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.	)	

MEMORANDUM IN RESPONSE TO
PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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, seeking to enjoin two ordinances (Valley Park Ordinances 1708 and 1715) that concerned the same general subject matter as the two ordinance at issue in this action (Valley Park 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, which was granted by this court on November 15, 2006. *Reynolds* was subsequently decided solely on state law grounds by the Circuit Court of Saint Louis County. The (repealed) ordinances at issue in *Reynolds* were structured completely differently from the ordinances at issue in the present case, as is explained further below.

On March 14, 2007, Plaintiff Jacqueline Gray filed the petition in this case. 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. Defendant now responds to Plaintiffs' motion for a preliminary injunction.

FACTUAL BACKGROUND

The ordinances at issue in this matter, Valley Park Ordinance 1721 and Valley Park Ordinance 1722, are municipal measures carefully drafted to comply with controlling federal precedents defining the

authority of state and local governments to take actions that discourage illegal immigration within their jurisdiction. Ordinance 1721 concerns inspections and occupancy permits for rental dwelling units in Valley Park. It is intended to prohibit landlords from harboring illegal aliens—which has long been a federal crime under 8 U.S.C. § 1324(a)(1)(A). Specifically, Ordinance 1721 requires owners, agents, or managers of dwelling units to obtain licenses in the form of "occupancy permits" from the City. Such permits will be denied if a proposed occupant is an alien unlawfully present in the United States. Ordinance 1721 § 2(a). "The [Valley Park] Building Commissioner shall make no independent judgment of the legal status of any alien." *Id.* Rather, the City defers entirely to the verification of an alien's status by the federal government, which Congress authorized in 8 U.S.C. § 1373(c). Ordinance 1721 § 2(a).

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). Both ordinances apply only prospectively. Ordinance 1721 applies only to new occupancies after the ordinance becomes effective. Ordinance 1721 § 2(c). And Ordinance 1722 applies only to employees hired after the ordinance becomes effective. Ordinance 1722 § 5.A.

ARGUMENT

I. PLAINTIFFS FAIL TO MEET THE STANDARD OF IRREPARABLE HARM

To prevail on a motion for preliminary injunction the moving party must show 1) a probability of success on the merits, 2) that the absence of a preliminary injunction threatens irreparable harm, 3) that this harm is greater then the injury inflicted on other interested parties by granting the injunction, and 4) that an injunction is in the public interest. *Lankford v. Sherman*, 451 F.3d 496, 503 (8th Cir. 2006). Plaintiffs in this case have failed to meet the irreparable harm standard, for four reasons.

A. Time Spent Applying for a Permit Does not Constitute "Irreparable Harm"

First, Plaintiffs assert that they (Ms. Gray and her company, Windhover, Inc.) will suffer irreparable harm by having to comply with the occupancy permit provisions of Ordinance 1721. Plaintiffs state that compliance with what is characterized as an "onerous and time-consuming process" amounts to irreparable harm. Pl. Mtn. for Pre. Inj., 17. This assertion is utterly without basis in case law. Time consumed by filling out a form has never been recognized by any federal court as irreparable harm sufficient to justify a preliminary injunction. If and when she has a new tenant wishing to occupy her rental dwelling unit, Ms. Gray will need to obtain an occupancy permit on behalf of her tenant. Simply put, all she must do is collect the prospective occupant's name, age, date of birth, citizenship, and a copy of the occupant's photo identification. Beyond that, in the case of an alien, the City merely asks for any number that the alien believes establishes his lawful presence in the United States; or, in the case of a U.S. citizen, the City asks for a signed declaration of U.S. citizenship. Ordinance 1721 § 2(a); "Notice: Applying for a Valley Park Occupancy Permit," attached as Exhibit A. This is little more than the basic information that a landlord routinely collects to determine the credit history of a prospective tenant. Its collection and presentation to the City certainly causes no "harm" to Plaintiffs, much less *irreparable* harm.

Plaintiffs do not present a shred of case law suggesting that the mere collection of basic identity information and filling out of a form to obtain a license constitutes judicially cognizable harm. No such case law exists. Indeed, Plaintiffs seem to be unaware that *federal law already requires all states and local governments to collect basic identifying information* to verify an alien's lawful presence in the United States with the federal government, before providing any "public benefit" (including a "license") to the alien. 8 U.S.C. §§ 1621, 1625. An occupancy permit is such a benefit.

B. Delay in Renting a Dwelling Unit Does not Constitute "Irreparable Harm"

Second, Plaintiffs suggest that even if the application for an occupancy permit does not constitute irreparable harm, the delay that would result if a permit were denied would constitute irreparable harm—because Plaintiffs "must start all over again to locate another prospective tenant." Pl. Mtn. for Pr. Inj. 18. Once again, Plaintiffs offer no case law indicating that such delay would constitute irreparable harm. However there is a much deeper flaw in this argument. A permit would only be denied if, after Valley Park

"verify[ies] with the federal government whether the alien is lawfully present in the United States, pursuant to 8 U.S.C. § 1373(c)," the federal government concludes that the individual is an "an alien unlawfully present in the United States." Ordinance 1721 § 2(a). In other words, only if the federal government concluded that the proposed occupant was an illegal alien would any occupancy permit be denied. Plaintiffs assume that they have a right to proceed with the rental of the dwelling unit to an illegal alien. However, there is no such right. It is a federal crime under 8 U.S.C. § 1324(a)(1)(A) to harbor an illegal alien. The provision of an apartment to an illegal alien falls within the federal immigration crime of harboring, as the Courts of the United States have held. *United States v. Aguilar*, 883 F.2d 662, 669-670 (9th Cir., 1989); *United States v. Lopez*, 521 F.2d 437 (2nd Cir. 1975), *cert. denied*, 423 U.S. 995 (1975).

Plaintiffs cannot assert a judicially-cognizable harm stemming from their inability to commit a federal crime. No plaintiff has a cognizable interest in swiftly entering into a contract to harbor an alien unlawfully present in the United States. "[W]here the contract grows immediately out of, and is connected with, an illegal or immoral act, a Court of justice will not lend its aid to enforce it." *Armstrong v. Toler*, 24 U.S. 258 (U.S. 1826).

C. Irreparable Harm Cannot be Speculative in Nature

Third, irreparable harm in a motion for preliminary injunction cannot be based on rank speculation. Plaintiffs' asserted harm under Ordinance 1721 will only occur if at some point in the future an illegal alien seeks to rent an apartment from Ms. Gray. She has not alleged that she has any reason to believe that this will occur. Plaintiffs' asserted harm under Ordinance 1722 will only occur if at some point in the future, Ms. Gray seeks to hire someone to work for her, and that hypothetical person turns out to be an unauthorized alien. She does not allege that she has any plans to hire anyone at present. In other words, there is no concrete basis for concluding that any harm will ever befall Plaintiffs. A preliminary injunction requires "a *concrete* showing of irreparable injury...to justify preliminary injunctive relief barring enforcement of [a] challenged statute." *Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Nixon*, 428 F.3d 1139, 1143-44 (8th Cir. 2005) (emphasis added). The Supreme Court has specifically rejected claims of irreparable harm due to their "speculative nature," *L.A. v. Lyons*, 461 U.S.

95, 111 (1983). The Eighth Circuit "has repeatedly emphasized the importance of a showing of irreparable harm." *Caballo Coal Co. v. Ind. Mich. Power Co*., 305 F.3d 796, 800 (8th Cir. 2002). The "failure to show irreparable harm is, by itself, a sufficient ground upon which to deny a preliminary injunction." *Adam-Mellang v. Apartment Search*, 96 F.3d 297, 299 (8th Cir. 1996) (quoting *Gelco Corp. v. Coniston Partners*, 811 F.2d 414, 418 (8th Cir. 1987)). "The burden of demonstrating that a preliminary injunction is warranted is a heavy one where, as here, granting the preliminary injunction will give plaintiff substantially the same relief it would obtain after trial on the merits." *Dakota Industries, Inc. v. Ever Best Ltd.*, 944 F.2d 438, 440 (8th Cir. 1991). Plaintiffs have not met this heavy burden.

D. If Delay Did Constitute Harm, it Would be De Minimis

Delay does not constitute not irreparable harm for the purposes of adjudicating a motion for preliminary injunction. However, even if it did, any delay that might result if Plaintiffs ever attempted to obtain an occupancy permit for an illegal alien would be negligible. Depending on which verification system Valley Park uses, the federal government can provide an answer in seconds or minutes. If Valley Park uses the Systematic Alien Verification for Entitlements (SAVE) program, which was created specifically to respond to state and local verification requests under 8 U.S.C. § 1621, the answer would come back within seconds. The local government official taps into the federal government's Verification Information System (VIS) via the internet. As the Department of Homeland Security reported in February 2007, "Users log into the VIS system to enter query information and results are returned within 3 seconds." DHS Exhibit 300 Public Release BY08, Feb. 12, 2007, at 2, attached as Exhibit B. If, on the other hand Valley Park uses the Law Enforcement Support Center (LESC), this telephone-based system provides a verification of an alien's status in less than ten minutes in the majority of cases.[1] It is hard to see how the delay of ten minutes or less in verifying a prospective occupant's legal status will cost the Plaintiffs any money. However, even if it did, "[a]s a general rule, a party may not obtain injunctive relief where it claims a loss of profits." *Fleet Nat'l Bank v. Burke*, 45 Conn. Supp. 566, 577 (Conn. App. Ct. 1998).

[1] Remarks of Dept. of Homeland Security Gen. Counsel Joe Whitley to National College of District Attorneys, October 7, 2003, accessible athttp://www.dhs.gov/xnews/speeches/speech_0135.shtm.

II. PLAINTIFFS DISTORT THE PLAIN MEANING OF ORDINANCE 1721 BY RELYING ON AN ERRONEOUS AND WITHDRAWN DOCUMENT

Plaintiffs assert that "Valley Park has interpreted and implemented Ordinance 1721 to prohibit immigrants from living in Valley Park who are lawfully present in the United States." Pl. Mtn. for Pre. Inj., 10. This statement is obviously incorrect. The text of the Ordinance is perfectly clear. Only an "alien unlawfully present in the United States" may be denied an occupancy permit. Ordinance 1721 § 2(a). Moreover, "The determination of whether an alien is lawfully present in the United States shall only be made by the federal government." Ordinance 1721 § 2(e). If for some reason the federal government cannot provide a final confirmation that an alien is unlawfully present, then the City gives the alien the benefit of the doubt and issues the occupancy permit. Ordinance 1721 § 2(d). It is impermissible, under the plain meaning of the ordinance, for any alien who is lawfully present in the United States to be denied an occupancy permit.

Plaintiffs base their misleading statement on an erroneous document that was hastily produced by an administrative assistant at Valley Park City Hall, on March 13, 2007, in response to requests by a few landlords regarding what sort of identification an alien could use in applying for an occupancy permit. See Pl. Mtn. for Pre. Inj., Exhibit G. The administrative assistant consulted the website of the Missouri Department of Revenue to see what documents the state accepted when issuing drivers licenses to aliens. She downloaded the state document, made a few changes, and handed it to fewer than ten people.

Her document contained numerous errors. For example, on the front page it stated, "Documents required to apply for a Valley Park occupancy permit." It should have stated "Documents *recommended* to apply for a Valley Park occupancy permit." Neither of the systems utilized by the federal government to verify the lawful status of an alien at the request a local official requires the alien to have a document in his possession. Using either the SAVE program or the LESC, discussed further below, the local official need only submit an identification number provided by the alien, along with the alien's name and date of birth. No physical document is necessary. It is also possible for the system to verify status without any identification number. The administrative assistant also neglected to make modifications to the Missouri

Department of Revenue document regarding categories of nonimmigrant aliens who are *not* eligible for a Missouri drivers license, but who *are* of course eligible to obtain a Valley Park Occupancy permit. See Pl. Mtn. for Pre. Inj., Exhibit G ("A-1… NO. Individuals with an 'A' status can only be issued a Drivers License from the U.S. State Department.") Plaintiffs seize on this error to assert, implausibly, that aliens lawfully present in the United States may not obtain an occupancy permit under Ordinance 1721—the plain language of the ordinance notwithstanding.

Fortunately, the erroneous document was only handed to fewer than ten people during a three week period, until the first week of April 2007. It was never posted in any public place, nor was it made available on the table in City Hall where public notices may be picked up. The City never published the erroneous document on its website. Beginning in May 2007, the City made every effort to correct the mistakes in this erroneous document by publishing a correct notice on the City's website and posting the correct notice in City Hall. The correct notice, which has been continuously available to the public on the appropriate table in City Hall, explains what information is necessary to obtain an occupancy permit and states clearly that, "All aliens lawfully present in the United States are eligible to obtain an occupancy permit." "Notice: Applying for a Valley Park Occupancy Permit," attached as Exhibit A. Regardless, the text of Ordinance 1721 speaks for itself. Plaintiffs' attempt to misconstrue that text is unavailing.

III. PLAINTIFFS CANNOT SUCCEED ON THE MERITS

A. The Ordinances Are Not Preempted by Federal Immigration Law

The controlling Supreme Court precedent of *De Canas v. Bica*, 424 U.S. 351 (1976), laid out a 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 recite *De Canas* test, but then *they fail to mention the controlling* De Canas *precedent again*. The reason that this controlling case disappears from Plaintiffs' memo is obvious: *De Canas* is filled with statements that clearly support Defendants, as is shown below. Plaintiffs also fail to mention

what *De Canas* 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.

Plaintiffs also neglect to mention the presumption against any judicial finding of preemption. There is 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).

1. The Ordinances are not a "Regulation of Immigration" Under *De Canas*

Plaintiffs declare that the ordinances "attempt 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 Ordinances 1721 and 1722 repeatedly make express reference to federal immigration

classifications in defining which aliens may not be harbored and 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 ordinances defer entirely to the federal government in determining whether an alien is lawfully present in the United States. "The determination of whether an alien is lawfully present in the United States shall only be made by the federal government." Ordinance 1721 § 2(e).

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 ordinances at issue in this case do not restrict the ability of aliens lawfully present in the United States to remain. Rather, Valley Park's ordinances restrict the ability of *illegal* aliens to violate federal law by residing 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). In 1996, Congress took the unusual step of stating this objective explicitly in federal law: "It is a compelling government interest to remove the

incentive for illegal immigration provided by the availability of public benefits." 8 U.S.C. § 1601(6). By taking away the public benefit of an occupancy permit, Valley Park achieves this congressional objective.

2. 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).

3. *De Canas* Permits Harmonious State Regulations Concerning Illegal Aliens

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.

4. Federal Law Expressly *Permits* Certain State Laws Restricting the Employment of Unauthorized Aliens.

With respect to Ordinance 1722, Congress has expressly permitted precisely the form of local regulation at issue in this case. In 1986, Congress passed the Immigration Reform and Control Act, which 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 exacting 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).

5. The Prohibition of Harboring Constitutes Concurrent Enforcement Activity and is Therefore not Preempted

Ordinance 1721 prohibits the harboring of an illegal alien in a dwelling unit. This prohibition of harboring is also in perfect alignment with congressional objectives. Enacting such a harboring provision is well within the authority of a municipality under the doctrine of "concurrent enforcement activity." 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).

In the case at bar, the harboring prohibition in Ordinance 1721 is perfectly consistent with the equivalent harboring provision of federal law, which imposes criminal penalties on:

> Any person who … knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien *in any place, including any building* or any means of transportation.

8 U.S.C. § 1324(a)(1)(A)(iii). As noted above, the provision of housing to illegal aliens is a fundamental component of the federal crime of harboring, as the Courts of the United States have repeatedly held. 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). It should also be noted that the illegal alien who proposes to occupy a dwelling unit is also committing a violation of federal law; the specific violation depends on whether he entered without inspection, overstayed his visa, or otherwise violated the immigration laws of the United States. See 8 U.S.C. § 1101, et seq. Valley Park reinforces federal law by discouraging the illegal alien from taking up residence in the United States.

6. Congress Expects States and Localities to ask for Federal Verifications of Aliens' Legal Statuses

Desperate to find some possible conflict with federal immigration law, Plaintiffs resort to what can only be describe as a bizarre argument. Plaintiffs contend that "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 with the United States." Pl. Mtn. for Pre. Inj., 12. Evidently, Plaintiffs are unaware that there are now "over 190,000 Federal, state, and local government agency users" of the SAVE system,

which answers such requests daily. DHS Exhibit 300 Public Release BY08, Feb. 12, 2007, at 4, attached as Exhibit B. One wonders what those 190,000 users would think of Plaintiffs' assertion.

Plaintiffs then reveal that they have not read 8 U.S.C. § 1373(c), when they claim (without any support) that "[t]he 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." Pl. Mtn. for Pre. Inj., 12. Actually, Valley Park follows the federal scheme precisely. In 1996 Congress, not Valley Park, created the scheme by enacting 8 U.S.C. § 1373(c), entitled "**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.

One of the ways that the federal government met this obligation was by creating the SAVE system. "Congress in various statutes mandated that USCIS provide a system that verifies citizenship and immigration status of individuals seeking government benefits…. USCIS implemented this mandate through the Systematic Alien Verification for Entitlements (SAVE) program…." U.S. Department of Homeland Security, Privacy Impact Assessment for the Verification Information System Supporting Verification Programs, April 1, 2007, at 2, attached as Exhibit C.

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).

Faced with the undeniable legal reality that 8 U.S.C. § 1373(c) *requires* the federal government to provide an answer to any local government official who seeks "to verify or ascertain the citizenship or immigration status of any individual," and that the federal government created the SAVE system to "verify" any alien's status and satisfy this statutory mandate of 1996, Plaintiffs resort to an extremely tenuous argument. Plaintiffs claim that SAVE does not actually suffice to verify an alien's legal status. In

making this claim, Plaintiffs cite a memorandum from the INS to other federal agencies that was published in the Federal Register in 2000. Pl. Mtn. for Pre. Inj., 13. However Plaintiffs either did not understand, or chose not to mention, the context of that memorandum. In Section 404 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Congress required certain federal agencies to report four times a year any alien that the federal agency "*knows* is not lawfully present in the United States" (emphasis added). Faced with the ambiguity of the term "knows," the relevant agencies consulted with one another and reached an agreement that, in 2000, the best way to interpret that reporting requirement would be to say that a federal agency "knows" after the formal process of administrative review in the INS was complete. 65 Fed. Reg. 58301. The memo had nothing to do with the provision of information on the legal status of aliens to state and local governments. *Id*.

More importantly, Plaintiffs neglect to inform this Court of the most recent DHS publication in the Federal Register on the subject, *dated March 9, 2007,* which clearly states that a SAVE verification is sufficient to inform a state whether or not an alien is lawfully present in the United States. Just a few quotations from the March 2007 publication illustrate the absurdity of Plaintiffs' argument. A SAVE "check" serves "to confirm lawful status." 72 Fed. Reg. 10820, 10832. "[A]ll fifty states have signed MOUs for access to SAVE and twenty State DMVs are currently querying SAVE *to verify lawful status*." *Id*. at 10833 (emphasis added). "DHS also proposes that States conduct a lawful status check through SAVE *to verify that the individual has lawful status in the United States*." *Id*. at 10840 (emphasis added). Plainly, DHS regards the SAVE program as sufficient to verify an individual's lawful status, contrary to Plaintiffs' assertion. Plaintiffs' failure to mention this recent DHS publication is troubling, to say the least.

B. Plaintiffs' Equal Protection Argument Cannot Succeed

1. The Ordinances Contain no Suspect Classifications and are Therefore Subject only to Minimal Scrutiny

Plaintiffs acknowledge that there are no suspect classifications in the Valley Park ordinances subject to facial challenge. Pl. Mtn. for Pre. Inj., 15. The only classification that exists in the ordinances 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 amount 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. Accordingly, the ordinances should only be subjected to minimal scrutiny. The City need only 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 the ordinances pass 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 ordinances. 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). Finally, it is clear that the means chosen by the City to reduce these expenses and burdens caused by illegal immigration are "reasonably adapted to the purposes" of the City.

2. The Ordinances Were Not Driven by any Discriminatory Purpose

Unable to bring a facial challenge on Equal Protection grounds, Plaintiffs resort to claiming that the ordinances have an ethnically discriminatory purpose and effect. To subject the ordinances to strict scrutiny, they must establish *both* discriminatory purpose and discriminatory impact. *Rogers v. Lodge*, 458 U.S. 613, 617 (U.S. 1982). This they cannot do. 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., Exhibit A, at p. 3, and mentioned epithets only in explaining that he would not use them. *Id*. at pp. 4-5.

More importantly, 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).[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). The inclusion of this sweeping anti-discrimination clause demonstrates conclusively the absence of any discriminatory motive on the party of elected City leaders.

3. Plaintiffs Cannot Show Discriminatory Effect

In order for their Equal Protection Clause claim to succeed, Plaintiffs would also have to show discriminatory effect. Unfortunately for Plaintiffs, this is impossible because the ordinances *are not in effect* at present, and were only in effect for a few weeks in March and April of 2007. On April 5, 2007, the Circuit Court of Saint Louis County, Missouri, issued a temporary restraining order suspending the ordinances in the parallel case of *Reynolds v. Valley Park*, 07CC-1420 (which asserts a combination of state law and federal law claims). That temporary restraining order was subsequently extended into September 2007. Thus, the discriminatory effect that Plaintiffs imagine is based entirely on conjecture, not on facts, because the ordinances are not in effect, and have not been in effect since April 5, 2007. For this reason, it is impossible for Plaintiffs to prevail on a discriminatory effect challenge. As a result, their Equal Protection claim can only rest on a facial challenge, which will not succeed. "[I]n a facial challenge, it is

the duty of the Court to interpret the language in a way that is Constitutional… [and] the challenger must establish that no set of circumstances exists under which the [challenged law] would be valid." *United States v. Salerno*, 481 U.S. at 739, 745 (1987).

Moreover, consider what would happen if the ordinances went into effect. Plaintiffs simply assert, without any support, that "landlords will be incentivized [sic] to turn away rental applicants who appear to be Hispanic…." Pl. Mtn. for Pre. Inj., 16. This speculative claim does not follow logically. It is already a federal crime to harbor an illegal alien in an apartment. 8 U.S.C. § 1324(a)(1)(A)(iii). So if landlords are inclined to make assumptions about legal status on the basis of ethnicity, there is already sufficient incentive to do so under federal law. More importantly, the operation of Ordinance 1721 is likely to *decrease* such discriminatory decision making, not increase it. Because a SAVE check can occur in seconds and the landlord can receive assurance from the federal government that a prospective occupant is lawfully present in the United States, the landlord need not guess anymore. Ordinance 1721 provides her a failsafe mechanism for verifying the status of her tenants, removing the need for haphazard judgments influenced by ethnic prejudice.

Plaintiffs also assert without support that employers will discriminate against Hispanic workers when hiring new employees. Plaintiffs complain 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. Plaintiffs are evidently unaware of a central feature of federal immigration law. Since 1986, employers have been obligated under federal law to refuse to hire unauthorized aliens, 8 U.S.C. § 1324a(a)(1), to scrutinize documents provided by prospective employees, 8 U.S.C. § 1324a(b)(1), and to retain employees' I-9 forms. 8 U.S.C. § 1324a(b)(3). The Basic Pilot Program electronic verification system takes the uncertainty out of this process, providing employers with confirmation from the federal government that a prospective employee is authorized to work in the United States. Ordinance 1722 encourages (but does not require) employers to use the Basic Pilot Program, by

[2] Plaintiffs in their Motion for Preliminary Injunction incorrectly append a draft of Ordinance 1722, not the final version that the Board of Aldermen enacted. In Plaintiffs' incorrect version, the anti-discrimination clause exists in §

offering them safe harbor and immunity from loss of license if they verify employees through the Program. Ordinance 1722 § 4.B(5). 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.

4. Plaintiffs' Theory Lacks State Action

Assuming *arguendo* Plaintiffs could somehow overcome all of the problems described above in their discriminatory effect 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 renting and 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 the ordinances. They 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).

C. Preclusion Doctrines Do Not Apply

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.

4.B(2), but is worded slightly differently.

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. Exhibit D, slip op. at 6-7. Moreover, since none of the claims that Plaintiffs included in their Motion for Preliminary Injunction were even mentioned by the *Reynolds* Court, preclusion does not occur.

In addition, the ordinances at issue differ 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 various provisions in Section 5 of Ordinance 1722 were present in the earlier ordinance (Ordinance 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. Therefore, the factual scenario that is presented is 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).

IV. THE PUBLIC INTEREST OUTWEIGHS PLAINTIFFS' CLAIM OF "INJURY"

In the context of this case, the third and fourth considerations in the issuance of a preliminary injunction essentially collapse into one—whether the public interest as expressed by the elected Board of Aldermen and Mayor outweighs any harm to Plaintiffs. Reflecting the paucity of legal support available to them, Plaintiffs resort to unsubstantiated opinion and pejorative description. Pl. Mtn. for Pre. Inj., 19. Plaintiffs protest that "shame and disrepute" has fallen on the City, and therefore it is in the public interest for a preliminary injunction to issue. *Id*.

The estimation of the Plaintiffs that "shame and disrepute" has befallen Valley Park is a curious one, to say the least. The elected representatives of the residents of Valley Park constitute the only body charged with determining the public interest of the City. They have expressed that public interest by

passing the ordinances in question. They are also quite capable of assessing any "disrepute" facing the City. Plaintiffs appear to be suggesting that this Court should save the City from its own disrepute and second-guess the judgment of the Board of Aldermen and Mayor. That is not the role of an Article III court in our constitutional system. And, for the record, Plaintiffs' opinions regarding the "disrepute" of the City were evidently not shared by the majority of Valley Park voters on April 3, 2007. Alderman Steve Drake, an outspoken proponent of the ordinances, defeated by a 7% margin a challenger who campaigned as an opponent of ordinances.[3]

Plaintiffs fail to recognize that the declarations of purpose in the opening sections of Ordinance 1722 are more than mere conjecture. It is a fact 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. In the last 12 months, numerous illegal aliens have been arrested by Valley Park police for criminal activity (and in each case the alien's illegal status was determined by the alien's admission or by LESC verification). Those crimes might not have occurred if the ordinances had been in effect beforehand. It is also a fact that the city has a clear public interest in discouraging employers from hiring unauthorized aliens over U.S. citizens and authorized alien workers. It is plainly in the public interest to protect law abiding residents against the loss of their jobs and the depression of their wages caused by competing illegal labor.

CONCLUSION

For all of the reasons explained above, Defendant respectfully requests that this Court deny Plaintiffs' motion for a preliminary injunction. If Plaintiffs were to succeed in obtaining final injunctive relief, their interests would be fully and sufficiently protected.

ORAL ARGUMENT REQUESTED.

[3] *St. Louis Co.*, ST. LOUIS POST-DISPATCH, April 4, 2007, B-4. The electoral contest between Alderman Steve Drake and challenger Martha Rodriguez was widely regarded as "partly … a test of how voters in this city of 6,500 feel about the series of ordinances aimed at illegal immigrants." Stephen Deere, *Candidate fights move against illegal immigrants*, ST. LOUIS POST-DISPATCH, March 15, 2007, B-1.

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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 1st day of June, 2007:

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