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

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

REPLY MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INUNCTION

INTRODUCTION

Notwithstanding the City's arguments to the contrary, there can be little doubt that the City's anti-immigrant ordinances are preempted under the Supremacy Clause. The ordinances conflict with federal law in numerous ways; they attempt to regulate in fields plainly occupied by the federal government; and they purport to usurp the federal government's exclusive authority to regulate immigration – indeed, the Mayor has repeatedly made statements to the effect that the purpose of the ordinances is to regulate illegal immigration because the federal government is not stepping up to the task. Each of these three types of Supremacy Clause violations requires invalidation of the ordinances. There also is a "probability of success on the merits" of Plaintiffs' claim that the ordinances violate the Equal Protection Clause. Constitutional violations are *per se* irreparable harm.

FURTHER FACTUAL BACKGROUND

Several significant events have occurred since the Plaintiffs filed the instant Motion in state court on April 19, 2007. The City has generated a confusing array of amendments to the Ordinances in its futile effort to stay one step ahead of the legal challenges to the ordinances.[1] There now appear to be three separate versions of the Employer Ordinance (Ordinance 1722), all three of which were purportedly passed by the City Council on February 5, 2007, and all three of which purport to have been signed by the Mayor and attested to by the City Clerk on February 14, 2007. Yet a fourth version of the Employer Ordinance is posted on the City's website. It is not clear which version of Ordinance 1722, if any, was properly enacted by the City.

In addition, sometime in May 2007 the City posted on its website a notice retracting the procedure it had implemented for seeking an occupancy permit under the Landlord Ordinance.

[1] *See* Motion for Order Consolidating Trial On the Merits with Hearing on Plaintiffs' Motion for Preliminary Injunction, filed concurrently herewith under Fed. R. Civ. P. 65(a)(2), hereafter "Rule 65 Motion," for a fuller discussion of the history of the ordinances.

(Def. Br. at 6-7 and Ex. A.) The Notice is an attempt to withdraw the City's earlier requirement that landlords provide to the City an array of immigration-status documents with their application for an occupancy permit, and the implicit admission that certain noncitizens with legal status would be denied residency in Valley Park.

Ultimately, however, the City's continuing amendments and changes cannot save the ordinances from preemption or from being deemed to violate the Equal Protection Clause.

ARGUMENT

Plaintiffs satisfy each of the elements necessary for the issuance of a preliminary injunction. *See* Pl. Mot. at 6 (citing Eighth Circuit authorities); *see also Heartland Acad. Cmty. Church v. Waddle*, 335 F.3d 684, 690 (8th Cir. 2003) (affirming this court's issuance of a preliminary injunction based upon satisfaction of all four *Dataphase* factors and noting that at preliminary injunction stage of litigation, the plaintiffs' constitutional claims need not be "prove[n] [by] a mathematical (greater than fifty percent) probability of success on the merits.").

I. CONSTITUTIONAL INJURY IS *PER SE* IRREPARABLE HARM.

The City's Response largely ignores the question of constitutional injury. Indeed, it is well-established that an alleged constitutional infringement can alone constitute irreparable harm. *See* Wright & Miller, 11 Federal Practice and Procedure § 2948 at 440 (1973). Where the movant has demonstrated that an alleged deprivation of a constitutional right is involved, "most courts hold that no further showing of irreparable injury is necessary" to satisfy this requirement for issuance of a preliminary injunction. *Mitchell v. Cuomo,* 748 F.2d 804, 806 (2d Cir.1984); *Lexington-Fayette Urban County Gov't.,* 305 F.3d 566, 578 (6th Cir. 2002). In this case the Ordinances' violation of the Equal Protection Clause and their preemption by federal law

demonstrate that injunctive relief is necessary to prevent the irreparable harm from the Ordinances' violation of the Constitution.

Instead of addressing the constitutional injury, the City tries to trivialize the additional harms of delay and lost business. The City breaks the harm down into its separate ingredients and then argues that each ingredient is insignificant. ***First***, the City argues that the time required to collect a prospective occupant's name, age, date of birth, citizenship, and photo identification is not irreparable harm. (Def. Br. at 2-3.) Nowhere do Plaintiffs assert that the collection of documents by itself is irreparable harm.[2] Rather, as noted above, the irreparable harm comes from being forced to do so in compliance with an unconstitutional and illegal law.

Second, the City argues that mere delay in renting a dwelling unit is not irreparable harm. (*Id.* at 3-4.) Again, that mischaracterizes Plaintiffs' position. Rather, Plaintiffs contend that the delay, burden and uncertainty of the permit process will deter renters from seeking to live in Valley Park at all, and that the anti-immigrant ordinances and their racist overtones will create an environment in which property values will be eroded.[3]

Third, the City argues that any harm to the Plaintiffs is "rank speculation" because any harm under the Landlord Ordinance will occur only when an illegal alien seeks to rent an apartment from Plaintiffs, and any harm under the Employer Ordinance will occur only when Plaintiffs seek to hire someone who turns out to be an unauthorized alien. (Def. Br. at 4.) Yet the City has claimed the exact opposite in seeking to remove this case to this Court: on May 16,

[2] Nevertheless, the City distorts the law by asserting that 8 U.S.C. §§ 1621, 1625 already require states and local governments to collect information regarding an "alien's lawful presence in the United States" before providing a "public benefit." (Def. Br. at 3.) First, Sections 1621 and 1625 require verification that a non-citizen is authorized to receive benefits, not that he or she is lawfully in the United States. Second, the ability to live in Valley Park is not a public benefit within the meaning of those sections.

[3] Even as to the delay component, the City makes the disingenuous argument that there can be no harm from a delay in renting to an illegal alien because harboring illegal aliens is a federal crime. (Def. Br. at 4.) But the anti-harboring statute prohibits the *knowing* or *reckless* harboring of persons not lawfully in the United States. 8 U.S.C. § 1324(a)(1)(A)(iii). The mere rental of a dwelling unit to a non-citizen who may not be authorized to work or receive public benefits is not a crime of any kind.

2007, the City's counsel represented to this Court that both ordinances were immediately enforceable against Plaintiffs. (Ex. I, Transcript of May 16, 2007 hearing, at 18-20, 31-32.) This Court ruled that it has subject-matter jurisdiction over this matter based in part on the City's assertion that the ordinances are immediately enforceable. (Docket No. 27 at 7, 11.) The City therefore is judicially estopped from now asserting that the ordinances will not become enforceable against the Plaintiffs until some unknown future date. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (citing *Pegram v. Herdrich*, 530 U.S. 211 (2000)); *Hossaini v. W. Mo. Med. Ctr.*, 140 F.3d 1140, 1142 (8th Cir. 1998); *U.S. v. Grap*, 368 F.3d 824, 831 (8th Cir. 2004).

In any event, the Landlord Ordinance will impose unavoidable obligations on Plaintiffs as soon as they have a vacancy (as the City argued to this Court), not merely in the event an illegal alien seeks to rent an apartment from them. And the Employer Ordinance will impose unavoidable obligations on Plaintiffs as soon as they seek to hire someone to perform maintenance on their rental property.[4]

Finally, the City argues that any delay in the occupancy-permit process is *de minimis* because the federal government can answer any inquiry regarding immigration-status in "seconds or minutes." That statement is baseless for at least two reasons. First, the federal verification systems are not capable of revealing that a non-citizen may not continue to reside in the United States. (*See* Pl. Mot. at 12-13; *see also infra*.) Second, the City's Building Commission currently does not have access to the federal verification systems, nor does it have any employee who is trained in their use. (Ex. J, April 26, 2007 Schaub Dep. at 37-38, 41, 43-44, 49, 60; Ex. K, April 26, 2007 Whitteaer Dep. at 80; Ex. L, April 26, 2007 Ruppel Dep. at 38-

[4] It should be noted, however, that neither ordinance is currently enforceable because the Landlord Ordinance is subject to a TRO in the *Reynolds II* case, [No. 07CC-001420], and the Employer Ordinance does not become effective by its own terms unless and until the injunction in the *Reynolds I* case, [No. 06 CC 3802], is terminated.

40, 42-43, 45-50, 52-55, 59-60.) Accordingly, the time-frame for the occupancy-permit process, far from being "seconds or minutes," is completely indeterminate.[5]

II. PLAINTIFFS HAVE A PROBABLITY OF SUCCESS ON THE MERITS.

A. The Ordinances Are Preempted By Federal Law.

Plaintiffs showed in their Motion that Ordinances 1721 and 1722 are preempted under all three types of preemption recognized in *De Canas v. Bica,* 424 U.S. 351, 358 (1976): (1) constitutional preemption; (2) field preemption; and (3) conflict preemption. (Pl. Mot. at 8-15.) Neither the City's belated changes to the ordinances, nor the arguments in its Response, save the Ordinances from preemption.

First, far from constituting "harmonious" concurrent activity, the Ordinances contain numerous specific conflicts with federal law that the City is unable to dismiss. Second, notwithstanding the City's reliance on anachronistic aspects of the *De Canas* case, both Ordinances are field preempted in light of Congress's specific, comprehensive enactments in the fields of presence, employment and housing of noncitizens.[6] Finally, the City's attempts through the Ordinances to "discourag[e] the illegal alien from taking up residence in the United States" (Def. Br. at 12) unmistakably intrudes on the exclusive federal power to regulate immigration – a

[5] The City takes Plaintiffs to task for including in their Motion papers a document entitled "Documents required to apply for a Valley Park Occupancy Permit[,]" which required an array of immigration-status documents and provided that certain categories of legally present non-citizens would be denied housing. (Pl. Mot. at 10-11 and Ex. G.) After receiving Plaintiffs' Motion on April 19, 2007 pointing out that such an application of the Ordinance could not possibly withstand a preemption challenge, the City posted a notice on its website withdrawing the implementing documents as erroneous. (Def. Br. at 6-7 and Ex. A.) The City asserts, without any evidentiary support whatsoever, that the promulgation of the "erroneous" implementing documents and their continued availability resulted from a series of spectacular mistakes by City personnel, which is surprising given that litigation over the Ordinances was pending. The mistakes were "corrected" several weeks *after* Plaintiffs filed the instant Motion. Yet the City accuses Plaintiffs of having misleadingly relied on an "erroneous and withdrawn document." (Def. Br. at 6-7.) Plaintiffs obviously could not have divined that the City would later claim that its own documents were a mistake or would withdraw them. Indeed, the City Clerk certified the document as recently as April 25, 2007. (Ex. M.) The City's accusation is meritless.

[6] As Plaintiffs explain, *De Canas* came down *ten years before* the federal government acted to outlaw the employment of noncitizens lacking work authorization and, further, in no way involved any attempt to regulate the residence or housing of noncitizens.

power which would be meaningless if, as the City suggests, it failed to include authority over persons lacking lawful immigration status.

1. Ordinance 1721 Conflicts with Federal Law and Procedures to Determine Who May Live in the United States.

Any local law that "burdens or conflicts in any manner with any federal laws or treaties" or "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" is invalid under the Supremacy Clause. *De Canas*, 424 U.S. at 358, 363 (*quoting Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).[7] The conflicts between Ordinance 1721 and federal law are direct and unavoidable, and demand invalidation of the Ordinance. (Pl. Mot. at 10-14.)

The City does not deny that the federal government has established an elaborate set of laws and procedures to determine whether a given individual may continue to live in the United States. Nor does it deny that there are numerous persons who lack current legal immigration status but, under these laws and procedures, may still be permitted to live in the United States. (Pl. Mot. at 11-14.) Indeed, absent those procedures, it is impossible for even the federal government to determine that someone should be denied the ability to live in the United States based on their immigration status. (Pl. Mot. at 12-13, citing 65 Fed. Reg. 58301; *Plyler v. Doe*, 457 U.S. 202, 241 n.6 (1982) (Powell, J., concurring).[8] Yet, Ordinance 1721 seeks to deny abode to individuals in advance of any of these procedures taking place.

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[7] In *De Canas*, the Court declined to decide whether the California law at issue there actually conflicted with federal law and remanded for a determination of whether a conflict existed. *Id.* at 363-65. 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).

[8] The City objects to Plaintiffs' citation of the Federal Register notice on the ground that "[t]he memo had nothing to do with the provision of information on the legal status of aliens to state and local governments." Def. Br. at 14. But, of course, Plaintiffs have never claimed that the memo was on that subject. (Pl. Mot. at 12-14.) Rather, the fact that the *federal* government does not consider a SAVE determination to provide a basis to "know" that an individual is not lawfully present is in the United States is powerful evidence that Valley Park cannot properly draw that conclusion either.

The City fails to respond to the fact that Ordinance 1721 conflicts with federal housing regulations, which permit persons who may lack lawful immigration status to live in federally subsidized housing with family members who are eligible for such benefits. (Pl. Mot. at 11-12.)[9]

Rather than address those conflicts, the City argues that the Landlord Ordinance is wholly consistent with the federal government's Systematic Alien Verification for Entitlements (SAVE) program, a mechanism to verify immigration status in certain circumstances. (Def. Br. at 12-14.) The City argues that the federal government thus can "answer, on demand, a local request … regarding whether a particular individual cannot reside lawfully in the United States," notwithstanding the statutes and other authority to the contrary. (Def. Br. at 12, quoting Pl. Mot. at 12). However, SAVE does no such thing.

As the word "entitlements" in the title of the program indicates, SAVE is designed to confirm that an applicant for a government benefit is in an immigration status that qualifies him or her to receive that benefit. The SAVE program, together with 8 U.S.C. § 1373(c), enables the federal government to share certain information about a person's current immigration status with the states in order to implement certain federal laws relating to eligibility for public benefits and driver's licenses.[10] SAVE was never intended, nor is it equipped, to provide a decisive

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[9] Indeed, the federal government's decision to allow mixed-immigration-status families to reside together in federally assisted housing reflects its recognition of the fundamental constitutional right to family integrity. The current regulations were adopted in response to a federal lawsuit challenging its former policy to the contrary. *See Yolano-Donnelly Tenants' Association v. Cisneros*, No. S-86-846 MLS PAN, 1996 U.S. Dist. LEXIS 22778 (E.D. Cal. Mar. 8, 1996).

[10] Federal welfare reform laws enacted in 1996 provide that only a subset of lawfully-present aliens may receive public benefits. *See* 8 U.S.C. §§ 1621, 1624. Similarly, the federal REAL ID Act of 2005 seeks to require states to obtain verification, under certain circumstances, that applicants for drivers' licenses are in one of a list of eligible immigration statuses. *See* REAL ID Act of 2005 § 202(c)(2)(B), Pub. L. 109-13, Div. B, Title II, §§ 201-207, 119 Stat. 311 (2005) (*codified at* 49 U.S.C. § 30301 note).

The Federal Register publication that Valley Park references in its brief, (Def. Br. at 14), is the narrative accompanying a proposed rule regarding the implementation of the REAL ID Act's driver's license requirements. 72 Fed. Reg. 10820. The phrase "lawful status" is used there in the same way it is used in the Act itself – that is, to denote the list of statuses that allow a person to receive a REAL ID-compliant driver's license. *See* Real ID Act § 202(c)(2)(B).

determination of whether an individual may reside in the United States. To cite just one example, SAVE would not properly account for persons who are subject to a deportation order and are not eligible for public benefits, but who are nonetheless permitted to live and work in the U.S. (*See* Pl. Mot. at 11.)

In this case, the City is neither administering a public benefit program, *see* 8 U.S.C. § 1621(c) (defining "public benefit"), nor issuing a driver's license. Rather, Ordinance 1721 uses the federal government's SAVE program to try to determine, on demand, that a person's continued presence in the United States is improper, something for which the program was not designed. This mechanism conflicts with federal laws for determining who may stay and who must depart. Indeed, if a locality could banish every person whose presence is allegedly unlawful based upon running a person's name through the SAVE program, the Immigrant and Naturalization Act's careful, extensive process for determining removability, and federal jurisprudence relating to the due process rights of non-citizens, would be eviscerated.

2. The City Fails to Address Any of the Specific Conflicts Plaintiffs Identified Between Ordinance 1722 and Federal Employment Law.

Ordinance 1722 conflicts with federal employment law because it requires the verification of the work-authorization status of individuals who are exempt from such verification under federal law and because it does not contain anti-discrimination provisions like those in federal law. (Pl. Mot. at 14-15.) The City has not denied any of those conflicts.

Ordinance 1722 additionally conflicts with federal law by requiring that certain employers participate in the federal Basic Pilot Program, (*see* Ordinance 1722 §§ 4.B(6)(b), 4.D, 5.B(2)), and attempting to force other employers to use that Program by subjecting them to the risk of substantial penalties if they do not. (*See Id.* § 4.B(5).) Congress designated the Basic Pilot Program as a *voluntary*, experimental program to be implemented by the Secretary of

Homeland Security. (*See* Illegal Immigrant Reform and Immigrant Responsibility Act ("IIRIRA"), §§ 401, 402(a), Pub. L. No. 104-28, Div. C (Sept. 30, 1996), *codified as amended at* 8 U.S.C. § 1324a.) In so doing, Congress set forth a very limited list of employers required to participate in the Basic Pilot or a related program -- a list completely different from Valley Park's. (IIRIRA § 402(e).) Congress also specifically provided that the government "*may not require* any person or other entity to participate in a pilot program." (IIRIRA § 401(a) (emphasis added); *see also id.* § 404(h) (providing that government may not "utilize any information, data base, or other records assembled under this subtitle for any other purpose other than as provided for under a pilot program").)

Several of the implementation and process provisions of Ordinance 1722 also conflict with federal law. Specifically, one method of "correcting" a violation is for the employer to obtain additional information from the worker and to reverify the workers' status through the Basic Pilot Program. (*See* § 5.B(2).) Yet federal law prohibits reverification except under limited circumstances. (8 U.S.C. § 1324b(a)(6).) Federal law also 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, none of which are applicable here. (8 U.S.C. §1324a(b)(5).)

Finally, while Congress has chosen only to regulate employers who act with *knowledge* that a particular worker lacks work authorization, Ordinance 1722 imposes a strict liability scheme. Despite the City's hasty and recent addition of the word "knowingly" to Ordinance 1722,[11] its complaint and sanctions procedures turn entirely on whether a worker is found to be

[11] The City states in its brief that Ordinance 1722 prohibits employers from "knowingly" employing unauthorized aliens. (Def. Br. at 2.) However, the City council did actually purport to amend Ordinance 1722 to add the work "knowingly" until June 4, 2007, *after* it filed its Response. It is not known whether that amendment was enacted in accordance with proper procedure.

an unlawful worker and make no provision for any inquiry regarding the employer's knowledge or compliance with the federal documentation process. Ordinance 1722 thus conflicts with Congress' decision in enacting a comprehensive federal employer sanctions-scheme to prohibit only the "knowing" employment of unauthorized workers and to protect an employer from liability if the employee "provides a document or combination of documents that reasonably appears on its face to be genuine" and is listed as acceptable by the federal government. (8 U.S.C. § 1324a(a)(1)(A),(b)(1)(A)(ii); *see* 8 U.S.C. § 1324a(a)(3).

3. Ordinances 1721 and 1722 are Field Preempted.

Contrary to the City's contention, the Ordinances are not laws that merely touch upon immigration. The Ordinances encroach on the very core of federal immigration law because they seek to regulate the *presence* of aliens within Valley Park. As the Supreme Court has explained, "where 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.*" *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).[12] The admission, continued presence, and removal of aliens in the United States is undeniably a field occupied by federal immigration law. *See id.* at 69 (recognizing as early as 1941 that federal immigration law is a "broad and *comprehensive* plan" (emphasis added)).

Moreover, both Ordinances address particular subject matter that Congress has specifically regulated in the immigration code. Ordinance 1721 is, by the defendant's own admission, aimed at the harboring of certain aliens in Valley Park. (Def. Br. at 12.) As the

[12] Contrary to Defendant's suggestion, *Hines* remains a vital precedent and a touchstone of the Supreme Court's preemption jurisprudence. Indeed, the Court has cited *Hines* far more frequently than *De Canas* in the decades since *De Canas* was decided.

Garrett court stated in analyzing an Ordinance similar to Ordinance 1721, 8 U.S.C. § 1324 "specifically provide[s] for fines and criminal penalties for the harboring of illegal aliens… Accordingly, this Court finds serious concerns in regards to the field preemption of the Ordinance by existing federal statutes." 465 F. Supp.2d at 1056. This Court should likewise recognize that Ordinance 1721 is field-preempted.[13]

Similarly, Ordinance 1722 attempts to create a local sanctions scheme to discourage and punish the hiring of unauthorized workers even though Congress created a comprehensive scheme to that effect in 1986. *See* 8 U.S.C. §§ 1324a-b.

The City cites language from *De Canas v. Bica* appearing to reject field-preemption challenges to state employer sanctions schemes (Def. Br. at 10), but that language no longer applies because it *predates* Congress' creation of a federal employer sanctions scheme by ten years. At the time that *De Canas* was decided, federal law did not penalize employers who hired unauthorized workers. In fact, the limited federal law relating to employment of aliens actually invited state regulation, stating that it was "intended to *supplement* State action." *De Canas*, 424 U.S. at 362 (emphasis added). Accordingly, in *De Canas*, the Supreme Court found that California's employer-sanctions statute was not field preempted. 424 U.S. at 352, 352 n.1, 353 n.2.

Ten years later, through the enactment of the Immigration Reform and Control Act,[14] Congress added employer sanctions and antidiscrimination provisions to the INA for the first

[13] The City relies on two cases that approved state or local police enforcement of federal immigration law to conjure a new "doctrine" of "concurrent enforcement activity." Def. Br. at 12 (citing *Gonzales* and *Marsh v. United States*, 29 F.2d 172, 174 (2d Cir. 1928)). Apparently, in the City's view, this "doctrine" establishes that field preemption no longer applies if a state or local government, in taking some action, wishes to assist the federal government by doing so. As an initial matter, these two cases approving police *assistance* in enforcing *federal* laws by no means imply that states' efforts to create and enforce their *own* laws on the same subject area would receive the same approval. Moreover, a basic feature of field preemption is that it does *not* turn on whether federal and state efforts are compatible or complementary; where the field is occupied, states and localities simply have no power to act.

[14] See 8 U.S.C. §§ 1324a-b; H.R. Rep. 30- 99-682(I), at 53-56 (recounting history of legislation).

time, removing its earlier permission for state regulation of employment and enacting instead an express bar on such regulation. (8 U.S.C. § 1324a(h)(2).) *De Canas*' conclusions regarding field preemption, which were reached at a time when federal law "at best evidence[d] … a peripheral concern with employment of illegal entrants," 424 U.S. at 360, clearly do not survive this enactment.

The City also claims that a parenthetical exception to the express preemption provision for "licensing and similar laws" defeats the field preemption claim with respect to Ordinance 1722. (Def. Br. at 11.) However, the mere fact that a local employer sanctions scheme imposes penalties by revoking licenses does not make it a "licensing law." That would lead to the absurd conclusion that Congress intended that any civil or criminal sanction scheme, no matter how slight the penalties, would be preempted in favor of the uniform federal scheme, but that a scheme imposing the enormous penalty of entirely shuttering a business would be permitted simply because it does so through the revocation of a license.

Rather, the statute's reference to "licensing" 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* [federal] *legislation*" — a finding that can only be made after extensive federal proceedings, see 8 U.S.C. § 1324a(e) — or "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 (emphasis added). Ordinance 1722 does not fall within either of those categories.

In any event, even if Ordinance 1722 did fall within the exception in § 1324a(h)(2), the section would still be invalid because it stands as an obstacle to federal law and policy, as

explained above. *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).

4. The Ordinances Attempt to Regulate Immigration.

The Ordinances impermissibly encroach on the exclusive federal power to regulate immigration because they attempt to regulate the presence of aliens in Valley Park. Unlike the state statute at issue in *De Canas* – which had only a "speculative and indirect impact on immigration" – these Ordinances are specifically designed to regulate immigration. The deposition transcripts from *Reynolds I* and statements made in the media show overwhelmingly that the Ordinances are intended and are understood to be an attempt to regulate immigration. (Ex. N, November 7, 200 Whitteaker Dep. at 65-72, 99-100, 141-143; Ex. O, November 7, 2006 White Dep. at 41-42, 46-47; Ex. P, November 7, 2006 Helton Dep. at 12-14; Ex. Q, November 7, 2006 Walker Dep. at 12-17; Group Ex. R. at 6-8, 17, 22, 30, 32-33, 48, 50-52, 54, 63, 65.)

Taken together, the Ordinances set forth a broad and integrated scheme that combines multiple provisions addressing different areas – tenant registration/harboring and employment – to single out certain individuals on the basis of their immigration status and remove them from the city limits by making it impossible for them to live or work in Valley Park. The Supreme Court has never allowed states or municipalities to regulate aliens in this manner; making rules about who may stay and who may depart, and effectuating that departure, is the very core of immigration regulation.

The City nonetheless argues that because the Ordinances purport to regulate only "illegal" aliens they should not be considered a regulation of immigration. (Def. Br. at 9.) The City is mistaken. As a logical matter, the power to regulate immigration would be hollow if it did not include the power to decide who may and who may *not* enter the country.[15] Otherwise, each city and town in the United States could, on its own, detain and actually deport any individual who was not in a lawful immigration status. Such measures, like the Ordinances here, clearly are not consistent with the constitutional reservation of immigration power to the federal government.

B. Plaintiffs' Equal Protection Claim Is Meritorious.

Plaintiffs' equal protection claim is based on the ordinances' discriminatory purpose and impact with regard persons of Hispanic heritage (not with regard to "illegal aliens"). There is ample evidence to demonstrate a probability of success that both the Landlord Ordinance and the Employer Ordinance have a discriminatory purpose and a discriminatory effect with respect to persons of Hispanic origin.

1. The Ordinances Were Motivated by the Purpose of Deterring Hispanics from Living or Working in Valley Park.

The City acknowledges that an ordinance violates the Equal Protection Clause where it has a discriminatory purpose and discriminatory effect. (Def. Br. at 15.) Though discovery has not yet commenced in this matter with respect to discriminatory purpose, the City's Mayor has already inculpated himself in the media. (Pl. Mot. at 15-16 and Ex. A.) The City tries to explain

[15] *See also In re Alien Children Education Litigation*, 501 F. Supp. 544, 578 (S.D. Texas 1980) ("Measures intended to increase or decrease immigration, whether legal or illegal, are the province of the federal government."), *aff'd sub nom. Plyler v. Doe*, 457 U.S. 202 (1982); Brief for the Secretary of Health and Human Services in Opposition to Petition for Writ of Certiorari, City of Chicago v. Shalala, No. 99-898 (Feb. 2000) at 13 n.7 ("*De Canas* stands only for the proposition that courts will not *automatically* strike down every state statute that adversely affects some group of aliens, if there is no conflict between the state and federal law. *De Canas* does not suggest that the federal government's extensive power over aliens is limited to the power to make decisions about who should be permitted to immigrate.") (emphasis added).

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. Br. at 15-16.) 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." (Pl. Mot. Ex. A 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 of a Mayor 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 9.)

The City argues that bias against Hispanics could not have been a motive because the Employer Ordinance contains a "sweeping anti-discrimination clause" providing that a complaint will not be enforced if it is based on "national origin, ethnicity or race[.]" (Def. Br. at 16.) First, assuming the version of the Employer Ordinance actually in force at this time contains that language, it 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. R at 41.) The City counsel could not answer. (*Id.*)

Second, the City is simply incorrect in asserting that the Employer Ordinance 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. More fundamentally, unlike the complaint process under the Employer Ordinance, a complaint filed under 8 U.S.C. § 1324a(e)(1) does not trigger a non-discretionary enforcement process.

2. The Ordinances Will Have a Discriminatory Effect.

The City argues that because the Ordinances are subject to a TRO in state court, Plaintiffs' claim that that they will have a discriminatory effect is "based entirely on conjecture." (Def. Br. at 16.)[16] While Ordinances 1721 and 1722 have not yet been enforced, and discovery has not yet been conducted in this matter, there is ample basis from which to infer that the Ordinances would have a discriminatory effect. That basis includes: (1) reaction to the original Valley Park anti-immigrant ordinances, including by residents, landlords and the police (Group Ex. R, at 9, 19, 25, 26, 28, 52, 55-56); and (2) trial testimony by Prof. Marc Rosenblum (Ex. S), an expert witness in *Lozano v. Hazleton*, No. 06 CV 1586, M.D. Pa. 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 landlords will be incentivized to avoid renting to persons of Hispanic heritage, that employers will be incentivized to avoid hiring persons of Hispanic heritage, and that residents of Valley Park will be incentivized to file complaints against other residents or workers based on their apparent Hispanic heritage.

The City argues that those conclusions are illogical. With respect to the Landlord Ordinance, the City contends that it is already a federal crime to harbor illegal aliens, and so there should be no added incentive to discriminate. (Def. Br. at 17.) But, once again, the City elides the fact that the federal anti-harboring statute, 8 U.S.C. § 1324(a)(1)(A)(iii), imposes criminal liability only for knowingly or recklessly harboring an illegal alien. If the Landlord Ordinance were extrapolated nationwide, requiring all landlords to seek a permit from the federal government for each and every prospective tenant, it can hardly be gainsaid that it would create a

[16] As a point of fact, the TRO in *Reynolds II* covers only Ordinance 1721. Ordinance 1722 is not even at issue in that matter. It is therefore puzzling that the City would state that both Ordinances have been enjoined.

much more profound incentive to discriminate than currently exists under the federal anti-harboring statute.[17]

With regard to the Employer Ordinance, the City similarly argues that federal law already requires employers to refuse to hire unauthorized aliens. (Def. Br. at 17.) The City contends that the Basic Pilot Program takes the uncertainty out of the process, thus lessening the incentive to discriminate. (*Id.* at 17-18.) But a complaint does not trigger automatic enforcement action under federal law. Consider the effect of making the Employer Ordinance federal law. Every employer in the country would be exposed to the risk of a complaint from a neighbor or competitor automatically triggering a federal enforcement action requiring the employer to provide identifying information about its employees within three-days, on pain of having its business shut down. If the government notifies the employer that there is a violation, then the employer will have three days to "correct" the violation, again on pain of being shut down. It cannot reasonably be disputed that such a system would incentivize employers to avoid that kind of disruption, expense and risk to their business by taking the defensive measure of not hiring anyone that appears to be Hispanic. (*E.g.*, Ex. S at 21, 48, 52, 60-62, 101-102, 113.)

3. There is a Sufficient Nexus Between the City's Actions and the Actions of Landlords and Employers to Constitute State Action.

The City argues that anticipated discrimination by landlords and employers cannot be attributed to the City government and therefore there is no "state action" within the meaning of the Fourteenth Amendment. (Def. Br. at 18.) First, the deterrent effect the Ordinances are likely to have on potential tenants and workers who are Hispanic is directly attributable to the existence

[17] The City further argues that landlords have a "safe harbor" under the Landlord Ordinance because a prospective tenant's immigration status can be checked in a matter of seconds with the SAVE system. As noted above, however, the SAVE system cannot reliably determine who may lawfully reside in the United States, and, in any event, the City does not currently have access to SAVE or have anyone trained in its use. Accordingly, the mechanism under the Landlord Ordinance for verifying whether a prospective tenant is lawfully in the United States is non-existent, not "failsafe."

of the Ordinances, and thus unquestionably is a result of state action. As to discrimination by landlords and employers, there is a sufficient nexus between the City Ordinances and the discrimination so that it may be deemed state action. Where there is a sufficient nexus between the state and both the private party and the alleged deprivation, the conduct at issue may fairly be attributable to the state. *Wickersham v. City of Columbia*, 481 F.3d 591, 597 (8th Cir. 2007). Furthermore, if an ordinance is the basis for a private party's discriminatory conduct, the state cannot be shielded from responsibility. *See Peterson v. City of Greenville, S.C.*, 373 U.S. 244, 248 (1963) (finding the city responsible despite the fact that the private individual would have discriminated against its Black customers of his own accord); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 169-171 (1970) (going so far as to indicate that state-enforced "custom" compelling segregation was actionable, even though it was the decision of the owners themselves to discriminate on the basis of race).[18]

The City cannot fairly contend that there is no nexus between the City Ordinances and the employers and landlords of Valley Park in their attempts to comply with the Ordinances. First, as discussed above, the Ordinances were implemented by the City with the purpose of deterring persons of Hispanic origin from living and working in Valley Park. The City, by way of its Ordinances, has transferred the task of actually sifting through its residents in search of illegal immigrants to the employers and landlords of Valley Park, effectively coercing them to serve this public function lest they face prohibitions in operating their businesses. The involvement of state officials in the continued enforcement of the Ordinances provides an

[18] The City's reliance on *City of Cuyahoga Falls v. Buckley Community Hope Found.*, 538 U.S. 188 (2003) is misplaced. That case involved a "citizen-driven petition drive" which resulted in a referendum created by private individuals with clearly private motives, which could only be attributable to the individual citizens and provided no nexus to state motives. *Id.* at 197.

additional link between the state and the private actor sufficient to deem the conduct "state action."

III. THE BALANCE OF PARTY AND PUBLIC INTERESTS WEIGHS IN FAVOR OF INJUNCTIVE RELIEF.

The violation of a fundamental constitutional right constitutes irreparable injury and it "is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Michigan Liquor Control Commission,* 23 F.3d 1071, 1079 (6th Cir.1994) (citing *Gannett Co., Inc. v. DePasquale,* 443 U.S. 368, 383 (1979)). "In the absence of legitimate, countervailing concerns, the public interest clearly favors the protection of constitutional rights." *Council of Alternative Political Parties v. Hooks*, 121 F.3d 8676, 883-84 (3d Cir. 1997).

The City has provided no evidence of any public harm that would outweigh the interest in protecting fundamental rights. The City contends that the mere fact that the Ordinances were enacted is evidence of public harm. (Def. Br. at 19-20.) But if the mere enactment of a law constituted the only determinant of whether it serves the public interest, then no statute or ordinance could ever be subject to challenge in court. That is not the law. *See e.g., Garrett v. City of Escondido*, 465 F. Supp. 2d 1043, 1053-54 (S.D. Cal. 2006) (balance of harms tipped in movant's favor where defendant failed to offer proof of any countervailing public benefit in the form of reduced urban blight and other purported harms associated with ordinance's enactment that would result from enforcement of ordinance concerning the harboring of illegal aliens).

The City further asserts that the Ordinances' declarations of purpose are "more than mere conjecture." The City contends, with no evidentiary support, that several crimes have been committed over the last 12 months in Valley Park by illegal aliens. Even if true, the possibility that a few "illegal aliens" may have been arrested for criminal activity does not show that undocumented aliens are more prone to criminal activity than the general population, or that the

presence of undocumented aliens in a community increases the crime rate. The City has provided no evidence of an increase in crime in Valley Park, nor has it provided any evidence that employers in Valley Park have been hiring unauthorized aliens "over" citizens or authorized workers. An injunction will cause no harm to Valley Park.

CONCLUSION

For the foregoing reasons, and the reasons stated in Plaintiffs' Motion, Plaintiffs respectfully request that this Court issue a preliminary injunction enjoining the enforcement of Valley Park Ordinances 1721 and 1722.

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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 June 14, 2007.

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