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

Windhover, Inc. and Jacqueline Gray,	)	
Plaintiffs,	)	Division 18
v.	)	Cause No. 07-CC-1103
City of Valley Park, Missouri,	)	
Defendant.	)	

PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Plaintiffs Windhover, Inc. ("Windhover") and Jacqueline Gray ("Gray") respectfully move this Court pursuant to Rule 92.02 of the Missouri Rules of Civil Procedure and Mo. Rev. Stat. § 526.030, for a preliminary injunction enjoining Defendant City of Valley Park, Missouri ("Valley Park" or "the City") from enforcing Valley Park Ordinance No. 1721, as amended by Valley Park Ordinance Nos. 1723 and 1725 (together "Ordinance 1721"), and Valley Park Ordinance No. 1722, as amended by Valley Park Ordinance No. 1724 (together "Ordinance 1722"). Plaintiffs seek preliminary relief to prevent them from suffering irreparable harm between now and a trial on the merits. In support of their Motion, Plaintiffs state as follows:

INTRODUCTION

The challenged Ordinances improperly seek to regulate immigration within the City of Valley Park. Ordinance 1721 prevents Valley Park landlords from leasing their dwelling units until the City determines that no aliens "unlawfully present in the United States" will be occupants. Ordinance 1722 requires Valley Park businesses to determine the immigration status of anyone they hire or contract to do work, or else risk being reported by their fellow Valley Park residents as employing "unlawful workers" and ultimately losing their business licenses. The Plaintiffs own a duplex in Valley Park that they rent out, and for which they contract workers to perform maintenance. The Plaintiffs fear that they will irretrievably lose renters and be subject

to enforcement actions by the City because they do not know how to determine a person's immigration status. They fear that any attempt to screen out "unlawful workers" will put them in violation of other laws. Plaintiffs seek a preliminary injunction because there is a reasonable likelihood that they will be faced with enforcement of Ordinance 1721 and/or Ordinance 1722 before they can obtain relief in a trial on the merits.

BACKGROUND

The City first came up with the idea of trying to enlist its residents to enforce federal immigration laws sometime in the summer of 2006. The City's mayor reportedly first formed the idea when a Mexican family (legal residents) moved into his neighborhood. (Ex. A, Kristen Hinman, "Valley Park to Mexican immigrants: *Adios,* illegals!", *Riverfront Times,* Feb. 28, 2007, www.riverfronttimes.com/2007-02-28/news/valley-park-to-mexican-immigrants-adios, at 9.) The mayor is reported to have later said, "You got one guy and his wife that settle down here, have a couple kids, and before long you have Cousin Puerto Rico and Taco Whoever moving in." (*Id.* at 1.) He has been quoted as referring to Mexicans as "wetbacks" and "beaners." (*Id.* at 4-5.)

On July 17, 2006, the City enacted Ordinance No. 1708 ("Ordinance 1708"), which included an "English-only" provision and purported to penalize any landlord who permitted an "illegal alien" to occupy a dwelling unit and to penalize any business that employed or contracted an "illegal alien" to work. (Ex. B, Ord. No. 1708.)

On September 22, 2006, Plaintiff Jacqueline Gray and other plaintiffs filed suit in this Court, alleging that Ordinance 1708 violated state and federal law.[1] On September 25, 2006, the Court entered a Temporary Restraining Order enjoining enforcement of Ordinance 1708. The

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[1] In addition to Plaintiff Gray, Stephanie Reynolds, Florence Streeter and the Metropolitan St. Louis Equal Housing Opportunity Council were named plaintiffs in the September 22, 2006 suit. The case was captioned *Reynolds, et al., v. City of Valley Park, et al.*, (hereafter *Reynolds I*), and

City promptly tried to circumvent the Temporary Restraining Order by repealing parts of Ordinance 1708, and, on September 26, 2006, enacting Ordinance No. 1715 ("Ordinance 1715"). (Ex. C, Ord. No. 1715.) Among other things, Ordinance 1715 removed the "English-only" provision, but nevertheless purported to penalize any landlord who leased property to an "illegal alien" or any business that employed an "unlawful worker." On September 27, 2006, the Court entered an Amended Temporary Restraining Order enjoining the enforcement of Ordinance 1715. On March 12, 2007, the Court entered an order permanently enjoining the enforcement of Ordinance 1708 and Ordinance 1715. (Ex. D, March 12, 2007 Order.)

Meanwhile, on February 14, 2007, apparently anticipating the fate of Ordinances 1708 and 1715, the City enacted Ordinance 1721 and Ordinance 1722. (Ex. E, Ord. No. 1721 and amendments; Ex. F, Ord. No. 1722 and amendments.)[2] Like its predecessor Ordinances, Ordinance 1721 seeks to regulate immigration by prohibiting the rental of dwellings to aliens unlawfully present in the United States. Ordinance 1721 requires landlords to obtain information from each prospective tenant regarding the "names, ages, citizenships, and relationships for each proposed occupant, together with such identifying information that shall be required by the City." (Exhibit E, Section Two.) The landlord then must use that information to apply for an occupancy permit. (*Id.*) The City will refuse to issue an occupancy permit if it is determined that "any alien unlawfully present in the United States is a proposed occupant[.]" (*Id.*) Thus, under no circumstances will an occupancy permit be issued unless and until the City either

docketed in this Court as Cause No. 06-CC-3802 in Division No. 13.

[2] Ordinance 1722, as amended by Ordinance No. 1724, provides that it becomes effective upon "the termination of any restraining orders or injunctions now in force [as of February 14, 2007] in Cause No. 06-CC-3802[.]" Because the Court entered a permanent injunction in Cause No. 06-CC-3802, it is not clear whether Ordinance 1722 is currently in force. Plaintiffs challenge Ordinance 1722 to the extent that: (1) Ordinance 1724 is construed as making Ordinance 1722 effective upon the termination of the preliminary injunction in Cause No. 06-CC-3802; and/or (2) the permanent injunction in Cause No. 06-CC-3802 is vacated on appeal or on remand.

determines that no proposed occupant is an "alien unlawfully in the United States" or the City concludes that it is unable to make that determination. (*Id.*)

Ordinance 1721 does not specify what additional "identifying information" will be required by the City. As it turns out, Ordinance 1721's implementing documents (Exhibit G hereto, "Documents Required to Apply for a Valley Park Occupancy Permit) require a confusing array of identifying documents and immigration-status documents for prospective tenants who cannot prove they are U.S. citizens. Moreover, the implementing documents indicate that certain classes of non-citizens who are *lawfully* within the United States are not eligible for an occupancy permit, including ambassadors, other foreign officials, and Temporary Visitors for business.

Ordinance 1722 seeks to regulate immigration matters by making it "unlawful for any business entity to recruit, hire for employment, or continue to employ, or to permit, dispatch, or instruct any person who is an unlawful worker to perform work in whole or in part in the City." (Ex. F at 3, Section Four, A.) It provides that an enforcement action may be initiated against a business entity by means of a complaint submitted by any resident of Valley Park alleging that the business entity is in violation of the Ordinance. (*Id.* at 4.) The business entity will then have 3 days within which to provide "identity information . . . regarding any persons alleged to be unlawful workers." *Id.* Any business entity that does not provide the information requested by the City within 3 days or who does not correct a violation of the Ordinance within 3 days of being notified of a violation, shall have its business license suspended. (*Id.*) Ordinance 1722 provides no information or guidance as to how a business entity is to determine that a potential worker or contractor is an "unlawful worker."

Both Ordinance 1721 and Ordinance 1722 subject the Plaintiffs to the risk of lost business and potential enforcement action by the City. Ms. Gray is the sole owner of Windhover, which owns a duplex with two rental units. (Affidavit of Jacqueline Gray, hereafter "Gray Aff.," at ¶2 attached as Exhibit G). At least one of those units has turnover, and therefore

Windhover may be seeking new tenants in the near future. (*Id.* at ¶3.) Windhover also employs contractors to perform maintenance on the property. (*Id.* at ¶4.) Accordingly, both Ordinance 1721 and Ordinance 1722 are likely to be enforced against the Plaintiffs in the near future.

The Plaintiffs are concerned that Ordinance 1721 will cause them to irretrievably lose business because of the delay it will cause in the occupancy permit process, and because it may reduce the available pool of tenants by deterring potential tenants from seeking rental units in Valley Park because of fear of being discriminated against. (*Id.* at ¶6.) Plaintiffs are also concerned that Ordinance 1721 may reduce the value of their property because it may induce some landlords to discriminate against Mexican-appearing applicants rather than risk the denial of an occupancy permit after going through the approval process. (*Id.*) Such discrimination is likely to give the City of Valley Park a negative public image that will drive away potential new businesses and residents. Moreover, such discrimination is likely to drive away people of diverse races and backgrounds, resulting in a community that is less diverse and a less desirable place to live.

As to Ordinance 1722, it appears that if the Plaintiffs wish to employ a painter, landscaper, plumber, electrician or any other contractor to perform maintenance work on their property, they will be required to perform an independent investigation to determine whether any such contractor or any of their employees is an "unlawful worker." Otherwise, they risk being "snitched on" by other residents of Valley Park, and risk potentially losing their privilege to do business in Valley Park if they are unable to prove within the prescribed time period that no such worker is an "unlawful worker." The Plaintiffs do not know precisely what constitutes an "unlawful worker," much less how to go about investigating and determining whether a person is an "unlawful worker." (Gray Aff. at ¶7.) Plaintiffs are concerned that, by attempting to do so, they might be in violation of state and federal anti-discrimination laws. (*Id.*) They also are concerned that their inability to comply with Ordinance 1722 is likely to subject them to its enforcement provisions and cause them to lose the privilege of doing business in Valley Park.

(*Id.*)

Accordingly, on March 14, 2007, the Plaintiffs filed this suit seeking a preliminary and permanent injunction enjoining the enforcement of Ordinances 1721 and 1722.[3] Because there is a high likelihood that one or both of Ordinances 1721 or 1722 will be enforced against the Plaintiffs before this matter proceeds to a trial on the merits, Plaintiffs have filed this motion for a preliminary injunction.

ARGUMENT

A preliminary injunction will allow this Court to "preserve the status quo until the trial court adjudicates the merits of the claim for a permanent injunction." *State of Mo. ex rel. Myers Memorial Airport Comm., Inc. v. City of Carthage*, 951 S.W.2d 347, 352 (Mo. Ct. App. 1997). Under Missouri law, Plaintiffs are entitled to a preliminary injunction upon establishing: (1) a probability of success on the merits; (2) a threat of irreparable harm absent the injunction; (3) that the harm to the Plaintiffs outweighs any injury that the injunction will impose upon the Defendant; and (4) that the injunction is not contrary to the public interest. *See State ex rel. Dir. of Revenue v. Gabbert*, 925 S.W.2d 838, 839 (Mo. 1996); *Pottgen v. Mo. State High Sch. Activities Ass'n*, 40 F.3d 926, 928 (8th Cir. 1994); *Database Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc). All four of those factors support a preliminary injunction here.

I. PLAINTIFFS HAVE A PROBABILITY OF SUCCESS ON THE MERITS OF THEIR CLAIMS.

Plaintiffs have a high probability of success on the merits of their claims for several

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[3] On April 4, 2007, Stephanie Reynolds and other plaintiffs from the *Reynolds I* case also filed a second lawsuit, *Reynolds et al. v. City of Valley Park,* 07-CC-1420 (*Reynolds II*), which challenges only Ordinance 1721. On April 5, 2007, the plaintiffs in *Reynolds II* obtained a temporary restraining order with respect to Ordinance 1721. A hearing is scheduled in that matter for April 20, 2007, at which the City is to show cause why the temporary restraining order should not be extended.

reasons. First, this Court has previously found Ordinances 1708 and 1715 invalid and has permanently enjoined their enforcement. Ordinance 1722 is not meaningfully different from Ordinance 1715, and therefore the City should be precluded from attempting to litigate its validity under principles of *res judicata.* Second, both Ordinance 1721 and Ordinance 1722 are preempted by federal immigration laws and fair housing laws under the Supremacy Clause of the United States Constitution. Third, Ordinances 1721 and 1722 are invalid under the Equal Protection Clause of the Unites States Constitution because they have a discriminatory impact and discriminatory purpose. Even prior to discovery being taken, there is substantial evidence suggesting that the enactment of Ordinances 1721 and 1722 was motivated by racial animus toward the Mexican immigrant population in Valley Park.

A. The City Is Precluded From Asserting The Validity Of Ordinance 1722 Under Principles Of *Res Judicata.*

A party is precluded under principles of *res judicata* from asserting a claim or defense in a subsequent action where there was: (1) a final judgment on the merits in the earlier action; (2) an identity of the cause of action in both the earlier and the later suit; and (3) an identity of the parties in the two suits. *King General Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints*, 821 S.W.2d 495, 501 (Mo. 1991); *Prentzler v. Schneider*, 411 S.W.2d 135, 138 (Mo. 1966). Here, there was: (1) a final judgment on the merits in the *Reynolds I* matter; (2) an identity of causes of action between *Reynolds I* and this matter, namely, a request for a declaratory judgment that a virtually identical ordinance is invalid; and (3) an identity of parties, namely, Plaintiff Gray and Defendant City of Valley Park. With respect to the identity of the ordinances at issue, Sections One, Two, Three and Four of Ordinance 1722 are virtually identical to Sections One, Two, Three and Four of Ordinance 1715, the sections purporting to regulate the hiring of "unlawful workers." *cf. JBK, Inc. v. City of Kansas City, Mo.*, 641 F. Supp. 893, 899 (W.D. Mo. 1986) (subsequent constitutional challenges to newly enacted ordinance barred by *res judicata* in the absence of any material changes in the ordinance previously adjudicated).

The only meaningful addition incorporated in Ordinance 1722 is Section Five, which essentially provides that business entities, the City, and State courts may require the federal government to provide information regarding a person's immigration status. Far from saving Ordinance 1722 from being invalid, those additional provisions render it all the more repugnant to federal immigration law and the Supremacy Clause. Ordinance 1722 is therefore substantively the same ordinance that this Court permanently enjoined, and therefore the City is precluded under principles of *res judicata* from arguing here that it is valid and enforceable.

B. Under the Supremacy Clause of the United States Constitution, Ordinances 1721 and 1722 Are Preempted by Federal Law.

Local laws concerning immigration and foreign nationals are invalid under the Supremacy Clause of the United States Constitution if they: (1) attempt to regulate immigration, which is "unquestionably exclusively a federal power;" or attempt to operate in a field that is entirely occupied by federal law; or (2) are "conflict" preempted because they "burden[] or conflict[] in any manner with any federal laws or treaties," or "[stand] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *De Canas v. Bica*, 424 U.S. 351, 354, 362 n. 5, 363 (1976) (internal citation omitted).[4] Ordinances 1721 and 1722 are preempted because the federal government has the exclusive constitutional authority to regulate immigration and has, in addition, implemented a comprehensive regulatory scheme

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[4] The United States Supreme Court has struck down numerous state statutes relating to non-citizens on one or both of those Supremacy Clause grounds. *See, e.g., Toll v. Moreno*, 458 U.S. 1, 10 (1982) (invalidating state denial of student financial aid to certain visa holders); *Graham v. Richardson*, 403 U.S. 365, 377-80 (1971) (invalidating state welfare restriction); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 418-20 (1948) (invalidating state denial of commercial fishing licenses); *Hines v. Davidowitz*, 312 U.S. 52, 62-68 (1941) (invalidating state alien registration scheme); *Truax v. Raich*, 239 U.S. 33, 42 (1915) (invalidating state employer sanctions scheme under Fourteenth Amendment and suggesting Supremacy Clause violation); *Chy Lung v. Freeman*, 92 U.S. 275 (1876) (invalidating state statute that authorized state official to classify certain arriving immigrants as undesirable and indirectly bar their entry); *Henderson v. Mayor of the City of New York*, 92 U.S. 259 (1876) (invalidating state bond requirement for arriving immigrants).

governing both the presence and "harboring" of non-citizens in the United States, as well as the employment of non-citizens. Therefore Valley Park lacks any authority to enact or enforce Ordinances of this type. Furthermore, both Ordinances are inconsistent with and will interfere with the administration of federal immigration law.

1. Ordinances 1721 and 1722 Impermissibly Regulate Immigration, and Attempt to Legislate in Fields Completely Occupied by Federal Law.

There can be no dispute that Ordinances 1721 and 1722 attempt to regulate immigration: they purport to directly regulate who may access housing and who may work within the city limits based on immigration status. Making rules about who may stay and who may depart, and effectuating that departure, is the very core of immigration regulation. *See, e.g.*, *Graham v. Richardson*, 403 U.S. 365, 379 (1971) (concluding that state laws denying "entrance and abode" "are constitutionally impermissible" because they "encroach upon exclusive federal power"); *Truax v. Raich*, 239 U.S. 33, 42 (1915) (same). Similarly, there can be no doubt that the federal government has enacted a comprehensive, and complex, regulatory scheme governing the topics of entry, employment and "harboring" of aliens, which permits no state or local legislation in the same field. *See Hines v. Davidowitz*, 312 U.S. 52, 69 (1941) (federal law sets forth a "broad and comprehensive plan" governing entry, naturalization, and removal of aliens); *Baltazar-Alcazar v. INS*, 386 F.3d 940, 948 (9th Cir. 2004) ("[w]ith only a small degree of hyperbole, the immigration laws have been termed second only to the Internal Revenue Code in complexity"); *see also* 8 U.S.C. § 1324 (specifically addressing the "harboring" of certain aliens); ; 8 U.S.C. § 1324a (specifically addressing employment of noncitizens). Accordingly, Ordinances 1721 and 1722 are preempted by federal immigration law and are therefore void.

2. Ordinances 1721 and 1722 Are Further Preempted Because They Conflict with the Execution of Federal Immigration Law.

Not only do Ordinances 1721 and 1722 encroach upon the federal government's exclusive power to regulate immigration, but their enforcement will actually conflict and interfere with the administration of federal immigration law.

a. Ordinance 1721 conflicts with federal immigration law.

Ordinance 1721 conflicts with federal immigration law in at least three ways. First, Ordinance 1721 prohibits immigrants who are *lawfully* within the United States from living in Valley Park. Second, Ordinance 1721 prohibits immigrants who may be "illegal" under Valley Park's definition − but who are nevertheless permitted to live in the United States under federal law − from living in Valley Park. Third, Ordinance 1721 purports to give local government the power to demand that the federal government determine an individual's immigration status.

(i). Ordinance 1721 purports to exclude immigrants who are *lawfully* within the United States from living in Valley Park.

Valley Park has interpreted and implemented Ordinance 1721 to prohibit immigrants from living in Valley Park who are lawfully present in the United States. The City's list of "documents required to apply for a Valley Park Occupancy Permit" provides that individuals in certain *legal* immigration statuses – including A-1 diplomatic visa holders, B-1 and B-2 temporary visitors, and visitors who have entered the United States lawfully under the Visa Waiver Program – are not "eligible for a permit." (Ex. G.) However, under federal immigration law, those individuals are explicitly allowed to live in the United States for a temporary period, typically lasting at least several months. *See* 8 U.S.C. § 1187. The City's decision to bar those individuals from living in Valley Park based on their immigration status, even though under federal law that status actually *permits* them to live anywhere in the United States, clearly conflicts with federal law. Indeed, the City's attempt to exclude such categories of individuals from living in Valley Park reflects either an animus toward (Mexican) immigrants generally (which is a violation of the Equal Protection Clause), or a complete misunderstanding of

immigration law, which demonstrates why local governments are not equipped to dabble in regulations relating to immigration.

(ii). Ordinance 1721 conflicts with federal immigration law because, under federal law, an individual's current status does not solely determine whether he or she is permitted to live in the United States.

Under federal immigration law, individuals who are not currently in a legal status may apply for a change in their status that will, if granted, make them lawful permanent residents or otherwise regularize their immigration status. See, e.g. 8 U.S.C. § 1255(i). The federal government routinely permits those and other individuals with pending applications to live in the United States even though they do not currently have legal immigration status. *See Clark v. Martinez*, 543 U.S. 371 (2005) (allowing persons released from detention pursuant to legal mandates and restrictions to stay and work in the U.S. regardless of immigration court's removal order); *Zadvydas v. Davis*, 533 U.S. 678 (2001) (same); *see also* 8 C.F.R. § 274a.12 (a) (11-13), (c) (8-11, 14, 18-20, 22, 24). Federal officials also may exercise discretion not to deport otherwise removable persons for humanitarian reasons. *See* 8 C.F.R. § 212.5(f).

Moreover, the federal government is affirmatively prohibited from removing certain individuals even though they may lack lawful immigration status, where removal to another country means the individual will face a likelihood of torture or persecution. *See* United Nations Convention Against Torture, Art. 3, as implemented in the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), Pub.L. No. 105-277, div. G, Title XXII, § 2242, 112 Stat. 2681, 2681-822 (1998) (codified as Note to 8 U.S.C. § 1231); 8 U.S.C. § 1231(b) (3) (withholding of removal). Those forms of relief from removal are mandatory under federal law even if the alien has no "legal" right to be here.

Ordinance 1721 further conflicts with federal law because it prohibits persons who may not be lawfully present in the United States from residing with lawfully present relatives, including relatives who live in housing partially subsidized by the federal government. *See* 24

C.F.R. § 5.508(e) (providing that "[i]f one or more members of a family elect not to contend that they have eligible immigration status, and other members of the family establish their citizenship or eligible immigration status, the family may be eligible for assistance . . . despite the fact that no declaration or documentation of eligible status is submitted for one or more members of the family."); *see also* 24 C.F.R. § 5.520 (providing for prorated subsidies based on the number of persons in the household eligible for benefits). Unlike federal law, Ordinance 1721 purports to deny an occupancy permit if *any* proposed occupant is an "alien unlawfully present in the United States," even if other occupants are legal residents or citizens. Ordinance 1721's denial of occupancy to any person its describes as "unlawfully present in the United States" clearly conflicts and interferes with the structure and administration of the federal immigration system.

(iii). Ordinance 1721 conflicts with federal law because it purports to give the City the power to require the federal government to determine, on demand, an individual's immigration status.

The requirement in Ordinance 1721 that the federal government provide the City with information regarding a person's immigration status is in conflict with the federal scheme. The federal government created a complex administrative system for determining when and why an individual must leave the United States. The central element of this system is the removal proceeding, a formal administrative procedure with extensive procedural requirements and an opportunity for judicial review, at which the burden of proof is *on the government* to prove that the individual should be removed from the country, and in which the individual is provided an opportunity to apply for asylum or other form of relief from removal. Any determinations by an immigration court are subject to further judicial appellate review before any actual removal occurs.

In the absence of having gone through that process, the federal government cannot answer, on demand, a local request, such as that dictated in Ordinance 1721, regarding whether a particular individual cannot reside lawfully within the United States. *See Plyer v. Doe*, 457 U.S.

202, 241 n.6 (1982) (Powell, J., concurring) ("Until an undocumented alien is ordered deported by the Federal Government, no State can be assured that the alien will not be found to have a federal permission to reside in the country…. Indeed, even the [federal immigration authorities] cannot predict with certainty whether any individual alien has a right to reside in the country until deportation proceedings have run their course."); *accord id.* at 236 (Marshall, J., concurring) ("[T]he structure of the immigration statutes makes it impossible for the State to determine which aliens are entitled to residence, and which eventually will be deported").

The federal government has rejected the concept of concluding that an immigrant is not lawfully in the United States in the absence of due process. With respect to the Systematic Alien Verification for Entitlements (SAVE) system, for example, the federal government has instructed its agencies that a federal entity

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

65 Fed. Reg. 58301 (emphasis added). This is particularly significant because the City of Valley Park has indicated that it intends to use the SAVE system to determine whether individuals are not lawfully present for the purpose of denying them housing permits or employment. Obviously, to do so would conflict with the federal government's own guidelines for the use of that system.

Moreover, to permit local governments to place such demands on the federal government for information regarding an individual's immigration status would place an undue burden on the federal government. A federal court in California issued a Temporary Restraining Order barring enforcement of a similar ordinance, noting that it had "serious concerns regarding the burden this Ordinance will place on federal regulations and resources" because of the

envisioned federal verification of status and the incorporation of federal-law definitions and concepts into a local law relating to housing. *Garrett v. City of Escondido*, 465 F. Supp.2d 1043, 1057 (S.D. Cal. 2006). Similarly here, Valley Park cannot be permitted to burden the federal government with its passage and enforcement of Ordinance 1721.

b. Ordinance 1722 conflicts with Federal Employment Verification Laws.

Ordinance 1722 conflicts with federal law in at least two respects. First, Ordinance 1722 imposes additional burdens on employers not required under the federal Immigration Reform and Control Act, thereby disrupting the deliberate choice Congress made in enacting the federal employment verification requirements in that Act. Ordinance 1722 requires all business entities to ensure that any person they "recruit, hire for employment, or continue to employ, or to permit, dispatch, or instruct . . . to perform work in whole or in part in the City is an authorized worker. (Ex. F at 3, Section Four, A.) In contrast, federal law does *not* require that employers verify the immigration status of certain categories of workers, such as independent contractors and casual domestic workers, and does not apply to entities, such as unions, that refer individuals for employment but without a fee or profit motive. *See* Immigration Reform and Control Act ("IRCA"), 8 U.S.C. § 1324a; 8 C.F.R. § 274a.1(c)-(f); *see also* H.R. Rep. 99-682(I), at 57 (stating that "[i]t is not the intent of this Committee that sanctions would apply in the case of casual hires" and noting an exception for unions and similar entities).

Ordinance 1722 further conflicts with and upsets the careful balance Congress struck in the IRCA in that it fails to contain any protections for immigrant workers from invidious discrimination by employers. Recognizing that any scheme requiring employers to verify workers' employment authorization status was likely to lead to employment discrimination against immigrants, Congress viewed IRCA's provisions prohibiting discrimination by employers (*see* 8 U.S.C. § 1324b) as a critical complement to the Act's enforcement provisions. *See, e.g.*, H.R. Conf. Rep. No. 99-1000 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5840, 5842

("[t]he antidiscrimination provisions of this bill are a complement to the sanctions provisions, and must be considered in this context"); H.R.Rep. No. 99-682(II) (1986), pt. 2, at 12 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5757, 5761 (explaining that the House Committee on Education and Labor "strongly endorses [the anti-discrimination amendment] and ... has consistently expressed its fear that the imposition of employer sanctions will give rise to employment discrimination against Hispanic Americans and other minority group members. It is the committee's view that if there is to be sanctions enforcement and liability there must be an equally strong and readily available remedy if resulting employment discrimination occurs."). Yet by enacting an enforcement-only scheme that contains no countervailing prohibition on discrimination by employers, Valley Park has undermined the balance Congress sought to achieve.

C. Ordinances 1721 and 1722 Violate The Equal Protection Clause Of The Fourteenth Amendment To The United States Constitution.

Ordinances 1721 and 1722 violate the Equal Protection Clause because they have a discriminatory purpose and a discriminatory effect with respect to persons of Hispanic heritage. A statute or ordinance violates the Equal Protection Clause where it has a discriminatory purpose and discriminatory effect, even if it appears facially neutral. *Rogers v. Lodge,* 458 U.S. 613 (1982); *Hayden v. County of Nassau*, 180 F.3d 42, 48 (2d Cir. 1999) ("a facially neutral statute violates equal protection if it was motivated by discriminatory animus and its application results in a discriminatory effect."); *Horizon House Developmental Services, Inc. v. Township of Upper Southampton*, 804 F. Supp. 683, 693 (E.D. Pa. 1992).

Here, the Plaintiffs have a high probability of success in proving both elements. Even prior to discovery in this matter, there is evidence that the enactment of Ordinances 1721 and 1722 had a discriminatory purpose. Statements in the media by Valley Park's mayor suggest that the intended targets of Ordinances 1721 and 1722 and its predecessor ordinances are Hispanic immigrants, and that the ordinances are motivated by racial animus toward the Mexican

immigrant population in Valley Park. (Ex. A.) As the mayor himself describes it, the precipitating incident was the entry of a Mexican family into his neighborhood. (*Id.*) In voicing his objection to that, the mayor invoked numerous racial stereotypes and epithets. (*Id.*) Yet he didn't have the slightest idea whether the Mexican family or other occupants of their home were lawful residents. He simply saw an anti-"illegal alien" ordinance as a means of purging persons of Mexican heritage from Valley Park. That is invidious discrimination.

There also is a high probability that Ordinances 1721 and 1722 will be shown to have a discriminatory effect. The Ordinances are likely to impose on Hispanic residents and workers unique obstacles to housing and employment by subjecting them to discriminatory treatment based solely on their apparent Hispanic heritage. For example, landlords will be incentivized to turn away rental applicants who appear to be Hispanic or have Hispanic surnames rather than risk the costly delay of the approval process set forth in Ordinance 1721, only to have to start the process all over again if the City declines to issue an occupancy permit. The ripple effect is that landlords are likely to avoid leasing properties to Hispanic persons in order to avoid all possible city intervention into their businesses. Likewise, the effect of Ordinance 1722 is that employers are likely to be reluctant to hire persons of Hispanic heritage lest they risk repeated complaints by their fellow Valley Park residents and subsequent enforcement actions to suspend their business licenses on the mere suspicion that a Hispanic individual may be an "unlawful worker."[5]

Finally, it appears that Ordinance 1721 is being implemented in a manner that discriminates against "aliens," irrespective of their legal status. As noted above, the

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[5] Ordinance 1722 itself acknowledges the probability of such stereotyping in providing that a complaint from a resident will not be "enforced" where it is based "solely or primarily" on "national origin, ethnicity, or race[.]" (Ex. F, Section Four, A.(2).) It can scarcely be doubted, however, that most complaints will be precipitated by a worker's Hispanic appearance, and that employers will be incentivized not to hire Hispanic workers at all.

implementing documentation provides that non-citizen aliens in certain *legal* categories are not eligible for an occupancy permit. It is well-established that discrimination on the basis of alienage violates the Equal Protection Clause. *In re Griffiths,* 413 U.S. 717 (1973); *Sugarman v. Dougall,* 413 U.S. 634 (1972); *Graham v. Richardson,* 403 U.S. 365 (1971).

II. PLAINTIFFS ARE THREATENED WITH IRREPARABLE HARM IN THE ABSENCE OF A PRELIMINARY INJUNCTION.

Preliminary injunctive relief is available to "prevent irreparable injury to a property right resulting from enforcement of an unconstitutional or invalid ordinance." *Glenn v. City of Grant City*, 69 S.W.3d 126, 129-30 (Mo. Ct. App. 2002). Ordinances 1721 and 1722, which have a high likelihood of being held unconstitutional or otherwise invalid, threaten to cause irreparable injury to the Plaintiffs' property rights. Plaintiff Gray (who is sole owner of Windhover) has invested significant amounts of time and energy into maintenance of the Windhover rental properties over the past ten years and has built an ongoing business with reasonable expectations of future profit. (Gray Aff. at ¶¶2, 3.) Enforcement of either Ordinance 1721 or Ordinance 1722 presents a substantial threat of irreparable harm to the Windhover business for which no adequate remedy at law exists and which therefore warrants preliminary injunctive relief.

If this Court does not preliminarily enjoin enforcement of Ordinance 1721, Plaintiffs will experience difficulty in filling any vacancy in their rental units that occurs prior to a trial on the merits in this case due to the Ordinance's onerous and time-consuming process for obtaining an occupancy permit. To comply with the requirements of the implementing documents, Plaintiffs will be forced to undertake a burdensome investigation and collection of documents by a law which is not only illegal, but unconstitutional. Ordinance 1721 requires landlords first to gather information about each prospective tenant's name, age, citizenship, and relationships with each of the other proposed tenants, in addition to any other unspecified information the City may subsequently decide to require. The landlord then must apply for an occupancy permit. The City will only grant a permit upon a determination that none of the proposed occupants are

"unlawfully present in the United States" or upon a finding that the City is unable to make such determination. If the City denies the permit, then the landlord must start all over again to locate another prospective tenant and then go through the same process. The delays in leasing the property will cause Plaintiffs to suffer significant losses in rental income. The onerous requirements of Ordinance 1721 are also likely to deter prospective tenants from seeking housing in Valley Park at all, thus diminishing the pool of applicants and thereby reducing the value of the Plaintiffs' property.[6] Moreover, there is the intangible but no less real harm to Plaintiffs in living in a community that is, or is perceived to be, bigoted and lacking in diversity.

The enforcement of Ordinance 1722 places the Plaintiffs at risk of losing their ability to do business at all in Valley Park. If the Plaintiffs wish to hire workers or contractors to perform maintenance on their property any time prior to a trial on the merits in this case, they will be forced to try to investigate whether any such workers are "unlawful workers," even though such verification is not required under federal law and even though the burdens imposed by the City are illegal and unconstitutional. Otherwise, they are likely to be subject to complaints by fellow Valley Park residents that they are employing "illegal aliens," potentially subjecting them to an enforcement action by the City that could result in the loss their business license. Indeed, the Plaintiffs may be subject to the threat of a multiplicity of enforcement actions by the City each time they hire a worker who might appear to someone else to be an "unlawful worker." Preliminary injunctions are specifically designed to prevent such a result during the pendency of an action. Plaintiffs are entitled to protection from "the expense, vexation and annoyance of such a multiplicity of proceedings" while the merits of their claim are adjudicated. *Brotherhood*

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[6] Courts have recognized that the threat of economic losses can constitute irreparable harm sufficient for issuance of a preliminary injunction, particularly where "the loss of business threatens[s] the very existence of an enterprise." *Assoc. Producers Co. v. City of Independence, Missouri*, 648 F. Supp. 1255, 1258 (W.D. Mo. 1986).

of Stationary Engineers, et al. v. City of St. Louis, 212 S.W.2d 454, 458 (Mo. Ct. App. 1948).

III. THE BALANCE OF HARMS FAVORS A PRELIMINARY INJUNCTION.

The City will not suffer any injury at all from the imposition of a preliminary injunction that prevents it from enforcing Ordinances 1721 and 1722 during the pendency of the litigation. First, there is a very high likelihood that the ordinances will be held unconstitutional or otherwise invalid, and therefore the City has no legitimate interest in enforcing them. Second, we are aware of no evidence that the "harms" supposedly addressed by Ordinances 1721 and 1722 actually exist in Valley Park. Though Ordinance 1722 intones what are presumably the City's "harms," including "higher crime rates," "fiscal hardships" to its local hospitals, and "diminishing the overall quality of life and provid[ing] concerns to the security and safety of the homeland[,]" there is no evidence that any such problems exist in Valley Park, or that the presence of aliens, legal or illegal, in Valley Park will cause such problems. Indeed, this Court's previous orders preliminarily and permanently enjoining the substantially similar Ordinance No. 1708 and Ordinance No. 1715 demonstrate that the balance of harms in this case decidedly tips in favor of a preliminary injunction.

IV. A PRELIMINARY INJUNCTION AGAINST ENFORCEMENT OF THE CHALLENGED ORDINANCES IS IN THE PUBLIC INTEREST.

It is clear that enforcement of Ordinances 1721 and 1722 poses a significant threat of harm to landlords and employers in Valley Park, to all the residents, potential residents and workers who may suffer discrimination as result of the Ordinances' enforcement, and to the public image of Valley Park, and by extension, to its residents like Plaintiff Gray. Similar ordinances enacted in this and other cities have sparked nationwide attention and elicited a negative response to the discriminatory purpose and effect of ordinances directed toward the supposed "regulation" of illegal aliens. Beyond the shame and disrepute of living in a community where one must comply with such clearly discriminatory ordinances in order to lease dwelling units or operate a business, the Ordinances have the likely effect of deterring

individuals of Hispanic heritage, as well as others who do not wish to live in such an environment, from moving to Valley Park.

Moreover current residents of Valley Park who are recent immigrants or who are of Hispanic heritage have a legitimate fear that they will face discrimination in their own community, whether it is in the context of housing or otherwise. Such hostile conditions would undoubtedly provoke persons of Hispanic heritage to move elsewhere in order to escape such hardship. Above and beyond the reputational harms associated with the discriminatory nature of the challenged Ordinances, the exodus of current residents, without the addition of new residents, exposes the city to economic harms (e.g., labor shortages, decreased commercial activity). Accordingly, a preliminary injunction is in the public interest.

WHEREFORE, Plaintiffs respectfully request that this Court order:

A. a preliminary injunction enjoining the enforcement of Ordinance No. 1721 and Ordinance No. 1722, or any ordinance that is substantially the same in content to Ordinance No. 1721 and Ordinance No. 1722; and,

B. any and all such other relief this Court deems just and proper.

Dated: April 19, 2007

Respectfully submitted,

By: _____

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* Not admitted in Missouri, motion for admission pro hac vice to be filed upon receiving Rule 6.01(m) receipt from Supreme Court.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Plaintiffs' Motion for a Preliminary Injunction was forwarded via facsimile and mailed on April 19, 2007 to:

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