UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

WINDHOVER, INC., and JACQUELINE GRAY,	)	
Plaintiffs,	)	
v.	)	Cause No. 4:07CV00881-ERW
CITY OF VALLEY PARK, MO,	)	
Defendant.	)	

MOTION FOR SUMMARY JUDGMENT

Defendant, by and through its attorneys, moves this Court pursuant to Rule 56(b) of the Federal Rules of Civil Procedure for an Order granting summary judgment for the Defendant and against the Plaintiffs and declaring that Valley Park Ordinance No. 1722 is constitutional under the United States Constitution and is consistent with Missouri state law. In support of this motion, Defendant avers as follows:

I. Defendant incorporates herein by reference Defendant's Statement of Uncontroverted Facts in Support of its Motion for Summary Judgment.

II. Defendant also incorporates herein by reference the legal arguments contained in the Memorandum in Support of Defendant's Motion for Summary Judgment, which is being filed contemporaneously herewith.

III. Pursuant to Federal Rule of Civil Procedure 56(c), summary judgment shall be rendered if the pleadings and other evidence "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

IV. Summary judgment is appropriate in favor of the Defendant because as a matter of law:

A. Ordinance No. 1722 does not violate the Supremacy Clause of the U.S. Constitution;

B. Ordinance No. 1722 does not violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution;

C. Ordinance No. 1722 does not violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, and Plaintiffs do not have standing to raise their Equal Protection Clause challenge;

D. Ordinance 1722 does not contravene Missouri law regarding imprisonment and fines;

E. Preclusion doctrines do not preclude Defendant from raising defenses.

V. Today, Defendant delivered electronically to counsel for Plaintiffs, via the Court's electronic case filing system, a copy of this Motion, Defendant's Statement of Uncontroverted Material Facts, and the Memorandum in Support of Defendant's Motion for Summary Judgment.

WHEREFORE, Defendant respectfully requests that this Court issue an order granting summary judgment in favor of Defendant, declaring that Ordinance No. 1722 is constitutional and consistent with Missouri law, and denying the injunctive relief sought by Plaintiffs.

Respectfully submitted by

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served on Plaintiffs' counsel of record, listed below, by operation of the Court's ECF/CM system, this 10th day of August, 2007:

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Defendant.	)	

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION AND PROCEDURAL BACKGROUND

On September 22, 2006, the Plaintiffs in this action, along with other plaintiffs, filed suit against the Defendant city of Valley Park, Missouri, seeking to enjoin two ordinances (Ordinances 1708 and 1715) that concerned the same general subject matter as the two ordinances challenged in this action (Ordinances 1721 and 1722)—illegal immigration. *Reynolds v. Valley Park*, No. 06-CC-3802. After removal of the *Reynolds* case to this court, Plaintiffs filed a motion to remand the case back to the Circuit Court of Saint Louis County, which was granted by this court on November 15, 2006. The *Reynolds* case was subsequently decided solely on state law grounds by the Circuit Court of Saint Louis County on March 12, 2007. The *Reynolds* decision only addressed ordinances that were by that time repealed (Ordinances 1708 and 1715). It did not address the new ordinances (Ordinances 1721 and 1722) that were in effect at that time and that are the subject of the complaint in this action.

On March 14, 2007, Plaintiff Jacqueline Gray filed the petition in this case in the Circuit Court of Saint Louis County. On April 12, 2007, Plaintiffs filed an Amended Petition adding Windhover, Inc., as a party Plaintiff. On May 1, 2007, Defendant removed the case to this Court; and on May 21, 2007, this Court denied Plaintiffs' motion to remand. On July 17, 2007, the Valley Park Board of Aldermen passed, and on July 18, 2007, the Mayor of Valley Park approved, Ordinance 1735, repealing Ordinance 1721

(which restricted the rental of housing units to illegal aliens). Ordinance 1722 (which restricts the employment of unauthorized aliens) remains in place. On August 9, 2007, both parties stipulated to the voluntary dismissal of Plaintiffs' causes of action relating to Ordinance 1721. Accordingly, this memorandum of law focuses on Ordinance 1722 and explains why Plaintiffs cannot prevail under the legal theories that they advance.

Finally, on August 9, 2007, the Valley Park Board of Aldermen passed, and the Mayor signed, an amendment to the effective date of Ordinance 1722 which clarifies that the Ordinance takes effect immediately (on August 9, 2007), but that no complaints will be received and no enforcement actions will occur until December 1, 2007, thereby allowing this Court time to address the legal issues presented in this case. This amendment occurred via Ordinance 1736, attached as Exhibit A. In addition, Ordinance 1736 amended Ordinance 1722 by restating the text of Ordinance 1722, thereby addressing any dispute raised by Plaintiffs concerning the true and correct wording of the text of Ordinance 1722.

FACTUAL BACKGROUND

The remaining ordinance at issue in this matter, Ordinance 1722, was carefully drafted to comply with controlling federal precedents defining the authority of state and local governments to restrict the unlawful employment of unauthorized aliens. Plaintiffs have not alleged any set of facts under which they could prevail on their claims relating to Ordinance 1722.

Ordinance 1722 prohibits employers in Valley Park from knowingly employing unauthorized aliens—which has been a federal crime since 1986 under 8 U.S.C. § 1324a. Ordinance 1722 requires employers to sign an affidavit stating that they do not knowingly utilize the services of or hire any person who is an unlawful worker (including an unauthorized alien). Ordinance 1722 § 4.A. Employers who violate the ordinance risk the suspension of their business licenses under Section 4.B(4)—a sanction that Congress expressly allowed municipalities to impose on employers of unauthorized aliens. 8 U.S.C. § 1324a(h)(2). Ordinance 1722 applies only prospectively—to employees hired after the ordinance becomes effective. Ordinance 1722 § 5.A.

ARGUMENT

I. PLAINTIFFS LEGAL CLAIMS AGAINST ORDINANCE 1722 ARE WITHOUT MERIT

A. Ordinance 1722 is Not Preempted by Federal Immigration Law

Plaintiffs contend that Ordinance 1722 is preempted by federal law. Plaintiffs appear to be somewhat confused, referring to their three preemption claims as "(1) *constitutional* preemption; (2) field preemption; and (3) conflict preemption." Pl. Reply Memo. Supp. Mtn. Prelim. Inj., 5. Plaintiffs evidently do not realize that *all* preemption claims are constitutional preemption claims, under the Supremacy Clause of the U.S. Constitution.

To clarify for Plaintiffs' sake, there are two broad categories of preemption—express preemption and implied preemption. *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (plurality opinion). Plaintiffs' do not, and cannot, make a claim of express preemption (which occurs when Congress passes a law expressly barring the state or local regulation at issue). Rather, their claims are that implied preemption has occurred. The controlling Supreme Court precedent of *De Canas v. Bica*, 424 U.S. 351 (1976), laid out the three-part test for determining whether a state or local regulation affecting immigration is displaced through implied preemption. A state regulation is preempted (1) if it falls into the narrow category of a "regulation of immigration," (2) if the federal government has completely occupied the field so as to complete displace state activity, or (3) if the state regulation "conflicts in any manner with any federal laws or treaties." *Id*. at 358.

Plaintiffs briefly mention the *De Canas* test, but then *they fail to mention the controlling* De Canas *precedent again* in their Memo Supporting their Motion for Preliminary Injunction. The reason that this controlling case disappears from Plaintiffs' memo is obvious: *De Canas* is filled with statements that clearly support Defendants, as quoted below. Plaintiffs also fail to mention what the *De Canas* case was about. In *De Canas*, the U.S. Supreme Court sustained against a preemption challenge a California law that imposed penalties on any employer who "knowingly employ[ed] an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident

workers." *Id.* at 352. The similarities to Ordinance 1722 are obvious; both involve state or local efforts to impose sanctions on the employers of unauthorized aliens. Consequently, controlling Supreme Court precedent weighs strongly in Defendants' favor.

In addition, Plaintiffs neglect to mention the presumption against any judicial finding of preemption. There must always be a heavy presumption against federal preemption of state law. "In all preemption cases…we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was a clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). "[I]n the absence of compelling congressional direction," courts will not infer that "Congress ha[s] deprived the States of the power to act." *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519, 540 (1979).

Finally, and most glaringly, Plaintiffs neglect to mention that Congress expressly allowed states and localities to deny business licenses to employers who hire unauthorized aliens when it passed the Immigration Reform and Control Act (IRCA) of 1986. This express congressional permission for state and local action is found at 8 U.S.C. § 1324a(h)(2), described below.

1. Federal Law Expressly *Permits* State and Local Laws Denying Business Licenses to the Employers of Unauthorized Aliens.

Ordinance 1722 fits exactly within the window of local action created by Congress. As noted above, federal law permits precisely the form of local regulation the Ordinance 1722 represents. With the enactment of IRCA in 1986, Congress made the employment of unauthorized aliens a federal crime. In so doing, Congress expressly preempted some state restrictions on the employment of unauthorized aliens, but expressly *permitted* others. The relevant provision of federal law is found at 8 U.S.C. § 1324a(h)(2):

> **Preemption**. 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) (emphasis added). In this section of U.S. law, Congress utilized its power of express preemption to deny states and localities the authority to impose civil or criminal fines on the

employment of unauthorized aliens. However, Congress explicitly left open a doorway for state and local legislation on the subject—in the form of "sanctions … through licensing and similar laws."

Valley Park has followed 8 U.S.C. § 1324a(h)(2) with precision. Valley Park has eschewed the imposition of criminal or civil penalties and has instead taken the action expressly permitted by Congress. Section 4.B. of Ordinance 1722 calls for the suspension of the business license of a business entity that employs unauthorized aliens—a licensing restriction under 8 U.S.C. § 1324a(h)(2).

Plaintiffs will undoubtedly urge this Court to follow the recent decision of Judge James Munley in the U.S. District Court for the Middle District of Pennsylvania, regarding the employment provisions of a similarly-worded ordinance enacted by City of Hazleton, Pennsylvania. *Lozano v. City of Hazleton*, 2007 U.S. Dist. LEXIS 54320 (M.D. Pa. 2007). In that decision, Judge Munley disregarded the plain language of 8 U.S.C. § 1324a(h)(2) because, in his opinion, "It would not make sense for Congress in limiting the state's authority to allow states and municipalities the opportunity provide the ultimate sanction, but no lesser penalty." *Id*. at *120. In Judge Munley's view, the temporary suspension of a business license is a greater sanction than criminal punishment, such as imprisonment. *Id*. at *119-20. Certainly, reasonable minds may disagree as to which sanction is greater. However, one thing is certain. Judge Munley erred by disregarding the plain language of federal law simply because he thought that Congress's approach "would not make sense." There is no ambiguity in Congress's reservation of "licensing" sanctions to states and local governments. In the absence of ambiguity, the plain language of a statute is decisive in any proper judicial interpretation. "[T]he plain language of the Act controls if it is unambiguous." *Trs. of the Twin City Bricklayers Fringe Benefit Funds v. Superior Waterproofing, Inc*., 450 F.3d 324, 329 (8th Cir. 2006) (*citing United States v. Mickelson*, 433 F.3d 1050, 1052 (8th Cir. 2006)). "Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" *Robinson v. Shell Oil Co*., 519 U.S. 337, 340 (U.S. 1997) (quoting *United States v. Ron Pair Enterprises, Inc*., 489 U.S. 235, 240 (1989)). See also *Barnhart v. Sigmon Coal Co*., 534 U.S. 438, 450 (U.S. 2002). The fact that Judge Munley disagreed as a policy

matter with Congress's decision to allow states and localities to impose licensing sanctions on the employers of unauthorized aliens did not constitute "ambiguity." Consequently, his decision to disregard the plain meaning of 8 U.S.C. § 1324a(h)(2) was erroneous.

2. Plaintiffs' Overbroad Preemption Theory Creates Surplusage

It is a long-standing principle of statutory interpretation that courts must not interpret statutes in a fashion that renders any provision redundant or unnecessary—"mere surplusage" in the words of Chief Justice Marshall in *Marbury* v. *Madison*, 5 U.S. 137, 174 (1803). "It is our duty to give effect, if possible, to every clause and word of a statute. We are thus reluctant to treat statutory terms as surplusage in any setting." *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

Plaintiffs urge this Court to adopt a sweeping implied preemption theory, asserting (incorrectly) that Ordinance 1722 is preempted because it operates in "a field that is entirely occupied by federal law." Pl. Mtn. for Prelim. Inj., 8. "Therefore Valley Park lacks any authority to enact or enforce Ordinances of this type." *Id*., 9. Plaintiffs offer no case law supporting these implied preemption claims.

When considering implied preemption arguments, courts must never act so as to render express preemption provisions mere surplusage. In other words, in the presence of an express preemption provision, it is inappropriate for a court to infer the existence of implied preemption from the wider statute in which the provision is located. The U.S. Supreme Court made this clear in *Wisc. Pub. Intervenor v. Mortier*, 501 U.S. 597, 612-13 (1991): "[F]ield preemption cannot be inferred. In the first place, § 136v itself undercuts such an inference. …*This [express preemption] language would be pure surplusage if Congress had intended to occupy the entire field* of pesticide regulation." Plaintiffs commit precisely this error, advancing a theory that renders 8 U.S.C. § 1324a(h)(2) surplusage.

Plaintiffs' broad implied preemption theory asserts that any state or local law penalizing the employers of unauthorized aliens is preempted. However, 8 U.S.C. § 1324a(h)(2) *expressly* preempts state laws imposing criminal and civil penalties on employers of unauthorized aliens. If Plaintiffs' sweeping theory were correct, then 8 U.S.C. § 1324a(h)(2) would be mere surplusage, because as Plaintiffs assert, Congress had already occupied the field and implicitly preempted all state and local laws on the subject. If

this theory were correct, Congress did not need to expressly preempt in U.S.C. § 1324a(h)(2), because it would have already displaced such state laws from the field through implied preemption.

In enacting 8 U.S.C. § 1324a(h)(2) as part of IRCA in 1986, Congress eschewed the imprecise blanket approach of judicial field preemption and took up the task of express preemption—carving out only one area in which it did not welcome state assistance. Only those few state regulations would be preempted; the remainder would be permitted, provided that they were consistent with congressional objectives. This can be seen in the text of 8 U.S.C. § 1324a(h)(2) itself. State criminal and civil penalties on employers are rejected, but state licensing sanctions and similar sanctions on such employers are invited. Moreover, the text of the provision makes clear that Congress did *not* intend to preempt in other sections of the INA: "The provisions of *this* section preempt any state or local law…." 8 U.S.C. § 1324a(h)(2). The provisions of other sections do not. If this Court were to adopt Plaintiffs' sweeping theory of preemption, it would render 8 U.S.C. § 1324a(h)(2) a nullity and would defeat Congress's intent. Congress knows very well how to preempt state laws in the field of immigration. If Congress chooses not to preempt, the judicial branch must respect that decision. As the Supreme Court has consistently reiterated, "'the purpose of Congress is the ultimate touchstone'" of preemption analysis. *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (*quoting Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)).

3. Ordinance 1722 is not a "Regulation of Immigration" Under *De Canas*

Plaintiffs declare that Ordinance 1722 "attempt[s] to regulate immigration." Pl. Mtn. for Pre. Inj., 9. However, they decline to quote the controlling *De Canas* precedent, which explained quite clearly what the term "regulation of immigration" means:

> [S]tanding alone, the fact that aliens are the subject of a state statute does not render it a regulation of immigration, *which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain*.

424 U.S. at 355 (emphasis added). The Supreme Court made it abundantly clear that states and localities possessed wide leeway to "deal with aliens" without being preempted: "[T]he Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-

empted by this constitutional power, whether latent or exercised." *Id.* "In other words, it is the creation of standards for determining who is an is not in this country legally that constitutes a regulation of immigration in these circumstances, not whether a state's determination in this regard results in the actual removal or inadmissibility of any particular alien." *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 603-04 (E.D. Va. 2004).

Valley Park has not in any way attempted to define who should or should not be admitted into the country. Indeed Ordinance 1722 repeatedly makes express reference to federal immigration classifications in defining which aliens may not be employed. "'Illegal Alien' means an alien who is not lawfully present in the United States according to the terms of United States Code Title 8, section 1101 et seq." Ordinance 1722 § 3.D. The definition of "unauthorized alien" expressly refers to the federal term "as defined by United States Code Title 8, subsection 1324a(h)(3)." Ordinance 1722 § 3.E. The ordinance defers entirely to the federal government in determining whether an alien is authorized to work in the United States. "The determination of whether an individual is an unauthorized alien shall be made by the federal government, pursuant to United States Code Title 8, Subsection 1373(c)." Ordinance 1722 § 5.E. No local official is permitted to even *attempt* an independent determination of status. "At no point shall any city official attempt to make an independent determination of any alien's legal status, without verification from the federal government, pursuant to United States Code Title 8, Subsection 1373(c)." Ordinance 1722 § 5.C.

Plaintiffs compound their misunderstanding of what constitutes a "regulation of immigration" by citing irrelevant, outdated cases that do not involve *illegal* immigration in any way. Pl. Mtn. for Pre. Inj., 9. Without explanation, Plaintiffs cite *Truax v. Raich*, 239 U.S. 33 (1915), which involved a state law that denied employment to an alien who was *lawfully* admitted to the United States and entitled to work under federal law—a law that was struck down on 14th Amendment grounds, not preemption grounds. *Id*. at 42-43. Then Plaintiffs cite *Hines v. Davidowitz*, 312 U.S. 52 (1941), an equally irrelevant case invalidating a state law that registered *legal* aliens because it conflicted with federal law. *Id*. at 73-74. Plaintiffs also attempt to use *Graham v. Richardson*, 403 U.S. 365 (1971) to their advantage. Like the others, that case

involved a state law that discriminated against certain aliens who were *lawfully* present in the United States. *Id*. at 367, 378.

The state statutes in those pre-*De Canas* cases were preempted, but as the Supreme Court later synthesized in *De Canas*, it was because the statutes sought to "determine the conditions under which a *legal* entrant may remain" in the United States. 424 U.S. at 355 (emphasis added). The ordinance at issue in this case does not restrict the ability of aliens lawfully present in the United States to remain. Rather, Ordinance 1722 restrict the ability of *unauthorized* aliens to violate federal law by working unlawfully in the United States. State laws that deny privileges and benefits to illegal aliens have been upheld by U.S. courts. See, e.g., *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 603-04 (E.D. Va. 2004) (upholding state policy denying university admission to illegal aliens).

4. Congress Has Not Occupied the Field so as to Displace all Local Legislation

Without any explanation or case support, Plaintiffs make the extraordinary claim that the field of immigration is a "field[] completely occupied by federal law." Pl. Mtn. for Pre. Inj., 9. Once again, Plaintiffs completely ignore controlling precedent. The *De Canas* Court considered and *rejected* the possibility that the regulation of immigration by the federal government might be so comprehensive that it occupies the field and displaces state action: "Respondents … fail to point out, and an independent review does not reveal, any specific indication in either the wording or the legislative history of the INA that Congress intended to preclude even harmonious state regulation touching on aliens in general, or the employment of illegal aliens in particular." *De Canas*, 424 U.S. at 357-358 (internal citations omitted). "No statute precludes other federal, state, or local law enforcement agencies from taking other action to enforce this nation's immigration laws." *Lynch v. Cannatella*, 810 F.2d 1363, 1367 (5th Cir. 1987).

The *De Canas* Court was unequivocal in its conclusion that a state is permitted to restrict the employment of unauthorized aliens and otherwise act in ways that have an impact on immigration:

> In this case, California has sought to strengthen its economy by adopting federal standards in imposing criminal sanctions against state employers who knowingly employ aliens who have no federal right to employment within the country; even if such local regulation has some purely speculative and indirect impact on immigration, *it does not thereby become a*

> *constitutionally proscribed regulation of immigration* that Congress itself would be powerless to authorize or approve.

424 U.S. at 355-56 (emphasis added). While Plaintiffs would have this Court believe that virtually all state regulations affecting illegal aliens are displaced, to the contrary, the *De Canas* Court held that a state law imposing penalties on employers of illegal aliens was *not* preempted under *any* possible theory. Interestingly, Plaintiffs attempt in vain to find support in an irrelevant footnote from a concurring opinion in *Plyler v. Doe*, 457 U.S. 202 (1982). Pl. Mtn. for Pre. Inj., 12-13. However, Plaintiffs completely ignore what the *Plyler* majority had to say on the subject:

> As we recognized in *De Canas v. Bica*, 424 U.S. 351 (1976), the States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal. In *De Canas*, the State's program reflected Congress' intention to bar from employment all aliens except those possessing a grant of permission to work in this country. *Id*. at 361.

Plyler, 457 U.S. at 225. The Supreme Court has never departed from this holding, and Plaintiffs have not presented any case law that comes even close to suggesting otherwise.

In their Reply Memo, Plaintiffs attempt to offer an answer to the unequivocal holding in *De Canas* that Congress has not completely occupied the field of immigration law. Plaintiffs suggest, without an iota of case support, that the enactment of IRCA in 1986 constituted occupation of the field. Pl. Reply Memo. Supp. Mtn. for Prelim Inj., 12. In other words, Plaintiffs would have this Court ignore controlling Supreme Court precedent, based on Plaintiffs' flimsy theory that IRCA constituted occupation of the field. There are three important reasons why this Court should reject Plaintiffs' suggestion that the controlling precedent of the U.S. Supreme Court is no longer good law.

First, and most obviously, the very Act of Congress that Plaintiffs contend occupied the field—IRCA—itself contains an express invitation for states and localities to enter the field. Congress plainly delineated a zone of state and local action in the field: imposing "sanctions (… 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). As the *De Canas* Court observed before IRCA, "Congress sanctioned concurrent state legislation on the subject covered by the challenged state law." 424 U.S. at 363. The same

observation applies post-IRCA, as Congress once again expressly sanctioned concurrent state and local legislation. "Congress's intent to preempt state law may be implied where it has designed a pervasive scheme of regulation that *leaves no room for the state to supplement*…." *Affordable Hous. Found., Inc. v. Silva*, 469 F.3d 219, 240 (2d Cir. 2006) (emphasis added). However, in passing IRCA, Congress expressly carved out a portion of the field for the state to supplement federal sanctions—through the imposition of licensing sanctions. Thus, it is logically impossible to conclude that Congress has left "no room for the state to supplement" federal law in this case.

Second, the U.S. Court of Appeals for the Second Circuit in 2006 reviewed a preemption challenge under IRCA, and held that IRCA did not result in field preemption. *Affordable Hous. Found., Inc. v. Silva*, 469 F.3d 219. The Court reviewed an IRCA preemption challenge to a state labor law allowing injured workers to seek compensatory damages where the worker is an unauthorized alien. The Court concluded that IRCA did not result in field preemption. *Id*. at 240-41.

Third, Plaintiffs fail to recognize that field preemption requires more than a mere Act of Congress in a particular field. Field preemption requires a demonstration by Congress of "a clear and manifest intent to supersede." *Id*. at 240. "'Where … the field which Congress is said to have pre-empted' includes areas that have 'been traditionally occupied by the States,' congressional intent to supersede state laws must be 'clear and manifest.'" *English v. Gen. Elec. Co*., 496 U.S. 72, 79 (1990) (*quoting Jones v. Rath Packing Co*., 430 U.S. 519, 525 (1977)). In the case at bar, the licensing of businesses and the regulation of employment practices are certainly areas traditionally occupied by the states and municipalities. There is no indication in text or legislative history of IRCA that Congress intended to displace states and localities from the field entirely. On the contrary, both the text of 8 U.S.C. 1324a(h)(2) and the Report of the House Committee on the Judiciary prior to IRCA's enactment expressly contemplate state and local action in the field. See H.R. No. 99-682(1) at 5662.

Here too, Plaintiffs will doubtless urge this Court to follow the recent decision of Judge Munley in *Lozano*. In that case, Judge Munley took the extraordinary step of setting aside the *De Canas* precedent of the U.S. Supreme Court, based on the theory that the enactment of IRCA in 1986 constituted congressional

occupation of the field. Therefore, he concluded that the *De Canas* holding that Congress had *not* occupied the field was no longer good law. *Lozano*, 2007 U.S. Dist. LEXIS 54320 at *135. In addition to the fact that a federal district court should not unilaterally set aside a binding precedent of the Supreme Court, there are three additional problems with Judge Munley's holding. First, in addressing the issue of field preemption he did not even consider the fact that IRCA expressly invited states and localities on to the field by including the language of 8 U.S.C. § 1324a(h)(2). See *Lozano*, 2007 U.S. Dist. LEXIS 54320 at *124-38. Consequently, he arrives at the incongruous conclusion that Congress fully occupied the field while simultaneously inviting states and localities on to the field. Defendants are aware of no preemption precedent that even comes close to supporting such an incongruous holding. Second, a court must not find implied preemption (of which field preemption is one variety) in the presence of express preemption. Doing so renders the express preemption provision mere surplusage. *Wisc. Pub. Intervenor v. Mortier*, 501 U.S. at 612-13. Third, Judge Munley failed to apply the correct standard of requiring a congressional demonstration of "a clear and manifest intent to supersede." *Affordable Hous. Found., Inc. v. Silva*, 469 F.3d at 240. He simply described the scope of IRCA and concluded without any analysis of congressional intent that the field was occupied.). See *Lozano*, 2007 U.S. Dist. LEXIS 54320 at *124-35.

5. The Prohibition of Employing Unauthorized Aliens Constitutes Concurrent Enforcement Activity and is Therefore not Preempted

It is well established that in immigration law, states and localities are not preempted when they undertake concurrent enforcement activity with the federal government. "Where state enforcement activities do not impair federal regulatory interests *concurrent enforcement activity is authorized*." *Gonzales v. City of Peoria*, 722 F.2d 468, 474 (9th Cir. 1983) (*citing Florida Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963)) (emphasis added). Where "[f]ederal and local enforcement have identical purposes," preemption does not occur. *Gonzales v. Peoria*, 722 F.2d at 474. In the words of Judge Learned Hand, "it would be unreasonable to suppose that [the federal government's] purpose was to deny itself any help that the states may allow." *Marsh v. United States*, 29 F.2d 172, 174 (2d Cir. 1928).

Ordinance 1722 prohibits precisely the same activity that is prohibited under federal immigration law: the knowing employment of unauthorized aliens. Under federal law, "It is unlawful for a person or other entity … to hire, or recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3) of this section… ." 8 U.S.C. § 1324a(a)(1). It is also a crime to continue to employ an unauthorized alien once one becomes aware of the employee's status. "It is unlawful for a person or other entity, after hiring an alien for employment … to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment." 8 U.S.C. § 1324a(a)(2). Similarly, Ordinance 1722 states that "[i]t is unlawful for any business entity to knowingly 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 part within the City." Ordinance 1722, § 4.A. "Unlawful worker" is expressly defined to encompass "an unauthorized alien as defined by United States Code Title 8, subsection 1324a(h)(3)." Ordinance 1722, § 3.E. (The term also encompasses any worker who is disqualified by nonage or any other provision of Missouri state law.) It is important to recognize that *Valley Park has painstakingly drafted its ordinance to confirm to the exact terms of federal law. As a result, both federal and local law proscribe the employment of an unauthorized alien with express reference to the definition of that term in 8 U.S.C. § 1324a(h)(3).* It is difficult to conceive of a better example of concurrent enforcement.

It must be noted that concurrent enforcement has been found to exist where the state statute in question is much less consistent with the terms of federal immigration law than in the case at bar. For example, the Arizona Human Smuggling Statute of 2005, A.R.S. §13-2319, created a state crime prohibiting the smuggling of illegal aliens. That state crime was parallel to the federal crime of alien smuggling; but the terms of the state and federal statutes differed considerably. Nevertheless, the state statute was recently upheld against a preemption challenge because it represented concurrent enforcement against substantially the same activity prohibited by federal immigration law.

> [C]oncurrent state and federal enforcement of illegal alien smuggling and conspiracy to smuggle illegal alien laws serves both federal and state law enforcement purposes and is highly compatible. In fact, concurrent enforcement enhances rather than impairs federal

> enforcement objectives. Thus, because federal and State enforcement have compatible purposes, and Congress has not expressly preempted state prosecution of such conduct, preemption does not exist. *Gonzales v. City of Peoria*, 722 F 2nd at 474.

Arizona v. Salazar, CR2006-005932-003DT, Slip Op. at 9 (Ariz. Super. Ct., June 9, 2006) (emphasis added) (opinion attached as Exhibit B). Ordinance 1722 not only is compatible with the purposes of Congress, it also adopts federal definitions and employs federal standards, deferring entirely to federal officials' judgments about the legal status of aliens in question.

6. Ordinance 1722 is Consistent with Congressional Objectives

As noted above, congressional intent is the cornerstone of any preemption analysis. *Malone v. White Motor Corp*., 435 U.S. 497, 504 (1978); *English v. Gen. Elec. Co*., 496 U.S. 72, 78-79 (1990); *Retail Clerks Int'l Assoc. v. Schermerhorn*, 375 U.S. 96, 103 (1963). Moreover, "[t]he conflict standard of preemption is strict." *Affordable Hous. Found., Inc*., 469 F.3d at 238. A "clear demonstration of conflict … must exist before the mere existence of a federal law may be said to pre-empt state law operating in the same field." *Jones v. Rath Packing Co*., 430 U.S. at 544 (Rehnquist, J., concurring in part and dissenting in part). Federal preemption cannot be based on "unwarranted speculations" about Congress's intent. *Id*.

What Plaintiffs fail to acknowledge is that in the past 21 years, Congress has repeatedly taken steps to encourage precisely the form of local action embodied in Ordinance 1722. As the Tenth Circuit has held, "in the months following the enactment of § 1252c, Congress passed a series of provisions designed to encourage cooperation between the federal government and the states in the enforcement of federal immigration laws." *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1300 (10th Cir. 1999) (*citing* 8 U.S.C. §§ 1103(a)(9) and (c), and 8 U.S.C. § 1357(g)(1)). In order to come to the conclusion that a state or local statute is preempted through implied preemption, a court must find that Congress intended such preemption to occur. Such a finding is impossible in this case for six reasons.

First, Congress plainly expected that state and local governments would determine which employers were illegally employing unauthorized aliens (with verification by the federal government), and would deny business licenses to those employers doing so. *There is no other way to coherently interpret 8 U.S.C. § 1324a(h)(2).* Congress explicitly left this window of regulation open to state and local

governments. *Plaintiffs' broad theory of implied preemption renders this provision of federal law nonsensical*.

Second, Ordinance 1722 is consistent with the broader purpose of IRCA (of which 8 U.S.C. § 1324a(h)(2) is part). The Ninth Circuit recently described purpose of the employment provisions of IRCA as follows:

> In passing IRCA, Congress wished to stop payments of wages to unauthorized workers, which act as a "magnet … attract[ing] aliens here illegally," and to prevent those workers from taking jobs that would otherwise go to citizens. P.L. 99-603, IMMIGRATION REFORM AND CONTROL ACT OF 1986 H.R. REP. 99-682(I), at 46, as reprinted in 1986 U.S.C.C.A.N. at 5650.

Incalza v. Fendi, 479 F.3d 1005, 1011 (9th Cir. 2007). This purpose is entirely consistent with the employment provisions of Ordinance 1722, which seek to discourage employers from hiring unauthorized aliens. If Ordinance 1722 prevents unauthorized workers from taking jobs in the future that would otherwise go to U.S. citizens or to authorized alien workers, then Congress's objective are met. By giving an employer notice that an employee is unauthorized and allowing the employer an opportunity to correct the situation (or seek re-verification of the employee's status), Ordinance 1722 effectuates the purpose of IRCA. "Given that IRCA makes it illegal to hire undocumented aliens … and mandates criminal penalties for those who knowingly employ such workers … termination is effectively required once an employer learns of an employee's undocumented status." *Affordable Hous. Found., Inc.*, 469 F.3d at 236. Far from conflicting with the objectives of Congress expressed in IRCA, Ordinance 1722 operates to promote them.

Third, Congress expected state and local governments to ask about the legal status of particular aliens, and expected the federal government to answer. Plaintiffs reveal their unfamiliarity with federal immigration law when they assert without support that "to permit local governments to place such demands for information regarding an individual's immigration status would place an undue burden on the federal government." Pl. Mtn. for Pre. Inj., 13. Plaintiffs evidently are not acquainted with 8 U.S.C. § 1373(c), which Congress enacted in 1996. This provision of federal law requires the federal government to answer any such request from a state or local government:

(c) Obligation to respond to inquiries

> The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.

For Plaintiffs to claim that such requests pose an "undue burden" on the federal government and are therefore preempted is nonsensical, given the fact that the federal government imposed the burden upon itself. Congress expected states and localities to be making inquiries concerning aliens in their jurisdiction and submitting requests for verification of status to the federal government. No other conclusion can logically be drawn from this statutory text.

Fourth, Congress also enacted 8 U.S.C. § 1373(a), which requires states and local governments to maintain unrestricted communications with federal immigration officers concerning the legal status of aliens in the United States. States and localities may not restrict any "official from *sending to*, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual." 8 U.S.C. § 1373(a) (emphasis added). Importantly, Congress wanted states to be able to *send* information—not just receive it—about an alien's legal status. This is definitive proof that Congress expected state and local government officers to make inquiries about the legal status of aliens in order to further the congressional objective of enforcing federal immigration laws. In the Senate report accompanying this legislation, Congress once again made clear its intent to encourage states to make their own efforts to assist in immigration enforcement:

> Effective immigration law enforcement requires a cooperative effort between all levels of government. The acquisition, maintenance, and exchange of immigration-related information by State and local agencies is consistent with, and potentially of considerable assistance to, the Federal regulation of immigration and the *achieving of the purposes and objectives of the Immigration and Nationality Act*.

Sen. Rep. No. 104-249, 104th Cong., 2d Sess. at 19-20 (1996) (emphasis added). It could not be clearer: Ordinance 1722 does not in any way impede the "purposes and objectives of Congress." *De Canas* at 363. On the contrary, according to the Senate, it helps fulfill them.

Fifth, Congress created the Basic Pilot Program as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, P.L. 104-208, Division C, Section 403(a), 8 U.S.C. §

1324a. Despite its name, the Basic Pilot Program is no longer basic; nor is it a pilot program. (It has recently been renamed the "Employment Eligibility Verification System.") It is an internet-based 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. Congress reauthorized the Basic Pilot Program and expanded it to all fifty states in 2004. As a representative of the U.S. Department of Homeland Security recently testified before Congress, the system is extremely easy to use and fast; in approximately 92 percent of cases, the federal government provides an answer verifying an individual's work authorization electronically within a few seconds. See DHS Statement to Congress Regarding the Employment Eligibility Verification System, attached as Exhibit C. The Program is now used by more than 16,000 employers across the country. *Id.* Although Congress has not yet required all employers in the United States to utilize the Program to verify worker authorization, states and localities may require employers to participate in the Program. "Any jurisdiction is free to take advantage of the Basic Pilot Program in order to prevent the illegal employment of aliens not authorized to work here."[1] No provision of federal law bars a jurisdiction from requiring employers to register with and participate in the Basic Pilot Program. Plaintiffs have not, and cannot, identify such a bar in federal law. In any event, Ordinance 1722 does not require any private employer to participate in the Basic Pilot Program. Instead, Valley Park encourages employers within its jurisdiction to do so, by offering them safe harbor under Section 4.B(5) of the ordinance if they verify their new hires with the federal government through the Basic Pilot Program.

Sixth, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, relevant provisions of which are codified at 8 U.S.C. §§ 1601-1622. In so doing, Congress required states and localities to begin determining the legal status of aliens seeking public benefits, by verifying the status such aliens with the federal government. Congress declared that an alien who is "not qualified" (i.e., is unlawfully present in the United States) "is not eligible for any State or local public benefits." 8 U.S.C. § 1621(a). Unqualified aliens, defined at 8 U.S.C. § 1641, are aliens who are

[1] Testimony of Jessica M. Vaughan before the State, Veterans & Military Affairs Committee of the Colorado General Assembly, February 21, 2006.

not lawfully present in the United States (with exceptions made for victims of spousal or parental abuse). Henceforth, all state and local governments were required by federal law to deny public benefits to illegal aliens. Congress defined "public benefit" broadly:

> [T]he term "State or local public benefit" means—
> (A) any grant, contract, loan, professional license, or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government; and
> (B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government.

8 U.S.C. § 1621(c). Thus, states and localities are not only encouraged to determine the status of aliens seeking such benefits, they are *required* to do so. Plainly, Congress expected that the federal government would receive millions of inquiries every year from state and local government regarding the legal status of particular aliens. Indeed, Congress effectively *demanded* that state and local governments make these inquiries, in the process of denying such benefits to unqualified aliens. In light of this federal statutory reality, Plaintiffs' claim that such inquiries are preempted because "demands … for information regarding an individual's immigration status would place an undue burden on the federal government" is untenable. Pl. Mtn. for Prelim. Inj., 13. Plaintiffs' strained theory simply cannot be squared with federal law.

In order to implement these PRWORA provisions, the federal government expanded the Systematic Alien Verification for Entitlements (SAVE) Program, which was originally established in 1987 pursuant to IRCA. The SAVE Program utilizes a massive automated database, allowing state and local government agencies to contact the federal government via internet to determine whether an aliens is lawfully present in the United States. Federal courts have recognized that reliance on such federal verification through SAVE allows a state or local government to act without being preempted. "The benefits denial provisions of Proposition 187 may therefore by implemented without impermissibly regulating immigration if state agencies, in verifying for services and benefits, rely on federal determinations made by the INS and accessible through SAVE." *League of United Latin American*

Citizens v. Wilson, 908 F. Supp. 755, 770 (C.D. Cal. 1995). There are at least 205 participating government agencies across the country that are currently using the SAVE program to verify individuals' immigration status. DHS Privacy Impact Statement for SAVE, Def. Memo. Resp. to Mtn. for Pre. Inj., Exh. C, at 18.

It is also important to note that among the public benefits denied to unqualified (illegal) aliens in 8 U.S.C. § 1621 is "any … professional license, or commercial license provided by an agency of a State or local government." Congress expressly required all cities and states to deny business licenses to the unqualified aliens themselves. Congress intended cities and states to prevent unauthorized aliens from owning and operating businesses of their own. This is entirely consistent with a city's suspension of the business licenses of those businesses entities that are found to have knowingly employing unauthorized aliens and refuse to take action to correct this violation of federal immigration law. Here again, Ordinance 1722 is entirely consistent with congressional objectives.

Seventh, when enacting IIRIRA in 1996 Congress expressly put to rest any notion that it did not welcome state and local efforts to assist with the problem of illegal immigration. In passing 8 U.S.C. § 1357(g), a provision allowing states enter into agreements to deputize specially-trained state officers to exercise the full "function[s] of an immigration officer" of the United States, Congress affirmed that no such agreement was necessary for states to act. States and localities retain unpreempted authority to otherwise assist in immigration enforcement: "Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision … otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." 8 U.S.C. § 1357(g)(10). Plaintiffs' broad claim of field preemption cannot be reconciled with this Congressional affirmation that states and cities may identify unauthorized aliens employed in the United States. In sum, these six Congressional actions, along with the undeniable window for local action created by 8 U.S.C. § 1324a(h)(2), constitute overwhelming evidence of congressional intent to facilitate state and local efforts to penalize the employment of unauthorized aliens and otherwise to cooperate with the federal government in the enforcement of immigration laws.

7. Plaintiffs Have Failed to Show Impossibility of Simultaneous Compliance

On March 7, 2007, the Ninth Circuit handed down a decision of significant relevance to this case. In *Incalza v. Fendi*, the Ninth Circuit held that a California state employment law was preempted by federal immigration law (specifically, the employment provision of 8 U.S.C. § 1324a(a)(2)). *Incalza v. Fendi*, 479 F.3d 1005. The Court addressed the question of whether a state statute that prohibited employers from firing employees without good cause conflicted with 8 U.S.C. § 1324a(a)(2), which prohibits an employer from continuing to employ a person who has become an unauthorized alien. 479 F. 3d at 1009.

The Ninth Circuit explained how high the hurdle is for conflict preemption to occur. "Conflict preemption occurs when either 1) it is *not 'possible to comply with the state law without triggering federal enforcement action,*' or 2) state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" *Id*. at 1009-10 (internal citations omitted) (emphasis added). This is a very difficult test for a party bringing a preemption claim to pass. The *Incalza* Court explained that the existence of *potential* conflict between the state and federal laws is *not enough*. Inevitable and unavoidable conflict is required for preemption to occur:

> Tension between federal and state law is not enough to establish conflict preemption. *Silkwood v. Kerr-McGee Corp*., 464 U.S. 238, 256 (1984). We find preemption only in "those situations where conflicts will necessarily arise." *Goldstein v. California*, 412 U.S. 546, 554 (1973). A "hypothetical conflict is not a sufficient basis for preemption." *Total TV v. Palmer Communications, Inc*., 69 F.3d 298, 304 (9th Cir. 1995).

479 F. 3d at 1010. Applying this standard, the Court held that *because there was a way to comply with both federal and state law, the preemption claim failed*. "It was possible for Fendi to obey federal law in this case without creating a conflict with state law because there were remedies short of discharge that were permissible under federal law." *Id*. at 1010. Determining that conflict between the state employment law and federal immigration law concerning the employment of aliens was *possible, but not inevitable*, the Court concluded: "[I]n this case, California law does not conflict with federal law; it was possible to comply with and satisfy the purposes of both." *Id*. at 1013.

The impossibility-of-simultaneous-compliance standard, set forth by the Supreme Court in *Goldstein*, 412 U.S. at 554, and *Silkwood*, 464 U.S. 238, has also been applied recently by the Second Circuit, which would not find preemption unless "compliance with both [the state law] and IRCA is *physically impossible*." *Affordable Hous. Found., Inc. v. Silva*, 469 F.3d at 241 (emphasis added). Only if compliance with both is physically impossible would the "irreconcilable conflict between IRCA and [state law]" exist. *Id*. at 242. The Court found no such conflict.

The same question must be asked in the case at bar: is it physically possible for the Plaintiffs to comply with both federal law and Ordinance 1722? The answer is plainly yes. By declining to hire unauthorized aliens in the future, Plaintiffs may comply with all of the requirements of 8 U.S.C. § 1324a while also complying with Ordinance 1722. Plaintiffs have not explained how they, specifically, could be placed in a position in which compliance with both federal and local law would be impossible. In addition, Plaintiffs would then have to demonstrate that arriving at that position was *inevitable*. Indeed, it is difficult to imagine a situation in which a Plaintiff could not possibly comply with both federal law and local law in the case at bar.

8. Plaintiffs Misconstrue Federal Law in Attempting to Find a Conflict with Ordinance 1722

In their Reply Memo, Plaintiffs attempt in vain to find inconsistencies between federal law and Ordinance 1722. In several respects, Plaintiffs have grievously misrepresented federal law. Before explaining these misrepresentations, however, it must be remembered that preemption doctrine does not require a state or locality to *mirror* federal law in every respect in order to avoid implied preemption. Rather, the test is simply whether the state or local statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *De Canas*, 424 U.S. at 363. That said, it is worth noting that none of the inconsistencies asserted by Plaintiffs actually exist.

For example, Plaintiffs attempt to find an inconsistency when they claim, with reference to Ordinance 1722's mechanism "to reverify the worker's status through the Basic Pilot Program," that

"federal law prohibits reverification except under limited circumstances. (8 U.S.C. § 1324b(a)(6).)" Pl. Reply Memo. Supp. Mtn. for Prelim. Inj., 9. Plaintiffs neglect to mention that the statutory section they cite—8 U.S.C. § 1324b(a)(6)—*has nothing to do with the Basic Pilot Program*. Rather, it is concerned with the documents collected by employers in filling out I-9 forms. "Reverification"—a term referring to subsequent verification by the federal government itself—appears nowhere in the cited section. The text of the federal statute reveals just how brazenly Plaintiffs have distorted the law:

> **(6) Treatment of certain documentary practices as employment practices**
> A person's or other entity's request, for purposes of satisfying the requirements of section 1324a(b) of this title, *for 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 shall be treated as an unfair immigration-related employment practice if made for the purpose or *with the intent of discriminating against an individual* in violation of paragraph (1).

8 U.S.C. § 1324b(a)(6) (emphasis added). Plainly, this has absolutely nothing to do with the electronic verification process of the Basic Pilot Program. This refers instead to the process established in 1986 by which employers collected and scrutinized documents from prospective employees. In addition, the italicized phrases of the section above illustrate two other respects in which this law is utterly inapplicable to the Basic Pilot Program and Ordinance 1722. First, the section refers to *documents* that employers might attempt to require employees to offer, above and beyond the documents required by federal law. Ordinance 1722 and the Basic Pilot Program do not require employees to provide any documents whatsoever. Second, the section refers to documentary demands made by employers with the intent to discriminate against employees in the hiring process. That is a far cry from allowing the employee to seek reverification in his own defense. Plaintiffs' misrepresentation of this section of federal law is disturbing, to say the least.

Plaintiffs then offer an argument that is less deceptive, but equally weak. They claim that Ordinance 1722 conflicts with federal law because 8 U.S.C. § 1324a(b)(5) prohibits using the federal I-9 form and information contained in it for purposes other than enforcing certain federal laws. Pl. Reply Memo. Supp. Mtn. for Prelim. Inj., 9. It is certainly true that I-9 forms "may not be used for purposes other than for enforcement of this chapter and [other sections of federal criminal law]." 8 U.S.C. § 1324a(b)(5). But that is entirely irrelevant to the case at bar. Ordinance 1722 does not make any reference to the federal

I-9 form or use it in any way. Rather, Ordinance 1722 relies entirely on federal verifications using the Basic Pilot Program and the SAVE Program. Those verifications can occur with as little information as simply the employee's name and date of birth. Presumably, Plaintiffs are not claiming that 8 U.S.C. § 1324a(b)(5) prohibits states and localities from using any employee's name and date of birth in any enforcement action, simply because that information is also included on the federal I-9 form. If they were, all state and local law enforcement in the country would be preempted under Plaintiffs' theory.

Finally, Plaintiffs attempt to invent a federal prohibition against a locality requiring the use of the Basic Pilot Program. As noted above, there is no provision of federal law that bars a state or local entity from requiring its own agencies, or private businesses within its jurisdiction, to use the Basic Pilot program. However, Plaintiffs offer the following quotation from an uncodified section of the IIRIRA passed by Congress in 1996: "may not require any person or other entity to participate in a pilot program." IIRIRA § 401(a), quoted in Pl. Reply Memo. Supp. Mtn. for Prelim Inj., 9. Plaintiffs have taken these words out of context. The smoking gun is in the missing subject. The full sentence reads: "[T]he Secretary of Homeland Security may not require any person or other entity to participate in a pilot program." IIRIRA § 401(a). This was a federalism-preserving provision inserted in 1996 when the Basic Pilot Program was first created. In the interest of comity, Congress did not allow *the Secretary of Homeland Security* (in the original text it was "the Attorney General") to impose such requirements. But state and local authorities were left free to do so.

In any event, it must be reiterated that Ordinance 1722 *does not require all business entities to participate in the Basic Pilot Program*. Rather, Ordinance 1722 merely encourages business entities to do so, by offering them safe harbor under Section 4.B(5). The only circumstance under which a business entity would be required to participate in the Basic Pilot Program is if the business entity were found to have violated the ordinance by hiring of two or more unauthorized aliens. Participation in the Basic Pilot Program is a condition that would have to be satisfied before the suspension of the business entity's business permit could be ended. Ordinance 1722, § 4.B(6)(b). This framework perfectly mirrors federal law, which provides that a business entity can be compelled to participate in the Basic Pilot Program as a

consequence of violating 8 U.S.C. § 1324a. "Application to certain violators. An order under 8 U.S.C. § 1324a(e)(4) or § 1324b(g) may require the subject of the order to participate in, and comply with the terms of, a pilot program with respect to the subject's hiring (or recruitment or referral) of individuals…." IIRIRA § 401(e)(2). In sum, all three attempts by Plaintiffs to manufacture some inconsistency between Ordinance 1722 and federal law fail. And they certainly fall short of establishing that Ordinance 1722 "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *De Canas*, 424 U.S. at 363. On the contrary, Ordinance 1722 advances the objective of IRCA—namely to "to stop payments of wages to unauthorized workers, which act as a 'magnet … attract[ing] aliens here illegally,' and to prevent those workers from taking jobs that would otherwise go to citizens." *Incalza*, 479 F.3d at 1011.

B. Plaintiffs' Equal Protection Argument is Fatally Flawed

Plaintiffs Equal Protection Clause challenge is simply a speculative assertion that Ordinance 1722 will cause employers to discriminate against Hispanic workers when hiring new employees. Plaintiffs argue that Ordinance 1722, though facially neutral, will have an unconstitutionally discriminatory impact on such workers in the private hiring process. Pl. Mtn. for Pre. Inj., 15. This challenge is fatally flawed for several reasons, the most important being: Plaintiffs do not have standing to raise this particular claim and their theory lacks state action. These flaws are sufficient to render Plaintiffs' Equal Protection claim invalid, even if all of Plaintiffs' factual assertions were true.

1. Plaintiffs Lack Standing to Raise Their Equal Protection Claim

To begin with, it must not be forgotten that the Plaintiffs *are employers*; they are not workers who have been denied a job. Assuming for the sake of argument that private discrimination by other employers in the hiring process were to arise in Valley Park in the future, Plaintiffs would not have standing to challenge this discrimination. Plaintiffs lack standing to challenge an allegedly unconstitutional hiring decision by another employer in which that employer declines to hire a particular worker. The injured party in such a scenario would be the worker—a third party not present in this action. Plaintiff employers

would not be involved in any way in this hypothetical hiring discrimination by other employers, and they would suffer no injury whatsoever. Plaintiffs are asserting that the Equal Protection rights of the hypothetical workers have been violated—not their own rights. Establishing a judicially cognizable injury to the plaintiff is a core requirement of Article III standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "[T]he plaintiff must have suffered an 'injury in fact'" for standing to exist. *Id.* at 734. "[T]he 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Sierra Club v. Morton*, 405 U.S. 727, 734-735 (1972). Consequently, "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, (1975). See *Thompson v. Adams*, 268 F.3d 609, 613 (8th Cir. 2001).

Plaintiffs must establish their standing with respect to each and every claim that they bring. "There is much at stake in the task of ensuring proper jurisdictional bases for each and every claim—particularly when courts are called upon to review a state or local legislative enactment." *Storino v. Borough of Point Pleasant Beach*, 322 F.3d 293, 300 (3d Cir. 2003). Although Plaintiffs do have standing to bring their preemption, due process, and state law challenges—because Plaintiffs, as employers, would suffer injury if their claims were valid—they do not have standing to assert an Equal Protection claim on behalf of hypothetical workers whom they speculate might not be hired by other employers.

2. Ordinance 1722 Contains no Suspect Classification and Plainly Survives Minimal Scrutiny

Plaintiffs acknowledge that there are no suspect classifications in Ordinance 1722 that are subject to facial challenge. Pl. Mtn. for Pre. Inj., 15. However, in the event that Plaintiffs attempt to recharacterize their Equal Protection challenge as a facial one, they would fail to establish a constitutional violation. The only classification that exists in the ordinance is a classification based on *immigration* status. The Supreme Court has expressly rejected the notion that a law that treats illegal aliens differently than U.S. citizens and aliens lawfully present in the United States amounts to a suspect classification:

> We reject the claim that "illegal aliens" are a "suspect class." No case in which we have attempted to define a suspect class … has addressed the status of persons unlawfully in our

> country. Unlike most of the classifications that we have recognized as suspect, entry into this class, by virtue of entry into this country, is the product of voluntary action. Indeed, entry into the class is itself a crime. In addition, it could hardly be suggested that undocumented status is a "constitutional irrelevancy."

Plyler, 457 U.S. at 219, n.19. Thus, Ordinance 1722 need only survive minimal scrutiny. The City must present a "sufficient rational basis" for its policy. *Id*. at 224. In addition, the City "must demonstrate that the classification is reasonably adapted to 'the purposes for which the state desires to use it.'" *Id*. at 226.

Clearly, Ordinance 1722 survives minimal scrutiny. The objectives listed in Ordinance 1722, §§ 2.C., 2.E.—reducing crime, reducing the burden on public services, protecting the economic welfare of authorized workers—all constitute a rational basis for the ordinance. Indeed, these goals would even meet the substantial government interest test of intermediate scrutiny. "[R]educing crime is a substantial government interest…." *City of L.A. v. Alameda Books*, 535 U.S. 425 (2000). Protecting the wages and employment of U.S. citizens and authorized alien workers against unfair competition from unauthorized alien workers is also a legitimate government interest. In addition, it is clear that the means chosen by the City to address the consequences of the unlawful employment of unauthorized aliens in the City are "reasonably adapted to the purposes" of the City. It is plain that deterring employers from hiring unauthorized aliens protects law abiding citizen and authorized alien workers against the loss of their jobs and the depression of their wages caused by competing illegal labor. It is also clear that "crime committed by illegal aliens harms the health, safety and welfare of authorized U.S. workers and legal residents in the City…." Ordinance 1722, § 2.C. Thus, the ordinance is rationally related to the legitimate government objectives that it seeks to promote.

3. The Ordinance Was Not Driven by any Discriminatory Purpose

Unable to bring a facial challenge on Equal Protection grounds, Plaintiffs must resort to claiming that Ordinance 1722 has an ethnically discriminatory purpose and impact. However, in order to subject the ordinance to strict scrutiny, they must establish *both* discriminatory purpose and discriminatory impact. *Rogers v. Lodge*, 458 U.S. 613, 617 (U.S. 1982). Assuming *arguendo* that they could show a discriminatory impact at some point in the future, Plaintiffs' allegation of discriminatory purpose is

unsustainable. Plaintiffs rest their allegation of discriminatory purpose on a single tabloid article. The article, which may charitably be described as a vulgar "hit piece" on the Mayor of Valley Park, is misleading in numerous respects. However, Plaintiffs compound the misdirection of the article by flagrantly misquoting it. For example, Plaintiffs state that in the article, "the mayor invoked numerous racial stereotypes and epithets." Pl. Mtn. for Pre. Inj., 16. However, in the article, the Mayor *denied* having any racial animus, Pl. Mtn. for Pre. Inj., Exh. A, at p. 3, and mentioned epithets only in explaining that he would not use them. *Id*. at pp. 4-5.

More importantly, Plaintiffs also ignore the fact that the Board of Aldermen must enact any Ordinance in the City of Valley Park. The Mayor is empowered only to sign or veto legislation. However, *Plaintiffs do not even allege any discriminatory purpose on the part of the Aldermen who enacted the Ordinance*. Thus, because Plaintiffs have not alleged that the legislative body that passed the Ordinance did so with discriminatory intent, their Equal Protection claim contains yet another gaping hole.

Also of significance is the fact that the text of Ordinance 1722 expressly rejects private ethnic discrimination in the filing of complaints. The City took the extra precaution of including an anti-discrimination clause, going well beyond the requirements of the Fourteenth Amendment: "A complaint which alleges a violation on the basis of national origin, ethnicity, or race shall be deemed invalid and shall not be enforced." Ordinance 1722 § 4.B(2). This anti-discrimination clause requires that the City take no action on any complaint reflecting private discrimination, *even if the individual subject to the complaint is guilty of violating the ordinance* (and violating federal law) by knowingly hiring an unauthorized alien. This is an extraordinary anti-discrimination provision in Ordinance 1722, one that is even more protective than federal law, which allows private complaints but does not screen out those containing racial or ethnic bases. See 8 U.S.C. § 1324a(e)(1). If the Board of Aldermen were intending to encourage ethnic discrimination by private individuals, then they certainly would not have inserted this anti-discrimination provision in the ordinance. No provision of federal or state law required the City to include this provision in the ordinance. The Board of Aldermen did so in order to *discourage* private discrimination. Thus, the

inclusion of this anti-discrimination clause demonstrates the absence of any discriminatory motive on the party of elected City leaders.

4. Plaintiffs Cannot Show Discriminatory Impact

In order for their Equal Protection Clause claim to be elevated to strict scrutiny, Plaintiffs would not only have to show discriminatory purpose, they would also have to show discriminatory impact. This is difficult because Ordinance 1722 has not yet been enforced against any business entity. And it will not be enforced until December 1, 2007. No complaints have been filed, no investigations have occurred, no verifications of employees' status with the federal government have taken place, and no penalty has been imposed. Thus, the discriminatory impact that Plaintiffs imagine is based entirely on conjecture—speculation that the enforcement of the Ordinance will somehow cause private employers to engage in anti-Hispanic discrimination in their mental processes of making hiring decisions. For this reason, it is virtually impossible for Plaintiffs to prevail on a discriminatory impact challenge. Because Plaintiffs rushed to file this lawsuit prior to Ordinance 1722 being enforced against any business entity, they cannot bring a coherent discriminatory impact challenge, because the ordinance has yet to be enforced against anyone.

Alternatively, Plaintiffs might simply assert that employers will discriminate against Hispanic individuals when hiring new employees merely because the obligation imposed by Ordinance 1722 is now in effect. In other words, Plaintiffs might claim that such discrimination will soon occur because Ordinance 1722 makes it "unlawful for any business entity to knowingly recruit, hire for employment, or continue to employ" an unauthorized alien. Ordinance 1722 § 4.A. Plaintiffs have already stated that employers "will be forced to try to investigate whether any such workers are 'unlawful workers,' even though such verification is not required under federal law…." Pl. Mtn. for Pre. Inj., 18. The problem with this claim is that the legal obligation of Ordinance 1722 is the same as the legal obligation that been in existence for more that two decades under federal law. Since 1986, employers have been prohibited under federal law from hiring unauthorized aliens, 8 U.S.C. § 1324a(a)(1), employers have been compelled to scrutinize documents provided by prospective employees, 8 U.S.C. § 1324a(b)(1), and employers have been forced to retain employees' I-9 forms. 8 U.S.C. § 1324a(b)(3). Employers face federal criminal

penalties for knowingly hiring unauthorized aliens, including imprisonment for up to 6 months where a pattern or practice of violations occurs, 8 U.S.C. § 1324a(f)(2), as well as civil fines ranging from $250 to $10,000 per alien, 8 U.S.C. § 1324a(e)(4)(A). If the legal obligation not to hire unauthorized aliens is the catalyst that drives employers to discriminate, under Plaintiffs' theory, *then the catalyst is already in effect*.

Plaintiffs also fail to recognize that Ordinance 1722 reduces any private discrimination that may exist in the workplace. As noted above, Ordinance 1722 encourages (but does not require) employers in the City to utilize the Basic Pilot Program. The Basic Pilot Program electronic verification system takes the uncertainty out of the hiring process, providing employers with confirmation from the federal government that a prospective employee is authorized to work in the United States. Once the uncertainty is taken out of the hiring process, employers have *less* incentive to make discriminatory guesses about a person's work authorization based on his ethnicity. In other words, such discriminatory "defensive hiring" practices can only exist in a situation of uncertainty. If the employer is given certainty that the federal government verifies the work authorization of the employee, and the employer is further granted safe harbor under Section 4.B(5) of Ordinance 1722, he has every incentive to hire the employee.

Plaintiffs also claim that Ordinance 1722 will promote private discrimination because Section 4.B(1) allows any Valley Park resident or business entity to submit a complaint to the City. Plaintiffs assert that the complaint process will prompt employers to engage in discriminatory hiring practices. Pl. Reply Memo Supp. Mtn. for Prelim. Inj., 16-17. There are two problems with this argument. First, Plaintiffs have not read Ordinance 1722 carefully. Contrary to Plaintiffs' assertion, the mere submission of a complaint does not mandate City enforcement action. Only if the City determines that the complaint is "valid" does any enforcement action occur. Ordinance 1722 § 4.B(3). 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 of the ordinance. Mere allegation that a business entity is employing unauthorized aliens is not enough. Ordinance 1722 § 4.B(1). Finally, as noted above, Ordinance 1722 contains a blanket anti-discrimination clause: "Any complaint which alleges a violation on

the basis of national origin, ethnicity, or race shall be deemed invalid and shall not be enforced." Ordinance 1722 § 4.B(2). This is an extraordinary provision. Even if the business entity that is the subject of the complaint is in violation of the ordinance, the City will take no action on such a complaint.[2]

The second problem with Plaintiffs' argument is that they are evidently unaware that federal law already contains a complaint process whereby members of the public may report employers who are alleged to be employing unauthorized aliens. Federal immigration law allows "individuals and entities to file written, signed complaints respecting potential violations of subsection (a) or (g)(1) of [8 U.S.C. § 1324a]." 8 U.S.C. § 1324a(e)(1)(A). Like Valley Park's ordinance, federal immigration law requires "the investigation of those complaints which, on their face, have a substantial probability of validity." 8 U.S.C. § 1324a(e)(1)(B). And unlike Valley Park's ordinance, federal law does *not* contain an anti-discrimination provision that renders complaints invalid if they are based on national origin, ethnicity, or race. Consequently, federal law already contains a public complaint process that is more permissive than that of Ordinance 1722. If the existence of a public complaint process somehow engenders private discrimination by employers, then such discrimination would already exist as a product of federal law.

An additional problem with Plaintiffs' Equal Protection claim is that there are already adequate provisions in federal immigration law that penalize the kind of discriminatory private hiring decisions that Plaintiffs speculate about. Federal law prohibits any employer from "discriminat[ing] against any individual (other than an unauthorized alien…) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment … because of the individual's national origin." 8 U.S.C. § 1324b(a)(1). The same section of federal immigration law created the office of the Special Counsel for

[2] In their Reply Memo, Plaintiffs assert an "inevitability that complaints under the Ordinance will be based on perceived national origin, ethnicity, or race." Pl. Memo Supp. Mtn. for Prelim. Inj., 15. Apparently, Plaintiffs' hold a rather distorted view of the world—in which racism lies behind every action intended to discourage the employment of unauthorized aliens. Plaintiffs then go so far as to suggest that it would be impossible to conceive of a complaint that was not based on national origin, ethnicity or race. *Id.* Since Plaintiffs cannot think of one, Defendants are willing to suggest a few. For example, a complaint might come from a customer overhearing a hiring discussion in which the prospective employee states that he does not have the documentation required for filling out an I-9 form, and the employer responds by giving him the name of a person who will furnish a "green card" for $100. Or, to offer another example, 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-

Immigration-Related Unfair Employment Practices within the Department of Justice. The sole responsibility of that office is to investigate complaints of hiring discrimination and related unfair employment practices. 8 U.S.C. §1324b(c). Any person in the United States who believes that he has been the subject of such discrimination may file a charge with the office. 8 U.S.C. § 1324b(b)(1). And even if the office declines to file a complaint in response to the private charge, the individual may himself file a complaint directly with an administrative law judge. 8 U.S.C. § 1324b(d)(2). Any person seeking employment in the City of Valley Park who is subject to the hypothetical discrimination described by Plaintiffs may avail himself of these remedies under federal law.

5. Plaintiffs' Theory Lacks State Action

Assuming that Plaintiffs could somehow overcome all of the problems described above in their discriminatory impact claim, the claim still has a fatal flaw: there is no state action. The Fourteenth Amendment prohibits racial or ethnic discrimination by state actors, not by private individuals. U.S. CONST., Amend. XIV, Section 1. Plaintiffs' theory of unconstitutional discrimination rests on the independent actions of private individuals. Under such circumstances, no state action exists. *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found*., 538 U.S. 188, 195-96 (2003).

Plaintiffs confuse hiring decisions by private individuals with the enforcement actions by the City. City officials are not permitted to consider race, ethnicity, or national origin when they enforce Ordinance 1722. City officials may only consider race/ethnicity/origin-*neutral* factors when deciding whether a complaint is a valid one that warrants further investigation. As Ordinance 1722 states, "A valid complaint shall include 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." Ordinance 1722 § 4.B(1).

In their Reply Memo, Plaintiffs attempt to resuscitate their Equal Protection claim by suggesting that the hypothetical private discrimination by employers in Valley Park would be "a result of state action." Pl. Memo. Supp. Mtn. for Prelim. Inj., 18. Although Plaintiffs do not identify it as such, their argument is

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worker's discussion with the alien. If either of these complaints contained sufficient information to render them credible and meet the requirements of Ordinance 1722 §4.B(1), they could be considered valid.

an attempt to fit within the "state entanglement" exception to the state action requirement. Plaintiffs assert that there is a sufficient nexus between the state, the private actor, and the alleged deprivation to constitute state action. In support of their theory, Plaintiffs only offer a passing reference to *Wickersham v. City of Columbia*, 481 F.3d 591 (8th Cir. 2007). Pl. Memo. Supp. Mtn. for Prelim. Inj., 18. However Plaintiffs decline to offer any quotations from *Wickersham*. A reading of *Wickersham* reveals why Plaintiffs decline to discuss it; the case does not support Plaintiffs' claim. The claim in that case involved First Amendment expressive conduct at an annual air show jointly held by a private organization in cooperation with the City of Columbia on public property. *Id*. at 593-94. The Court held that the restrictions on expression at the air show were attributable to state action because City officials knew of the restrictions, had an ongoing arrangement with the private organization to maintain the restrictions year after year, and used City police officers to enforce the restrictions. According to the Court, "the city not only provided critical assistance in planning and operating the show, but also played an active role in enforcing the particular speech restrictions challenged in this action." *Id*. at 598. As a result, the private organization "and the city were knowingly and pervasively entangled in the enforcement of the challenged speech restrictions." *Id*. at 599. Plainly, such pervasive entanglement in which the City cooperates in unconstitutional conduct and uses City resources to enforce the unconstitutional conduct does not exist in the case at bar—even under the most far-fetched hypothetical scenario offered by Plaintiffs. Moreover, it must be remembered that *Plaintiffs do not even allege a single, concrete, identifiable incident in which such discrimination has occurred*. Defendants are aware of no case law in federal constitutional jurisprudence in which state action was held to exist without any documented instance of the unconstitutional conduct occurring.

Plaintiffs fail to apply relevant the "state entanglement" test of state action case law. The *Wickersham* Court applied the correct standard:

> To ascertain whether there is state action in a case, we examine the record to determine "whether the conduct at issue is 'fairly attributable' to the state." *Montano v. Hedgepeth*, 120 F.3d 844, 848-849 (8th Cir. 1997) (*quoting Lugar v. Edmondson Oil Co*., 457 U.S. 922, 937, (1982)). We are guided in this inquiry by two additional queries: whether the claimed deprivation "resulted from the exercise of a right or privilege having its source in state authority" and whether the party engaging in the deprivation "may be appropriately

> characterized as [a] state actor[]." *See Lugar*, 457 U.S. at 939 (internal quotations omitted).

481 F.3d at 597. The second *Lugar* query was described in full by the Supreme Court as follows: whether the person may characterized as a state actor "because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state." 457 U.S. at 937. The two *Lugar* queries yield very a different answer in the case at bar than they did in *Wickersham*. No City authority gives employers in Valley Park the right or privilege to discriminate on the basis of race, national origin, or ethnicity. Nothing in Ordinance 1722 can even be remotely characterized as authorizing private discrimination. And private employers cannot be characterized as state officials. There is no cooperative, joint decision making between the City and the private employer when an employee is hired. And City officers do not enforce the employers' decisions to hire or not to hire.

Moreover, Plaintiffs' state action theory is contradicted by their own arguments. Elsewhere in their memos, Plaintiffs do not paint such a collusive and cooperative picture between the City and employers. According to the Plaintiffs, the provisions of Ordinance 1722 constitute onerous "burdens imposed by the City" on them and other employers. Pl. Mtn. for Prelim. Inj., 18. Plaintiffs contend that they suffer irreparable harm because they "will be forced to try to investigate whether any such workers are 'unlawful workers.'" *Id*. Accordingly, Plaintiffs wish to avoid the "expense, vexation and annoyance" caused by Ordinance 1722. That doesn't sound like the cooperative entanglement and "critical assistance" provided by the City in *Wickersham*. Without such collaboration between state actors and private actors, Plaintiffs Equal Protection claim lacks the necessary component of state action.

C. Plaintiffs' Due Process Claim is Meritless

In their Amended Petition, Plaintiffs set forth a brief due process claim that is weak on its face. In full, Plaintiffs claim is: "[Ordinance 1722] violates Plaintiffs' due process rights … in that it subjects the Plaintiffs to being deprived of their business without providing any standards or guidance for compliance.

Plaintiffs have no way of determining the immigration status of a prospective employee or contractor, and are at risk of violating other laws by attempting to do so." Pl. Amended Pet. ¶ 29.e.

Three misstatements are immediately apparent in Plaintiffs' claim. First, Ordinance 1722 provides extensive standards for compliance. The various provisions of Section 4.B provide lengthy guidance to business entities in the event that they are the subject of a complaint. In addition, the provisions of Section 5.B describe options available to a business entity seeking to correct a violation; and Section 5.D. describes judicial remedies available to any business entity that wishes to challenge the enforcement of the ordinance. Second, Plaintiffs again fail to note that current federal law already requires them to determine the immigration status of an employee. 8 U.S.C. §§ 1324a(a), 1324a(b). Third, Plaintiffs do have a way of determining the work authorization of prospective employees. They may scrutinize documents presented by the employee, as they are already required to do by federal law, *id*.; and they may utilize the Basic Pilot Program, along with more than 18,000 other employers across the country, to verify the work authorization of employees with the federal government over the internet.

The more fundamental problem with Plaintiffs' due process claim is that Plaintiffs apparently do not recognize what due process requires in the context of an administrative action regarding the potential suspension of a business permit. The fundamental requirement of due process is a meaningful opportunity to be heard that is appropriate to the circumstances. *Matthews v. Eldridge*, 424 U.S. 319, 333 (U.S. 1976). There is no rigid set of procedural requirements that must be satisfied. Indeed, "[t]he judicial model of an evidentiary hearing is neither required, nor even the most effective, method of decision-making in all circumstances." *Id*. at 348. As long as the party subject to the revocation of a license has notice and a meaningful opportunity to be heard, due process is satisfied. *Artman v. State Bd. of Registration for the Healing Arts*, 918 S.W.2d 247, 251 (Mo. 1996); see also *Goldberg v. Kelly*, 397 U.S. 254, 268-69, (1970). Ordinance 1722 provides multiple meaningful opportunities to be heard, including judicial evidentiary hearings. In so doing, it goes well beyond the minimum requirements of due process.

First, all business entities within the City of Valley Park are placed on notice at the time of applying for a business permit when they must sign an affidavit stating that they do not knowingly utilize

the services of or hire any unlawful worker. Ordinance 1722 § 4.A. Any business entity in the City can fully immunize itself against violations of the ordinance by verifying the work authorization of its future employees through the federal government's Basic Pilot Program. Ordinance 1722 § 4.B(5). This safe harbor provision allows a business owner to ascertain the legal status of any employee through the chosen mechanism established by the federal government. Thus, business entities are given adequate notice of the requirements of the ordinance and are provided an administrative mechanism for ensuring and confirming that they are not violating the ordinance in the future. Ordinance 1722 operates prospectively only, so employment contracts entered into prior to the effective date of the Ordinance cannot provide the basis for enforcement against an employer. Ordinance 1722 § 5.A.

Second, prior to taking any action concerning a possible violation of Ordinance 1722, officials in Valley Park must follow the substantial procedural requirements outlined by the Ordinance. An enforcement action must be initiated by a written, signed, and valid complaint, which must describe the alleged violator, the actions constituting the violation, and the date and location on which the alleged violation occurred. Ordinance 1722 § 4.B(1). A complaint that alleges a violation on the basis of national origin, ethnicity, or race shall be deemed invalid and shall not be enforced. Ordinance 1722 § 4.B(2). Upon the determination by the City that a complaint is valid, the business entity is given three business days simply to collect information concerning the employee(s) in question. Ordinance 1722 § 4.B(3). In providing this information to the City, the employer is given an additional opportunity to be heard—by affording him an opportunity to present any information that he relied on when hiring the employee. The City then submits that information to the federal government pursuant to 8 U.S.C. § 1373(c).

Third, 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. Upon receipt of the document indicating an alien's unlawful status, the business entity has three business days to correct the violation. Ordinance 1722 § 4.B(4). At this point, the business entity is provided yet another opportunity to be heard. One of the ways that the business entity may correct the violation is by acquiring additional information from the employee, presenting that information to the City,

and requesting a second or additional verification of the employee's status with the federal government. Ordinance 1722 § 5.B(2). The employer may present any information he wishes in order to show that he did not knowingly hire an unauthorized alien. During this process of providing additional information to the City and seeking verification by the federal government, the three day period is tolled.

In addition to this due process in the administrative context, Ordinance 1722 provides for extensive judicial process as well. Either a business entity or an employee may challenge the enforcement of the ordinance at any time—including before any penalties are imposed and before any termination of employment takes place—before the Board of Adjustment of the City of Valley Park, Missouri, with all of the procedural protections of that forum, as well as the right of appeal to the St. Louis County Circuit Court. Ordinance 1722 § 7.D. The business entity may seek injunctive relief to prevent the City from enforcing the ordinance against him if he believes that the City has acted in error. If the business entity seeks clarification of the federal government's determination of his employee's work authorization status through the Basic Pilot Program, the federal government can provide witness testimony. The Board of Adjustment may also request such testimony. Ordinance 1722 § 5.E.

Finally, it must be noted that Ordinance 1722 provides considerably more process than is due. With respect to business licenses, due process does not require pre-deprivation hearing. A business owner need only be given an opportunity to be heard at a meaningful time and in a meaningful manner *following* revocation of his business license. *Tanasse v. City of St. George*, 1999 U.S. App. LEXIS 2389 (10th Cir., February 17, 1999). Thus, Ordinance 1722 goes well beyond the requirements of due process, offering the business entity multiple opportunities to be heard, both pre-deprivation and post-deprivation.

D. Ordinance 1722 Does Not Contravene Missouri Law Regarding Imprisonment and Fines

Plaintiffs' state law claim is expressed in a single sentence in their Amended Petition: "[Ordinance 1722's] penalty provision exceeds that authorized by Mo.R.Stat. § 79.479." Pl. Am. Petit. ¶ 29.a. Plaintiffs offer no explanation of this claim in their Amended Petition. Nor did they mention it in their Motion for a

Preliminary Injunction. Regardless, there is no plausible way to construe R.S.Mo. § 79.479 as a law that bars the enactment of Ordinance 1722.

1. Plaintiffs Misapply R.S.Mo. § 79.479

The first and most obvious problem with Plaintiffs' claim is that the statute they cite is simply a limit on the amount of fines and the terms of imprisonment that Missouri cities of the fourth class may impose on those who commit offenses. It is *not* a restriction on what conditions such cities may impose upon the retention of business permits. The text of the statute simply reads:

> For all ordinance violations the board of aldermen may impose penalties not exceeding a fine of five hundred dollars and costs, or ninety days' imprisonment, or both the fine and imprisonment. Where the city and state have a penalty for the same offense, the board shall set the same penalty by ordinance as is set by statute, except that imprisonments, when made under city ordinances, may be in the city prison or workhouse instead of the county jail.

R.S.Mo. § 79.479. The limitations on penalties and offenses has no bearing upon the authority of cities of the fourth class to issue, suspend, or revoke business permits. Plaintiffs do not offer any case law suggesting that R.S.Mo. § 79.479 may somehow restrict the issuance and suspension of business permits. Nor are Defendants aware of any case law that extends the reach of R.S.Mo. § 79.479 to business permit suspensions. Because Ordinance 1722 does not impose any fines or prison sentences whatsoever, R.S.Mo. § 79.479 is irrelevant to its operation.

2. Ordinance 1722 Falls Within the City's Licensing Authority

Missouri cities of the fourth class have long possessed the authority to issue business licenses to business entities in their jurisdiction, and to use that licensing authority to regulate such business entities. This authority is statutorily recognized in R.S.Mo. § 94.270: "The mayor and board of aldermen shall have power and authority to regulate and to license … merchants of all kinds, grocers, confectioners, restaurants, butchers, taverns, hotels, public boardinghouses … manufacturing and other corporations or institutions … and all other business, trades and avocations whatsoever." R.S.Mo.§ 94.270.

The power to issue such licenses necessarily includes the power to suspend, revoke, or decline to issue such licenses. As the Supreme Court of Missouri recognized long ago:

> [T]he same body which may be vested with the power to grant, or refuse to grant, a license, may also be vested with the power to revoke. The statutes of all the states are full of enactments giving the power to revoke licenses … to the same bodies, boards, or officers who are authorized to issue them…. The constitutionality of such laws, as a valid exercise of the police power, has often been sustained and indeed rarely questioned.

Horton v. Clark, 316 Mo. 770, 781 (Mo. 1927). The courts of Missouri continue to adhere to the fundamental principle that a city has the power to revoke a license that it has issued. *Riverside-Quindaro Bend Levee Dist. v. Mo. Am. Water Co.*, 117 S.W.3d 140 (Mo. Ct. App. 2003). Unlawful action by a business entity is a well-established basis for the revocation of a municipal business permit. The courts of Missouri have accordingly recognized a city's "power to suspend or revoke licenses on final adjudication of violation of city ordinances." *State ex rel. Jimmy's Western Bar-B-Q, Inc. v. Independence*, 1975 Mo. App. LEXIS 1800 (Mo. Ct. App. 1975). Thus Valley Park is well within its authority under state law.

If Plaintiff's novel theory were correct, a Missouri city would have the power to issue a license, but not to suspend that license for any period of time once it is issued—because doing so would constitute a punishment not authorized by R.S.Mo. § 79.479. This is plainly an unsupportable theory, because it renders meaningless the city's express power to license and regulate (and its corollary power to suspend or revoke a license, once issued). A city must possess the authority to stipulate the terms upon which a license is issued, as well as the authority to suspend or revoke the license if those terms are breached.

In addition to the express statutory authority for the issuance of business licenses found in R.S.Mo.§ 94.270, Ordinance 1722 also draws authority from the inherent police powers possessed by cities in Missouri. A Missouri city may act within it police powers to protect the general health, safety, or welfare of the public. Businesses may be "reasonably regulated in the interest of the public welfare" by a city using its police powers. *McLellan v. Kansas City*, 379 S.W.2d 500, 504 (Mo. 1964) Conditions imposed on licensing are also a manifestation of the police powers of a Missouri city. *Horton v. Clark*, 316 Mo. 770, 781 (Mo. 1927). "[I]n the exercise of its police power, the city could regulate the conduct of the business here involved and could employ licensing as a means for such regulation." *McLellan v. Kansas City*, 379 S.W.2d at 505. An ordinance is presumed to be a valid exercise of the police power and the party challenging the ordinance has the burden of showing that it is unreasonable, see *Miller v. City of*

Town & Country, 62 SW3d 431, 437 (Mo.App. E.D. 2001), *citing Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959). As the Missouri Supreme Court has explained:

> [T]he municipal power to regulate by legislation pursuant to the police power is equivalent to State power. The determination of what considerations properly call for the exercise of the police power is primarily a legislative, not a judicial question. [Courts] do not second-guess the judgment of the legislative body as to the wisdom, adequacy, propriety, expediency or policy of the legislative act in question.

St. Louis v. Liberman, 547 S.W.2d 452, 457 (Mo. 1977) (*citing McClellan v. Kansas City*, 379 S.W.2d at 504-05). Plainly, protecting the jobs of U.S. citizens and authorized alien workers against loss to unauthorized aliens, and protecting their wages against depression resulting from the presence of illegal labor are measures that serve the welfare of the public. However, if reasonable minds differ as to whether a particular ordinance bears a substantial relationship to the protection of the general health, safety, or welfare of the public, then the issue must be decided in favor of the ordinance. *Lewis v. City of University City*, 2004 Mo .App. Lexis 1119. Conditioning the retention of a business permit upon compliance with federal immigration laws governing the employment of unauthorized aliens serves the welfare of legal workers in Valley Park and the interest of all Valley Park residents in preserving the rule of law.

E. Preclusion Doctrines Do Not Apply in this Case

Plaintiffs maintain that *res judicata* precludes Defendant from asserting any defenses in this case with respect to Ordinance 1722, because of the judgment of the Circuit Court of the County of Saint Louis in *Reynolds v. Valley Park*, 06-CC-3802 (Mar. 12, 2007). The three requirements for such preclusion to apply are: (1) whether the issue decided in the prior adjudication was identical to the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; and (3) whether the party against whom preclusion is asserted was a party in the prior adjudication. *Liberty Mut. Ins. Co. v. FAG Bearings Corp.*, 335 F.3d 752, 758 (8th Cir. 2003). Plaintiffs fail to meet the first requirement.

The *Reynolds* Court *did not address any of the federal claims raised by Plaintiffs in the present case*. Rather, the *Reynolds* Court decided the case only on two narrow state law grounds, neither of which is relevant to the present case. See *Reynolds*, Pl. Memo Supp. Mtn. for Prel. Inj., Exh. D, slip op. at 6-7.

Moreover, since none of the claims that Plaintiffs included in their Amended Petition were even mentioned by the *Reynolds* Court, preclusion does not occur.

In addition, Ordinance 1722 differs markedly from the ordinances at issue in *Reynolds*. As this Court recognized in its May 21, 2007, order, "Although the ordinances are similar, the cases are distinct…." Slip. op. at 1. Indeed, *none* of the numerous provisions in Section 5 of Ordinance 1722 were present in the earlier ordinances (Ordinance 1708 and 1715). Among other things, Section 5 stipulates that the ordinance applies only prospectively, and describes various actions that an employer may take to correct a violation of the ordinance. Perhaps most importantly, *none* of the specific provisions in Ordinances 1708 and 1715 that the *Reynolds* Court found fault with are present in Ordinance 1722. *Reynolds*, Pl. Memo Supp. Mtn. for Pre. Inj., Exh. D, slip op. at 6-7. Therefore, the factual and statutory scenario is now materially different. Preclusion applies only when there has been "no change in controlling facts or legal principals since the state court action." *U.S. v. Stauffer Chemical Co*., 464 U.S. 165, 169 (1984); *Montana v. U.S.*, 440 U.S. 147, 159 (1979). Where an amended ordinance "is different in any presently material respect" from the original ordinance, *res judicata* does not apply to a subsequent facial challenge. *JBK, Inc. v. Kansas City*, 641 F. Supp. 893, 900 (D. Mo. 1986).

CONCLUSION

For all of the reasons presented above, and because Plaintiffs have not alleged any facts that would cure the defects in Plaintiffs' legal arguments, Defendant respectfully requests that this Court grant Defendant's Motion for Summary Judgment, declaring that Ordinance No. 1722 is constitutional and consistent with Missouri law, and denying the injunctive relief sought by Plaintiffs.

Due to the complex nature of the federal preemption arguments at issue in this case, ORAL ARGUMENT is REQUESTED.

Respectfully submitted by

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served on Plaintiffs' counsel of record, listed below, by operation of the Court's ECF/CM system, this 10th day of August, 2007:

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/s/ Kris W. Kobach
KRIS W. KOBACH

BILL NO. 1885 ORDINANCE NO. 1736

****

AN ORDINANCE AMENDING ORDINANCE 1722 AS AMENDED BY ORDINANCES 1724 AND 1732 BY MAKING THE ORDINANCE EFFECTIVE IMMEDIATELY BUT STAYING THE ENFORCEMENT OF SECTIONS 2, 3, 4, 5 AND 6 AND NOT ACCEPTING COMPLAINTS THEREUNDER UNTIL DECEMBER 1, 2007

****

BE IT ORDAINED BY THE BOARD OF ALDERMEN OF THE CITY OF VALLEY PARK, MISSOURI, AS FOLLOWS:

Section One

Ordinance 1722, as amended by Ordinance 1724 and Ordinance 1732, is hereby amended by deleting Section Seven therefrom and, in lieu thereof, inserting a new Section Seven so that Ordinance 1722, as amended by Ordinances 1724 and 1732, shall read as follows:

"Section One

Ordinance No. 1715 and sections one, two, three and four of Ordinance No. 1708 are hereby repealed and the following is enacted in lieu thereof:

Section Two

FINDINGS AND DECLARATION OF PURPOSE.

The people of the City of Valley Park find and declare:

A. That state and federal law require that certain conditions be met before a person may be authorized to work in this country.

B. That unlawful workers and illegal aliens, as defined by this Ordinance and state and federal law, do not normally meet such conditions as a matter of law when present in the City of Valley Park.

C. That the unlawful employment of, harboring of, and crimes committed by, illegal aliens harm the health, safety, and welfare of residents of the City of Valley Park. Illegal immigration leads to higher crime rates, subjects our hospitals to fiscal hardship and our residents to substandard quality of care, contributes to other burdens on public services, increasing their costs and diminishing their availability, diminishes our overall qualify of life, and

endangers the security and safety of the homeland. Employment of unauthorized aliens reduces the wages of, and may result in the unemployment of, U.S. citizens and aliens who are authorized to work in the United States.

D. That the City of Valley Park is authorized to enact ordinances to promote the health, safety, and welfare of its residents and to abate public nuisances, including the nuisance of illegal immigration, by diligently prohibiting the acts and practices that facilitate illegal immigration, in a manner consistent with federal law and the objectives of Congress.

E. This Ordinance seeks to secure to those lawfully present in the United States and this City, whether or not they are citizens of the United States, the right to live in peace free of the threat of crime, to enjoy the public services provided by this City without being burdened by the cost of providing goods, support and services to aliens unlawfully present in the United States, and to be free of the debilitating effects on their economic and social well being imposed by the influx of illegal aliens, to the fullest extent that these goals can be achieved consistent with the Constitution and Laws of the United States and the State of Missouri.

F. The City shall not construe this Ordinance to prohibit the rendering of emergency medical care, emergency assistance, or legal assistance to any person.

Section Three

DEFINITIONS.

When used in this chapter, the following words, terms and phrases shall have the meanings ascribed to them herein, and shall be construed so as to be consistent with state and federal law, including federal immigration law:

A. “Business entity” means any person or group of persons performing or engaging in any activity, enterprise, profession, or occupation for gain, benefit, advantage, or livelihood, whether for profit or not for profit.

(1) The term business entity shall include, but not be limited to, self-employed individuals, partnerships, corporations, contractors, and subcontractors.

(2) The term business entity shall include any business entity that possesses a business license, any business entity that is exempt by law from obtaining such a business license, and any business entity that is operating unlawfully without such a business license.

B. "City" means the City of Valley Park, Missouri.

C. "Contractor" means a person, employer, subcontractor or business entity that enters into an agreement to perform any service or work or to provide a certain product in exchange for valuable consideration. This definition shall include, but not be limited to, a subcontractor, contract employee, or a recruiting or staffing entity.

D. "Illegal Alien" means an alien who is not lawfully present in the United States, according to the terms of United States Code Title 8, section 1101 et seq. The City shall not conclude that a person is an illegal alien unless and until an authorized representative of the City has verified with the federal government, pursuant to United States Code Title 8, subsection 1373(c), that the person is an alien who is not lawfully present in the United States.

E. "Unlawful worker" means a person who does not have the legal right or authorization to work due to an impediment in any provision of federal, state or local law, including, but not limited to, a minor disqualified by nonage, or an unauthorized alien as defined by United States Code Title 8, subsection 1324a(h)(3).

F. "Work" means any job, talk, employment, labor, personal services, or any other activity for which compensation is provided, expected, or due, including, but not limited to, all activities conducted by business entities.

G. "Basic Pilot Program" means the electronic verification of work authorization program of the Illegal Immigration Reform and Immigration responsibility Act of 1996, P.L. 104-208, Division C, Section 403(a); United States Code Title 8, subsection 1324a, and operated by the United States Department of Homeland Security (or a successor program established by the federal government.)

Section Four

BUSINESS PERMITS, CONTRACTS, OR GRANTS.

A. It is unlawful for any business entity to knowingly 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 part within the City. Every business entity that applies for a business license to engage in any type of work in the City shall sign an affidavit, prepared by the City Attorney, affirming that they do not knowingly utilize the services or hire any person who is an unlawful worker.

B. Enforcement: The Valley Park Code Enforcement Office shall enforce the requirements of this section.

(1) An enforcement action shall be initiated by means of a written signed complaint to the Valley Park Code Enforcement Office submitted by any City official, business entity, or City resident. A valid complaint shall include 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.

(2) A complaint which alleges a violation on the basis of national origin, ethnicity, or race shall be deemed invalid and shall not be enforced.

(3) Upon receipt of a valid complaint, the Valley Park Code Enforcement Office shall, within three (3) business days, request identify information from the business entity regarding any persons alleged to be unlawful workers. The Valley Park Code Enforcement Office shall suspend the business permit of any business entity which fails, within three (3) business days after receipt of the request, to provide such information.

(4) The Valley Park Code Enforcement Office shall suspend the business license of any business entity which fails to correct a violation of this section within three (3) business days after notification of the violation by the Valley Park Code Enforcement Office.

(5) In any case in which the alleged unlawful worker is alleged to be an unauthorized alien, the Valley Park Code Enforcement Office shall not suspend the business license of the business entity if prior to the date of the violation, the business entity had verified the work authorization of the alleged unlawful worker using the Basic Pilot Program.

(6) The suspension shall terminate one (1) business day after a legal representative of the business entity submits, at a City office designated by the City Attorney, a sworn affidavit stating that the business entity has corrected the violation, as described in Section 5.B.

(a) The affidavit shall include a description of the specific measures and actions taken by the business entity to correct the violation, and shall include the name, address and other adequate identifying information of the unlawful workers related to the complaint.

(b) Where two or more of the unlawful workers are verified by the federal government to be unauthorized aliens, the legal representative of the business entity shall submit to the Valley Park Code Enforcement Office, in addition to the prescribed affidavit, documentation acceptable to the City Attorney which confirms that the business entity has enrolled in and will participate in the Basic Pilot Program for the duration of the validity of the business permit granted to the business entity.

(7) For a second or subsequent violation, the Valley Park Code Enforcement Office shall suspend the business permit of a business entity for a period of twenty (20) days. After the end of the suspension period, and upon receipt of the prescribed affidavit, the Valley Park Code Enforcement Office shall reinstate the business permit. The Valley Park Code Enforcement Office shall forward the affidavit, complaint, and associated documents to the appropriate federal enforcement agency, pursuant to United States Code Title 8, section 1373. In the case of an unlawful worker disqualified by state law not related to immigration, the Valley Park Code Enforcement Office shall forward the affidavit, complaint, and associated documents to the appropriate state enforcement agency.

C. All agencies of the City shall enroll and participate in the Basic Pilot Program.

D. As a condition for the award of any City contract or grant to a business entity for which the value of employment, labor or, personal services shall exceed $10,000, the business entity shall provide documentation confirming its enrollment and participation in the Basic Pilot Program.

Section Five

IMPLEMENTATION AND PROCESS

A. Prospective Application Only. The default presumption with respect to Ordinances of the City of Valley Park – that such Ordinances apply only prospectively – shall pertain to the provisions of this Ordinance, which shall apply only to employment contracts, agreements to perform service or work, and agreements to provide a certain product in exchange for valuable consideration that are entered into or renewed after the date that this Ordinance becomes effective and any judicial injunction prohibiting its implementation is removed.

B. Correction of Violations–Employment of Unlawful Workers. The correction of a violation with respect to the employment of an unlawful worker shall include any of the following actions:

(1) The business entity terminates the unlawful worker's employment.

(2) The business entity, after acquiring additional information from the worker, requests a secondary or additional verification by the federal government of the worker's authorization, pursuant to the procedures of the Basic Pilot Program. While this verification is pending, the three business day period described in Section 4.B.(4) shall be tolled.

(3) The business entity attempts to terminate the unlawful worker's employment and such termination is challenged in a Court of the State of Missouri. While the business entity pursues the termination of the unlawful worker's employment in such forum, the three business day period described in Section 4.B(4) shall be tolled.

C. Procedure if Verification is Delayed. If the federal government notifies the City of Valley Park that it is unable to verify whether an individual is authorized to work in the United States, the City of Valley Park shall take no further action on the complaint until a verification from the federal government concerning the status of the individual is received. At no point shall any city official attempt to make an independent determination of any alien's legal status, without verification from the federal government, pursuant to United States Code Title 8, Subsection 1373(c).

D. Venue for Judicial Process. Any business entity subject to a complaint and subsequent enforcement under this Ordinance, or any individual employed by or seeking employment with such a business entity who is alleged to be an unlawful worker, may challenge the enforcement of this Ordinance with respect to such entity or individual before the Board of Adjustment of the City of Valley Park, Missouri, subject to the right of appeal to the St. Louis County Circuit Court.

E. Deference to Federal Determinations of Status. The determination of whether an individual is an unauthorized alien shall be made by the federal government, pursuant to United States Code Title 8, Subsection 1373(c). The Board of Adjustment of the City of Valley Park, Missouri, may take judicial notice of any verification of the individual previously provided by the federal government and may request the federal government to provide automated or testimonial verification pursuant to United States Code Title 8, Subsection 1373(c).

Section Six

CONSTRUCTION AND SEVERABILITY

A. The requirements and obligations of this section shall be implemented in a manner fully consistent with federal law regulating immigration and protecting the civil rights of all citizens and aliens.

B. If any parts of or any provision of this Chapter is in conflict or inconsistent with applicable provisions of federal or state statutes, or is otherwise held to be invalid or unenforceable by any court of competent jurisdiction, such part or such provision shall be suspended and superseded by such applicable laws or regulations, and the remainder of this Chapter shall not be affected thereby.

Section Seven

This Ordinance shall become effective from and after its passage and approval by the Mayor in repealing Ordinances 1708 and 1715, provided that the enforcement of the provisions contained within Sections Two, Three, Four, Five and Six shall be stayed and no complaints thereunder shall be accepted by the City of Valley Park until December 1, 2007."

Section Two

This Ordinance shall become effective from and after its passage and approval by the Mayor.

PASSED this _____ day of _____, 2007.

APPROVED this _____ day of _____, 2007.

_____
JEFFERY J. WHITTEAKER, MAYOR

ATTEST:

_____
MARGUERITE WILBURN
City Clerk

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2006-005932-003 DT 06/09/2006

HONORABLE THOMAS W. O'TOOLE

CLERK OF THE COURT
G. Nevitt
Deputy

FILED:_____

STATE OF ARIZONA

VICKI L KRATOVIL
SETH W PETERSON
SALLY WOLFGANG WELLS

v.

CUPERTINO H SALAZAR (003)

TIMOTHY J AGAN

VICTIM SERVICES DIV-CA-CCC
PETER SCHEY
CENTER FOR HUMAN RIGHTS AND CONSTITUTIONAL LAW
256 S OCCIDENTAL BLVD
LOS ANGELES CA 90057
CARLOS HOLQUIN
CENTER FOR HUMAN RIGHTS AND CONSTITUTIONAL LAW
256 S OCCIDENTAL BLVD
LOS ANGELES CA 90057

RULING

The following Motions have been under advisement following oral argument on 05/23/2006:

Defendant Evangelina Espinoza's **Motion to Dismiss for Lack of Jurisdiction** and **Motion to Dismiss For Lack Of Venue**;

Defendant Cupertino H. Salazar's **Motion to Remand/Dismiss, Motion to Dismiss** and **Motion to Dismiss (Federal Preemption)**

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2006-005932-003 DT 06/09/2006

Defendant Jose Carreto's **Motion to Sever** and **Motion to Dismiss for Incurable and Ongoing Violations of Constitutional Rights**[1]

BACKGROUND

The Defendants seek dismissal of Count 1 of the Indictment, which charges 48 of the 49 defendants with Conspiracy To Commit Smuggling, in violation of A.R.S. §13-1003 and §13-2319.[2] In essence, they claim that the conspiracy charge must be dismissed because 1) this Court lacks jurisdiction and venue; 2) based on Wharton's Rule and Arizona case law, it is legally impossible to conspire to commit human smuggling or be an accomplice thereto when the objective of the conspiracy is to smuggle themselves; 3) legislative history concerning the human smuggling statute, A.R.S. §13-2319, shows that it was intended to prosecute only the smuggler, not the illegal aliens being smuggled; and 4) state prosecution of conspiracy to commit human smuggling is preempted by the federal constitution, statutes and case law. For reasons outlined below,

IT IS ORDERED denying all of these claims. [3]

JURISDICTION AND VENUE CLAIMS

The Court finds that the indictment properly alleges jurisdiction and venue in Maricopa County, Arizona. A reading of Count 1 and the statutes cited therein shows that probable cause has been found that the Defendants are illegal aliens who conspired to engage in the crime of human smuggling amongst themselves and with others, that they crossed the Mexican-American border into Arizona, that they were transported by another smuggler, and committed at least part of the

[1] This motion to dismiss is moot because defense counsel has talked to her client.
[2] In Count 1, the State alleges that on or between February 27, 2006 and March 2, 2006, with the intent to promote or aid in the commission of the offense of human smuggling, a violation of A.R.S. §13-2319, the 48 named defendants agreed with one or more persons that at least one of them or another would engage in conduct that constituted the offense of human smuggling, in violation of A.R.S. §13-2319, and that one or more persons committed the following overt act(s); each named defendant individually crossed the United States-Mexican border and was physically present in Maricopa County, Arizona on March 2, 2006, in violation of A.R.S. §13-1003 (conspiracy), A.R.S. §13-2319 (human smuggling), and other cited statutes. In Count 2, the State alleges that Javier Ruiz, Defendant 49, smuggled the 48 illegal aliens named as defendants in Count 1.
[3] Defendants in other similar cases have joined in these motions to dismiss. Separate minute orders will be issued as to these defendants.

conspiracy and one overt act in Maricopa County. Assuming arguendo that a substantial part of the conspiracy occurred in Mexico, the ongoing nature of the conspiratorial conduct, including the commission of the overt act(s) in Arizona and in Maricopa County is sufficient to confer jurisdiction and venue in Maricopa County, as defined by the controlling jurisdiction and venue statutes, A.R.S. §13-108(A)(1) & (2) and A.R.S. §13-109. See *State v. Willoughby*, 181 Ariz. 530, 535-540 (1995) and *State v. Flores*, 195 Ariz. 199, 205-206 (App. 1999) where on similar facts the court of appeals held that because essential elements of the conspiratorial and criminal conduct occurred in both Mexico and Arizona, as well as in different counties, jurisdiction and venue in Arizona and in counties where the criminal conduct occurred was proper. However, should jurisdiction become a fact issue at trial, the State will be required to prove jurisdiction beyond a reasonable doubt to a jury. *State v. Willoughby*, 181 Ariz. at 539-540.

DISMISSAL CLAIMS

The Court finds that the Defendants may be prosecuted for conspiracy to smuggle themselves, a violation of the conspiracy and human smuggling statutes, A.R.S. §13-1003(A) and §13-2319. To prove this conspiracy the state must prove that one or more of the Defendants, with the intent to promote or aid in the commission of human smuggling, agreed with one or more other persons that at least one of them or another person would engage in the smuggling of illegal aliens for profit or commercial purpose by providing them transportation or procuring transportation knowing or having reason to know that the persons are illegal aliens not lawfully in Arizona. Given the circumstances alleged, the State will also be required to prove that the Defendant and other illegal alien co-defendants supplied themselves as human cargo to be smuggled.[4]

Wharton's Rule, relied on by the defendants as grounds to dismiss the conspiracy charge, is a long recognized rule of statutory construction that bars prosecution for conspiracy and the underlying substantive offense. It applies only in very limited fact situations where there is a necessary congruence of the agreement and the completed substantive offense, e.g., adultery, incest, bigamy and dueling. See *U.S. v. Iannelli*, 420 U.S. 770, 779-782(1975), where, after a

[4] The sufficiency of the evidence to prove this highly unusual conspiracy allegation is not an issue before the Court at this time.

detailed discussion of the rule, the U.S. Supreme Court held that the defendants were properly convicted of conspiracy to violate the federal anti-gambling statute and of violating the statute, as they were separate offenses and that this rule of merger did not apply.

In *State v. Chitwood*, 73 Ariz. 161, 166(1952) the Arizona Supreme Court applied the rule and described it as follows:

> "The law is that where the agreement is to commit an offense which can only be committed by the concerted action of the two persons to the agreement, such agreement does not amount to a conspiracy." (Emphasis added).

The Court explained that this constitutes a merger of offenses, which precludes conviction for both conspiracy and the substantive offense. The Court explained, however, that the rule does not apply when the conspiracy involves more than two people:

> "Likewise, if the alleged conspiracy is not between the immediate participants in the offense, but between one or more such participants and a third party or parties, the theory of the rule would render it inapplicable, even though the substantive offense is one which requires concerted action." 73 Ariz. at 166.

As in *Chitwood*, the rule does not apply to the facts of this case. Here each of the 48 defendants could be found guilty of a conspiracy to commit human smuggling, while not being exposed to criminal liability for the substantive offense of human smuggling, even though they are the illegal aliens being smuggled.

In *Iannelli*, 420 U.S. at 780-782, the Court discussed the application of the rule in its earlier decision, *U.S. v. Holte*, 236 U.S. 140(1915). In *Holte*, the Defendant was charged with conspiracy to violate the Mann Act, which criminalized the interstate transportation of a female for purposes of prostitution. In rejecting the Defendant's claim that Wharton's Rule prevented charging and convicting her with conspiracy to violate the Mann Act when she was the person being transported in interstate commerce, the Court held that rule applied only

when it was impossible for the transported woman to be guilty of conspiracy regardless of the facts of the case. The Court cited many factual scenarios, including conspiring with a third person to commit the crime, where the transported woman could also be prosecuted and found guilty of conspiracy to violate the Mann Act. *Id.* at 144-145. Here, as in *Holte*, Wharton's Rule doesn't apply. Proof that the defendants committed the crime of conspiracy to commit human smuggling, including smuggling themselves, does not necessarily require proof that the same defendants committed the substantive offense of human smuggling for profit or commercial purpose and vice versa.

The Defendant's claim that the conspiracy charge must be also dismissed because it is factually analogous to *State v. Cota*, 191 Ariz. 380 (1998), which held that a person cannot sell or transfer drugs to himself or be an accomplice in a sale to himself, also fails. Unlike the facts in *Cota* and cases cited therein, here a Defendant can supply himself and others as cargo for the human smuggling venture while at the same time conspiring to engage in such activity for profit or commercial purpose. Again, neither *Cota* nor Wharton's Rule applies when the charged conspiracy involves more conspirators than are required to commit the underlying offense of human smuggling. *Iannelli*, 420 U.S. at 782, n. 15.

The Defendant's related claim that he cannot be subjected to criminal liability as an accomplice pursuant to A.R.S. §13-301 et seq., must also fail. Conspiracy and accomplice liability are separate and distinct rules of criminal liability. See A.R.S §13-1003(A) and (B), which provides for conspiracy liability for a wide variety of conduct, including the unknown acts of third party co-conspirators. Here the defendants are only charged with conspiracy, not the underlying substantive offense of human smuggling, so accomplice liability is not relevant. Although a person charged with both conspiracy and the substantive offense can be found guilty of the underlying substantive offense either as a principle or an accomplice, he cannot be found guilty as an accomplice to the conspiracy. *State ex rel. Woods v. Cohen*, 173 Ariz. 497, 498-501(1993).

The Defendants are also incorrect in claiming that the plain language of A.R.S. §13-2319 and its legislative history do not allow the smuggled aliens to also be held liable for conspiracy to commit alien smuggling. The purpose of A.R.S. §13-2319 is clear and unambiguous, and there is no evidence from the legislative

history that the legislature intended to exclude any prosecution for conspiracy to commit human smuggling. A fair reading of the conspiracy statute and other statutes of the Arizona criminal code establishes that the legislature has authorized prosecution for the crime of conspiracy to commit various substantive offenses. See *State v. Rodriguez*, 205 Ariz. 392, 396(App. 2003) (In statutory interpretation the Court will employ a common sense approach, interpreting the statute by reference to its stated purpose and the system of related statutes of which it forms a part.) Pursuant to A.R.S. §13-1003, a person may be guilty of conspiracy if, with the intent to promote or aid in the commission of another offense, the person agrees with one or more persons that at least one of them or another person will engage in conduct constituting that offense and then one of them commits an overt act in furtherance of that offense. Thus, unless it explicitly foreclosed such prosecution, the Court must presume that when the legislature enacted A.R.S. §13-2319, it knew and intended that a person could be prosecuted for both conspiracy to commit human smuggling and human smuggling. *Iannelli*, 420 U.S. at 789.

FEDERAL PREEMPTION

IT IS ORDERED denying the claim that Count 1 must be dismissed because the Arizona human smuggling statute, A.R.S. §13-2319, as applied herein or on its face violates the Supremacy Clause of the U.S. Constitution and is preempted by federal law. In particular, citing *De Canas v. Bica*, 424 U.S. 351(1956), *Hines v. Davidowitz*, 312 U.S. 52(1941) and other preemption cases, the Defendants claim that preemption exists because 1) this prosecution is an invasion of the exclusive power of the federal government to regulate immigration; 2) it injects the State into a field fully occupied by federal immigration laws; and 3) it irreconcilably conflicts with and is an obstacle to the full and proper enforcement of federal immigration laws. *De Canas*, 424 U.S. at 354-363. These issues are addressed below.

BURDEN OF PROOF

There is a strong presumption against federal preemption of state law. "In all preemption cases…we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was a clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485(1996) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). In

addition, for this Court to declare A.R.S. §13-2319 or any other statute unconstitutional, the Defendant must establish beyond a reasonable doubt that the statute is in conflict with the federal or state constitutions. *State ex rel. Thomas v. Foreman*, 211 Ariz. 153, 156 (App. 2005). In other words, "Congress' intent to supercede or exclude state action is not lightly inferred. The intent to do so must definitely and clearly appear." *State v. McMurry*, 184 Ariz. 447, 449 (App. 1995) (Citations omitted) (State prosecution and conviction for forgery based on possession of counterfeit U.S. currency is not preempted by comparable federal counterfeiting statutes).

PREEMPTION CLAIMS

Factually similar cases have rejected the claim that comparable federal law preempts laws like A.R.S. §13-2319. In 1976, in *De Canas v. Bica*, supra, the Supreme Court held that a California statute and regulations penalizing employers for employing illegal aliens was not preempted by the exclusive federal power to regulate immigration and comparable federal immigration laws. In explaining the interrelationship between the exclusive federal power to regulate immigration and the exercise of concurrent state power over certain immigration matters, the Court said that it "…has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se preempted by this constitutional power, whether latent or exercised." 424 U.S. at 355. In rejecting the claim that comparable federal immigration laws preempted California from exercising its power to penalize state employers who knowingly employ illegal aliens, the Court stated,

> "Only a demonstration that complete ouster of state power including state power to promulgate laws not in conflict with federal laws was "'the clear and manifest purpose of Congress'" would justify that conclusion." *Id*. at 357 (citations omitted). [5]

The Court also reiterated that States have broad authority under their power to enact statutes and regulations concerning illegal immigration as long

[5] Subsequently, in reaction to the *De Canas* decision, Congress amended 8 U.S.C. § 1324a(h)(2), to expressly preempt state civil and criminal sanctioning of employers who hire illegal aliens.

there is no manifest intent of Congress to "occupy the field" and they do not burden or conflict in any matter with federal laws and treaties. *Id*. at 358.

Applying *De Canas* and other relevant preemption cases, it is clear that Arizona has not been preempted from enacting and enforcing the human smuggling statute, ARS §13-2319. As is evident from the legislative history leading up to its passage and signing by the Governor in 2005, it was determined that the problem of smuggling and transporting illegal aliens for profit in Arizona directly impacted the safety and welfare of the citizens of the state. Thus, the statute was enacted.[6]

Subsequent to *De Canas*, other courts have rejected claims that federal immigration smuggling laws preempt state authority to regulate immigration. In *Gonzales v. City of Peoria*, 722 F. 2nd 468 (9th Cir. 1983), the Ninth Circuit determined that the criminal provisions of the Federal Immigration and Naturalization Act (INA), 8 U.S.C. 1324, 1325 and 1326, were not so pervasive as to preempt state action whereby local police arrested illegal aliens for violating federal immigration laws. The Court noted that the federal laws regulating criminal activity by illegal aliens was limited in nature and insufficient to support the inference that the federal government had fully occupied the field of criminal immigration enforcement. *Id*. at 475.[7] More recently, other federal circuits have reached this same conclusion. See discussion and cases cited in *U.S. v. Santana-Garcia*, 264 F 3rd 1188, 1194(10th Cir. 2001). Also, in an analogous circumstance, in *State v. McMurry*, *supra*, the Court said that while the federal government has primary jurisdiction over prosecution of crimes related to counterfeiting, the federal statutes do not wholly occupy the field and the state has concurrent jurisdiction to prosecute counterfeiting crimes to protect its citizens from fraud. *Id*. at 449-450.

The Defendant has also failed to show that A.R.S. §13-2319 stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' exclusive authority over immigration and is therefore preempted by federal legislation. Instead, a fair reading of the legislative history, as well as the

[6] The debate recognized that both the federal and state governments have a mutual interest in addressing the smuggling and transportation of illegal aliens at the border and within the state.
[7] In 1983, Arizona had not yet criminalized the smuggling of illegal aliens so no state prosecution could follow the arrests.

interaction of A.R.S. §13-2319 and equivalent provisions of the federal criminal code, 8 U.S.C. §1324 et seq., shows that concurrent state and federal enforcement of illegal alien smuggling and conspiracy to smuggle illegal alien laws serves both federal and state law enforcement purposes and is highly compatible. In fact, concurrent enforcement enhances rather than impairs federal enforcement objectives. Thus, because federal and State enforcement have compatible purposes, and Congress has not expressly preempted state prosecution of such conduct, preemption does not exist. *Gonzales v. City of Peoria*, 722 F 2nd at 474.

In conclusion, the defendants have failed to carry their heavy burden of showing that the U.S. Constitution and federal immigration laws have preempted Arizona and other states from passing and enforcing laws such as A.R.S. §13-2319. In addition, the claim that this conspiracy to commit human smuggling prosecution violates the intent of the legislature is incorrect and cannot be resolved judicially. Legislative action, either federal or state, or both, is the proper way to address the issues raised by the Defendants.

SEVERANCE

IT IS ORDERED denying **Defendant Carretto's Motion to Sever.** At the direction of the court, the State has severed the trial of the 49 co-defendants into small group trials of no more than five defendants each. A joint trial of the defendants is now proper and likely free of any prejudice. In addition, as it does in any conspiracy trial, the court will carefully instruct the jury on what the law requires proving a conspiracy and membership therein, and that they are to consider the evidence against each defendant separately. However, if during any of the small joint trials a defendant suffers unfair prejudice due to such factors as a gross disparity in the evidence, the "rub-off effect" from evidence introduced only against another co-defendant, presentation of antagonistic defenses, significant disparity in evidence presented against various defendants, the court will address the prejudice by giving limiting or curative jury instructions. *State v. Grannis*, 183 Ariz. 52, 58(1995)(citations omitted). Finally, the court will sever the defendant's trial from that of some or all co-defendants if it becomes evident that such is "necessary to promote a fair determination of guilt or innocence of any defendant…" Rule 13.4(a), Rules of Criminal Procedure.

U.S. Citizenship and Immigration Services

STATEMENT

OF

JOCK SCHARFEN
DEPUTY DIRECTOR
U.S. CITIZENSHIP AND IMMIGRATION SERVICES
U.S. DEPARTMENT OF HOMELAND SECURITY

REGARDING A HEARING ON

"Problems in the Current Employment Verification and Worksite Enforcement System"

BEFORE THE

HOUSE JUDICIARY SUBCOMMITTEE ON IMMIGRATION

April 24, 2007
11:00 AM
2226 Rayburn House Office Building

I. Introduction

I am grateful for this opportunity before the Subcommittee to discuss the Employment Eligibility Verification (EEV) Program administered by United States Citizenship and Immigration Services (USCIS). Previously known as the Basic Pilot Program, this unique program provides employment eligibility information on newly hired employees to more than 16,000 participating American employers.

Any company anywhere in America can try the Employment Eligibility Verification System (EEVS) and use it for free over an easy-to-use government website. Currently, over 92% of queries from employers receive an instantaneous employment authorized response within three seconds. EEVS is a valuable tool that helps employers comply with immigration law while also strengthening worksite enforcement. In FY 2007, USCIS has been making progress to further improve and expand the program.

In his speech at the U.S.-Mexico border in Yuma, Arizona, President Bush laid out five elements of a comprehensive immigration policy. One of these elements is the need to hold employers accountable for the workers they hire. The President emphasized that an accurate and secure Employment Eligibility Verification Program is a critical component of efforts to comprehensively reform our immigration laws. Today, USCIS is actively taking steps to improve the overall performance of the system, add new capabilities, and continuing to simplify the process for employers.

II. The Current Employment Eligibility Verification Program

USCIS received $114 million in FY2007 for the expansion and improvement of EEVS to better support an increasing amount of employers who are choosing to electronically verify the employment eligibility of workers.

In FY2007, USCIS continues to improve the Employment Eligibility Verification Program by:

- Improving our ability to help identify instances of document fraud and identity theft by pilot-testing a photo screening tool.

- Reducing the percentage rate of Department of Homeland Security (DHS) and Social Security Administration (SSA) mismatches by incorporating additional data sources on immigrants and nonimmigrants into the program and implementing a new capability to query by DHS card number.

- Streamlining the enrollment process for employers by making it completely electronic.

- Beginning to monitor EEVS data for patterns to detect identification fraud, verification-related discrimination, and employer misuse of the program.

- Conducting outreach with effective force multipliers such as human resource and employer associations to educate employers about the program.

USCIS is also improving the program in many other ways, including updating training materials, creating more user-friendly web pages, providing better customer support, and exploring additional query access methods that could be used by employers who do not have web access. We are also continuing to conduct independent evaluations to provide additional input for improving the program.

Additionally, USCIS and ICE are working collaboratively on worksite enforcement and all employers enrolled in the ICE Mutual Agreement between Government and Employers (IMAGE) are required to participate in the EEV Program. IMAGE is a joint government and private sector voluntary initiative designed to build cooperative relationships that strengthen overall hiring practices.

III. History of the Basic Pilot Program

With that brief overview of the accomplishments we've made so far in FY2007, I'd like to take this opportunity to outline the history of the Basic Pilot, how it works, and how USCIS plans to expand and improve the program.

Congress established the Basic Pilot as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), creating a program for verifying the employment eligibility, at no charge to the employer, of both U.S. citizens and noncitizens. The Basic Pilot program began in 1997 as a voluntary program for employers in the five states with the largest immigrant populations -- California, Florida, Illinois, New York, and Texas. In 1999, based on the needs of the meat-packing industry as identified through a cooperative program called Operation Vanguard, Nebraska was added to the list. Basic Pilot was originally set to sunset in 2001, but Congress has twice extended it, most recently in 2003, extending its duration to 2008 and also ordering that it be made available in all 50 States. Although only a small percentage of U.S. employers participate, we have seen a large increase in users over the last two years. In 2006, the number of employers doubled. This year the program is growing by over 1,000 employers every month. We project that the 16,000 participating employers will verify over 3 million new hires this fiscal year at more than 71,000 work sites. Chairwoman Lofgren, California has 2,104 participating employers in the program, representing 12,174 sites. In the state of Iowa, Ranking Member King, there are 148 participating employers, representing 659 sites.

IV. How the Employment Eligibility Verification Program Works

After hiring a new employee, an employer takes information from the Form I-9 (Employment Eligibility Verification form) and submits a query, including the employee's name, date of birth, Social Security number (SSN), and whether the person claims to be a U.S. citizen, lawful permanent resident, or other work-authorized noncitizen. For noncitizens, a DHS issued identifying number is also submitted. Within seconds, the employer receives an initial verification response.

For an employee claiming to be a U.S. citizen, the system transmits the new hire's SSN, name, and date of birth to SSA to match that data, and SSA will confirm citizenship status on the basis of its NUMIDENT database. For those employees whose status can be immediately verified electronically, the process terminates here; in the remaining minority of cases, the system issues a tentative nonconfirmation to the employer.

The employer must notify the employee of the tentative nonconfirmation and give the employee the opportunity to contest that finding. If the employee contests the tentative nonconfirmation, he or she has eight business days to visit an SSA office with the required documents to correct the SSA record. The employee must be allowed to keep working while the case is being resolved with SSA and cannot be fired or have any other employment-related action taken because of the tentative nonconfirmation.

When a noncitizen's SSN information does not match in the NUMIDENT database, the individual is referred to a local SSA field office to resolve the mismatch. If information does match with SSA or the issue is resolved, then a noncitizen employee's name, date of birth, DHS ID number, and work authorization is matched against a USCIS database. If the system cannot electronically verify the information, the system automatically forwards the information to a USCIS Immigration Status Verifier who researches the case and usually provides an electronic response within one business day, either verifying work authorization or issuing a DHS tentative nonconfirmation.

If the employer receives a tentative nonconfirmation, the employer must notify the employee and provide an opportunity to contest that finding. An employee has eight business days to call a toll-free number to contest the finding and cannot be fired or have any other adverse employment-related action taken during that time because of the tentative nonconfirmation. Once the necessary information from the employee has been received, usually by phone or fax, USCIS generally resolves the case within three business days, by issuing either a verification of the employee's work authorization status or a DHS final nonconfirmation.

V. Program Improvements

As previously noted, in FY2007, the program received $114 million in appropriations which is being used to expand and improve the EEV through the incorporation of improved data sources into the program, launching initiatives to help combat identity fraud, streamlining employer registration, working with SSA to address mismatch issues, and beginning to monitor system usage. A recent independent evaluation revealed that in 2006, nearly 92% of initial queries were found to be employment-authorized instantaneously.

A June 2006 study by the Government Accountability Office (GAO) stated that Basic Pilot, "shows promise to enhance the current employment verification process, help reduce document fraud, and assist ICE in better targeting its worksite enforcement efforts." However, the GAO report also identified a number of weaknesses including Basic Pilot's inability to detect identity fraud and delays within DHS to timely update

information. This report, along with feedback from employers, has been helpful in targeting our improvements to EEVS. We are directly addressing these issues and others as part of our effort to improve the performance of EEVS.

Photo Tool Incorporation

In March 2007, USCIS began testing a pilot program to enhance the EEV system by allowing an employer to make a query using the new hire's USCIS-issued card number, when that worker uses a secure I-551 ("green card") or secure Employment Authorization Document, both of which include photographs of card recipients. When available, the system displays the photo that DHS has on file for the given card number, allowing the employer to make a visual match of identical photos. This prevents employees from successfully using a fraudulent or photo-substituted document for verification purposes. The initiative is currently being tested by 40 participating employers in the program and is expected to be expanded to all EEV employers this summer. To date, over 200 queries have been processed using this new tool.

The current EEV system is not fraud-proof and was not designed to detect identity fraud. However, the photo tool functionality helps detect identity fraud from a fraudulent document or photo-substituted card because the system-issued photo should be the identical photo shown on the document presented to the employer. Employers noticing any variation between the photo in the system to the photo on the card presented to them are instructed by the system to issue a DHS tentative nonconfirmation and send the case to DHS for further review. In this test phase, we have already encountered a case where an employer detected a fraudulent green card presented by a new hire.

Additional Data Sources

USCIS has also been working to decrease DHS and SSA data mismatches (for example, changes in immigration status or name changes that are not reflected in SSA's database) in the program by incorporating additional data sources into the EEV program. Evaluation of the program reveals that less than one percent of initial system nonconfirmation responses are a result of data mismatches in DHS systems. Earlier this year, the Verification Division incorporated two important data sources into the system: the Custom and Border Protection's real-time arrival and departure information for nonimmigrants, and USCIS information about immigrants who have had their status adjusted or extended. Although these data sources have been available for only a short time, they appear to be increasing the number of cases verified instantaneously.

As mentioned earlier, data mismatches found to exist within the SSA's NUMIDENT database require a contesting employee to visit an SSA office with the required documents to correct their SSA record. Many of the individuals receiving SSA tentative nonconfirmations include naturalized citizens whose citizenship data have not been updated in the NUMIDENT database. To address these issues, DHS and SSA are working to develop a streamlined, automated process to reduce the need for individuals to visit SSA offices.

Automated Registration

Earlier this year, USCIS simplified and completely automated the EEV registration process for interested employers voluntarily choosing to sign up to use the program. This significant programmatic improvement decreases the time burden on employers desiring to participate in EEV and positions the program well for timely registration of all seven million U.S. employers if the program becomes mandatory.

Monitoring & Compliance

No electronic verification system is foolproof or can fully eliminate document fraud, identity theft, or intentional violation of the required procedures. Likewise, no system can fully prevent employers from intentionally circumventing the law by hiring or continuing to employ unauthorized persons. USCIS is developing a monitoring and compliance unit to help detect unauthorized employment, to prevent verification-related discrimination or employer misuse of the program, and to detect identity and document fraud.

The new USCIS unit will monitor employers' use of the system and conduct trend analysis to detect potential fraud and discrimination. Findings that are not likely to lead to enforcement action (e.g., a user has not completed training) will be referred to USCIS compliance officers for follow-up. Findings concerning potential fraud (e.g., SSNs being run multiple times in improbable patterns; employers not indicating what action they took after receiving a final nonconfirmation) may be referred to ICE worksite enforcement investigators. A memorandum of understanding (MOU) with ICE will be developed to implement this process.

With the ability to of the Employment Eligibility Verification Program to help identity fraud and system misuse, it is also important that the system contain security and other protections to guard personal information from inappropriate disclosure or use and to discourage use of the system to discriminate unlawfully or otherwise violate the civil rights of U.S. citizens or work-authorized noncitizens.

VI. Conclusion – The Future of an EEV

An accurate and secure Employment Eligibility Verification Program is a critical component of efforts to improve worksite enforcement. Better worksite enforcement is a key component of any proposal to create a Temporary Worker Program (TWP). The success of a TWP will be essential in reducing the pressure on our border. A secure border will allow us to free up much needed resources, enforce our laws, and protect our homeland against foreign threats. It's all connected. Each link in this chain is critical to its overall integrity. This is why we must take a comprehensive approach to reforming our immigration laws.

Legislative proposals phasing in an EEV program recognize the challenges of implementing a mandatory national system and seek to minimize the burdens placed on employers. A gradual approach to mandatory verification could be based either on

employer size or by industry, starting with the most vulnerable critical infrastructure sectors, to first help ensure homeland security. We favor having the discretion to phase in certain industry employers ahead of others, as a phased-in implementation schedule on a carefully drawn timeframe will allow employers to begin using the system in an orderly and efficient way.

USCIS is also committed to constructing a system that responds quickly and accurately. In order for this system to work, it must be carefully implemented and cannot be burdened with extensive administrative and judicial review provisions that could effectively tie up the system, and DHS, in litigation for years.

Our ultimate success with future implementation of an Electronic Employment Eligibility Verification program will rely on public-private cooperation and active employer participation in government partnerships to secure our workforce. With a bipartisan, cooperative effort we can set a positive tone. Our work is critically important to the future of our Nation and directly impacts national security, our economy, and individual lives. We all share in the responsibility to make our Nation greater, and I look forward to working with you to advance our mutual interests and assist those who come here seeking freedom, prosperity, and the hope for a better future.

Thank you; I look forward to answering your questions.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

WINDHOVER, INC., and JACQUELINE GRAY,	)	
Plaintiffs,	)	
	)	Cause No. 4:07CV00881-ERW
v.	)	
CITY OF VALLEY PARK, MO,	)	
Defendant.	)	

DEFENDANT'S STATEMENT OF UNCONTROVERTED MATERIAL FACTS

Defendant City of Valley Park, Missouri, hereby avers that the following uncontroverted material facts are true and sufficient to support Defendant's Motion for Summary Judgment, as described in the attached Memorandum in Support of Defendant's Motion for Summary Judgment.

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

2. On February 14, 2007, Valley Park Ordinances No. 1721 and No. 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.

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.

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 No. 1721 and Ordinance No. 1722. *Reynolds*, Pl. Memo Supp. Mtn. for Pre. Inj., Exhibit D, slip op. at 6-7.

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

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

7. On July 16, 2007, Valley Park Ordinances 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.

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.

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.

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

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

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

13. The Basic Pilot Program (recently renamed 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.

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.

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.

Respectfully submitted by

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served on Plaintiffs' counsel of record, listed below, by operation of the Court's ECF/CM system, this 10th day of August, 2007:

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