

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

STEPHANIE REYNOLDS, et al.	)	
	)	
Plaintiffs,	)	
	)	
and	)	
	)	Cause No. 06-CC-3802
JAMES ZHANG,	)	Division No. 13
	)	
Intervenor,	)	
	)	
v.	)	
	)	
CITY OF VALLEY PARK, MO, et al.)	)	
	)	
Defendants.	)	

PLAINTIFFS' TRIAL BRIEF

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Plaintiffs bring this case seeking: a declaration that Valley Park Ordinance No. 1708 and Ordinance No. 1715 are void and unenforceable; and a permanent injunction enjoining their enforcement.^{1/} Plaintiffs base their claim on many grounds, some state others federal, some a matter of state law, others of constitutional proportions. This Court need not address the constitutional issues if the Ordinances can otherwise be declared void. *See, e.g., Committee for a Healthy Future, Inc. v. Carnahan*, 201 S.W.3d 503, 505 fn.1 (Mo. banc 2006) (“Decisions regarding constitutional questions will be avoided if the case can be fully determined without reaching them”). Thus, Plaintiffs present their state law arguments first, followed by those involving constitutional issues.

I. STATE LAW ISSUES

A municipality can legislatively regulate its citizens only where: the power is “granted in express words”; or it is “necessarily or fairly implied in or incident to” an express power; or it is “essential to the declared objects and purposes” of the municipality.” *State ex rel. Curators of Univ. of MO v. McReynolds*, 193 S.W.2d 611, 612 (Mo. en banc 1946) (citation omitted); *see also Premium Std. Farms, Inc. v. Lincoln Township of Putnam Cty.*, 946 S.W.2d 234, 238 (Mo. en banc 1997) (same). “Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied.” *Id.*

As a fourth class city, Defendant Valley Park can enact only those ordinances which are “not repugnant to the constitution and laws of this state,” and which are “expedient for the good

^{1/}Defendants declared in the midst of this litigation that they have repealed Ordinance No. 1708 and Ordinance No. 1715. Even if Defendants did effectively repeal the Ordinances (Plaintiffs take no position on this issue), Plaintiffs are entitled to have those Ordinances declared void on any or all of the grounds raised in the Second Amended Petition. *See, e.g., R.E.J., Inc. v. City of Sikeston*, 142 S.W.3d 744 (Mo. banc. 2004); *Northeastern Florida Chapter of the Assoc. General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 661-62 (1993).

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.STAT. § 79.110.^{2/}

A. The Ordinances Conflict With Missouri Statutes.

Ordinance No. 1715 and Ordinance No. 1708 are void because they are “repugnant to the ... laws of this state” as expressly prohibited by MO.R.STAT. § 79.110. The issue of whether a conflict with state law voids the Ordinances is one of law which can be resolved without evidence. Missouri Supreme Court precedent provides the guidelines for resolving whether a conflict exists:

A municipal ordinance must be in harmony with the general law of the state and is void if in conflict. In determining whether an ordinance conflicts with general laws, the test is whether the ordinance permits that which the statute forbids and prohibits, and vice-versa. The powers granted a municipality must be exercised in a manner not contrary to the public policy of the state and any provisions in conflict with prior or subsequent state statutes must yield.

Morrow v. City of Kansas City, 788 S.W.2d 278, 281 (Mo. banc 1990) (citations omitted); *see also* State ex rel. Drury Displays, Inc. v. City of Columbia, 907 S.W.2d 252, 256 (Mo.App. 1995) (“A municipal ordinance must be consistent with the general law of the state, and the ordinance is void if the two are in conflict”).

Conflict With Landlord Tenant Law (Pet. ¶ 26(c)): Missouri landlord-tenant law forbids and prohibits a landlord from evicting a tenant without 30 days notice. MO.R.STAT. § 441.060. And, if the tenant refuses to leave voluntarily upon the 30th day, Missouri law forbids the landlord from removing the tenant’s belongings from the premises without “judicial process.” MO.R.STAT. § 441.233. In direct conflict with these mandates, Ordinance No. 1715 compels a landlord to evict a tenant within 5 days of being given notice that the City of Valley Park has unilaterally decided that tenant is an “illegal alien,” or the landlord will be subject to severe penalties. *See* Ordinance No. 1715, § 5.B.(4). Thus, it is clear that Ordinance No. 1715: is not in harmony with Missouri

^{2/}Per the Court’s Order, the most pertinent authorities, as well as the relevant portions of all articles and government publications cited in this Trial Brief, are included in Plaintiffs’ Appendix, which is submitted herewith.

law; compels actions that are contrary to the public policy of this State (eviction within 5 days); and permits (in fact, compels) that which the State statute forbids (*i.e.*, eviction on less than 30 days notice).

Direct Conflict With Statutorily Authorized Punishments(Pet. ¶ 26(e)): Under Missouri law a fourth class city, like Valley Park, can penalize a person for an ordinance violation only by imposing a fine of not more than \$500 and/or a sentence of no more than 90 days in jail. MO.R.STAT. § 79.470. Fourth class cities, like Valley Park, are not authorized to prohibit the collection of rent or compensation as punishment for an ordinance violation. Id. Nor is such a city allowed to “sentence” a business to foregoing a business permit, or the renewal of a business permit, for a period of “not less than five (5) years.” Id. Nor can a city summarily suspend a validly-issued business permit or occupancy permit for an ordinance violation.^{3/} Id. Ordinance No. 1715 is void because it expressly provides for these penalties which are not authorized by Missouri law, *e.g.*, it provides that a violation can be punished by denial or suspension of a business license and occupancy permit, and by prohibiting the collection of rent, fees, and compensation. See Ordinance No. 1715, §§ 4.B.(3), (4), (6), (7); Ordinance No. 1715, §§ 5.B.(4), (5), (6), (8). Likewise, Ordinance No. 1708 is void because it expressly provides that a violation of its provisions will result in the denial of a business permit (or its renewal) for “not less than five (5) years.” See Ordinance No. 1708, § 2.

The monetary value of the fines imposed by Ordinance No. 1708 and Ordinance No. 1715 likewise render the Ordinances void due to the imposition of unauthorized penalties. Indeed, in direct violation of the \$500 maximum fine authorized by Missouri law for an ordinance violation (MO.R.STAT. § 79.470), Ordinance No. 1708 expressly provides that a violation of its provisions

^{3/}Although municipalities can deny business licenses/permits for reasons set forth in a license/permit ordinance itself (provided there are adequate safeguards for a due process hearing, which the Ordinances here do not provide), suspension of an already-issued license is prohibited without provision of a prior hearing. See, *e.g.*, Davis v. City of Kinloch, 752 S.W.2d 420, 423-24 (Mo.App. 1988).

shall be punished by a fine of “*not less than* Five Hundred Dollars (\$500.00).” See Ordinance No. 1708, § 3.B. (emphasis added). And, by authorizing punishments which include the indefinite suspension of business licenses/permits, occupancy permits, and the collection of rent, Ordinance No. 1715 likewise violates the \$500 fine limit imposed by MO.R.STAT. § 79.470, as the value of such penalties could greatly exceed this statutory limitation.

B. Defendants Exceeded Their Delegated Authority (Pet. ¶ 26(b)).

The issue of whether Defendants exceeded their delegated authority to enact legislation that is “expedient 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.STAT. § 79.110), by enacting Ordinance No. 1708 and Ordinance No. 1715, is a both a purely legal question, and a mixed question of fact and law. As a purely legal matter, the statute authorizing fourth class cities to enact legislation does not authorize regulation of immigration. MO.R.STAT. § 79.110. Nor does it allow a fourth class city to enact legislation for the declared purpose of “the security and safety of the homeland.” *Id.*; see also Ordinance No. 1715, § 2.C. Yet, this is the stated direct goal of the Ordinances. Because the Ordinances regulate in an unauthorized area, they should be declared void due to Defendants lack of authority to enact them.

Even if, based on the face of the Ordinances, it could be said that they do not seek to regulate in an unauthorized area (which it cannot), the facts admitted to by Defendants make clear that Defendants exceeded their delegated authority in enacting them. In the Ordinances, Defendants declare that their alleged authority to “abate public nuisances” encompasses the right to regulate “illegal immigration.”^{4/} But, while a city has “the power to pass ordinances for the prevention of nuisances, and their abatement, [] the city has no power to declare that to be a nuisance which is not so at common law or by statute, or which is not in fact a nuisance.” Olympic Drive-In Theatre, Inc.

^{4/}See Ordinance No. 1715, § 2.D; see also Ordinance No. 1708 “WHEREAS” clause.

v. City of Pagedale, 441 S.W.2d 5, 9 (Mo. 1969) (citations omitted); *see also* Campbell v. City of Frontenac, 527 S.W.2d 643, 645 (Mo.App. 1975) (same); Union Cemetery Ass’n v. Kansas City, 161 S.W. 261, 271-73 (Mo. 1913) (rejecting ordinance aimed at cemetery based on nothing more than bald declaration it constituted a “nuisance”).

“Illegal aliens” have never, under either the common law or any statute, been declared to be a “nuisance.” Thus, Defendants’ attempt to regulate, as a “nuisance,” this distinct group of people is improper unless Defendants had evidence to prove this group is in fact a nuisance. And, the standard for determining whether in fact this is so is one of reasonableness, and involves a determination of whether the enacting legislative body had a factual predicate for concluding the subject of the ordinance was, in fact, a nuisance. *See Olympic Drive-In*, 441 S.W.2d at 10; Union Cemetery, 161 S.W. at 272-73.

Here, the evidence at trial will unequivocally prove that Defendants had no such evidence; indeed the evidence will prove that before passing the Ordinances Defendants did not know of a single “illegal alien” who ever lived or worked in Valley Park, they read no studies about illegal immigration, and they did no investigations to determine whether the Ordinances were necessary for “the good government of the city, the preservation of peace and good order, [or] the benefit of trade and commerce and the health of the inhabitants thereof.” Having failed to do so, Defendants acted outside the authority delegated to them under MO.R.STAT. § 79.110. *See Olympic Drive-In*, 441 S.W.2d at 8-10; Union Cemetery, 161 S.W. at 272-73. In fact, Defendants’ lack of *any* due diligence prior to enacting the Ordinances makes clear the Ordinances resulted from an “arbitrary and capricious” exercise of Defendants’ legislative power in that their enactment was a “willful and unreasoning action, without consideration of and in disregard of the facts and circumstances.” Jones. v City of Jennings, 595 S.W.2d 1, 3 (Mo.App. 1979). The Ordinances are thus void. *Id.*

C. **Ordinance No. 1715 Was Enacted In Violation Of The Sunshine Act (Pet. ¶ 26(d)).**

The Missouri Open Meetings Act (a/k/a Sunshine Act), MO.R.STAT. § 610.010, *et seq.*, requires, with limited exceptions, that: actions and deliberations of public governmental bodies be open to the public (MO.R.STAT. § 610.011); allow for attendance by the public (*id.*); and be preceded by notice “reasonably calculated to advise the public of the matters to be considered” (MO.R.STAT. § 610.020.1). The Act is to be “liberally construed” to effectuate Missouri’s “public policy ... that meetings, records, votes, actions, *and deliberations* of public governmental bodies be open to the public.” MO.R.STAT. § 610.011 (emphasis added). A violation of the Act need be proved only by a preponderance of the evidence, and upon such proof a plaintiff is entitled to both monetary sanctions up to \$5,000 per defendant and a declaration that any ordinance enacted in violation of the Act is void. *See* MO.R.STAT. § 610.027. Defendants are presumed to have knowledge of the provisions of the Sunshine Act. *See, e.g., State ex rel. Broadway-Washington Associates, Ltd. v. Manners*, 186 S.W.3d 272, 275 (Mo. banc 2006).

Whether Defendants violated the Sunshine Act requires presentation of evidence. The evidence here will show that there was no notice (nor any minutes) of any meeting advising the public that changes were being contemplated to Ordinance No. 1708. Nor was there any notice (or minutes) advising that Ordinance No. 1715 was being contemplated, or indicating a discussion of its substance was to, or had, occurred. Yet, there will be both direct and circumstantial evidence that modifications to No. 1708 were repeatedly discussed by and among members of the legislative body. Remarkably, Defendants would have the public (and this Court) believe that Ordinance No. 1715 appeared out of thin air, with no debate over whether Ordinance No. 1708 should be modified and/or what the substance of Ordinance No. 1715 should be.

II. **CONSTITUTIONAL PREEMPTION ISSUES (Pet. ¶¶ 26(a), 26(f))**

For over 100 years, the United States Supreme Court has emphasized that the power to

regulate immigration is exclusively federal. There are two reasons for this. First, a single state could otherwise “embroil us in disastrous quarrels with other nations.” Chy Lung v. Freeman, 92 U.S. 275, 280 (1875). Second, “the laws which govern the right to land passengers in the United States from other countries ought to be the same in New York, Boston, New Orleans, and San Francisco.” Henderson v. Mayor of City of New York, 92 U.S. (2 Otto) 259, 273 (1875).

Local laws concerning immigration and foreign nationals are invalid under the Supremacy Clause of the United States Constitution if they (1) are *conflict* 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;” (2) are *field* preempted because they are an attempt to legislate in a field occupied by the federal government, or (3) attempt to regulate immigration, which is “unquestionably exclusively a federal power.” DeCanas v. Bica, 424 U.S. 351, 354, 362, 363 (1976).

A. The Housing Provisions Of The Ordinances.

Field Preemption: Most basically, Defendants’ effort to decide which non-citizens can live where is simply beyond their authority. Permitting or barring residency of non-citizens is the core of immigration regulation, and Congress has entirely occupied the relevant field, leaving no room for contrary or even supplemental regulation by states, much less by cities. In Hines v. Davidowitz, 312 U.S. 52, 66-67 (1941), which invalidated Pennsylvania’s state alien-registration law, the Supreme Court explained:

[W]here the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation ... states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.

(emphasis added). Deciding which foreign nationals may live within our nation’s borders and for how long – whether as of right for some immigration statuses, or as a matter of discretion for

congressionally specified federal officials^{5/} – is a *federal* decision, governed by a comprehensive federal network of substantive and procedural statutes and regulations. The process of determining who can stay and who must go involves (as the Ordinances do not) notice, a hearing with the opportunity to present evidence and argument, administrative appeal, and judicial review.^{6/} Thus, the grave decision to expel a person from the United States is not permissibly made by one federal official or even one federal agency, let alone by a local municipality. Our nation has only one set of borders. When the federal government has not acted to deport someone, whatever that person's formal immigration status, individual cities may not countermand that federal decision and create a checkerboard of residency exclusions.^{7/}

Conflict preemption: Even if it were permissible for Defendants to regulate residency for non-citizens (which it is not), under the Supremacy Clause such regulation may not conflict with federal requirements. *See, e.g., Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000). Here, the housing provisions of the Ordinances conflict irreconcilably with numerous provisions of both federal immigration and federal housing law.

For example, considering federal immigration law, Ordinance 1715 puts landlords and other regulated entities in a completely untenable position because landlords, who would surely wish to avoid the disruption and high cost of losing tenants mid-lease term due to an Ordinance violation,

^{5/}*See* 8 U.S.C. §§ 1158, 1182(d)(5), 1229b, 1229c, 1255, 1259; 8 C.F.R. § 241.6 (2006) (discussing asylum, voluntary departure, parole, cancellation of removal, adjustment of status, registry, stays of removal, etc.).

^{6/}*See, e.g.,* 8 U.S.C. §§ 1154, 1228-1252, 1255-1259; *see also* Stephen H. Legomsky, Immigration and Refugee Law and Policy 634-645 (4th Ed. 2005) (providing overview of deportation process).

^{7/}As the Supreme Court explained when invalidating a Massachusetts statute touching on foreign relations:

[T]he fact of a common end hardly neutralizes conflicting means ... and the fact that some companies may be able to comply with both sets of sanctions does not mean that the state Act is not at odds with achievement of the federal decision about the right degree of pressure to employ ... Sanctions are drawn not only to bar what they prohibit but to allow what they permit, and the inconsistency of sanctions here undermines the congressional calibration of force.

Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 379-380 (2000); *see also* American Ins. Assoc. v. Garamendi, 539 U.S. 396 (2003).

have no way to know which of their would-be tenants are “illegal aliens.” The Ordinance does offer protection from liability for landlords if, prior to leasing, they ask the City’s Code Enforcement Office to, “pursuant to the United States Code Title 8, section 1373(c), verify with the federal government the lawful immigration status” of a would-be tenant. See Ordinance No. 1715 § 5.B(9). However, this provision misconprehends both the nature of the federal regime governing non-citizen residency and the availability of federal assistance. Indeed, federal immigration status is simply not susceptible to the kind of determinative answer Ordinance 1715 suggests. As one justice of the United States Supreme Court has explained:

Until an undocumented alien is ordered deported by the Federal Government, no State can be assured that the alien will not be found to have a federal permission to reside in the country, perhaps even as a citizen. Indeed, *even the Immigration and Naturalization Service cannot predict with certainty whether any individual alien has a right to reside in the country until deportation proceedings have run their course. See, e.g., 8 U.S.C. §§ 1252, 1253(h), 1254 (1976 ed. and Supp.IV).*

Plyler v. Doe, 457 U.S. 202, 241 (1982) (Powell, J., concurring) (emphasis added).

It is for this very reason that the federal executive branch itself has definitively declared that the federal government’s “Systematic Alien Verification for Entitlements” (SAVE) program – the program implementing the federal statute referenced in the Ordinance, *i.e.*, 8 U.S.C. § 1373(c) – *does not authoritatively establish any non-citizen’s immigration status:*

for purposes of the requirement [that governmental entities report when they ‘know’ an alien is not lawfully present in the United States] ... an entity will ‘know’ that an alien is not lawfully present in the United States only when the unlawful presence is a finding of fact or conclusion of law that is made by the entity as part of a formal determination that is subject to administrative review ... In addition, that finding or conclusion of unlawful presence must be supported by a determination by the Service or the Executive Office of Immigration Review, such as a Final Order of Deportation. *A Systematic Alien Verification for Entitlements (SAVE) response showing no Service record on an individual or an immigration status making the individual ineligible for a benefit is not a finding of fact or conclusion of law that the individual is not lawfully present.*

65 FR 58301-01 (2000) (emphasis added).

Determining who is a citizen is by no means a simple matter.^{8/} And, SAVE's databases, which are geared towards determining eligibility for various federal aid programs, include no information whatsoever about citizenship status. Moreover, the SAVE program's databases are riddled with error, as numerous federal reports have found. *See, e.g.*, U.S. Department of Justice Office of Inspector General, Follow-up Report on INS Efforts to Improve the Control of Nonimmigrant Overstays, Report No. I-2002-006, April 2002 ("According to an official from the INS's Statistics Office, the unreliability of nonimmigrant information continues to be a problem ... To compound the difficulty in identifying overstays, the Statistics Office no longer receives updates on visa extensions or adjustments of status. Therefore, some aliens appear to be overstays when they are legally in the United States. The Statistics Office Official acknowledged that current Form I-94 data is not reliable for ... determining with certainty whether an alien who appears to be an overstay is actually an overstay.").^{9/} In short, Defendants' attempt to clothe the residency requirements of its Ordinances in federal authority is a mirage. The federal method for deciding who may live within our nation's borders has both substantive and procedural components that conflict with the casual approach of Ordinance No. 1715 (and, in the case of Ordinance No. 1708, the nonexistent approach). Because the Ordinances conflict with federal immigration law, they are preempted.

The Ordinances are preempted for the additional reason that they conflict with the provisions of the Fair Housing Act, which forbids national origin discrimination in housing. Again,

^{8/}A national study recently determined that 7% of voting-age American citizens do not have ready access to documentation to demonstrate that status, and only 66% of voting-age American women have any documentary proof of citizenship that includes their current surname. Brennan Center for Justice, Citizens without Proof (November 2006). The Missouri Supreme Court recently found, in a different context, that between 3 and 4% of Missouri citizens lack a government-issued photo identification. Weinschenk v. State, 203 S.W.3d 201, 206 (Mo. 2006). Moreover, citizenship status may be legally complex, particularly for the citizens by descent born abroad. *See, e.g.*, Charles Gordon et al., 7 Immigration Law & Procedure, ch. 93 (Rev. Ed. 2001).

^{9/}There is a separate federal database called the "Basic Pilot Program," but it contains information only about authorized workers, not about the millions of other lawfully present aliens. This program is discussed below.

the problem is that landlords who wish to avoid a mid-tenancy eviction must – but cannot – know in advance which of their tenants are “illegal aliens.” The only course readily open to them is to avoid renting to would-be tenants who somehow look or sound foreign-born. Yet, such conduct would violate the Fair Housing Act, which prohibits housing practices, including leasing, based on, *inter alia*, race, color, and national origin. See 42 U.S.C. § 3604. Landlords are thus placed in an untenable position in which the requirements of local law push them inexorably to violate federal law. Such a conflict is illegal; federal fair housing law trumps. See Reitman v. Mulkey, 387 U.S. 369 (1967) (striking down results of a California referendum that encouraged, but did not mandate, private race discrimination); 42 U.S.C. § 3615 (“any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid”).

B. The Employment Provisions Of The Ordinances.

The employment provisions of Ordinance No. 1708 and Ordinance No. 1715 are likewise barred by the conflicts they create with federal law. The Supreme Court explained the appropriate analysis in DeCanas v. Bica, 424 U.S. 351 (1976). In that decision, the Court remanded the case before it to California’s state courts, instructing them to examine whether California’s employer sanction statute was “unconstitutional because it ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the INA.’” 424 U.S. at 363. Any conflict, of course, dooms the non-federal regulation under the Supremacy Clause.^{10/} The

^{10/}The analysis is unchanged by the Immigration and Nationality Act’s express preemption clause, 8 U.S.C. § 1324a(h)(2), which provides:

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.

This section dispositively preempts Ordinance 1708, which did indeed seek to impose federally forbidden sanctions. But it does not save whatever regulation of immigration a state or local government chooses to attempt, simply because the enforcement is via licensing. As the Supreme Court has held, “neither an express preemption provision nor a saving clause ‘bar[s] the ordinary working of conflict preemption principles.’” Buckman Co. v. Plaintiffs’ Legal Committee, 531 U.S. 341, 352 (2001) (citation omitted).

employment provisions of the Ordinances at issue here establish obstacles to federal goals, and expressly conflict with federal law.

Defendants' Lack of Expertise: The Ordinances authorize Defendant City of Valley Park to make determinations of work eligibility entirely on its own, without recourse to federal authorities. But the multiplicity of different immigration statuses and immigration documents are much too complex for local administration. These statuses include lawful permanent resident, conditional permanent resident, refugee, asylee, parolee, special status under any of a number of ad hoc congressional enactments, and 22 different “nonimmigrant,” or temporary visitor, categories laid out in 8 U.S.C. § 1101(a)(15), subdivided into 76 current subcategories, 22 C.F.R. § 41.12. Each of these subcategories requires different documentation. Sometimes employment is automatically authorized by virtue of the status category, sometimes it is discretionary, and sometimes it is prohibited. The regulations issued by both the Department of Homeland Security and the Department of State to govern employment are therefore lengthy and complex. See 8 C.F.R. § 214.2 (spanning more than 100 pages); 22 C.F.R. § 41. Local officials simply lack the capacity to administer this complex regulatory regime.

National origin discrimination and document abuse: The federal statute that governs employment of non-citizens is the Immigration Reform and Control Act (“IRCA”). IRCA is simultaneously an immigration control statute and an antidiscrimination statute. It forbids the employment of “unauthorized aliens,” but it maintains a careful balance between 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. The Ordinances are entirely inconsistent with IRCA’s text and the balance it strikes. Unlike the Ordinances at issue here, in IRCA “Congress intended to minimize the burden and the risk placed on the employer in the [employment authorization] verification process,” Collins Foods

Intern., Inc. v. I.N.S., 948 F.2d 549, 554 (9th Cir. 1991). Thus under IRCA – but not under the Ordinances – employers have a complete affirmative defense to sanctions if they verify that an employee has documentation satisfying requirements promulgated by the Attorney General. 8 U.S.C. § 1324a(a)(3), (b). As the authoritative Committee report accompanying IRCA explained, “An effective verification procedure, combined with an affirmative defense for those who in good faith follow the procedure, is essential. Otherwise, the system cannot both be effective and avoid discrimination.” H.R. Rep. 99-682(Part I) at 60, 1986 U.S.C.C.A.N. at 5664; *see also, e.g., Collins Foods*, 948 F.2d at 552. Defendants’ attempt to deprive employers of their federal affirmative defense, standing alone, is enough to preempt the employment provisions of the Ordinances. *See Crosby*, 530 U.S. 363 (discussed at fn.6, *supra*).

And, the conflicts only multiply. The federal government affirmatively forbids employers to “request, for purposes of satisfying the requirements of section 1324a(b) of this title ... more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine” (even if those documents turn out to be forged or otherwise flawed). 8 U.S.C. § 1324(b)(6); Getahun v. OCAHO, 124 F.3d 591, 596 (3d Cir. 1997). Violation of this provision is labeled “document abuse,” and classed as a type of unlawful discrimination. The Ordinances here, by contrast, strongly encourage employers to seek more definitive evidence of work authorization than the federally acceptable documents, under penalty of sanctions if an employee is later deemed an “unlawful worker” by the City. Even though the Ordinances state that those sanctions come into play only after the City makes the relevant determination, the inescapable reality is that employers are less likely to hire and invest in a worker who might need to be fired on three days notice at any time. Just as the Ordinances’ housing provisions encourage violation of the Fair Housing Act, the employment provisions unlawfully encourage document abuse, federally banned under IRCA, 8 U.S.C. § 1324(b)(6), and national

origin discrimination, federally banned under IRCA, 8 U.S.C. §1324, and the federal fair employment law, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

The Pilot Program: Rather than offering employers the federally required safe harbor of document compliance, Ordinance No. 1715 substitutes a more limited defense – employer participation in the federal work authorization database known as the Basic Pilot Program. See Ordinance No. 1715 § 4.B(6)(b). In doing so, Defendants thereby illegally seek to substitute for congressional policy their own ideas about employer best practices. For example, Ordinance No. 1715 imposes severe pressure on employers, and in many instances requires them to use the federal work authorization database known as the Basic Pilot Program. But, Congress has expressly designated the Basic Pilot Program as voluntary and experimental. See Illegal Immigration Reform and Immigrant Responsibility Act §§ 401, 402(a), Pub. L. No. 104-28, Div. C (Sept. 30, 1996); Basic Pilot Program Extension and Expansion Act of 2003 (Public Law 108-156), both codified at 8 U.S.C. § 1324a. Congress’s hesitancy to require broad participation in the Pilot Program marks the federal government’s own acknowledgement that the Program has overwhelming problems, combining a lack of capacity with unacceptable inaccuracy. Therefore, Congress not only set out its own extremely limited list of employers required to participate, it actually went so far as to mandate that “Except as specifically provided in subsection (e), the Secretary of Homeland Security may not require any person or other entity to participate in a pilot program.” *Id.* at § 401(a). The federally required participants are completely different from those specified in the Ordinances. *Id.* at § 402(e). Defendants’ attempt to do what federal law prohibits even the Secretary of Homeland Security from doing – mandating employer participation in the federal Basic Pilot Program – is incompatible with federal law. The Ordinances are thus preempted.

III. MISCELLANEOUS CONSTITUTIONAL ISSUES

A. Ordinance No. 1715 Unconstitutionally Compels Testimony (Pet. ¶ 26(g)).

Under Ordinance No. 1715, a landlord is required to provide “the identity data needed to obtain a federal verification of immigration status,” which Defendant City of Valley Park will then use to determine if that landlord is in violation of the Ordinance. *See* Ordinance No. 1715 § 5.B(3). If a violation is found to have occurred (based on the information supplied by the landlord and checked with other sources), the landlord is open to severe penalties. *Id.* at § 5.B. By mandating that a landlord provide information which could directly lead to his “conviction” for an Ordinance violation, Ordinance No. 1715 violates the Constitutions of both the United States and the State of Missouri. Every individual has a right to protection from compelled testimony as guaranteed by the 5th and 14th Amendments to the United States Constitution and Article I Section 19 of the Constitution of the State of Missouri. For this separate reason, Ordinance No. 1715 is void.

B. Interference With Constitutional Rights Of “All Persons” (Pet. ¶ 26(b)).

The Missouri Constitution, Article I, § 2, guarantees “*all* persons” in this State the “right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry” and that “*all* persons” will be given “equal rights and opportunity under the law.” The Ordinances trample on these rights in that they deprive *persons* deemed by Defendants to be “illegal aliens” of their right to housing choices they would otherwise have gained through their own industry, and to housing and employment opportunities equal to those of other persons. For this additional reason, the Ordinances are void.

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