649, 5662 (emphasis added) -- a finding that can only be made after extensive federal proceedings. *See* 8 U.S.C. § 1324a(e). Thus, "[t]he 'licensing' that the statute discusses refers to revoking a local license for a violation of the federal IRCA sanction provisions, as opposed to . . . for a violation of local laws." *Hazleton*, 2007 WL 2163093, at 44. Ordinance 1722 imposes the sanction of suspending a license for violations of the Ordinance, not for violations of federal law. Moreover, a violation under the Ordinance does not involve a finding of a violation of IRCA, because such a finding can only be made in federal proceedings.

The legislative history further indicates that "licensing laws" refers to "licensing or 'fitness to do business laws,' such as state farm labor contractor laws or forestry laws, which specifically require such licensee or contractor to refrain from hiring, recruiting or referring undocumented aliens." H.R. Rep. 99-682 (I), 1986 U.S.C.C.A.N. 5649, 5662. Fitness to do business laws deal with a person's character as it relates to the business to be engaged in. *Hazleton*, 2007 WL 2163093, at 45. Neither IRCA nor Ordinance 1722 are concerned with an employee's fitness to do business, and thus Ordinance 1722 is not a "licensing law" within the meaning of the statute.

Defendant incorrectly contends that Plaintiffs present a theory that would render Section 1324a(h)(2) surplusage. Section 1324a(h)(2) establishes a sweeping preemption provision with a very narrow exception. The fact that Section 1324a(h)(2)'s parenthetical clause does not control *this* case does not make it meaningless.

B. The Ordinance is Preempted Because It Conflicts with Federal Law.

Even if Ordinance 1722 somehow came within the exception to the express preemption provision in 8 U.S.C. 1324(a)(h)(2), it would nevertheless be preempted because it conflicts with federal law. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002) ("Congress' inclusion of an express pre-emption clause does not bar the ordinary working of conflict pre-emption principles" (punctuation and citation omitted)); *see also Geier v. American Honda Motor Co.*, 529 U.S. 861, 869 (2000) (finding conflict preemption even where state action fell outside express preemption clause).

Ordinance 1722 is invalid because it affirmatively conflicts with multiple provisions of federal law and because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *De Canas*, 424 U.S. at 363 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).[7] In addressing the issue of conflict-preemption, Plaintiffs need not demonstrate, as the City contends, "[i]mpossibility of [s]imultaneous [c]ompliance" to show that a local law is conflict preempted. Rather, as the very case relied upon by Defendant expressly indicates, "Conflict preemption occurs when . . . [local] law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Incalza v. Fendi North America, Inc.*, 479 F.3d 1005, 1009-10 (9th Cir. 2007) (emphasis added) (relying on

[7] Notably, the *De Canas* case never decided whether the statute in that case was conflict preempted, 424 U.S. at 363-64, but instead expressly reserved that question and remanded the case for a determination of that issue. *Id.* On remand, the plaintiffs, who were seeking enforcement of the statute, "dropped" the case, so the validity of the statute was never finally resolved and the statute was not enforced. *Bevles Co., Inc. v. Teamsters Local 986*, 791 F.2d 1391, 1394 (9th Cir. 1986).

the *Hines* standard); *see also* Def.'s Mem. at 20 (quoting same). Applying the proper standard, the Ordinance cannot stand.

1. The Ordinance Conflicts With Individual Provisions Of Federal Law.

The City is unable to explain away the numerous conflicts between Ordinance 1722 and federal law. As an initial matter, the City has entirely ignored several very significant conflicts. Indeed, the Ordinance's requirement that certain individuals who are exempt from verification under federal law, such as independent contractors and casual domestic workers, be subject to verification of work authorization presents a direct conflict with IRCA. (*See* Pl. Mot. for PI (Doc. No. 1-2) at 14; Pl. Reply Mem. In Support of PI (Doc. No. 42) at 8; *see also* 8 U.S.C. § 1242a; 8 C.F.R. § 274a.1(c)-(f); H.R. Rep. 99-682(I), at 57 (stating that "[i]t is not the intent of this Committee that sanctions would apply in the case of casual hires" and noting an exception for unions and similar entities); *Hazleton*, 2007 WL 2163093, at 50 (concluding that the Hazleton ordinance "conflicts with federal law in that under federal law, employers need not verify the immigrant status of certain categories of workers. For example, casual domestic workers and independent contractors are not covered by the federal requirements").

Another conflict the City has failed to address involves the Ordinance's failure to prohibit, as Congress chose to do in IRCA, discrimination by employers based on national origin or alienage. (Pl. Mot. for PI at 15; Pl. Reply Mem. In Support of PI at 8); *Hazleton*, 2007 WL 2163093, at 52 ("IRCA . . . seeks to prevent discrimination against legally admitted immigrants. . . . [Hazleton's ordinance] has no anti-discriminatory provisions, and this omission represents another conflict.").

The City likewise fails to address the obvious conflict between the process laid out in Ordinance 1722 and the process required by the federal government under IRCA. Under the federal system, an employee who receives an initial adverse finding under Basic Pilot is given eight days during which to contest that finding, and the federal government is then given ten

business days to respond. *See* 62 C.F.R. 48309(IV)(B)(2)(a). During this period, the employer may *not* terminate the employee or take other adverse action relating to his work authorization status. *Id.* In direct contrast, under Ordinance 1722, the employer faces suspension of a business license if it "fails to correct a violation . . . within three (3) business days after notification of the violation by the Valley Park Code Enforcement Office." (Ex. H § 4.B.(4).) While the Ordinance authorizes termination of the worker in question within three days as one method of "correction," *id.* § 5.B.(1), the federal government would prohibit such termination. Faced with an identical incompatibility, the *Hazleton* court concluded that such a local law was conflict preempted. *See* 2007 WL 2163093, at 52.

The Ordinance further conflicts with federal law in that it requires certain employers to enroll in the Basic Pilot Program, while the Program is voluntary under federal law. The City attempts to reconcile that conflict by arguing, incorrectly, that under federal law, it is only the federal government who is prohibited from mandating participation in Basic Pilot, and that "state and local authorities were left free to do so." (Def.'s Mem. at 23.) Yet Congress made a considered decision not to require all employers to participate in Basic Pilot, and specified a limited list of employers required to participate in the Basic Pilot or a related program—a list completely different from Valley Park's. *See* Illegal Immigrant Reform and Immigrant Responsibility Act ("IIRIRA"), § 402(e), Pub. L. No. 104-28, Div. C (Sept. 30, 1996), *codified as amended at* 8 U.S.C. § 1324a note.[8] If every locality across the country could mandate participation in Basic Pilot, then Congress' choice would be completely undone. Moreover, Congress has created Basic Pilot as a *temporary* program that is currently scheduled to expire in November 2008. Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-

[8]IIRIRA § 402(e) requires certain Federal entities to participate in a pilot verification program and provides that a federal administrative law judge may require an employer to participate in a pilot program as part of a cease and desist order issued under 8 U.S.C. § 1324a.

156 (Dec. 3, 2003). Ordinance 1722 undermines the voluntary and temporary character of the Basic Pilot program as established by Congress, and therefore is incompatible with congressional objectives. Accordingly, the *Hazleton* court concluded that a requirement identical to Valley Park's (that all public employers and businesses contracting with the city enroll in Basic Pilot) was conflict preempted. *See Hazleton*, 2007 WL 2163093, at 56.

The City also argues that Ordinance 1722 does not require all businesses to participate in Basic Pilot, but merely "encourages" businesses to enroll in the program by offering them a "safe harbor." (Def.'s Mem. at 23.) However, federal courts have construed government pronouncements as "binding as a practical matter" "if the language of the document is such that private parties can rely on it as a norm or safe harbor by which to shape their actions." *Gen'l Electric Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002) (internal punctuation and citation omitted).

The City's arguments that Ordinance 1722's reverification requirements do not conflict with federal law are likewise unavailing. The City contends that the Ordinance does not require employers to request any additional documents and therefore does not contravene IRCA's prohibition on document abuse at 8 U.S.C. § 1324b(a)(6). (Def.'s Mem. at 21-22.) But the Ordinance expressly requires employers to "acquir[e] additional information from the worker." That requirement is incompatible with Congress's intent that employers not seek to reverify workers once they have satisfied the initial verification requirements set forth in IRCA. *See, e.g.*, H. Rep. 99-682(I) at 57, 1986 USCCAN at 5661 (indicating that Congress does "not intend to impose a continuing verification obligation on employers"). Moreover, and fully consistent with this intent of Congress, the Memorandum of Understanding that all Basic Pilot participants must sign expressly provides that "[t]he Employer agrees not to use Basic Pilot procedures for

reverification." (*See* Exhibit I, at 4.)[9] Thus, the federal government affirmatively prohibits what the Ordinance requires.

The City's argument that the Ordinance does not violate IRCA's confidentiality provision also misses the mark. The confidentiality provision, 8 U.S.C. § 1324a(b)(5), specifically prohibits using the federal I-9 form "and any information contained in or appended to such form" for purposes other than enforcing the federal employer-sanctions provisions and certain federal criminal laws. The Ordinance conflicts with this provision by requiring employers to turn over identity information relating to employee work authorization status -- identity information reported to the employer on an I-9 form and in "appended" documents -- to the City of Valley Park. (*See* Ex. H § 4 B.(3).)

2. The Ordinance Interferes With The Federal Government's Regulatory Scheme.

Even if the Ordinance did not explicitly conflict with specific provisions of federal law, the Ordinance's attempt to *supplement* federal immigration law nonetheless undermines the legislative scheme enacted by Congress, and therefore violates the Supremacy Clause.

The City avoids discussion of the controlling precedent of *Hines v. Davidowitz,* 312 U.S. 52 (1941) , in which the Supreme Court ruled that where the federal government had passed an alien registration scheme, Pennsylvania could not enforce its own state alien-registration law.[10] The Court explained that:

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[9] Indeed, a further conflict exists because, while employers enrolled in Basic Pilot are prohibited from using Basic Pilot to verify employees hired before the date of enrollment in Basic Pilot (*see* Exhibit I at 4), Ordinance 1722 applies to all employment relationships entered into after the date of enactment. (*See* Ex. H § 5.A.)

[10] Plaintiffs note that the Supreme Court has cited *Hines* far more frequently than *De Canas* in the decades since *De Canas* was decided. *De Canas* itself reinforces the importance of *Hines*. *De Canas* specifically cited *Hines* in remanding the conflict-preemption issue to the California Supreme Court. 424 U.S. at 363-64. Moreover, *De Canas* emphasized that both *Hines* and *Pennsylvania v. Nelson*, 350 U.S. 497 (1956) (addressing the same statute as Hines) turned on the fact that "the federal statutes [at issue in those cases] were in the specific field which the States were attempting to regulate." See 424 U.S. at 362. Here, IRCA is precisely "in the specific field" which Defendant is attempting to regulate.

> where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.

Hines, 312 U.S. at 66-67. The Court further noted that the federal system attempted "to steer a middle path," creating a "single integrated and all-embracing system … in such a way as to protect the personal liberties of law-abiding aliens through one uniform national registration system, and to leave them free from the possibility of inquisitorial practices and police surveillance" while also obtaining the information sought under the statute. *Id*. at 73-74. *Accord Rogers v. Larson*, 563 F.2d 617, 626 (V.I. 1977) (invalidating Virgin Islands employer sanctions scheme and stating that "[b]ecause of the different emphasis the [Virgin Islands and federal employment] schemes place on the purposes of job protection and an adequate labor force, we conclude that [the Virgin Islands statute] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the INA").

Similarly here, Congress has created an integrated scheme of regulation that includes provisions specifically directed at employer sanctions and represents a careful balance of policy choices. *See Hazleton*, 2007 WL 2163093, at 52. ("[As] [i]n *Hines*[,]. . . Congress passed legislation aimed at the very issue addressed by the State or local law. Specifically, in this case, the federal government . . . has enacted a complete scheme of regulation on the subject o[f] the employment of unauthorized aliens."). In IRCA, Congress carefully balanced the important goals of reducing employment of individuals who lack work authorization; creating a workable system for employers and employees; and avoiding harassment of or discrimination against employees. *See* H.R. Rep. 99-682(I),at 56-62.[11]

[11] Congress has repeatedly refused to give states and local governments any role in this system, for example, by deciding not to include a provision that would have given state and local governments access to the Basic Pilot program. *See* 149 Cong. Rec. H 11582-01 (Nov. 19, 2003) (statement of Rep. Jackson-Lee) ("I am pleased to note that the Senate removed a provision that would give State and local

The effect of Ordinance 1722 is clearly to upset the balance struck by Congress in the employment verification law and in immigration law generally by implementing Valley Park's own enforcement mechanism, penalties, and interpretations in place of the federal system. For example, Congress viewed IRCA's provisions prohibiting discrimination by employers as a critical complement to the Act's enforcement provisions. *See* H.R. Conf. Rep. No. 99-1000 (1986), *reprinted in* U.S.C.C.A.N. 5840, 5842 ("[t]he antidiscrimination provisions of this bill are a complement to the sanctions provisions, and must be considered in this context"); H.R. Rep. No. 99-682(II) (1986), pt. 2, at 12, *reprinted in* 1986 U.S.C.C.A.N. 5757, 5761 (expressing view of the House Committee on Education and Labor that "if there is to be sanctions enforcement and liability, there must be an equally strong and readily available remedy if resulting employment discrimination occurs").[12] Yet by enacting an enforcement-only scheme that contains no countervailing prohibition on discrimination by employers, Valley Park has undermined the balance Congress sought to achieve.

The teaching of *Hines* is clear: local ordinances that address the same subject area as federal statutes and "conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations" cannot stand. *Hines*, 312 U.S. at 66-67. *See also Hazleton*, 2007 WL 2163093, at 52 (same).[13]

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governments access to the information collected with this program …. [I]n fact, we have provided safeguard provisions to make this legislation work, to provide the information that is necessary to ensure the protection of the workplace, and also to provide due process rights for all who are involved"); *id.* (Statement of Rep. Berman) (noting support of proposal and that he had opposed previous version "in part because I had concerns about what was in section 3 of the bill allowing data to be shared with State and local governments").

[12] Indeed, Congress explicitly linked the employer verification provisions to the antidiscrimination provisions by forcing the latter to expire if the employer sanction provisions were repealed pursuant to 8 U.S.C. § 1324b(k).

[13] *Accord Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 379-380 (2000) (state statute touching on foreign relations not saved by the fact that state and federal statute "share the same goals and … some companies may comply with both sets of restrictions," because "the inconsistency of sanctions … undermines the congressional calibration of force"); *Wis. Dep't of Indus. v. Gould*, 475 U.S. 282, 286, 288-89 (1986) (state statute touching on area governed by a "complex and interrelated federal scheme of law, remedy and administration" preempted because "conflict is imminent whenever two separate

3. Defendant's Citation to Unrelated Statutory Provisions Fails to Ameliorate the Conflicts Posed by Ordinance 1722.

The City attempts to downplay the significance of some of the foregoing conflicts by invoking a number of unrelated statutory provisions as supposed evidence of congressional intent to facilitate local action to address illegal immigration. (Def.'s Mem. at 14, 15-16, 17-19.) The City misconstrues the import of the various initiatives and programs it references. Rather than encouraging unbounded participation in immigration matters by state and local authorities, Congress has carefully authorized certain specific initiatives and programs and defined the limitations of those programs where it has determined that the state or local authorities may play a complimentary role. For example, Congress's enactment of a provision relating to communications between government entities and the Immigration and Naturalization Service regarding "citizenship or immigration status," 8 U.S.C. § 1373(a) (cited in Def.'s Mem. at 16), says nothing about the propriety of a local government creating from whole cloth an entire scheme for verifying *work authorization* status. Likewise, Congress's determination in the Personal Responsibility and Work Opportunity Reconciliation Act (cited at Def.'s Mem. at 17-18) that states and localities should verify *immigration status* to determine eligibility for *public benefits*, says nothing about the independent creation of a system of verification of *work authorization status*.

Significantly, and as the City acknowledges (Def.'s Mem. at 19), Congress has created a program to allow states and localities to enter into agreements with the federal government to engage in certain immigration-enforcement functions, pursuant to training and other requirements. *See* 8 U.S.C. § 1357(g). The City has provided no evidence that it has entered into such an agreement or that it intends to enter into such an agreement. Instead, Valley Park

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remedies are brought to bear on the same activity" and "[e]ach additional [state] statute incrementally diminishes the [agency's] control over enforcement of the [federal law] and thus further detracts from the integrated scheme of regulation created by Congress") (citations omitted).

has chosen to invent a wholly different, unauthorized, and conflicting system of local immigration regulation.

II. Plaintiffs' Equal Protection Claim Is Legally Sound And There Are Material Fact Issues Regarding Whether Ordinance 1722 Has A Discriminatory Purpose and Discriminatory Effect.

The City contends that Plaintiffs' Equal Protection claim is "fatally flawed" because Plaintiffs lack standing to bring a claim under the Equal Protection Clause and because Plaintiffs' "theory lacks state action." (Def.'s Mem. at 24-25, 31-33.) The City further contends that, even if Plaintiffs' Equal Protection claim is legally sound, Plaintiffs cannot show as a factual matter that Ordinance 1722 is motivated by a discriminatory purpose or will have a discriminatory effect. (*Id.* at 26-31.) As explained below, the City's legal challenge to Plaintiffs' Equal Protection claim is based on a misunderstanding of Plaintiffs' equal protection theories. As to Plaintiffs' factual allegations of discriminatory purpose and discriminatory effect, even without formal discovery in this matter, there is sufficient evidence to raise genuine issues of material fact.

A. Plaintiffs Have Standing to Sue On Behalf of Third Parties or On Behalf of Themselves for Injury Suffered on Account of Their Association With Persons of Hispanic Origin.

There are at least two ways in which Plaintiffs allege Ordinance 1722 will have a discriminatory effect: (1) by inducing employers to refrain from employing Hispanics; and (2) by inducing City officials or Valley Park residents to file complaints under the Ordinance against business entities based on their employment of Hispanics. (Sec. Amend. Compl., Doc. No. 78, ¶ 2.) The City focuses on only the first form of discriminatory effect and argues that Plaintiffs do not have standing to assert an Equal Protection claim on behalf of Hispanic employees or prospective employees. However, Plaintiffs can demonstrate standing under either theory of discriminatory impact.

First, it is well-settled that a party may rely upon the unequal treatment of third parties as a premise for an equal protection challenge where the party alleges "injury in fact" sufficient to establish Article III standing, and prudential considerations favor the party representing the interests of third parties who are direct victims of the discrimination. For example, in *Craig v. Boren*, 429 U.S. 190, 192-197 (1976), the Supreme Court held that a party may have *jus tertii* standing (standing to represent the interests of third parties) where the party has Article III standing in his or her own right, and the interests of third parties who cannot adequately represent themselves will be affected by the litigation. In *Craig*, a beer vendor challenged a gender-based law that set the minimum drinking age for males at 21 years and for females at 18 years. The Court concluded that the vendor had Article III standing because she was subject to sanctions for violating the gender-based law, and was entitled to assert the concomitant equal protection rights of males 18-20 years old, stating that "[a]s a vendor with [Article III] standing to challenge the lawfulness of [the statute], appellant [] is entitled to assert those concomitant rights of third parties that would be 'diluted or adversely affected' should her constitutional challenge fail and the statutes remain in force." *Id.* at 195 (citing *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965)). *See also Wilson v. Little Rock*, 801 F.2d 316, 322 n.2 (8th Cir. 1986) (finding error in the trial court's dismissal of § 1983 action against police officers whose conduct dissuaded minority clientele from frequenting white person's roller rink, and stating "[t]here is no question that [the plaintiff] has standing to assert a claim bottomed on alleged racial discrimination suffered by his black clientele") (citing *Craig*, 429 U.S. at 195).

Here, Plaintiffs have Article III standing to challenge Ordinance 1722 because they are subject to sanctions for violations of the Ordinance. Plaintiffs are thus entitled to assert the equal protection rights of third party employees or prospective employees, particularly where the Plaintiffs are in a better position than the employees or prospective employees to assert those rights.

Second, Federal courts have universally held that the Equal Protection Clause and civil rights statutes do not require that a claimant be a member of the group disfavored by the discriminator where the claimant is being targeted because of his or her association with the disfavored group. In *Adickes v. S.H. Kress and Co.*, 398 U.S. 144 (1970), the Supreme Court held that the petitioner, who was a white woman, could make out a claim under 42 U.S.C. § 1983 and the Equal Protection Clause where she was refused service in a restaurant because she was in the company of black persons. The Court remarked, "[f]ew principles of law are more firmly stitched into our constitutional fabric than the proposition that a State must not discriminate against a person because of his race or the *race of his companions* . . . ." *Id.* at 150-52 (emphasis added). The Court held that the petitioner could make out a claim under the Fourteenth Amendment and Section 1983 if she could show that the defendant restaurant and a city policeman had reached an understanding to deny her service "because she was a white person in the company of Negroes." *Id.* at 152.

Other federal courts have followed that principle, holding that both the Equal Protection Clause and civil rights statutes apply where "non-minority" plaintiffs are injured because of their relationship with "minority" persons. In *RK Ventures v. City of Seattle*, 307 F.3d 1045 (9th Cir. 2002), for example, the City of Seattle had enacted a public nuisance ordinance that the plaintiff nightclub owners, who were white, alleged was being selectively enforced upon them because their nightclub attracted a predominantly African-American clientele. The court held that the nightclub owners could assert an Equal Protection claim based on the allegation that the city discriminated against them based on the race of their clientele. *Id.* at 1056. The court stated that there was "no bar to standing under the Equal Protection Clause where an individual alleges a personal injury stemming from his or her association with members of a protected class." *Id.* at 1055.

The protected relationship may be social, as where the victim is interracially married or socializes with members of another race,[14] ideological, as where a member of one group is victimized for defending or advocating the rights another group,[15] or commercial, as where a person is victimized for doing business with members of another group.[16]

Here, Plaintiffs allege that they will be subject to complaints by residents and resulting enforcement action by the City based on their commercial relationship with Hispanics, that is, their hiring or contracting of Hispanics to work or perform services. Plaintiffs clearly have standing to assert an Equal Protection claim in their own right on that basis.

B. The Plaintiffs' Equal Protection Claim Is Based On State Action.

The City further argues that Plaintiffs' Equal Protection claim is not legally sustainable because it is not based on state action. That is simply incorrect. Plaintiffs are suing the City of Valley Park for the enactment and enforcement of an Ordinance that was motivated by a discriminatory purpose and will have a discriminatory effect. Plaintiffs are not suing any private businesses or private persons. Therefore, Plaintiffs' claim is squarely based on state action.

The City has mistakenly relied on cases in which the defendant is a *private party* and the question is whether there is a sufficient nexus between the private party and a government actor so that the private party nevertheless may be sued under the Constitution and/or 42 U.S.C. § 1983. The Supreme Court has recognized that theory of state action. *See, e.g., Adickes,* 398 U.S. at 173-74 (holding that plaintiff could sue restaurant under the Fourteenth Amendment and Section 1983 based on an allegation that the restaurant acted in concert with a city police officer

[14] *See, e.g., United States v. Hayward*, 6 F.3d 1241 (7th Cir. 1993), *overruled on other grounds* by *U.S. v. Colvin*, 353 F.3d 569 (7th Cir. 2003); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888 (11th Cir. 1986); *Bills v. Hodges*, 628 F.2d 844 (4th Cir. 1980); *Faraca v. Clements*, 506 F.2d 956 (5th Cir.), *cert. denied, Clements v. Faraca*, 422 U.S. 1006 (1975).

[15] *See, e.g., Maynard v. City of San Jose*, 37 F.3d 1396 (9th Cir. 1994); *Patrick v. Miller*, 953 F.2d 1240 (10th Cir. 1992).

[16] *See, e.g., Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *Cutting v. Muzzey*, 724 F.2d 259 (1st Cir. 1984); *Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983).

to deny service based on racial bias). But that is not the basis for alleging state action here. Rather, it is Plaintiffs' theory that the intended and inevitable result of the enactment and enforcement of Ordinance 1722 -- clearly state action -- is that it will induce businesses to discriminate against employees and contractors, and will induce businesses and city residents to file complaints based on race or national origin. There is ample authority that there is state action where a state or local law induces private actors to deprive persons of their constitutional rights, notwithstanding that the actual deprivation may have been perpetrated by the private actors.

For example, in *Peterson v. City of Greenville, S.C.*, 373 U.S. 245 (1963), the Court found a violation of the Equal Protection Clause where a city ordinance requiring segregated restaurants caused a restaurant manager to remove a group of young black persons from his restaurant. The Court acknowledged that purely private conduct abridging individual rights "does no violence to the Equal Protection Clause[,]" *id.* at 247, but held that "[w]hen a state agency passes a law compelling persons to discriminate against other persons because of race, . . . such a palpable violation of the Fourteenth Amendment cannot be saved by attempting to separate the mental urges of the discriminators." *Id.* at 248. The Court found a violation "even assuming, . . . that the manager would have acted as he did independently of the existence of the ordinance." *Id.*

While Ordinance 1722 does not expressly compel private actors to discriminate, the principle of the *Greenville* case has been extended to circumstances where state or local law *encourages* constitutional deprivations by private actors. In *Robinson v. State of Florida*, 378 U.S. 153 (1964), for example, the Court held that a state regulation requiring separate bathroom facilities for each race, while not expressly forbidding restaurants from serving black and white people together, "certainly embod[ied] a state policy putting burdens upon any restaurant which serves both races, burdens bound to discourage the serving of the two races together." *Id.* at 156.

The Court held, therefore, that the restaurant's action in having black patrons arrested for trespass was attributable to state policy and therefore violated the Fourteenth Amendment. *Id.* at 156-57.

In *Reitman v. Mulkey*, 387 U.S. 369 (1967), the Court considered whether an article of the California Constitution violated the Fourteenth Amendment. The article in question provided that no state or local governmental body could deny the right of any person "to decline to sell, lease or rent [real property] to such person or persons as he, in his absolute discretion, chooses." *Id.* at 371 and n.2. The article clearly was not discriminatory on its face, nor could it remotely be construed as *compelling* owners of real property to discriminate in the sale of their property. Yet the Court affirmed the California Supreme Court's holding that the article violated the Fourteenth Amendment because it "unconstitutionally involves the State in racial discriminations[.]" *Id.* at 375-76. The article "announced the constitutional right of any person to decline to sell or lease his real property to anyone[,]" including persons of another race, and thus, in context, encouraged private discrimination. *Id.* at 377. The Court cited with approval the California Supreme Court's conclusion based on U.S. Supreme Court precedent that "a prohibited state involvement could be found 'even where the state can be charged with only encouraging, rather than commanding discrimination.'" *Id.* at 375.

Here, Plaintiffs allege that Ordinance 1722 is intended and likely to have the impact of encouraging employers, City officials and Valley Park residents to discriminate against persons of Hispanic heritage. Significantly, the *Reitman* Court observed that the Court had not developed an "infallible test for determining whether the State . . . has become significantly involved in private discriminations. Only by sifting facts and weighing circumstances on a case-by-case basis can a nonobvious involvement of the State in private conduct be attributed its true significance." *Id.* at 378 (internal citation omitted). At minimum, Plaintiffs are entitled to discovery on this issue and to present the issue to a trier of fact.

The City's reliance on *Wickersham v. City of Columbia*, 481 F.3d 591 (8th Cir. 2007), (Def.'s Mem. at 32-33), is misplaced because the issue in *Wickersham* was whether a *private* nonprofit corporation could be deemed a "state actor" and thus be sued under Section 1983 for a violation of the First Amendment. Even if *Wickersham* were applicable,[17] it would not advance the City's position because the *Wickersham* court in fact found that there *was* a sufficient nexus between the challenged conduct by the private corporation and the exercise of state authority. *Wickersham*, 481 F.3d at 598. The City labors to distinguish *Wickersham* from this case by pointing out that in *Wickersham* the city officials knew of the restriction on speech, had an ongoing arrangement with the private corporation, and used city police officers to enforce the restrictions. (Def.'s Mem. at 32.) But that does not meaningfully distinguish *Wickersham* from this case. Plaintiffs here similarly allege that the City not only knows of, but intends that Ordinance 1722 will have the result of causing persons of Hispanic heritage to be deterred from working in Valley Park, that employers and residents who discriminate will be acting in conjunction with and because of Ordinance 1722, and that City officials will enforce the discrimination by acting on complaints filed by the discriminators.

The City's reliance on *City of Cuyahoga Falls v. Buckley Community Hope Found.*, 538 U.S. 188 (2003) (Def.'s Mem. at 31), is also misplaced. That case involved a "citizen-driven petition drive" that resulted in a referendum to repeal a housing ordinance authorizing construction of a low-income housing project. *Id.* at 191-196. The plaintiffs alleged that the referendum was motivated by racial bias and violated the Equal Protection Clause. The issue before the Court was whether there was sufficient evidence of discriminatory intent on the part

[17] Plaintiffs cited *Wickersham* in their Reply Memorandum in Support of Motion for Preliminary Injunction because it shows that there can be state action even where the constitutional deprivation is carried out by a private actor. However, *Wickersham's* analysis of the "circumstances in which a private party may be characterized as a state actor," *Wickersham*, 481 F.3d at 597, is not squarely applicable here because there is no question that the sued party here is a state actor, and that the challenged action, the enactment and enforcement of a City Ordinance, is state action.

of the city and its officials to survive summary judgment. *Id.* at 194. The Court held that there was not evidence of discriminatory intent because the referendum was instigated by a "citizen-driven" petition, not the City, which was required by its charter to place the referendum on the ballot, and because any statements by private individuals evidencing "discriminatory voter sentiment" could not fairly be attributed to the city or its officials. *Id.* at 195-96.

Here, in contrast, Ordinance 1722 was enacted by the City's Board of Aldermen at the instance of the Mayor. The City was not merely reacting to some citizen-initiative that it was bound by a City charter to follow. As shown below, even in advance of discovery, there is evidence of discriminatory intent on the part of the Mayor himself. There is nothing in the *Cuyahoga* decision that would preclude a finding here that there was discriminatory intent on the part of City or that the enactment of Ordinance 1722 constituted state action.

C. Ordinance 1722 Was Motivated by the Purpose, and Will Have the Effect of, Discriminating Against Hispanics And Those Who Hire Them.

The City acknowledges that an ordinance violates the Equal Protection Clause where it has a discriminatory purpose and discriminatory effect. (Def.'s Mem. at 26, citing *Rogers v. Lodge*, 458 U.S. 613, 617 (1982).) Plaintiffs are entitled to discovery regarding whether Ordinance 1722 suffers those infirmities.

1. There is a genuine issue of material fact as to whether Ordinance 1722 is motivated by a discriminatory purpose.

Even prior to discovery in this matter, there is evidence that the enactment of Ordinance 1722 had a discriminatory purpose: The City's Mayor first formed the idea of enlisting the City's residents to enforce federal immigration laws when a Mexican family (legal residents) moved into his neighborhood. (Ex. J, at 9.) The mayor is reported to have later said, "You got one guy and his wife that settle down here, have a couple kids, and before long you have Cousin Puerto Rico and Taco Whoever moving in." (*Id.* at 1.) He acknowledged that his lawyers did not want him to talk to the media because they were concerned that he would use words like

"wetbacks" and "beaners" to refer to persons of Mexican descent. (*Id.* at 4-5.) The Mayor did not like the idea of Hispanic families and workers moving into Valley Park, and, after learning of the anti-immigrant ordinances in Hazleton, Pennsylvania, saw the enactment of a similar ordinance in Valley Park as a means of weeding them out. (*Id.* at 9.) The Mayor did not have the slightest idea whether the Mexican family that moved into his neighborhood were lawful residents. (*Id.*) He simply saw an anti-"illegal alien" ordinance as a means of purging persons of Mexican heritage from Valley Park. (*Id.*) That is invidious discrimination.

The City tries to explain away the racial epithets used by the Mayor by asserting that he was merely explaining that he would *not* use words such as "wetback" and "beaner." (Def.'s Mem. at 27.) Space does not permit lengthy quotations here, but the news article speaks for itself. The Mayor clearly was not explaining what he would *not* say when he referred to Hispanics moving into the neighborhood as "Cousin Puerto Rico" and "Taco Whoever." (Ex. J at 1.) Nor was he explaining what he would *not* say when he said his lawyers were afraid he would say words like "wetback" and "beaner" in an interview. (*Id.* at 4-5.) But more important than the epithets themselves is the overall picture the Mayor painted of himself as a person who objected to people of Mexican origin moving into Valley Park and who saw an illegal-immigration ordinance as a way of weeding them out. (*Id.* at 1, 3-5, 9.) Indeed, the Mayor confirmed in an April 26, 2007 deposition in the *Reynolds I* case that there was nothing in the Riverfront Times article that he believed was falsely attributed to him. (Ex. K at 97.)

The City counters that it is the Board of Aldermen that enacted Ordinance 1722, and that Plaintiffs have not alleged that the Board of Aldermen acted with discriminatory purpose. (Def.'s Mem. at 27.) But Plaintiffs allege that the *City* acted with discriminatory purpose. That allegation is based, in part, on public statements by the Mayor. Plaintiffs are entitled to discovery as to both the Mayor's motivations and the motivations of the Board of Aldermen. That said, the City cites no authority for the proposition that discriminatory purpose on the part

of the Mayor would not be enough. There is no question that Ordinance 1722 was the Mayor's brainchild, that he is the one who pushed it through the Board of Aldermen, and that he is the one who appeared in the national media to take credit for Valley Park's anti-immigrant ordinances. (*See* Group Ex. L at 6.)

The City next argues that bias against Hispanics could not have been a motive because Ordinance 1722 contains an "anti-discrimination clause" providing that a complaint will not be enforced if it is based on "national origin, ethnicity or race[.]" (Def.'s Mem. at 27-28.) First, that language was inserted into the Ordinance after it was first enacted and in response to litigation both here and in the *Hazleton* matter. It says nothing about the Mayor's or the Board of Aldermen's initial motivations.

Second, that language can do nothing to change the inevitability that complaints under the Ordinance will be based on perceived national origin, ethnicity or race. As the state court judge in *Reynolds I* is reported to have asked the City counsel, "What would have to be alleged in a complaint that would not be related to national origin or race?" (Group. Ex. L at 41.) The City counsel could not answer. (*Id.*)[18]

Third, the City is simply incorrect in asserting that the modified language in Ordinance 1722 affords more protection against discrimination than federal law. There is no Valley Park ordinance comparable to 8 U.S.C. § 1324b, which affirmatively prohibits discrimination by employers. Without a provision that actually imposes sanctions for discrimination, the "anti-discrimination clause" will be toothless. There will be no way of actually identifying complaints

[18] The City's belated response to that query simply proves the point. The City now posits that a complaint might be based on a customer having overheard a conversation between an employer and a job applicant in which the applicant tells the employer that he does have the appropriate papers and the employer tells the applicant where to go to get a fraudulent "green card." (Def.'s Mem at 30 n.2.) Or, posits the City, "a complaint might come from a discharged employee who learns from a former co-worker that the employer knowingly replaced him with an unauthorized alien, based on the co-worker's discussion with the alien." (*Id.*) Those scenarios are so highly improbable, particularly in a smaller community like Valley Park, that they simply underscore the improbability of a complaint that is not precipitated by the race or national origin of an employer's workers.

that are precipitated by racial bias, except in the rare instance in which a complainant is sufficiently unwitting to actually say so on the face of the complaint.

2. There is a genuine issue of material fact as to whether Ordinance 1722 will have a discriminatory effect.

The City argues that because Ordinance 1722 has not been enforced and will not be enforceable until December 1, 2007, Plaintiffs' claim that the Ordinance will have a discriminatory effect is "based entirely on conjecture." (Def.'s Mem. at 28.) But clearly courts are not required to wait until an unconstitutional law actually causes injury to enjoin its enforcement. *See Reitman*, 387 U.S. at 380 (stating that prior cases "do exemplify the necessity for a court to assess the *potential* impact of official action in determining whether the State has significantly involved itself with invidious discriminations") (emphasis added). Indeed, the City acknowledges that the very existence of the Ordinance might cause employers and residents to discriminate. (Def.'s Mem. at 28.)

Even prior to discovery in this matter, there is ample basis from which to infer that the Ordinance would have a discriminatory effect: (1) reaction to the original Valley Park anti-immigrant ordinances, including by residents, landlords and the police (Group Ex. L at 6, 9, 19, 28, 52, 55-56; Ex. J at 3); and (2) trial testimony by Prof. Marc Rosenblum (Ex. C at 21-3, 40-42, 44-52, 54-58, 61-62, 102-104), an expert witness in *Hazleton*. Those sources demonstrate a high probability that, as a result of the existence of the anti-immigrant Ordinances, persons of Hispanic heritage will be deterred from living or working in Valley Park, that employers will be incentivized to avoid hiring persons of Hispanic heritage, and that City officials and residents of Valley Park will be incentivized to file complaints against businesses or employers based on the apparent Hispanic heritage of their workers.

The City argues nevertheless that no such discrimination can be expected because: (1) federal law already sanctions employers for hiring unauthorized workers and permits private

persons to file charges (Def.'s Mem. at 28-29, 30); (2) the availability of the Basic Pilot Program diminishes the incentive to discriminate (*id.* at 29); (3) the Ordinance's requirement that any complaint by a resident be "valid" mitigates any incentive to discriminate (*id.* at 29-30); and (4) there are already provisions in federal immigration law that penalize discriminatory hiring. (*Id.* at 30-31.) None of those arguments has merit.

First, the City argues that if the legal obligation not to hire unauthorized workers and a system of private complaints are "catalysts" for discrimination, then the catalysts already exist under federal law. It may in fact be the case that there are incentives to discriminate under federal law. But local ordinances like Ordinance 1722 compound and amplify the incentive to discriminate for a number of reasons: (a) unlike federal law, Ordinance 1722 does not contain a countervailing provision that penalizes discrimination; (b) Ordinance 1722 adds to the sanctions that may be imposed under federal law the very severe sanction of potentially losing the ability to conduct business for an indefinite period of time; and (c) a local ordinance is much more visible to the community, and a greater number of residents are likely to be aware of the invitation to file complaints.

Second, as to the availability of the Basic Pilot Program, there is nothing in the Ordinance that instructs a business entity as to how it may enroll in the Basic Pilot Program, nor is there any evidence that anyone within the City government has any expertise that could assist a business entity to enroll in the Basic Pilot Program. (Ex. M at 46-47; Ex. N at 37, 43-44.)

Third, the City's description of what constitutes a "valid" complaint under the Ordinance is misleading. The Ordinance describes a valid complaint as one that "include[s] an allegation which describes the alleged violator(s) as well as the actions constituting the violation, and the date and location where such actions occurred." (Ex. H at § 4B.(1).) In its memorandum, the City writes some additional language into the Ordinance: "In order to be considered valid, a complaint must *credibly describe specific, observed or corroborated* actions taken by a business

entity which constitute a violation of the ordinance. Moreover, the complaint must specify the exact *time* and date of the actions allegedly constituting a violation[.]" (Def.'s Mem. at 29, emphasis added.) In any event, as explained below in Section III, the Ordinance sets forth no procedures or standards for determining whether a complaint is "credible" or valid. Rather it is at the sole discretion of the City's Code Enforcement Office. Under those circumstances, an employer has every reason to fear that complaints will be lodged against it and enforcement actions instituted in the event it employs persons of Hispanic heritage. And residents will have no disincentive to file complaints based on racial bias because there is no penalty for doing so.

Finally, the City argues that the federal anti-discrimination remedies should be sufficient to ameliorate the discriminatory effect of the Ordinance. (Def.'s Mem. at 30-31.) The City cites no evidence for the proposition that the existence of federal anti-discrimination laws will negate the incentive to discriminate under the Ordinance. Indeed, it is an odd argument that an ordinance that has the purpose and effect of causing discrimination should be allowed to stand because there are federal laws that prohibit such discrimination.

III. Ordinance 1722 Violates The Due Process Clause.

The Fourteenth Amendment guarantees persons subject to civil sanctions by states or localities the right to due process before being deprived of a protected interest. *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970). The hallmarks of due process are notice and a meaningful opportunity to be heard. *See, e.g.*, *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (citations omitted). Plaintiffs allege that Ordinance 1722 violates the Due Process Clause because it "subjects the Plaintiffs to being deprived of their business or otherwise punished without providing any standards or guidance for compliance" (Sec. Amended Compl. ¶ 39), and "provides for no pre-sanction hearing, . . . and no meaningful process or procedure by which Plaintiffs might challenge Defendant's determination that Plaintiffs have violated the ordinance." (*Id.* ¶ 40.) The City argues that Ordinance 1722 gives businesses ample notice of how they may comply because

it requires only that they follow federal law, and that the Ordinance's *post*-sanction procedures provide an adequate opportunity to be heard. (Def.'s Mem. at 33-36.) As demonstrated below, the Ordinance fails to provide adequate notice or a meaningful opportunity for businesses to be heard before (or after) their licenses to conduct business in the City are summarily suspended.

A. Ordinance 1722 Fails to Provide Notice of How to Comply.

The City contends that the Ordinance provides sufficient notice to employers as to how to comply because: (1) employers may determine the work authorization of prospective employees by "scrutiniz[ing] documents presented by the employee, as they are already required to do by federal law," (Def.'s Mem. at 34); (2) employers must sign an affidavit upon applying for a business permit that they do not knowingly employ any unlawful worker (*id.* at 34-35); and (3) employers may "immunize" themselves against violations by utilizing the federal government's Basic Pilot Program to verify the work authorization of its future employees. (*Id.* at 35.) None of those arguments has merit.

First, nowhere does the Ordinance spell out that employers may comply by scrutinizing documents presented by the employee to determine his or her immigration status. More importantly, the Ordinance does not provide any guidance as to how to use the documents to determine immigration status. Under federal law, employers are required to review certain documents before hiring an individual. 8 U.S.C. § 1324a(b). However, review of those documents does not constitute a "determination" of the workers' status, nor could it: only an immigration judge can make a final determination with regard to the lawful status of any alien. *See* 8 U.S.C. § 1229a(a)(3).

Second, only businesses newly applying for a business permit are required to submit the affidavit referenced by the City. (Ex. H § 4A.) In any event, the business's submission of an affidavit that it does not knowingly employ unlawful workers in no way advises the business as to how it can screen out unlawful workers. Third, nowhere does the Ordinance explain how a

business entity can obtain access to the Basic Pilot Program. Moreover, as noted above, a requirement that business entities enroll in the Basic Pilot Program to avoid a violation is inconsistent with federal law, under which enrollment in the Basic Pilot Program is purely voluntary. (*See supra* at Section I.B.1.)

B. Plaintiffs have No Meaningful Opportunity to Be Heard Before or After They Are Deprived of Their Ability to Do Business in Valley Park.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) (citation omitted). Three factors determine whether procedures satisfy the due process clause, including the "private interest . . . affected by the official action;" the "risk of an erroneous deprivation" of those interests and the value of additional procedural safeguards; and the government's interest, including the burden of additional procedures. *Matthews*, 424 U.S. at 335. Ordinance 1722 provides no meaningful procedural protection and creates a high risk of an erroneous deprivation of Plaintiffs' interests because it: (1) employs a complaint-initiated system that provides no notice to an accused business of the basis for the allegation that it employs unlawful workers and affords no hearing prior to suspending the business's license; (2) provides no meaningful opportunity to be heard with regard to "correcting" a violation; and (3) provides an inadequate post-deprivation remedy.

1. The Ordinance's automatic suspension procedures deny business entities a pre-deprivation hearing.

Generally speaking, governmental entities must provide a hearing before depriving an individual or business of a protected interest to minimize "substantively unfair or mistaken deprivations." *Fuentes*, 407 U.S. at 97. The City may be excused from providing a pre-deprivation hearing only if such a hearing would be "unduly burdensome in proportion to the liberty interest at stake;" if the City could not anticipate the deprivation; or if there were an emergency requiring immediate action. *Zinermon v. Burch*, 494 U.S. 113, 132 (1990). The City

has not asserted that any of these situations are at play: the very nature of the Ordinance excludes the latter two circumstances and the City cannot, in good faith, suggest that the first situation applies when the interest at stake is a business entity's ability to conduct business in Valley Park.[19]

The Ordinance's enforcement mechanism is triggered by a complaint from any Valley Park resident or City official. (Ex. H § 4B.(1).) As discussed earlier, after receiving a "valid" complaint, the Code Enforcement Office must request "identity information" from an accused business. (*Id*. § 4B.(3).) Any business that fails to provide this undefined information within 3 days of receiving the City's request will have its permit suspended. (*Id*.)

Once the City begins an Enforcement Action, the accused business has no opportunity, let alone a meaningful one, to challenge the allegations. After the City requests "identity information," the business has no right to view the original Complaint or to learn the identity of its accuser. The business also has no right to appear before any entity to challenge the basis of the charges. Rather, it must collect and turn over information that it is arguably not required to possess under federal or state law. Failure to produce this information results in an automatic, mandatory suspension of the license even though there has been no finding that the business hired an unlawful worker. The business is assumed to be guilty of a violation based solely on a complaint filed by someone whose identity (and motive) is unknown to the business. [20]

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[19] The City relies on an unpublished case from the Court of Appeals for the Tenth Circuit to argue that no pre-deprivation hearing is required (Def. Mot. at 36), notwithstanding *Stauch v. City of Columbia Heights*, which found that a city was "required to provide [plaintiffs] with some form of notice and opportunity for a hearing *before* determining they were no longer licensed." 212 F.3d 425, 431 (8th Cir. 2000) (emphasis added). *See also Jamison v. State, Dept. of Social Servs., Div. of Family Servs.*, 218 S.W.3d 399, 408-09 (Mo. 2007) ("if the State feasibly can provide a hearing before deprivation of a protected interest, it generally must do so").

[20] The City argues that only "valid" complaints will trigger the City's enforcement provisions: yet the Ordinance contains no mechanism to ensure that the complaints bear the indicia of validity, such as truthfulness or a reasonable basis. Moreover, the Ordinance contains no consequences for the filing of false complaints (it prohibits only complaints alleging violations on the basis of national origin, ethnicity

Under no circumstances do these procedures provide the notice or hearing contemplated by the Fourteenth Amendment. Due process requires pre-deprivation notice that provides "enough information to be able to defend the allegations and to present conflicting evidence in a timely manner." *Div. of Family Servs. v. Cade*, 939 S.W.2d 546, 554 (Mo. App. W.D. 1997). *See also Goldberg*, 397 U.S. at 268 (notice sufficient when welfare recipients are informed of the "legal and factual bases" for the City's doubts about their eligibility). In this case, the Ordinance requires only that the complaint list the "actions constituting the [alleged] violation," (§ 4B.(1)), yet it fails to indicate *what* actions would constitute a violation. In fact, it is unclear what actions any Valley Park citizen could observe—excluding observations based on national origin, ethnicity or race, which are prohibited—that would constitute evidence of unlawful employment. Without knowing how an individual would identify an "action constituting the violation," no business entity could possibly have notice that it might be subject to a complaint and face the automatic reporting requirement. Moreover, "[n]o matter how elaborate, an investigation does not replace a hearing." *Winegar v. Des Moines Indep. Cmty. Sch. Dist.*, 20 F.3d 895, 901 (8th Cir. 1994). The Ordinance's alleged opportunity for business entities to be heard is nothing more than a reporting requirement: a response to an investigation in which the business must proffer unidentified "identity information" without the benefit of a hearing where it could challenge the basis of the accusations leveled against it.[21]

2. The Ordinance provides no meaningful opportunity to be heard when "correcting" violations.

The City also denies business entities a meaningful opportunity to be heard once a business is found to have violated the Ordinance. The City is directed to suspend the business

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or race.) Anyone with an axe to grind—or simply an aggressive business competitor—takes little risk in filing a false complaint in order to trigger an enforcement action.

[21] The Ordinance's failure to specify what "identity data" a business entity must produce to avoid suspension of its license (§ 4B.(3)) also violates due process. Without notice of what documents it must produce, an accused business entity has no hope of a meaningful opportunity to avoid having its license suspended.

license of any entity that fails to correct a violation within 3 days after notification of a violation by the City's Code Enforcement Office. (Ex. H § 4B.(4).)[22] Second or subsequent violations of the Ordinance result in a mandatory suspension of the business permit for 20 days. (*Id.* §4B.(7).) A business has only three ways to correct "violations," none of which involve an opportunity to contest the finding. A business must terminate the unlawful worker's employment; request a secondary or additional verification by the federal government of the worker's authorization under the Basic Pilot Program; or attempt to terminate the unlawful worker's employment, which termination is challenged in state court. (*Id.* § 5B.) The latter two "corrections" toll the 3-day "correction" period of § 4B.(4).[23]

This procedure denies a business any opportunity to contest the finding that it employs an unlawful worker. Nevertheless, the City argues that the Ordinance satisfies due process because "upon receipt of a final confirmation from the federal government that an individual is an unauthorized alien, City officials must provide the business entity with written confirmation of the alien's status." (Def.'s Mem. at 35.) While this may provide a form of notice to a business entity, it does not provide a meaningful opportunity *to be heard.* More significantly, neither the City's brief nor the Ordinance indicates what constitutes a "final confirmation" from the federal government. Plaintiffs assert that this is because the only source of a final determination of an

[22] The only exception to the mandatory suspension of a business license required by Ordinance § 4B.(4) is a showing by the business entity that it "verified the work authorization of the alleged unlawful worker(s) using the Basic Pilot Program." (Ex. H § 4B.(5).)

[23] In its motion, the City suggests that a business may correct a violation by presenting additional information from the employee to the city and by requesting additional verification of the employee's status from the federal government. (Def.'s Mem. at 35-36.) The city argues, without pointing to any language in the Ordinance to support this argument, that the employer "may present any information he wishes in order to show that he did not knowingly hire an unauthorized alien." (*Id.* at 36.) To the contrary, the "correction" section of the Ordinance (§ 5B) does not instruct the business to provide information to the City, but to acquire additional information from the worker and request a secondary or additional verification by the federal government. The City cannot mandate what information the employer presents to the federal government; and, by its own terms, the City cannot make an independent determination of an employee's status (§ 5D). Therefore, any "opportunity to be heard" by presenting this information to the City is meaningless.

individual's lawful status is a final ruling from an immigration judge. *See* 8 U.S.C. 1229a(a)(3). The procedures outlined in Sections 4 and 5 of the Ordinance cannot comport with due process to the extent that they are based on a misreading of the mechanisms available under federal law for verifying employment status.[24]

In sum, the City's claim of "extensive standards for compliance" (Def.'s Mem. at 34) is a red herring: the Ordinance's many procedures may provide notice of what punishment the City will impose under its regime, but they fail to provide business entities with a meaningful opportunity to contest the basis for the initial allegations levied against it or to avoid suspension of their licenses without taking action that could violate federal law. Moreover, the City's provision of a "safe harbor," in which business entities that "verif[y] the work authorization of the alleged unlawful worker(s) using the Basic Pilot Program" (Ex. H § 4B.(5)) does not save an otherwise constitutionally deficient process. The City cannot mandate participation in an otherwise voluntary federal program[25] as a condition for avoiding an unconstitutional procedure.

3. The post-deprivation procedures are similarly inadequate.

Because the Ordinance fails to provide for meaningful review subsequent to suspending the accused's license, the post-deprivation remedy is also constitutionally infirm. A post-deprivation hearing must provide a meaningful opportunity to challenge the basis of the state's action. *See, e.g., Doe v. Hennepin County*, 858 F.2d 1325, 1329 (8th Cir. 1988), *cert. denied*, 490 U.S. 1108 (1989) (post-deprivation hearing included the opportunity to be represented by counsel, the opportunity to testify and the ability to call witnesses). Although the Ordinance permits a challenge to the City's Board of Adjustment (§ 5E), it fails to identify what procedures

[24] Additionally, as discussed earlier, the Ordinance conflicts with federal law to the extent it requires businesses to provide information from employees' I-9 forms and to re-verify employees' status. (*See supra* at I.B.1.) Procedural requirements that conflict with federal law cannot provide an accused business with the due process to which it is entitled.

[25] *See* Illegal Immigrant Reform and Immigrant Responsibility Act, §§ 401, 402(a), Pub. L. NO. 104-28, Div. C (Sept. 30, 1996), *codified as amended at* 8 U.S.C. § 1324a.

will be afforded as part of a challenge, the standards for reviewing a challenge and the criteria for sustaining or rejecting a challenge. Such standard-less procedures do not comport with due process. *See, e.g.*, *Martinez v. Ibarra*, 759 F. Supp. 664, 668 (D. Colo. 1991) (no due process when appeals procedure was "never articulated in clear, written standards").

Moreover, the City's attempt to cloak the Ordinance under the aura of constitutionality by providing a "right of appeal to the St. Louis County Circuit Court" (§ 5E) is an empty gesture. Any appeal to a state court would necessarily impose upon that court an obligation to determine an allegedly unlawful worker's immigration status. Yet federal law contains no provision permitting state courts to make such determinations, which are reserved instead to immigration judges. *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 2007 WL 2163093, at 59 (M.D. Pa July 26, 2007) (citing 8 U.S.C. § 1229a(a)(1) ("An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.")).

IV. This Court Should Give Preclusive Effect To The State Court's Judgment That The Penalty Provision That Appears In Ordinance 1722 Is Invalid Under State Law.

The Plaintiffs incorporate herein by reference their Motion for Summary Judgment and supporting papers (Doc. Nos. 73, 74, 75). It is Plaintiffs' position that they are entitled to summary judgment that the state court's judgment that the penalty provision that appears in Ordinance 1722 is invalid is entitled to preclusive effect in this Court.

V. On The Merits, Ordinance 1722 Is Invalid Under State Law.

Ordinance 1722 is invalid because the penalty it imposes for a violation -- revocation of a business license -- exceeds what a fourth-class city is permitted to impose under Missouri law. Though a city is certainly authorized to regulate businesses and to require them to be licensed, Missouri law does not permit a fourth-class city to revoke a license as a penalty for violating an ordinance other than the licensing ordinance, and does not permit the revocation of a license in any event without due process. Ordinance 1722 violates Missouri law because: (1) it is not a

licensing law, and yet imposes revocation of a business license as a sanction, and (2) it does not provide for due process prior to the revocation of a license.

In Missouri, a city can only regulate their citizens through legislation where (a) the power to do so is "granted in express words" by the State, (b) the power is "necessarily or fairly implied in or incident to" such an express power, or (c) the power is "essential to the declared objects and purposes" of municipal government. *State ex rel. Curators of Univ. of MO v. McReynolds*, 193 S.W.2d 611, 612 (Mo. en banc 1946)(internal citation omitted); *see also Premium Std. Farms, Inc. v. Lincoln Township of Putnam Cty.*, 946 S.W.2d 234, 238 (Mo. en banc 1997). "Any fair, reasonable doubt concerning the existence of a power is resolved by the courts against the corporation and the power is denied." *Id.*[26]

Under Missouri law, Valley Park is a fourth-class city. (Def.'s Stmt. of Material Facts, Doc. No. 55, ¶ 1.) Fourth-class cities can enact and enforce ordinances only if they are "not repugnant to the constitution and laws of [Missouri]" and are necessary "for the good government of the city, the preservation of peace and good order, the benefit of trade and commerce[,] and the health of the inhabitants thereof." Mo.R.S. § 79.110. Section 79.740, which sets forth the penalties that may be imposed by fourth-class cities, provides that a fourth-class city may penalize a person for an ordinance violation only by imposition of a fine not exceeding $500.00, a sentence of not to exceed 90 days in jail, or some combination of fine and sentence within those limits. Mo.R.S. § 79.470.

Ordinance 1722 violates Section 79.470 because it is enforced by the mandatory suspension of "the business license of any business entity [that] fails to correct a violation …

[26] The City cites *Miller v. City of Town & Country*, 62 S.W.3d 431 (Mo. App. E.D. 2001), and *St. Louis v. Lieberman*, 547 S.W.2d 452 (Mo. 1977), for the proposition that a court should defer to municipal legislative power and that any doubt about whether an ordinance is a wise or reasonable exercise of a city's police power should be resolved in favor of the ordinance. (Def.'s Mem. at 38-39.) But the question of whether an ordinance is a reasonable exercise of the police power or is reasonably related to protecting the public welfare is different than the question presented here: whether the penalty provision of Ordinance 1722 is specifically prohibited by state law.

within three (3) business days after notification of the violation…" (Ex. H § 4B.(4). Once a suspension is imposed, it appears to be indefinite, lasting until "one business day after a legal representative of the business entity submits … a sworn affidavit stating that the business entity has corrected the violation…" (*Id.* §4B.(6). A fourth-class city therefore cannot penalize a violation of an ordinance by forcing a business to forego a business permit. *See Reynolds v. City of Valley Park,* No. 06 CC 3802, at 6-7 (March 12, 2007) (holding that Mo.R.S. § 79.470 does not authorize the suspension of a business license for a violation of a municipal ordinance). Moreover, the monetary value of the suspension of a business license exceeds the $500 maximum fine that may be imposed under Section 79.470. *Reynolds,* at 7. That is so because the revenue lost from not being able to conduct business will very quickly exceed $500.

Although with adequate safeguards for due process (safeguards not present in Ordinance 1722) a municipality may deny business licenses for reasons set forth in the licensing ordinance itself, suspension of a license that has already been issued is prohibited without allowing for a hearing. *Davis v. City of Kinloch,* 752 S.W.2d 420, 423-24 (Mo.App. 1988). Absent exigent circumstances, a post-deprivation hearing does not satisfy due process. *Id.* at 424. Ordinance 1722 provides neither a pre-deprivation nor a post-deprivation hearing to either the employer (whose license will be forfeited) or to the employee (who must be terminated in order for the license to be reinstated).

The City relies on several cases that acknowledge a city's power to revoke a license for violation of the licensing ordinance itself (not the scenario we have here). (Def.'s Mem. at 38-39.) But the City misses the point. Even in those circumstances where a city may suspend or revoke a license, it may not do so absent a hearing and final adjudication of a violation of the licensing ordinance. *Davis,* 752 S.W.2d at 423-24. As shown above, Ordinance 1722 authorizes the suspension of a business license with no hearing or adjudication whatsoever.

Finally, the City's reliance on *Jimmy's Western Bar-B-Q, Inc. v. Independence*, 1975 Mo. App. LEXIS 1800 (Mo. Ct. App. 1975) and *McClellan v. Kansas City*, 379 S.W.2d 500 (Mo. 1964), also is misplaced. Neither case addressed whether a city could revoke a license for violation of an ordinance other than the licensing ordinance. Indeed, in *Jimmy's*, the court held that the city could not deny a business license for reasons not set forth in the licensing ordinance itself and not related to the business for which the plaintiff sought a license. In *McLellan*, the issue was whether the City could validly require television and radio servicemen to obtain a license, not whether a license could be suspended for violation of a different ordinance and without due process.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that Defendant's Motion for Summary Judgment be denied in all respects.

Dated: September 13, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served on Defendant's counsel of record, listed below, by operation of the Court's ECF/CM system on September 13, 2007.

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

WINDHOVER, INC. AND JACQUELINE GRAY,	)	
Plaintiffs,	)	Cause No. 07-cv-881 ERW
v.	)	
CITY OF VALLEY PARK, MISSOURI,	)	
Defendant.	)	

PLAINTIFFS' STATEMENT OF MATERIAL FACTS

Pursuant to L.R. 7-4.01(E), Plaintiffs Windhover, Inc. ("Windhover") and Jacqueline Gray ("Gray") (together "Plaintiffs") submit this statement of material facts as to which there are genuine issues that preclude summary judgment. Below, Plaintiffs first respond to each of the numbered statements in the Defendant's Statement of Uncontroverted Material Facts; and then set forth additional statements of material fact that preclude summary judgment.

1. The City of Valley Park is a City of the fourth class located in St. Louis County, Missouri.

RESPONSE: Undisputed.

2. On February 14, 2007, Valley Park Ordinances No. 1721 and 1722 were enacted, after passage by the Board of Aldermen and approval by the Mayor. See Ordinance No. 1722, Def. Amended Answer to Pl. Amended Petit., Exhibit 1. See Ordinance No. 1721, Pl. Mtn. for Pre. Inj., Exhibit E.

RESPONSE: Disputed that the version of Ordinance No. 1722 attached as Exhibit 1 to Defendant's Amended Answer to Plaintiffs' Amended Petition was enacted on February 14, 2007. (*See* Doc. No. 38-1 at 4-6; Doc. No. 66-1 at 4 n. 2.) The remainder of Statement No. 2 is not disputed.

3. On Feb. 14, 2007, Valley Park Ordinance No. 1724 was enacted, amending the effective date of Ordinance No. 1722. See Ordinance No. 1724, Pl. Mtn. for Pre. Inj., Exhibit F.

RESPONSE: Not disputed.

4. On March 12, 2007, the Circuit Court of Saint Louis County issued its decision in *Reynolds v. Valley Park*, No. 06-CC-3802. That case was decided solely on state law grounds. The *Reynolds* Court did not address any of the federal claims at issue in this action. In addition, the *Reynolds* decision solely addressed ordinances that were by that time repealed (Valley Park Ordinances No. 1708 and No. 1715). It did not address Valley Park Ordinances [sic] No. 1721 and Ordinance No. 1722. *Reynolds*, Pl. Memo Supp. Mtn. for Pre. Inj., Exhibit D, slip op. at 6-7.

RESPONSE: Disputed that the March 12, 2007 decision in *Reynolds v. Valley Park*, No. 06-CC-3802 solely addressed ordinances that were by that time repealed. (*See* Defendant's Amended Answer to Plaintiffs' Amended Petition (Doc. No. 43) Ex. 1, which purports to be the version of Ordinance No. 1722 that was enacted on February 14, 2007, but which leaves Ordinance No. 1708 and Ordinance No. 1715 unaffected until such time as Ordinance No. 1722 becomes effective.) It is further disputed that the March 12, 2007 decision did not address Ordinance No. 1721 and Ordinance No. 1722. (Ex. **A**, March 12, 2007 Findings of Fact, Conclusions of Law, Order and Judgment at 5, ¶ 2 (without deciding whether the City had effectively repealed Ordinance No. 1708 and Ordinance No. 1715, finding that the "new ordinances," *i.e.*, Ordinance No. 1721 and Ordinance No. 1722, were "sufficiently similar" to the "old ordinances" that they did not render the case moot).) The remainder of Statement No. 4 is not disputed.

5. On April 12, 2007, Plaintiffs Windhover, Inc., and Jacqueline Gray filed their Amended Petition for Declaratory and Injunctive Relief.

RESPONSE: Not disputed.

6. In June 2007, Section 4 of Ordinance 1722 was amended by Ordinance 1732.

RESPONSE: Not disputed for purposes of the instant Motion for Summary Judgment.

7. On July 16, 2007, Valley Park Ordinance No. 1735 was enacted, after passage by the Board of Aldermen and approval by the Mayor. Ordinance No. 1735 amended the occupancy code of Valley Park so as to eliminate the challenged provisions of Ordinance No. 1721.

RESPONSE: Not disputed for purposes of the instant Motion for Summary Judgment.

8. On August 9, 2007, Valley Park Ordinance No. 1736 was enacted, after passage by the Board of Aldermen and approval by the Mayor. Ordinance No. 1736 amended Ordinance No. 1722 so as to make it effective immediately upon passage and approval, and provided that the enforcement provisions shall not be implemented and complaints shall not be accepted until, December 1, 2007. Ordinance No. 1736, Memo. Supp. Def. Mtn. for Summ. Judgment, Exh. A.

RESPONSE: Disputed. (*See* Amended Reply Mem. in Supp. of Mot. for Declaration (Doc. No. 66) and Exs. A-D.)

9. Ordinance No. 1736 amended Ordinance No. 1722 by restating Ordinance No. 1722 in its entirety (with modifications to its effective date provision) thereby removing all doubt or dispute as to the true and correct wording of Ordinance No. 1722. Ordinance No. 1736, Memo. Supp. Def. Mtn. for Summ. Judgment, Exh. A.

RESPONSE: Disputed. (*See* Doc. No. 38-1 at 4-6; Doc. No. 66-1 at 4 n. 2.) There is, at minimum, an open question as to which version of Ordinance No. 1722, if any, was lawfully enacted on February 14, 2007, and whether Ordinance No. 1722 was ever lawfully amended prior to August 20, 2007 to remove the language "solely or primarily" from Section Four, B.(2) of the Ordinance.

10. Plaintiff Windhover, Inc., is a corporation that owns rental units in Valley Park, Missouri. Pl. Amended Petit., ¶ 3.

RESPONSE: Undisputed.

11. Plaintiff Jacqueline Gray is the sole owner and principal of Windhover, Inc., Pl. Amended Petit., ¶ 4.

RESPONSE: Undisputed.

12. Plaintiff Windhover, Inc., is an employer that hires individuals to work on its properties and is accordingly subject to Ordinance 1722.

RESPONSE: Disputed. Windhover, Inc. is a business entity that permits or instructs persons to perform work within the City of Valley Park by means of contracting them to perform work on property owned by Windhover, Inc. (Ex. **B**, Affidavit of Jacqueline Gray ¶ 4.)

13. The Basic Pilot Program (recently named the "Employment Eligibility Verification System.") is a system that any employer in the United States may utilize to verify whether an individual seeking employment is authorized to work in the United States. Under the internet-based system, the federal government verifies whether the individual is authorized to work in the United States. DHS Statement to Congress Regarding the Employment Eligibility Verification System, Memo. Supp. Def. Mtn. for Summ. Judgment, Exh. C.

RESPONSE: Disputed that "any employer in the United States may utilize" either the Basic Pilot Program (recently re-named "E-Verify") to "verify whether an individual seeking employment is authorized to work in the United States." Only employers that have enrolled in the Basic Pilot Program, which requires certain steps including entering into a memorandum of understanding with the Department of Homeland Security and Social Security Administration that imposes obligations on the employer, may use the system. (VIS Privacy Impact Assessment (Doc. No. 29-4) at 20.) The current Basic Pilot/E-Verify program is set to expire by statute in November 2008. Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156 (Dec. 3, 2003). It is not disputed that the Basic Pilot/E-Verify program purports to verify whether an individual is authorized to work in the United States. However, the Basic Pilot/E-Verify database has not been reliable; it has issued initial "non-confirmations" to individuals who are in fact authorized to work, and adverse actions have been taken against employees based on the non-confirmations. (Ex. **C**, Transcript of trial testimony by Marc Rosenblum in *Lozano v. Hazleton*, 06-cv-1586, M.D. Pa., at 24-25, 28-31.)

14. The Basic Pilot Program is now used by more than 16,000 employers in the United States. DHS Statement to Congress Regarding the Employment Eligibility Verification System, Memo. Supp. Def. Mtn. for Summ. Judgment, Exh. C.

RESPONSE: Undisputed.

15. The Systematic Alien Verification for Entitlements (SAVE) program allows local government officials to verify individuals' immigration status with the federal government. There are at least 205 participating local, state, and federal government agencies across the country that are already using the SAVE program. DHS Privacy Impact Statement for SAVE, Def. Memo. Resp. to Mtn. for Pre. Inj., Exh. C, at 18.

RESPONSE: Not disputed with regard to the number of participants in the SAVE program. Disputed to the extent "immigration status" refers to whether a person is lawfully within the United States. The SAVE system is designed to verify status *for the purpose of determining eligibility for public benefits.* (VIS Privacy Impact Assessment (Doc. No. 29-4) at 20 ("Before an agency may use VIS to obtain immigration status information, an MOU must be signed between that agency and DUS/USCIS . . . . The MOU clearly states its purpose as verifying the citizenship and immigration status of alien applicants for benefits granted by the Agency.").)

PLAINTIFFS' ADDITIONAL STATEMENT

16. On July 17, 2006, the City of Valley Park enacted Ordinance No. 1708, attached hereto as Exhibit **D**.

17. On September 26, the City of Valley Park enacted Ordinance No. 1715, attached hereto as Exhibit **E**.

18. On February 5, 2007, the City of Valley Park's Board of Aldermen passed, and on February 14, 2007 the Mayor of Valley Park signed, Ordinance No. 1722, attached hereto as Exhibit **F**.

19. On February 11, 2007, the City of Valley Park's Board of Aldermen passed, and on February 14, 2007 the Mayor of Valley Park signed, Ordinance No. 1724, attached hereto as Exhibit **G**. Ordinance No. 1724 amended Ordinance No. 1722 so that it would not become effective until the "termination of any restraining orders or injunctions which are now in force in Cause No. 06-CC-3802[.]"

20. On August 20, 2007, the City of Valley Park purported to enact Ordinance No. 1736, which purports to amend Ordinance No. 1722 so that it is immediately effective, but not enforceable until December 1, 2007. (Ex. **H**.)

21. The Memorandum of Understanding that all participants in the Basic Pilot Program must sign provides that '[t]he Employer agrees not to use Basic Pilot procedures for reverification." (Ex. **I**.)

22. On February 28, 2007, the Mayor of the City of Valley Park, Jeffrey Whitteaker, gave an interview to a reporter for the Riverfront Times newspaper. (Ex. **J,** Kristen Hinman, "Valley Park to Mexican immigrants: *Adios* illegals!," *Riverfront Times,* Feb. 28, 2007.)

23. The Riverfront Times article reports that "Whitteaker says he's been thinking about cracking down on illegal immigrants for some time -- at least since the day in August 2004 when the Del Abra family moved into his neighborhood, right around the corner from his sister and mother." (*Id.* at 9.)

24. The Riverfront Times article reports that the Del Abras are of Mexican origin but have lived in the United States for twenty years. The husband and wife have green cards, and all of their children were born in the United States. (*Id.*)

25. The Riverfront Times article reports that about a day after the Del Abras moved into (then) Alderman Whitteaker's neighborhood, Whitteaker received a complaint from a neighbor that she was afraid the Del Abra children would trespass onto her property and jump into her pool. (*Id.*)

26. The Riverfront Times article reports that at a meeting of the Board of Aldermen the next night, Whitteaker brought up the neighbor's complaint, and asked an officer of the St. Louis County Police whether the Del Abras had green cards, and asked who checks whether they

have green cards. The City attorney responded that the employer checks for green cards. Whitteaker then wondered who checks green cards for little kids. (*Id.*)

27. The Riverfront Times article reports that Whitteaker conceded that he had never spoken to Mr. Del Abra or any other Mexican living in Valley Park. (*Id.*)

28. The Riverfront Times article reports that whenever Whitteaker thinks about illegal immigration, "his mind fills with unpleasant visions of Mexicans pouring into town." (*Id.* at 1.)

29. The Riverfront Times article reports that, in discussing the issue of overcrowding, Mayor Whitteaker said: "You got one guy and his wife that settle down here, have a couple of kids, and before long you have Cousin Puerto Rico and Taco Whoever moving in. They say it's their cousins, but I don't really think they're all related. You see fifteen cars in front of one house -- that's pretty suspicious." (*Id.*)

30. The Riverfront Times article reports that the City attorneys warned Whitteaker not to give the interview with the Riverfront Times, for fear that he might use ethnic slurs. Whitteaker is reported to have said, "they don't want me to say something that could be helpful to the other side," such as "'wetbacks' or 'beaners' or something." (*Id.* at 4-5.)

31. The Riverfront Times article reports that the idea for the immigration ordinances came to Whitteaker when he learned of the immigration ordinances in Hazleton, Pennsylvania. He is reported to have said, "[t]he problems they had in Hazleton, I seen the same thing here, just on a smaller scale," such as public urination and driving without insurance. (*Id.* at 5.)

32. The Riverfront Times article reports that Whitteaker said that a group of apartments rented to numerous Mexican workers was one of the town's problem areas, and that some of its residents were seen "doing outside drinking, urinating against the walls, hootin' and hollerin' at women." (*Id.*)

33. The Riverfront Times article reports that apartments that are rented to Mexican workers belong to Ray Thompson, who hires some 30 Mexicans each year through a federal program. Thompson is reported to have said that he fielded anonymous calls over the past few years saying things to the effect of, "[g]et those f_____ spics outta here!" (*Id.*)

34. The Riverfront Times article reports that shortly after Valley Park's immigration ordinances had been enacted, residents began making anonymous calls to the St. Louis County Police Department, asking them to investigate certain homes for illegal immigrants. The police reportedly responded by knocking on a handful of doors asking Hispanics to provide proof of legal residence in the United States. (*Id.* at 3.)

35. Mayor Whitteaker testified in an April 26, 2007 deposition in the *Reynolds I* case, Cause No. 07CC-1420 in the Circuit Court of the County of St. Louis. In response to a question regarding whether there was anything in the February 28, 2007 Riverfront Times article attributed to him that he believed was "definitely false," he testified "[n]ot that I can remember." (Ex. **K**, April 26, 2007 transcript of J. Whitteaker deposition, at 97.)

36. In his April 26, 2007 deposition, in response to the question, "[w]hat is your understanding of the legal status of people from Puerto Rico?", Mayor Whitteaker answered, "I believe that the, you know, if they're illegal, they're illegal." (*Id.* at 95.)

37. On September 20, 2006, Mayor Whitteaker stated on the ABC Nightline program: "I was listening to a talk radio show here in St. Louis. And the mayor of Hazelton [sic], Pennsylvania was on there with some of his new legislation and ordinance they passed. And I talked to the board and the city attorney, drafted a new bill for us to consider. It went to the Board of Aldermen, passed 8-0, in favor of. There was a zero audience complaints." (Group Ex. **L** at 6.)

38. Valley Park business owner Stephanie Reynolds stated on the September 20, 2006 Nightline program that her deli had lost business from Hispanic residents as a result of the enactment of the immigration ordinances, because they are afraid. (*Id.* at 9.)

39. Valley Park deli manager Tish Ricks stated on the September 20, 2006 Nightline program that Hispanics are afraid to come into the store, and that her (presumably Hispanic) neighbors no longer allow their small children to play outside. (*Id.*)

40. Stephanie Reynolds has stated in other media that both legal and illegal immigrants are scared to come to her store because of the immigration ordinances. (*Id.* at 19.)

41. A legal resident of Valley Park who is from Mexico stated to the media that the police have been to his house following the enactment of the immigration ordinances. (*Id.*)

42. It was reported in the media that, days after Valley Park's immigration ordinances were passed, the police department began receiving calls from residents regarding homes at which undocumented workers were allegedly living. The police reportedly responded by knocking on doors and asking residents for proof that they were in the country legally. (*Id.* at 28.)

43. It has been reported in the media that, at a meeting of the Valley Park Board of Aldermen subsequent to the enactment of the immigration ordinances, the Clerk read several emails from residents, including one email complaining of "30 to 40 Mexicans" playing volleyball in a park, and stating "I bet 30 were here illegally[.]" (*Id.* at 52.)

44. It has been reported in the media that sixteen-year old Valley Park resident Alberto Lopez stated that, subsequent to the enactment of the immigration ordinances, four police officers knocked on his family's front door and asked to see immigration documents for everyone who was there. (*Id.* at 55-56.)

45. Professor Marc Rosenblum is a professor of political science at the University of New Orleans, and testified as an expert witness in *Lozano v. Hazleton,* No. 06cv1586, M.D. Pa. (Ex. C at 3-4.)

46. Professor Rosenblum testified that it was his opinion that the Hazleton ordinances would likely have the effect of increasing discrimination in housing and employment, particularly against people of Latino descent, and he explained why. (*Id.* at 21-23, 40-42, 44-52, 54-58, 61-62, 102-104.)

47. Professor Rosenblum testified that a historical analogue for ordinances such as the Hazleton ordinance (and thus the Valley Park Ordinance) are the employer provisions of the Immigration Reform and Control Act (IRCA) that was initially enacted in 1986. (*Id.* at 2-13, 40.) There is widespread consensus in the literature that, among other things, IRCA has led to greater employment discrimination against Latinos. (*Id.* at 41.) There is evidence that a significant percentage of employers took the "informational shortcut" of simply not hiring applicants who looked or sounded like Latinos, or otherwise looked or sounded foreign born. (*Id.* at 41-42.) There is also evidence that a significant number employers required more documentation of applicants who looked or sounded Latino or otherwise foreign born. (*Id.* at 42.)

48. Professor Rosenblum explained that, faced with sanctions for hiring unauthorized workers and with the burden and uncertainty of attempting to determine an applicant's immigration status, employers engage in "defensive hiring," that is, assuming that an applicant who looks and sounds Latino is not from the United States and is more likely to be "illegal," and thus avoiding that risk by not hiring that person. (*Id.* at 47-48, 61-62.)

49. Professor Rosenblum testified that an ordinance like the Hazleton ordinance (and thus the Valley Park ordinance) can be expected to exacerbate the phenomenon of defensive

hiring because it "ratchet[s] up the punishment for getting [the determination of lawful status] wrong," and "ratchet[s] down the due process steps prior to the determination being made." (*Id.* at 44.) The Hazleton ordinance (like the Valley Park ordinance) eliminated some of the due process provisions contained in IRCA by, for example, requiring the termination of a worker within only three days of a "non-confirmation," as opposed to the eight days provided under IRCA. (*Id.* at 46.) Moreover, the Hazleton ordinance (like the Valley Park ordinance) does not require that notice of a complaint or of a "non-confirmation" be provided to the affected employee, which gives the employer an incentive to simply terminate the employee without notice or explanation. (*Id.* at 49-50.)

50. Professor Rosenblum further explained that the Hazleton ordinance's provision for citizen complaints (to which Valley Park's provision is similar) "creates a great opportunity for individuals to initiate complaints against business competitors or against somebody who . . . has been hanging out on the street corner or for whatever reason, including, despite the [anti-discrimination] language in here, including quite probably because they think that they look or seem foreign born on the basis of their race or ethnicity." (*Id.* at 51-52.)

51. Professor Rosenblum testified that the discriminatory effects he described would be generalizable to similar schemes around the country. (*Id.* at 62, 102-104.)

52. The City of Valley Park currently does not have access to the federal verification systems (*i.e.*, SAVE and Basic Pilot), nor does it have any employee who is trained in their use. (Ex. K, at 80; Ex. **M**, April 26, 2007 transcript of Ruppel deposition, at 38-40, 42-43, 45-50, 52-55, 59-60; Ex. **N,** April 26, 2007 transcript of Schaub deposition, at 37-38, 41, 43-44, 49, 60.)

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served on Defendant's counsel of record, listed below, by operation of the Court's ECF/CM system on September 13, 2007.

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