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.	)	

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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In their Amended Response Memorandum, Plaintiffs concede that there are no genuine issues of material fact that must be resolved before this Court can adjudicate Plaintiffs' preemption claim and state law claim. Pl. Amd. Resp. Memo. 4. However, Plaintiffs still seem rather uncertain in this regard. Plaintiffs make a fleeting attempt to present an issue of material fact regarding preemption in their September 18, 2007, Memorandum, claiming implausibly that "whether the nature or enforcement of Ordinance 1722 brings it within the 'licensing law' exception" of 8 U.S.C. § 1324a(h)(2) can be construed as a "factual issue." Pl. Memo. Supp. Mtn. for Contin. 7. However, this matter of express preemption under 8 U.S.C. § 1324a(h)(2) is obviously a question of statutory interpretation—not one of fact. Then, in their September 26, 2007, Memorandum, Plaintiffs change course once again and concede that there are no controverted issues of material fact regarding their express preemption claim, but state that there might be issues of material fact that could be discovered regarding their conflict preemption claim. Pl. Reply Supp. Rule 56(f) Mtn. and Stay 4.

Plaintiffs do not explain how a conflict preemption claim could possibly turn on a factual question, much less what the particular factual question is in this case. *Id*. It is well established in constitutional jurisprudence that "[p]reemption is a question of law…." *Nat'l Bank of Commerce v. Dow Chem. Co*., 165 F.3d 602, 607 (8th Cir. 1999)); *Noe v. Henderson*, 456 F.3d 868, 870 (8th Cir. 2006). It is not, and never has been, an issue of fact. It is a legal inquiry into the question of whether a state or local statute conflicts with federal law, either expressly or impliedly. Thus, there is certainly no impediment to this Court ruling on Defendant's Motion for Summary Judgment with respect to Plaintiffs' preemption claim and Plaintiffs' state law claim.

With regard to Plaintiffs' remaining two claims—due process and equal protection—Plaintiffs assert that there are genuine issues of material fact that must be resolved. However, Plaintiffs have failed to explain how the discovery of any additional information would advance this Court's adjudication of the issues. With respect to Plaintiffs' due process claim, it is difficult to see how there could be any material facts discovered in this regard, since Ordinance 1722 has yet to be enforced against any business entity; and

the process that is established by Ordinance 1722 has never commenced. With respect to Plaintiffs' due process claim, it is a facial challenge based simply on the text of the ordinance. Any discovery would merely involve the asking of hypothetical questions about hypothetical cases of future enforcement. It is difficult to see how there could be any material facts discovered in this fashion. It is undisputable that this Court may consider a facial due process claim, without additional fact finding, in adjudicating Defendant's Motion for Summary Judgment.

The only claim left is the equal protection claim. But as Defendant has pointed out, Plaintiffs lack standing to bring this claim on behalf of unidentified third parties and Plaintiffs also lack the necessary state action behind their hypothetical discriminatory impact. Standing is a jurisdictional issue. Moreover, neither party is seeking discovery that has any relevance to Plaintiffs' attempt to raise the claim of unidentified third parties. With respect to Defendant's argument that Plaintiffs lack state action, neither party is seeking discovery that has any relevance to that inquiry either. As is explained below, Plaintiffs' attempts to plug these two holes in their equal protection argument are unavailing. (If, however, this Court disagrees with Defendant's contentions that Plaintiffs lack the necessary standing and state action to bring their equal protection claim, then discovery would be appropriate at that point.) Therefore, all four substantive claims in Plaintiffs' complaint may be disposed of immediately in this Court's adjudication of Defendant's Motion for Summary Judgment.

I. ORDINANCE 1722 IS NOT PREEMPTED BY FEDERAL IMMIGRATION LAW

A. The Heavy Presumption Against Preemption Must be Applied

Plaintiffs begin their argument on the preemption issue by attempting to displace one of the most fundamental presumptions in constitutional law: the presumption that state laws are not preempted, unless congressional intent to preempt is *clear and manifest*. "In all preemption cases…we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was a clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485(1996)

(*citing Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947)). See also *Cipollone v. Liggett Group, Inc*., 505 U.S. 504, 516 (1992).

The presumption against preemption is not simply a canon of statutory interpretation, it is a bulwark in our constitutional structure. As Justice Stevens has observed:

> Our presumption against pre-emption is rooted in the concept of federalism. ....The signal virtues of this presumption are its placement of the power of pre-emption squarely in the hands of Congress, which is far more suited than the Judiciary to strike the appropriate state/federal balance … In addition, the presumption serves as a limiting principle that prevents federal judges from running amok with our potentially boundless (and perhaps inadequately considered) doctrine of implied conflict pre-emption based on frustration of purposes.

Geier v. Am. Honda Motor Co., 529 U.S. 861, 907 (2000) (Stevens, J., dissenting). Accordingly, it is not a presumption to be set aside lightly.

Nevertheless, Plaintiffs attempt to persuade this Court to set this presumption aside, *citing United States v. Locke*, 529 U.S. 89, 108 (2000), for their claim that the presumption against preemption does not apply in areas where there has been significant federal involvement in the past (such as immigration). Pl. Amd. Resp. Memo. 6. However, Plaintiffs fail to note that *Locke* has since been distinguished and narrowed by the Supreme Court. The passage that Plaintiffs cite from *Locke* is part of a section of the *Locke* opinion dissecting the earlier holding of *Ray v. Atlantic Richfield Co*., 435 U.S. 151 (1978). The Supreme Court would come back two years later and clarify that "As we explained in *United States v. Locke*, … the analysis in *Ray* was governed by field-pre-emption rules *because* the rules at issue were in a 'field reserved for federal regulation' and 'Congress had left no room for state regulation of these matters.' *Sprietsma v. Mercury Marine*, 537 U.S. 51, 69 (2002) (emphasis added). In contrast, the case at bar concerns an area in which such field preemption has *not* occurred. As the U.S. Supreme Court stated unequivocally in *De Canas v. Bica*, 424 U.S. 351 (1976)—the controlling precedent in all preemption cases involving immigration law—the regulation of immigration by the federal government is *not* 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).

Moreover, Plaintiffs fail to address the rule that regardless of the presumption that an Article III Court brings to preemption, the Court must not find preemption absent clear and manifest congressional intent to preempt. "[W]e will not infer pre-emption of the States' historic police powers absent a clear statement of intent by Congress." *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 111-12 (1992) (Kennedy, J., concurring) (*citing Rice v. Santa Fe Elevator Corp*., 331 U.S. at 230; *Jones v. Rath Packing Co*., 430 U.S. 519, 525 (1977); and *English v. General Electric Co*., 496 U.S. 72, 79 (1990)). Article III Courts are bound by an "obligation to infer pre-emption only where Congress' intent is clear and manifest" *Cipollone v. Liggett Group*, 505 U.S. 504, 524 (1992) (Blackmun, J., dissenting). Indeed, as Justice Rehnquist would remember with regard to the controlling precedent in the case at bar—*De Canas v. Bica*: "The statute in *De Canas* discriminated against aliens, yet the Court found no strong evidence that Congress intended to pre-empt it." *Toll v. Moreno*, 458 U.S. 1 (1982) (Rehnquist, J., concurring). Plaintiffs have not produced any evidence of congressional intent to preempt Ordinance 1722, much less evidence of *clear and manifest* congressional intent to preempt.

B. Plaintiffs Cannot Avoid the Express Language of 8 U.S.C. 1324a(h)(2)

In what can only be described as an Orwellian twist of language, Plaintiffs assert that when Congress expressly *permitted* the imposition of licensing sanctions on the employers of unauthorized aliens in 1986, Congress actually intended to *prohibit* such sanctions. 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). Clearly, 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 clearly allowed for state and local legislation on the subject—in the form of

"sanctions … through licensing and similar laws." The text states unambiguously upon whom states and localities may impose such sanctions: "upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2). Thus, the plain meaning of the statute is that states and localities may deny or suspend licenses sought or held by those who employ, or recruit or refer for a fee for employment, unauthorized aliens.

It is axiomatic that the plain meaning controls the interpretation of statutes. "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: the judicial inquiry is complete." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254, 112 (1992) (citations and internal quotation marks omitted). "A statute's plain meaning must be enforced… ." *United States Nat'l Bank v. Independent Ins. Agents of Am.*, 508 U.S. 439, 454 (1993). "[T]he plain language of the Act controls if it is unambiguous." *Trs. of the Twin City Bricklayers Fringe Benefit Funds v. Superior Waterproofing, Inc.*, 450 F.3d 324, 329 (8th Cir. 2006) (*citing United States v. Mickelson*, 433 F.3d 1050, 1052 (8th Cir. 2006)). "We adhere to the general principle that '[when] the plain language of a statute is clear in its context, it is controlling.'" *King v. Ahrens*, 16 F.3d 265, 271 (8th Cir. 1994) (*quoting Blue Cross Ass'n v. Harris*, 622 F.2d 972, 977 (8th Cir. 1980)). "Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (U.S. 1997) (quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240 (1989)). See also *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (U.S. 2002). An Article III Court must have a truly extraordinary reason to set aside the plain meaning of the statutory text. *See BP Am. Prod. Co. v. Burton*, 127 S. Ct. 638, 649 (2006).

Nevertheless, Plaintiffs would have this Court set aside the plain meaning of the statutory text of 8 U.S.C. §1324a(h)(2) and replace it with Plaintiffs' implausible interpretation of a stray statement in a committee report. Plaintiffs disregard the longstanding principle of statutory interpretation that when presented with a "straightforward statutory command, there is no reason to resort to legislative history."

United States v. Gonzales, 520 U.S. 1, 6 (1997). "While we now turn to the legislative history as an additional tool of analysis, we do so with the recognition that *only the most extraordinary showing of contrary intentions* from those data would justify a limitation on the 'plain meaning' of the statutory language." *Garcia v. United States*, 469 U.S. 70, 75 (1984). Plaintiffs' spin of the committee report not only fails to meet the standard of "extraordinary showing," it fails to meet the standard of common English usage.

C. Plaintiffs Misconstrue the Committee Report by Inserting a Requirement of Prior Federal Prosecution

What, precisely, is the statement from a committee report that Plaintiffs rely upon? Far from being an "extraordinary showing" in support of Plaintiffs' argument, it is statement that actually supports the Defendant in this case. Plaintiffs point to a statement from the House Committee Report on the Immigration Reform and Control Act (IRCA) of 1986; however, Plaintiffs do not provide the full paragraph, which reads:

> They [the penalties in this section] are not intended to preempt or prevent lawful state or local processes concerning the suspension, revocation or refusal to reissue a license to any person who has been found to have violated the sanctions provisions in this legislation. Further, the Committee does not intend to preempt licensing or "fitness to do business laws," such as state farm labor contractor laws or forestry laws, which specifically require such licensee or contractor to refrain from hiring, recruiting or referring undocumented aliens.

H.R. Rep. 99-682(I), 1986 U.S.C.C.A.N. 5649, 5662. Plaintiffs offer only a fragment of the first sentence in their memo. They focus on the words "who has been found to have violated the sanctions provisions in this legislation." Pl. Amd. Resp. Memo. 8. They claim, without any support, that "has been found" means "has been found in federal proceedings." *Id.* Therefore, they reason, local governments are only permitted to impose licensing sanctions on a person after that person has been prosecuted and convicted in federal proceedings for employing unauthorized aliens. There are three fatal flaws in Plaintiffs' reading of this committee report text.

First, and most importantly, Plaintiffs conveniently ignore the first half of the sentence, which specifically refers to "state or local processes." The actor who "finds" the person to have violated the law by employing an unauthorized alien is not a federal official, but the state or local official who makes the determination in the "state or local process." The whole sentence from the committee report reads: "They are not intended to preempt or prevent lawful *state or local processes* concerning the suspension, revocation or refusal to reissue a license *to any person who has been found to have violated* the sanctions provisions in this legislation." H.R. Rep. 99-682(I), 1986 U.S.C.C.A.N. 5649, 5662 (emphasis added). Admittedly, the sentence is somewhat ambiguous. But the most reasonable interpretation of *who* the actor is that "finds" a person to have employed unauthorized aliens is derived by looking to the first half of the sentence, which refers to state or local processes. The federal government is mentioned nowhere in the paragraph. A fundamental rule of grammar and statutory interpretation requires that the subject of a passive verb construction ("has been found") be identified in an adjacent sentence. But no such mention of the federal government is to be found. Plaintiffs manufacture their assumption (that the federal government must be the actor) out of thin air.

Second, assuming *arguendo* that Plaintiffs' assumption about the meaning of the committee report were true—that the federal government must first "find" that the employer is employing an unauthorized alien before a state or city could suspend or deny a business license—Ordinance 1722 would still pass muster. Ordinance 1722 specifically requires that the federal government must *first* find that the alien in question is unauthorized to work in the United States before the City may reach the same conclusion:

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

Ordinance 1722 § 5.C. Only *after* a conclusive verification is received from the federal government can the City move forward and notify a business entity that the employee in question is believed to be unauthorized to work in the United States, Ordinance 1722 § 4.B(4), and that the employer

has three days to take one of several possible actions to correct the violation after being so notified, Ordinance 1722 § 5.B.(1)-(3). At that point, the employer has constructive knowledge that he is employing an unauthorized alien in violation of 8 U.S.C. § 1324a. 8 C.F.R. § 274a.1(l)(1) (situations in which employer may have "constructive knowledge that an employee is an unauthorized alien include, but are not limited to, situations where the employer: … (iii) Fails to take reasonable steps after receiving information indicating that the employee may be an alien who is not employment authorized…."); *Mester Mfg. Co. v. INS*, 879 F.2d 561, 567 (9th Cir. 1989); *New El Ray Sausage Co. v. INS*, 925 F.2d 1153, 1158 (9th Cir. 1991). The committee report's phrase "has been found" is ambiguous as to what constitutes a "finding." Plaintiffs, without a shred of support, insist that "has been found" means "has been prosecuted and convicted in by the federal government." That is quite a stretch. If such hurdles had to be met before a local government could exercise its authority to apply licensing sanctions as allowed by federal law, Congress certainly could have (and would have) listed those requirements in the statutory text.

The third problems with Plaintiffs' implausible interpretation of this Committee Report is that it conflicts with the plain language of the statutory text. The plain language of 8 U.S.C. § 1324a(h)(2) indicates that licensing sanctions may be imposed by localities "upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." If Congress had shared Plaintiffs' view, Congress would have enacted a statute containing the words "upon those *who have been prosecuted and convicted by the federal government* for employing, or recruiting, or referring for a fee for employment, unauthorized aliens." Of course, Congress did not choose that phrasing, or anything close to it. Rather, we have the statutory text as it is, which plainly indicates that localities may impose such sanctions upon those who employ unauthorized aliens. Nothing in the statutory language requires any prior federal action against the employer before a locality may suspend the license of an entity that employs unauthorized aliens. The language of the statute that Congress approved, not language from the House Report, controls. *Exxon Mobil Corp. v. Allapattah Services*, Inc. 545 U.S. 546, 568 (2005) (the "authoritative statement is the statutory text, not the legislative history"); see also *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S.

137, 150 n. 4 (describing House Report No. 99-682 as a "single Committee Report from one House of a politically divided Congress" and noting that dissent's reliance on the report "is a rather slender reed").

D. A Committee Report Cannot Trump the Language of a Statute in Any Case

Plaintiffs are evidently unaware of the rule that in preemption cases, an Article III Court must preempt only when congressional intent is "clear and manifest." As the Supreme Court has emphasized, when interpreting "an express pre-emption clause, our 'task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.'" *Sprietsma*, 537 U.S. at 62-63 (*quoting CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)). In *Sprietsma*, the Supreme Court was similarly urged to override the plain language of a federal statute by finding broader preemptive intent in a committee report. Importantly, the Court held that *such preemptive intent could not be based on a committee report*: "Nor is a clear and manifest intent to sweep away state common law established by an unembellished statement in a House Report…." 537 U.S. at 69-70. A statement in a committee report is not enough to constitute the "clear and manifest" intent of Congress. Only the text of a statute can establish such intent. As noted above, the plain statutory language permits a broad window for states and localities to act in the field, by imposing licensing sanctions. The text of the statute does not include any condition requiring prior federal enforcement to occur before a state or locality may act. Such a requirement would dramatically narrow the scope of the permitted state and local activity. An Article III Court cannot infer such a preemptive requirement absent a clear and manifest statement of congressional intent.

E. Ordinance 1722 is a Licensing Law Within the Meaning of 8 U.S.C. § 1324a(h)(2)

Plaintiffs' next argument is one that borders on the frivolous. Plaintiffs contend that even though the only "sanction" imposed by Ordinance 1722 is the temporary suspension of a business license, and Ordinance 1722 requires employers to sign an affidavit at the time they apply for a business license, nevertheless "Ordinance 1722 is not a 'licensing or similar law.'" Pl. Amd. Resp. Memo. 7. According to

Plaintiffs, the term "licensing [] law" in 8 U.S.C. 1324a(h)(2) only includes fitness to do business laws. Therefore Plaintiffs assert, "Neither IRCA nor Ordinance 1722 are concerned with an employee's fitness to do business, and thus Ordinance 1722 is not a 'licensing law' within the statute." Pl. Amd. Resp. Memo. 8. In order to reach this cramped and narrow definition of "licensing law," Plaintiffs refer to the following sentence in the committee report: "Further, the Committee does not intend to preempt licensing *or* 'fitness to do business laws,' such as state farm labor contractor laws or forestry laws, which specifically require such licensee or contractor to refrain from hiring, recruiting or referring undocumented aliens." H.R. Rep. 99-682(I), 1986 U.S.C.C.A.N. 5649, 5662 (emphasis added). Plaintiffs then conclude that this sentence means that licensing laws and fitness to do business laws are the same thing. Pl. Amd. Resp. Memo. 7. There are two problems with Plaintiffs' argument.

First, Plaintiffs ignore the word "or" in the sentence quoted. The committee report does not define licensing laws *as* fitness to do business laws. Rather the committee reports states: "the Committee does not intend to preempt licensing or 'fitness to do business laws….'" H.R. Rep. 99-682(I), 1986 U.S.C.C.A.N. 5649, 5662. The use of the word "or" indicates that the two types of laws are alternatives. "The ordinary usage of the word 'or' is disjunctive, indicating an alternative. Construing the word 'or' to mean 'and' is conjunctive, and is clearly in contravention of its ordinary usage." *United States v. Smith*, 35 F.3d 344 (8th Cir. 1994). "The usual meaning of the word 'or' is that it 'indicates alternatives.'" *Wang v. Immigration & Naturalization Service*, 622 F.2d 1341 (9th Cir. 1980) (*quoting Azure v. Morton*, 514 F.2d 897, 900 (9th Cir. 1975) (reversed on other grounds in *Immigration & Naturalization Service v. Jong Ha Wang*, 450 U.S. 139 (1981)).

Second, in making this argument, Plaintiffs conveniently ignore the preceding sentence in the committee report: "They [the penalties in this section] are not intended to preempt or prevent lawful *state or local processes concerning the suspension, revocation or refusal to reissue a license* to any person who has been found to have violated the sanctions provisions in this legislation." H.R. Rep. 99-682(I), 1986

U.S.C.C.A.N. 5649, 5662 (emphasis added).[1] The italicized words explain what the committee report deemed a "licensing law" to be. And they describe Ordinance 1722 precisely: a local process concerning the suspension of a license where a business entity is informed that it is employing an unauthorized alien but nevertheless continues to do so. Plaintiffs can only come to their implausible conclusion that Ordinance 1722 is not a licensing law within the meaning of 8 U.S.C. § 1324a(h)(2) by ignoring this sentence, while also ignoring the word "or" in the next sentence of the committee report. The language of the committee report simply cannot bear the meaning that Plaintiffs ascribe to it. In any event, Defendant contends that it is not even necessary to parse this legislative history, because the text of the statute is unambiguous.

F. Plaintiffs Ask this Court to Second-Guess a Policy Decision of Congress

Perhaps recognizing the weakness of their claim that Ordinance 1722 is not a "licensing law," Plaintiffs in the alternative argue that even if Ordinance 1722 *is* a licensing law, as that term was used by Congress, *it shouldn't be*. Pl. Amd. Resp. Memo. 7-8. Plaintiffs complain that it would be a bad policy for Congress to reserve for the federal government the penalties of civil fines and criminal punishment while allowing states and localities "to impose the enormous penalty of entirely shuttering a business." *Id*. at 8. In seeking to correct this congressional policy error, Plaintiffs urge this Court to follow the lead of Judge James Munley in the U.S. District Court for the Middle District of Pennsylvania in *Lozano v. City of Hazleton*, 496 F.Supp. 2d 477 (M.D. Pa. 2007).

In that decision, Judge Munley disregarded the plain language of 8 U.S.C. § 1324a(h)(2) because, in his opinion, "It *would not make sense* for Congress in limiting the state's authority to allow states and municipalities the opportunity provide the ultimate sanction, but no lesser penalty." *Id*. at 519 (emphasis added). In Judge Munley's view, "to force the employer out of business by suspending its business permit [is] what we could call the 'ultimate sanction.'" He concluded that the suspension of a business license is a

[1] This is the very same sentence that Plaintiffs place so much emphasis on when making their spurious claim that the committee report allows states and localities only to impose licensing sanctions after a federal conviction has been

greater sanction than criminal punishment in the form of imprisonment. *Id.*[2] Certainly, reasonable minds may disagree as to which sanction is greater.[3] However, one thing is certain. Although Judge Munley cloaked his inquiry as one into the meaning of the "plain language" of federal law, in the very next sentence he disregarded the plain language of under 8 U.S.C. § 1324a(h)(2) simply because he thought that Congress's approach "would not make sense." *Id.* He substituted his own policy judgment for that of Congress, deciding that Congress should not have given states and localities what he described as the "ultimate sanction." In so doing, he stepped outside of his judicial role. Plaintiffs would have this Court make the same mistake. There is no ambiguity in Congress's reservation of sanctions "through licensing … laws" to states and local governments. 8 U.S.C. § 1324a(h)(2). The fact that Judge Munley disagreed as a policy matter with Congress's decision to do so (and that Plaintiffs share the same dissatisfaction with Congress's decision) is not an appropriate basis for this Court to find that Congress has expressly preempted Ordinance 1722.

G. Ordinance 1722 Does Not Conflict with the Basic Pilot (E-Verify) Program in Any Way

Plaintiffs also argue that federal law preempts Ordinance 1722 because, under federal law, participation in the Basic Pilot Program (recently renamed "E-Verify") is discretionary. Plaintiffs style this argument as one of conflict preemption. Amd. Resp. Memo. 11. At the outset, Plaintiffs intentionally gloss over the fact that Ordinance 1722 *does not establish any general requirement* that business entities in Valley Park enroll in the E-Verify Program. A business entity that is never found to violate Ordinance 1722 by employing two or more unauthorized aliens would never be required to participate in the E-Verify Program under the terms of Ordinance 1722. See Ordinance 1722 § 4. The only business entity that would ever be required to participate in the E-Verify Program is one that is confirmed by the federal government

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secured.

[2] Judge Munley also incorrectly characterized the operation of the Hazleton ordinance, which did not force an employer "out of business," but simply imposed a *temporary* suspension of a business license, similar to Ordinance 1722. 496 F.Supp. 2d at 519, 535-36.

to be employing two or more unauthorized aliens, fails to correct the violation within the allotted time, has its license suspended, and as a condition of terminating the suspension enrolls in the E-Verify Program as stipulated in Ordinance 1722 § 4.B(6)(b). Beyond that, enrollment in the E-Verify Program is a prerequisite to receiving a City contract or grant exceeding $10,000. Ordinance 1722 § 4.D. And Valley Park encourages business entities in the City to enroll in the E-Verify Program, by offering them safe harbor under Section 4.B(5) of Ordinance 1722 if they verify their new hires with the federal government through E-Verify.

This framework of requiring enrollment only in limited instances where a business entity has been found to employ unauthorized aliens perfectly conforms to federal law, which provides that a business entity *can be compelled* to participate in the E-Verify Program as a consequence of violating 8 U.S.C. § 1324a. "Application to certain violators. An order under 8 U.S.C. § 1324a(e)(4) or § 1324b(g) may require the subject of the order to participate in, and comply with the terms of, a pilot program with respect to the subject's hiring (or recruitment or referral) of individuals…." IIRIRA § 401(e)(2).

Ordinance 1722's requirement that business entities must enroll in the E-Verify Program to receive government contracts also mirrors federal practice. The Secretary of Homeland Security recently announced that the federal government will be requiring federal contractors to participate in E-Verify:

> [W]e will want to encourage as many companies as possible to use E-Verify, and we're going to start with the federal government.
>
> We want to lead by example. For this reason, today we are announcing that the administration has initiated a rulemaking process to require new federal contractors to enroll in E-Verify. In order to do this, we're going to amend the federal acquisition regulations, which are the rules that basically govern federal contracting, and we're going to require that federal contractors who receive new federal contracts use the E-Verify system to check the employment eligibility of the contractor work force that will work on those contracts.

Remarks by Homeland Security Secretary Michael Chertoff and Commerce Secretary Gutierrez, August 10, 2007, attached as Exhibit A. In this respect as well, Ordinance 1722 and federal practices are mirror

[3] Defendants respectfully disagree with Judge Munley in this regard; in Defendant's opinion, spending up to six months in a federal prison—a penalty under 8 U.S.C. § 1324a(f)(1)—is a greater penalty that the suspension of a business license for as brief a period as one day.

images of one another. It is well established that in immigration law, states and localities are not preempted when they undertake concurrent enforcement activity with the federal government. "Where state enforcement activities do not impair federal regulatory interests *concurrent enforcement activity is authorized*." *Gonzales v. City of Peoria*, 722 F.2d 468, 474 (9th Cir. 1983) (*citing Florida Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963)) (emphasis added). Where "[f]ederal and local enforcement have identical purposes," preemption does not occur. *Gonzales v. Peoria*, 722 F.2d at 474.

Moreover, assuming *arguendo* that Ordinance 1722 could somehow be construed as requiring participation in the E-Verify Program, it still would not be impliedly preempted through conflict preemption. Nothing in federal law suggests that a locality cannot require employers within its jurisdiction who have been found to employ unauthorized aliens to participate in the federal program as a condition of having a suspended business license reinstated. Plaintiffs have yet to identify any such barrier in federal law. They cannot do so because, as noted above, *federal law expressly provides for mandatory participation* in the E-Verify Program where the business entity has been found to employ unauthorized aliens in the past. The history of successive Acts of Congress expanding the E-Verify Program, described below, coupled with the instances in which the federal government mandates participation in the program, described above, indicates that Congress has consistently encouraged the widest possible use of the E-Verify Program. The encouragement that Ordinance 1722 gives to Valley Park business entities to enroll in the Program in no way undermines this congressional objective. On the contrary, it promotes the objective.

Determined to fabricate some sort of "conflict" with federal law, Plaintiffs next resort to speculating that perhaps the E-Verify Program will disappear in the future. Pl. Amd. Resp. Memo. 11. They must know something that the Secretary of Homeland Security doesn't. As Secretary Chertoff announced in August:

> More than 19,000 employers across the country rely on [E-Verify], it has no charge, and it's available in all the states. And what it simply does is tell you whether the particular document matches the Social Security number and whether both of those are genuine when compared to these databases.

> Because of the success of this system and its ability to take the guesswork, or some of the guesswork out of employment document review, we're going to be strengthening and *expanding* the system….

Remarks by Homeland Security Secretary Michael Chertoff and Commerce Secretary Gutierrez, August 10, 2007 (emphasis added), attached as Exhibit A. What Plaintiffs fail to inform the Court is that the Basic Pilot Program was created by Act of Congress as part of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") of 1996. IIRIRA §§ 401-405. Pub. L. 104-208, Div. C., Title IV, Subtitle A, 110 Stat. 3009-655 through 3009-666, codified as note to 8 U.S.C. § 1324a; see specifically IIRIRA § 403(a). In 2001, Congress extended its authorization of the Program to six years from the date of its initial authorization. Basic Pilot Extension Act of 2001, Pub. L. 107-128, 115 Stat. 2407. In 2003, Congress extended authorization of the Program again to eleven years from its initial implementation date and mandated its expansion to all fifty states by December 1, 2004. Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. 108-156, 117 Stat. 1944-46. This series of successive expansions and reauthorizations of the E-Verify Program, coupled with the Secretary of Homeland Security's August 2007 announcement that it will continue to be expanded, indicates that Plaintiffs' speculation that the Program might theoretically be discontinued is well off the mark. In any case, it does not represent a "clear statement of intent by Congress," which is necessary for implied preemption to occur. *Gade*, 505 U.S. at 111-12. Moreover, if the E-Verify Program ever did cease to exist, then those subsections of Ordinance 1722 requiring enrollment in the E-Verify Program would cease to operate as a practical matter because employers obviously cannot participate in a non-existent program. See, e.g., *EEOC v. Commercial Office Products Co*., 286 U.S. 107, 120 (1988) (statutes should not be construed to lead to futile results). The remainder of Ordinance 1722 would continue to operate, including the communication between the City and the federal government about any alien's work authorization status, because the federal government will continue to be obliged to answer any state or local inquiry about any alien's status, under 8 U.S.C. § 1373(c). In any event, Plaintiffs' speculation about the future of the E-Verify Program is in no way indicative of a clear and manifest congressional intent to preempt.

In another ill-fated attempt to find a conflict between Ordinance 1722 and the E-Verify Program, Plaintiffs suggest in a footnote that Congress "refused" to give state and local governments any role in the E-Verify Program. They base this claim not on any provision of federal law or regulation but on comments by two U.S. Representatives in 2003. Pl. Amd. Resp. Memo. 14-15, n.11. There is no such provision denying local government access to the Program anywhere in federal law. Indeed, the City of Valley Park has been a registered user of the E-Verify Program since March 8, 2007. See DHS Basic Pilot Confirmation, Attached as Exhibit B. Plaintiffs are evidently also unaware that there are two systems that provide internet-based access to the same federal databases: the E-Verify Program and the Systematic Alien Verification for Entitlements (SAVE) Program. The SAVE Program was developed specifically for state and local governments seeking to verify the immigration status of aliens. There are at least 205 participating government agencies across the country that are currently using the SAVE program to verify individuals' immigration status. DHS Privacy Impact Statement for SAVE, Def. Memo. Resp. to Mtn. for Pre. Inj., Exh. C, at 18. The City of Valley Park is also a user of the SAVE Program. See SAVE Memorandum of Understanding, Attached as Exhibit C.

Finally, Plaintiffs contend that Ordinance 1722 is conflict-preempted because the regulations governing the E-Verify Program allow an employee eight days to contest a tentative non-confirmation. Pl. Amd. Resp. Memo. 10-11. Here, Plaintiffs are correct in their reading of the relevant federal regulations. However, they are incorrect in their reading of Ordinance 1722. When the Department of Homeland Security (DHS) issues a "tentative non-confirmation" response to an inquiry through the E-Verify Program, the employee whose work authorization is at issue has eight days to contest that finding, and the federal government has ten days to respond. 62 C.F.R. 48309(IV)(B)(2)(a). Ordinance 1722 was carefully drafted to allow for this process to occur before the City would take any action. The receipt of a "tentative non-confirmation" response from DHS triggers Section 5.C, which was drafted specifically to accommodate this federal process when DHS is only able to offer *tentative* answer: "If the federal government notifies the City of Valley Park that it is unable to *verify* whether an individual is authorized to work in the United States, the City of Valley Park shall take no further action on the complaint until a *verification* from the

federal government concerning the status of the individual is received." Ordinance 1722 § 5.C. (emphasis added). A tentative non-confirmation, which currently occurs in under eight percent of E-Verify cases, is by definition *tentative*. See DHS Statement to Congress, Def. Memo. Supp. Mtn. for Summ. J., Exhibit C. DHS has not verified an alien's work authorization status until it issues a final non-confirmation of work authorization or a final confirmation of work authorization. Until that point, the City "shall take no further action on the complaint." Ordinance 1722 § 5.C. Only after a *final* answer is received from DHS concerning an alien's work authorization (in which the alien is found to be unauthorized) does the City notify the business entity of a violation under Section 4.B(4) and start the three-day clock running. Ordinance 1722 § 4.B(4). Only at that point is the business entity under an obligation to correct a violation under the terms of Section 5.B. *Id*.

Once DHS has issued a final verification that an alien employee is unauthorized, the business entity in question is not only obligated under Ordinance 1722 to take action, it is also obligated under federal law. "Given that IRCA makes it illegal to hire undocumented aliens … and mandates criminal penalties for those who knowingly employ such workers … termination is effectively required once an employer learns of an employee's undocumented status." *Affordable Hous. Found., Inc. v. Silva*, 469 F.3d 219, 236 (2d Cir. 2006).

In summary, Plaintiffs' argument (in addition to being based on a misreading of Ordinance 1722) falls well short of establishing that Ordinance 1722 "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *De Canas*, 424 U.S. at 363. On the contrary, Ordinance 1722 advances the objective of IRCA—namely to "to stop payments of wages to unauthorized workers, which act as a 'magnet … attract[ing] aliens here illegally,' and to prevent those workers from taking jobs that would otherwise go to citizens." *Incalza v. Fendi*, 479 F.3d 1005, 1011 (9th Cir. 2007). There is no actual conflict with federal law and Ordinance 1722 does not stand as an obstacle to the execution of the federal verification system. Therefore, it is not preempted.

H. Re-Verification of Employees is Permitted Under Federal Law

In their memorandum, Plaintiffs make the rather astonishing claim that "Congress intend[ed] that employers not seek to reverify workers once they have satisfied the initial verification requirements set forth in IRCA." Pl. Amd. Resp. Memo. 12. For this novel assertion, Plaintiffs offer only this statement from the same committee report that they repeatedly distort: "The Committee does not intend to impose a continuing verification obligation on employers." H.R. Rep. 99-682(I), 1986 U.S.C.C.A.N. 5649, 5661; see Pl. Amd. Resp. Memo. 12. Once again, Plaintiffs ignore an important word in the sentence—the word "continuing." A continuing obligation is one that is present continuously, every day that the employee works for the employer. The absence of a continuing obligation cannot be logically or grammatically equated with a flat prohibition on any re-verification of an employee's authorization to work lawfully in the United States.

Plaintiffs would do well to acquaint themselves with the terms of federal immigration law and regulations, rather than simply fishing in a committee report for stray quotes. One need not look in a committee report to see if re-verification is permitted. The answer is found in the text of federal law and regulations. In fact, federal immigration law not only allows re-verification of an employee's work authorization, it *requires* it in certain situations.

Under 8 C.F.R. § 274a.2(b)(1)(vii), "[r]everification on the Form I-9 must occur not later than the date work authorization expires." Form I-9 Instructions (Rev. 5/31/05Y) for Section 3 clearly state for the benefit of the Plaintiffs and all other employers that "[e]mployers must reverify employment eligibility of their employees on or before the expiration date recorded in Section 1 [of the Form I-9]. The Special Counsel for Immigration-Related Unfair Employment Practices confirmed as long ago as 1994 that "(INS) regulations and procedures permit reverification prior to the expiration date of the employee's work authorization" and thus reverification does not constitute document abuse. Fragomen & Bell, Immigration Employment Compliance Handbook, §10.19 (2006) (reproducing April 18, 1994, opinion letter from Special Counsel William Ho-Gonzalez). In 1996, Congress amended Section 1324b(a)(6) to clarify that requiring reverification could not be treated as an unfair immigration-related employment practice unless, upon the filing of a charge, and after notice and hearing, it has been proven that the reverification request

was made with discriminatory intent. P.L. 104-208 §421(IIRAIRA)(1996). "The 1996 amendment provides that an employer's request for more documents is not unlawful unless made for the purpose or with the intent of discriminating against an individual on the basis of national origin or citizenship status." Fragomen & Bell, *supra*, at §3.5.

In addition to these long-standing provisions of federal regulations, recent amendments to federal regulations also allow re-verification of an employee's work authorization. Whenever an employer receives information from the Department of Homeland Security indicating that an employee may not be authorized to work in the United States, the employer is expected to re-verify the employee's work authorization at least once, and possibly twice: "If the employer is unable to verify with the Department of Homeland Security within ninety days of receiving the written notice that the immigration status document or employment authorization document is assigned to the employee, the employer must again verify the employee's employment authorization and identity within an additional 3 days… ." 8 CFR 274a.1(l)(2)(iii)(B) The employer may bring himself into the "safe harbor" under the regulations by re-verifying the work authorization of the employee concerned. See 72 Fed. Regist. 45611 (Aug. 15, 2007).

I. Plaintiffs' Assertions Regarding Casual Domestic Workers and Independent Contractors are Incorrect

Plaintiffs attempt to fabricate a similar inconsistency between Ordinance 1722 and federal law with respect to independent contractors and casual domestic workers. Specifically, Plaintiffs contend that these categories of individuals are not subject to verification of work authorization under federal law, but are subject to verification under Ordinance 1722. Pl. Amd. Resp. Memo. 10. Plaintiffs do not explain how they reach this conclusion. See *id*. Upon closer inspection, it collapses completely, because they are incorrect about several aspects of federal immigration law, as well as the scope of Ordinance 1722.

Under federal law, it is illegal for a person or other entity to hire an individual for employment in the United States without complying with certain universal employment eligibility verification

requirements involving the filling out of I-9 Forms. 8 U.S.C. 1324a(a)(1)(B)(i).[4] Hire is defined as "the actual commencement of employment of an employee for wages or other remuneration." 8 C.F.R. §274a.1(c). There is a narrow exception for casual domestic workers under 8 C.F.R. § 274a.1(h). What Plaintiffs fail to explain is that this regulatory exception only extends to "casual employment *by individuals*" where the workers "provide domestic service *in a private home* that is sporadic, irregular or intermittent." 8 C.F.R. § 274a.1(h) (emphasis added). The leading case construing 8 C.F.R. §274a.1(h) is *Jenkins v. Immigration and Naturalization Services*, 108 F.3d 195 (9th Cir. 1997) . In *Jenkins*, the Ninth Circuit upheld civil penalties imposed on a private individual who picked up day laborers at a day labor site in San Rafael, California. The Court held that the plain statutory language of 8 U.S.C. §1324(a)(1)(B) extended the requirement for compliance with the Form I-9 process to all employers who "hire for employment in the United States." *Id*. at 200. The Ninth Circuit construed "domestic" employment exemption restrictively. The Court determined that "domestic" work exemption from I-9 requirements included solely household tasks that would normally be completed by a resident of the household, and expressly included "cleanup, moving or gardening" work. *Id* at 197. In addition, "domestic" work only referred to solely household tasks completed only *within one's private abode*. *Id.*

What Plaintiffs fail to recognize is that Ordinance 1722 extends only to employment relationships involving a *"business entity."* Ordinance 1722 states that "[i]t is unlawful for any *business entity* to knowingly recruit, hire for employment…." Ordinance 1722, § 4.A (emphasis added). "Business entity" is limited in Section 3 of the ordinance to business entities that require a business license, unless expressly exempted by law. "The term business entity shall include any business entity that possesses a business license, any business entity that is exempt by law from obtaining such a business license, and any business entity that is operating unlawfully without such a business license." Ordinance 1722 § 3.A(2). Therefore,

[4] An important distinction must be made at the outset. These regulatory requirements concern the process of filling out I-9 Forms, which was instituted by IRCA. As already noted in Defendant's Memorandum in Support of Motion for Summary Judgment, this type of I-9 Form documentary verification by the employer has nothing to do with whose employment may or may not be verified electronically by the federal government itself through E-Verify. This form of verification by employers scrutinizing documents is subject to errors and flaws that do not occur when the federal government itself verifies an individual's work authorization using federal electronic databases.

any business entity under Ordinance 1722 could not fit within the casual domestic worker exception to verification under federal law. Because the casual domestic worker exception is defined so narrowly by federal regulation and federal case law to include only employment by *individuals* for work *inside one's private abode*, there is no overlap with Ordinance 1722, which only concerns employment by business entities. Stated differently, the casual domestic worker exception, by definition, does not extend to business entities covered by Ordinance 1722. There is no possible conflict with federal law. The ordinance further states, "The requirements and obligations of this section shall be implemented in a manner fully consistent with federal law regulating immigration…." Ordinance 1722 § 6.A.[5]

Plaintiffs' argument regarding independent contractors is also unexplained in Plaintiffs' Memorandum. Pl. Amd. Resp. Memo. 10. They make no reference to the controlling provisions of federal law. Had they consulted these provisions, the error in their argument would have become apparent. While it is true that employers have no duty under federal law to undertake the Form I-9 process to determine the employment eligibility of *bona fide* independent contractors, the IRCA provisions of federal law expressly prohibit any employer from using "a contract, subcontract, or exchange … to obtain the labor of an alien in the United States knowing that the alien is an unauthorized alien…." 8 U.S.C. § 1324a(a)(4). If an employer is made aware that such an alien is unauthorized, then federal law effectively transforms that business-independent contractor relationship to an employer-employee relationship for the purposes of IRCA. The business entity that engages in such prohibited contractual activity "shall be considered to have hired the alien for employment in the United States in violation of paragraph 1(A)." *Id*. Further, it is a separate and additional violation of federal law for either of the Plaintiffs to continue to "employ" an independent contractor once the person or entity has learned that the person "is (or has become) an unauthorized alien…." 8 U.S.C. § 1324a(a)(2). Business entities are not required to follow the Form I-9

[5] In any event, even if this argument had any merit, Plaintiffs do not possess standing to assert it. Plaintiffs' complaint states that Windover Inc. and Jacqueline Gray are, respectively, a business entity and the entity's owner. Windover Inc. cannot, by definition, recruit or hire an exempt domestic casual worker because it is not a private individual with a private abode. Similarly, Ms. Gray cannot recruit or hire domestic casual labor in the capacity under which she filed her complaint, as a business owner. If Gray were to hire domestic casual labor to babysit or

process with a *bona fide* independent contractor under 8 U.S.C. § 1324a(b), but once they become aware the such contractor is an unauthorized alien, that relationship is treated as an employer-employee relationship (subject to verification), and they do have a statutory duty to terminate the services of such a contractor once they become aware the contractor is an unauthorized alien.

There is one additional problem with Plaintiffs' arguments concerning verification of casual domestic workers and independent contractors. There is absolutely no restriction anywhere in federal law or federal regulations on a *municipality's* verification of an alien's immigration status according to 8 U.S.C. § 1373(c). That provision of federal law requires the federal government to answer any such request from a local government, concerning *any* alien:

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

8 U.S.C. § 1373(c). Under Ordinance 1722, when a complaint is filed, it is the City that does the verifying, not the employer. The two situations that Plaintiffs identify concern *employers* who need not verify independent contractors and casual domestic workers. Those provisions in no way restrict a municipality's verify of immigration status pursuant to 8 U.S.C. § 1373(c).

J. Preemption Principles Do Not Require a Locality to Replicate an Office Within the U.S. Department of Justice

Plaintiffs illustrate just how expansive their concept of implied conflict preemption is when they claim that Ordinance 1722 is preempted because it does not establish an office to receive complaints of racial discrimination by employers. Pl. Amd. Resp. Memo. 10. Plaintiffs' novel theory appears to be this: a state or locality is conflict preempted when it takes any action as permitted under 8 U.S.C. § 1324a(h)(2) unless it also establishes an office to investigate discriminatory employment practices. Plaintiffs theory does not meet the standard of conflict preemption in immigration—that the state or local action "stands as

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wash up the dishes after a dinner party in her home, she would not be doing so as a business entity, and would not in

an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *De Canas*, 424 U.S. at 363. There is no conflict preemption standard supporting Plaintiffs' theory.

Federal law prohibits any employer from "discriminat[ing] against any individual (other than an unauthorized alien…) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment … because of the individual's national origin." 8 U.S.C. § 1324b(a)(1). The same section of federal immigration law created the Office of the Special Counsel for Immigration-Related Unfair Employment Practices within the Department of Justice. The sole responsibility of that office is to investigate complaints of hiring discrimination and related unfair employment practices. 8 U.S.C. §1324b(c). Any person in the United States who believes that he has been the subject of such discrimination may file a charge with the office. 8 U.S.C. § 1324b(b)(1). Any person seeking employment in the City of Valley Park who is subject to the hypothetical discrimination described by Plaintiffs may avail himself of these remedies under federal law. Those federal protections are fully in force in Valley Park. For Valley Park to duplicate those provisions on a local level would serve no purpose whatsoever. Employees in Valley Park remain protected by the all of the prohibitions against discrimination that are included in federal civil rights laws. *See* 8 U.S.C. § 1324b; 42 U.S.C. 2000e-2 (prohibiting discrimination based on "race, color, religion, sex, or national origin").

Later in their memorandum, Plaintiffs put a slightly different spin on this same argument. They claim that when Congress enacted IRCA, it "carefully balanced" the imposition of criminal penalties for the employment of unauthorized aliens with federal protections against employment discrimination. Pl. Amd. Resp. Memo. 14. They then suggest that Ordinance 1722 is preempted because its enforcement provisions are not balanced by a similar set of employment discrimination provisions at the local level. *Id.* at 15. This argument is blind to two crucial facts. First, the existing federal statutory protections against employment discrimination provide "balance" to the enforcement of Ordinance 1722 in the same manner that they provide balance to the federal government's enforcement of 8 U.S.C. § 1324a. Second, Ordinance 1722 provides an additional layer of anti-discrimination protection that *does not exist* under federal law.

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any conceivable circumstance be subject to Ordinance 1722.

Ordinance 1722 renders invalid any "complaint which alleges a violation on the basis of national origin, ethnicity, or race." Ordinance 1722 § 4.B(2). Like Ordinance 1722, federal immigration law allows "individuals and entities to file written, signed complaints respecting potential violations of subsection (a) or (g)(1) of [8 U.S.C. § 1324a]." 8 U.S.C. § 1324a(e)(1)(A). However, unlike Ordinance 1722, federal law does *not* contain an anti-discrimination provision that renders complaints invalid if they are based on national origin, ethnicity, or race. If the theoretical "balance" is any different under Ordinance 1722, it is weighted more heavily toward *preventing discrimination*, not toward enforcement. In any event, Plaintiffs' balance theory finds no support in the controlling precedent of *De Canas v. Bica*, 424 U.S. 351, *passim*.

What Plaintiffs continually gloss over in their repeated attempts to find "conflict" between federal law and Ordinance 1722 is that "[t]he conflict standard of preemption is strict." *Affordable Hous. Found., Inc. v. Silva*, 469 F.3d 219, 238 (2d Cir. 2006). Even if Plaintiffs could identify any slight differences between the provisions of federal law and the provisions of Ordinance 1722, such differences would not be sufficient to create implied conflict preemption. "Tension between federal and state law is not enough to establish conflict preemption. *Silkwood v. Kerr-McGee Corp*., 464 U.S. 238, 256 (1984)." *Incalza*, 479 F. 3d at 1010. A "clear demonstration of conflict … must exist before the mere existence of a federal law may be said to pre-empt state law operating in the same field." *Jones v. Rath Packing Co*., 430 U.S. at 544 (Rehnquist, J., concurring in part and dissenting in part). Federal preemption cannot be based on "unwarranted speculations" about Congress's intent. *Id*.

K. Plaintiffs' Reliance on *Hines v. Davidowitz* to Assert Field Preemption is Misplaced

Plaintiffs rely in particular on a 66-year old case that is largely irrelevant to the case at bar. Plaintiffs cite *Hines v. Davidowitz*, 312 U.S. 52 (1941), in which the Supreme Court found that Pennsylvania's Alien Registration Act of 1939 was preempted by the Alien Registration Act that Congress established in 1940. Plaintiffs cite this case in support of their theory that once the federal government enters a field, all state laws are preempted because allowing them to remain in effect would disrupt the federal government's "careful balance of policy choices." Pl. Amd. Resp. Memo. 14. Although Plaintiffs

are unclear as to what type of preemption they are asserting, it appears that they are trying to formulate a field preemption argument. In any event, they fail to recognize two important limitations on the scope of the *Hines* precedent—limitations that were imposed by the Supreme Court itself.

First, the state law at issue in *Hines* was on constitutionally weak footing because the state attempted to register *legal* aliens. 312 U.S. at 73-74. As the Supreme Court later explained in the now-controlling precedent of *De Canas v. Bica*, 424 U.S. 351, the state statute in *Hines* trenched upon Congress's authority to regulate immigration because the statute sought to "determine the conditions under which a *legal* entrant may remain" in the United States. *Id*. at 355 (emphasis added). The Supreme Court went on to distinguish *Hines* from the state law at issue in *De Canas*, which prohibited the employment of unauthorized aliens, because "the Pennsylvania statute[] in Hines … imposed burdens *on aliens lawfully within the country* that created conflicts with various federal laws." *Id*. at 363. The ordinance at issue in case at bar does not restrict the ability of aliens lawfully present in the United States to remain either. Rather, Ordinance 1722 restricts the ability of unauthorized aliens to violate federal law by working unlawfully in the United States. In *De Canas*, the Court was unequivocal in its conclusion that a state is permitted to restrict the employment of unauthorized aliens:

> 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). Six years later, the Supreme Court would reiterate that states and localities possess the authority to discourage the employment of illegal aliens:

> 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 v. Doe, 457 U.S. 202, 225 (1982). The Supreme Court has never departed from this holding. Plaintiffs offer no response in their memorandum to these two unequivocal statements from the U.S.

Supreme Court. In addition, state laws that deny privileges and benefits to *illegal* aliens have been upheld in the wake of *De Canas* by inferior 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).

The second reason that the 66-year-old decision in *Hines* is inapposite is because the federal alien registration statute in *Hines* did not explicitly reserve authority for the states and localities to act. In *De Canas*, the Supreme Court expressly distinguished the *Hines* holding in this regard and limited it accordingly:

> Moreover, *in neither* Hines *nor* Nelson *was there affirmative evidence, as here, that Congress sanctioned concurrent state legislation on the subject covered by the challenged state law*. Furthermore, to the extent those cases were based on the predominance of federal interest in the fields of immigration and foreign affairs, there would not appear to be a similar federal interest in a situation in which the state law is fashioned to remedy local problems, and operates only on local employers, and only with respect to individuals whom the Federal Government has already declared cannot work in this country.

424 U.S. at 363 (emphasis added). In contrast to the federal law involved in *Hines*, with IRCA Congress expressly reserved authority for states and localities to enact "licensing and similar laws" that impose sanctions "upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2).

Finally, Plaintiffs fail to recognize that the Supreme Court has expressly rejected the conclusion that they attempt to extract from *Hines*—that field preemption has occurred. The *De Canas* Court considered and rejected the hypothetical possibility that the regulation of immigration by the federal government might be so comprehensive that it occupies the field and leaves not room for state action:

> Only a demonstration that complete ouster of state power—including state power to promulgate laws not in conflict with federal laws—was "'the clear and manifest purpose of Congress'" would justify that conclusion…. Respondents have not made that demonstration. They 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.

424 U.S. at 357-358 (internal citations omitted). "Nor can such intent [to occupy the field] be derived from the scope and detail of the INA. The central concern of the INA is with the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully within the country." *Id*. at 359.

The passage of IRCA in 1986 did not constitute subsequent occupation of the field (even if the field is defined narrowly to cover only the employment of unauthorized aliens), because IRCA itself contains an express invitation for states and localities to enter the field. 8 U.S.C. § 1324a(h)(2). As the *De Canas* Court observed before IRCA, "Congress sanctioned concurrent state legislation on the subject covered by the challenged state law." 424 U.S. at 363. The same observation applies post-IRCA. As the Second Circuit observed in 2006, in adjudicating a preemption challenge under IRCA: "Congress's intent to preempt state law may be implied where it has designed a pervasive scheme of regulation that *leaves no room for the state to supplement*…." *Affordable Hous. Found., Inc. v. Silva*, 469 F.3d at 240 (emphasis added). The Second Circuit concluded that IRCA did *not* result in field preemption. *Id*. at 240-41. State courts have reached the same conclusion. "IRCA does not … so thoroughly occupy the field as to require a reasonable inference that Congress left no room for states to act." *Safeharbor Employer Servs. I, Inc. v. Cinto Velazquez*, 860 So. 2d 984, 986 (Fl. Ct. App. 2003).

L. Implied Preemption Does Not Usually Exist in the Presence of Express Preemption

One final observation is necessary on the subject of implied preemption (be it implied field preemption or implied conflict preemption): finding implied preemption in the presence of an express federal provision defining the exact scope of preemption contradicts basic rules of statutory construction. As Defendant has previously observed, this creates the problem of surplusage—in that the express preemption language becomes unnecessary if broad implied preemption is also being inferred from the same statute. The Supreme Court has recognized this problem and discouraged Article III Courts from finding implied preemption where Congress has inserted express preemptive language. "This [express preemption] language would be pure surplusage if Congress had intended to occupy the entire field… ." *Wisc. Pub. Intervenor v. Mortier*, 501 U.S. 597, 612-13 (1991). Plaintiffs commit precisely this error,

asserting various implied preemption arguments stemming from the enactment of IRCA, even though accepting such arguments would render 8 U.S.C. § 1324a(h)(2) mere surplusage.

In their Memorandum, Plaintiffs respond that it is possible to find implied preemption in the same statute that includes an express preemption clause. Pl. Amd. Resp. Memo. 9. In support of this statement, they cite the cases of *Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002), and *Geier v. American Honda Motor Co*., 529 U.S. 861, 869 (2000), two instances in which the Court considered an express preemption claim as well as an implied field preemption claim in the same case. Plaintiffs apparently misunderstand Defendant's argument. Defendant does not contend that it is *impossible* to consider both an express preemption claim and an implied preemption claim stemming from the same federal statute. Rather Defendant points out that the Supreme Court has repeatedly *cautioned against* finding implied preemption in the presence of express preemption language. Doing so runs the risk of violating two fundamental canons of statutory interpretation: violating the principle that judicial interpretations must not render statutory text mere surplusage, and violating the principle of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another). As the Supreme Court has explained with respect to the latter:

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," *Malone v. White Motor Corp*., 435 U.S., at 505, "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation. *California Federal Savings & Loan Assn. v. Guerra*, 479 U.S. 272, 282 (1987) (opinion of Marshall, J.). Such reasoning is a variant of the familiar principle of expression unius est exclusio alterius: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.

Cipollone v. Liggett Group, Inc., 505 U.S. 504, 518 (1992). These interpretive canons make any claim of implied preemption particularly weak in the presence of an express congressional statement on the subject. It is quite clear that Congress in enacting IRCA sought to limit its preemptive effect, by carving out an area for continuing state action in 8 U.S.C. § 1324a(h)(2). Plaintiffs would have this Court ignore the express limitation on preemption that Congress enacted.

II. Plaintiffs' Equal Protection Argument Cannot Survive

Plaintiffs Equal Protection Clause challenge, as expressed in their Motion for Preliminary Injunction, was simply a speculative assertion that Ordinance 1722 will cause employers to discriminate against Hispanic individuals when hiring new employees. Plaintiffs argue that Ordinance 1722, though facially neutral, will have an unconstitutionally discriminatory impact on such workers in the private hiring process. Pl. Mtn. for Pre. Inj., 15. In their Second Amended Complaint and in their Amended Response Memorandum, Plaintiffs belatedly recharacterize their equal protection argument by adding another theory: that a discriminatory effect will occur "by inducing City officials or Valley Park residents to file complaints ... against business entities based on their employment of Hispanics." Pl. Amd. Resp. Memo. 17. However, this new claim is subject to the same fatal flaws that require summary judgment against Plaintiffs: (1) Plaintiffs do not have standing to raise this particular claim and (2) their theory lacks state action. These flaws are sufficient to render Plaintiffs' Equal Protection claim invalid, even if all of Plaintiffs' factual assertions were true.

A. Plaintiffs Lack Standing to Raise Their Equal Protection Claim

At the outset, it must be reiterated that Plaintiffs *are employers*; they are not workers who have been denied a job. The hypothetical future hiring discrimination that they predict will occur is private discrimination against the *employees* of *other employers*. Plaintiffs do not have standing to challenge such discrimination because they, as unrelated employers, suffer no judicially cognizable injury. The injured party in such a scenario is a third party not present in this action. Establishing a judicially cognizable injury to the plaintiff is a core requirement of Article III standing. "[T]he 'injury in fact' test requires more

than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Sierra Club v. Morton*, 405 U.S. 727, 734-735 (1972). Consequently, "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, (1975). See *Thompson v. Adams*, 268 F.3d 609, 613 (8th Cir. 2001). It is a well-established general rule that "a litigant may only assert his own constitutional rights or immunities." *United States v. Raines*, 362 U.S. 17, 22 (1960). Exceptions to this rule are very narrow.[6]

Recognizing that their standing to raise this hypothetical equal discrimination claim is fatally flawed, Plaintiffs make a last-ditch attempt to resuscitate their standing in their Amended Response Memorandum. They assert that their equal protection claim falls within the narrow exception allowing third parties to possess standing to assert the rights of others. Pl. Amd. Resp. Memo. 18-20. Tellingly, Plaintiffs neglect to state what the requirements for asserting standing as a third party are.

The elements needed to assert third party constitutional rights are (1) the litigant himself still must have suffered an "injury in fact" therefore giving him a "sufficiently concrete interest" in the outcome, (2) the litigant has a "close relationship to the third party," and (3) there must be something hindering the third party's ability to protect its own interests. *Powers v. Ohio*, 499 U.S. 400, 411 (1990). Plaintiffs fail to meet all three elements of the test.

First, Plaintiffs have not shown that they themselves would suffer actual injury as was present in *Craig v. Boren*, 429 U.S. 190 (1974) on which the plaintiffs rely on heavily. In *Craig*, the vendor suffered a "direct economic injury through the constriction of her buyer's market." *Id*. at 194. Besides the obvious distinction that *Craig* involved a vendor asserting the rights of vendees (whereas in this case Plaintiff is an employer attempting to assert the rights of another employer's hypothetical future employees), there is no plausible way in which such discrimination by another employer would cause a direct injury to be suffered by Plaintiffs. Furthermore, because the plaintiffs assert only a hypothetical injury from hypothetical

[6] The exceptions include an association asserting the rights of its members (with rules); a law firm asserting the rights of clients; corporate shareholders asserting corporation's rights; a physician or hospital asserting a patient's

employees, a more applicable case than *Craig* would be *Kowalski v. Tesmer*, 543 U.S. 125 (2004). In that case, attorneys attempted to assert the rights of hypothetical indigent clients (*their own* hypothetical indigent clients, not the clients of other attorneys). The Court rejected their assertion of third-party standing.[7] The Court held that establishing an "injury in fact" under *Lujan* was still necessary. Even in a third-party standing case, the plaintiff "must demonstrate an 'injury in fact;' a causal connection between the injury and the conduct of which the party complains; and that it is 'likely' a favorable decision will provide redress. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)." *Kowalski*, 543 U.S. at 129 n.2. It is important to note that the Court made clear that the plaintiff himself must suffer all three Constitutional requirements of standing: injury, a causal connection between the injury and the challenged conduct, and redressability.

Plaintiffs recognize that they have a problem here. In an effort to gloss over this requirement, Plaintiffs make the passing statement that they meet the injury in fact requirement "because they are subject to sanctions for violation of the Ordinance." Pl. Amd. Resp. Memo. 18. What Plaintiffs neglect to mention is that they must demonstrate "a causal connection between the injury and the conduct of which the party complains." *Kowalski*, 543 U.S. at 129 n.2. There is no causal connection whatsoever between Plaintiffs "injury" (the possibility that they themselves might be subject to a complaint) and the discriminatory conduct of another employer in refusing to hire an employee because of his ethnicity. The unequal treatment of others must in turn cause the Plaintiffs direct injury. They have not, and cannot, explain how they as an employer are injured by the discriminatory employment decision of another employer. Merely being subject to sanctions in the abstract is not enough. In *McGowan v. Maryland*, 366 U.S. 420, 429-430 (1960), a case that involved an employee-employer relationship, the Court found that the employees could not assert the third-party standing to assert the constitutional rights of *their own* employer despite the fact that the employees themselves were subject to sanctions.

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rights; vendor asserting vendees rights - almost all of these have cases going both ways).

[7] The Court assumed for the sake of argument that the plaintiff attorneys could establish the first requirement—injury to themselves—but found that they could not establish the second and third requirements of third-party standing. 543 U.S. at 129-34.

Second, Plaintiffs show no close relationship to the third party victims of hypothetical discriminatory hiring practices by other employers. To even have a chance of satisfying the third party standing requirement, Plaintiffs would have to assert a close relationship to *their own* hypothetical employees. However, the Supreme Court has been reluctant to recognize third party standing even when there is a direct employer-employee relationship. *Id*. Moreover, as the *Kowalski* Court clearly stated, there is a huge distinction between *known* third-parties and *hypothetical* third-parties. "[An] *existing* attorney-client relationship is, of course, quite distinct from the *hypothetical* attorney-client relationship posited here." Kowalski, 543 U.S. at 131 (emphasis added). As the Court explained, "The attorneys before us do not have a 'close relationship' with their alleged 'clients'; indeed, they have no relationship at all." *Kowalski*, 543 U.S. at 131. The same failure is present in the case at bar. Plaintiffs would not be able to establish a sufficiently close relationship to the potential employees of another employer, even if Plaintiffs could identify actual potential employees. Much less when Plaintiffs are asserting the interests of hypothetical future employees. Plaintiffs provide no case law that even comes close to indicating that they meet this requirement to establish third-party standing. All they can do is cite an irrelevant case from the civil rights era in which close companions were discriminated against because of the race of one of the companions. From the statement that "a State must not discriminate against a person because of his race or the race of his companions," Plaintiffs extrapolate that they therefore have a sufficiently close relationship with hypothetical potential employees of another employer to satisfy the third-party standing requirements. Pl. Amd. Response Memo. 19 (quoting *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 150-52 (1970)). Standing was not even at issue in the case they cite. See *id*., passim. Clearly, the Plaintiffs have not satisfied the second element required to assert third-party standing.

Third, Plaintiffs must establish that the third parties they hope to represent are hindered in their ability to protect their interests on their own. Here Plaintiffs say absolutely nothing. Plaintiffs are either unaware of this requirement or they do not wish to talk about it. It is potential employee could bring his own Equal Protection Clause challenge. Even if the would-be employee were an illegal alien, he would

have standing to assert his own rights under the Equal Protection Clause. See *Lozano*, 496 F.Supp. at 498-99. In addition, the potential employee, not Plaintiffs, would have access to the Office of the Special Counsel for Immigration-Related Unfair Employment Practices within the Department of Justice. Only a person who believes that he has been the subject of such discrimination may file a charge with that office. 8 U.S.C. § 1324b(b)(1). Moreover, Plaintiffs are in no position to effectively assert the rights of that individual when such future discrimination occurs. Plaintiffs would not be witness to the discrimination, Plaintiffs would not be able to effectively argue the facts of the discrimination because they would be ignorant of the circumstances, Plaintiffs would have no relationship to the victim of the discrimination in order to establish the trust necessary to effectively represent him. Indeed, plaintiffs would probably not even be aware that such discrimination had occurred. Thus, the Plaintiffs clearly fail to meet the third requirement of third-party standing. Having failed to meet any of the three requirements, Plaintiffs' equal protection claim must be rejected because Plaintiffs lack standing to raise it.

B. Plaintiffs' Theory Lacks State Action

Plaintiffs second basic flaw in their equal protection theory is that it lacks 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).[8]

In their Amended Response Memorandum, Plaintiffs attempt to explain how the requisite state action exists. However, their explanation reveals a basic misunderstanding about state action: "Plaintiffs are suing the City of Valley Park… . Plaintiffs are not suing any private businesses or private persons.

[8] Plaintiffs make an unpersuasive attempt to distinguish *Cuyahoga Falls*, stating that because it involved a referendum by private individuals that preceded any action by city officials, that distinguishes it from the present case, where the action by city officials came first, and the racially-motivated private discrimination came second. Pl. Amd. Resp. Memo. 23-24. Plaintiffs offer a distinction without a difference. The order of events is entirely beside the point. The question is whether the discriminatory actions of private individuals can be said to be attributable to the City. The answer is no, in both Cuyahoga Falls and in the case at bar.

Therefore, Plaintiffs' claim is squarely based on state action." Pl. Amd. Resp. Memo. 20. Plaintiffs' argument is essentially: because we are suing a city, there is state action. To be sure, Plaintiffs are suing a city. But the problem with their argument is that in order to make a discrimination claim under the Equal Protection Clause, Plaintiffs must demonstrate that the state actor has caused or has participated in the unconstitutional conduct. Merely suing a city does not establish the requisite state entanglement. The question that the court must answer is whether the allegedly unconstitutional discrimination is attributable to a state actor. *Wickersham v. City of Columbia*, 481 F.3d 591, 597-99 (8th Cir. 2007). In the *Wickersham* case, the Eighth Circuit asked and answered this question, holding that the private organization "and the city were knowingly and pervasively entangled in the enforcement of the challenged speech restrictions." *Id*. at 599.

Plaintiffs fail to apply relevant the "state entanglement" test of state action case law. Under *Lugar v. Edmondson Oil Co*., 457 U.S. 922, 937, (1982), a court must ask whether the claimed deprivation "resulted from the exercise of a right or privilege having its source in state authority" and whether the party engaging in the deprivation "may be appropriately characterized as [a] state actor[]." *See Lugar*, 457 U.S. at 939. See also *Wickersham*, 481 F.3d at 597. The second *Lugar* query was described in full by the Supreme Court as follows: whether the person may characterized as a state actor "because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state." 457 U.S. at 937. The Supreme Court has explained the operation of the state action requirement in such cases more fully as follows:

> Our cases try to plot a line between state action subject to Fourteenth Amendment scrutiny and private conduct (however exceptionable) that is not. *Nat'l College Athletic Assoc. v. Tarkanian*, 488 U.S. 179, 191 (1988); *Jackson v. Metropolitan Edison Co*., 419 U.S. 345, 349 (1974). The judicial obligation is not only to " 'preserv[e] an area of individual freedom by limiting the reach of federal law' and avoi[d] the imposition of responsibility on a State for conduct it could not control," Tarkanian, supra, at 191(*quoting Lugar*, *supra*, at 936-937), but also to assure that constitutional standards are invoked "when it can be said that the State is responsible for the specific conduct of which the plaintiff complains," *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (emphasis in original). If the Fourteenth Amendment is not to be displaced, therefore, its ambit cannot be a simple line between States and people operating outside formally governmental organizations, and the deed of an ostensibly private organization or individual is to be treated sometimes as if a State had caused it to be performed. Thus, we say that *state*

> *action may be found if, though only if, there is such a "close nexus between the State and the challenged action" that seemingly private behavior "may be fairly treated as that of the State itself." Jackson, supra*, at 351.

Brentwood Academy v. Tennessee Secondary School Athletic Ass'n, 531 U.S. 288, 295 (2001) (emphasis added). Clearly, the behavior that Plaintiffs predict private individuals will engage in the future (whether they by private employers or private individuals submitting complaints) cannot "be fairly treated as that of the [City] itself. No City authority gives employers in Valley Park the right or privilege to discriminate on the basis of race, national origin, or ethnicity. Nothing in Ordinance 1722 can even be remotely characterized as authorizing or encouraging such private discrimination. Indeed, Ordinance 1722 expressly prohibits private discrimination in the filing of complaints. Ordinance 1722 § 4.B(2). Without such close and deliberate collaboration between state actors and private actors, Plaintiffs' equal protection claim lacks the necessary component of state action.

C. Plaintiffs' New Equal Protection Theory is Equally Flawed

Plaintiffs new version of their equal protection argument suffers from the same standing and state action problems, as well as others. They speculate that Ordinance 1722 will promote private discrimination in the form of Valley Park residents submitting complaints to the City because the employers in question employ Hispanics. Pl. Amd. Resp. Memo. 17. Once again, Plaintiffs assert an Equal Protection argument that lacks both standing and state action. Indeed, the problems are worse with this claim.

In addition to suffering from the same third party standing problems described above, due to the fact that this claim alleges discrimination against a hypothetical future employee, not against the Plaintiff employer, this claim suffers from additional standing problems: it is entirely speculative and causation rests upon the intervening action of unknown third parties. A speculative injury does not meet the requirements of standing. An injury in fact for the purpose of establishing Article III standing must be "actual or imminent, not 'conjectural' or 'hypothetical[.]'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555,

560-61 (1992). "The litigant must clearly and specifically set forth facts sufficient to satisfy these Art. III standing requirements," not rely on speculation and conjecture to do so. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). In addition, "the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560-61 (internal citations omitted). Plaintiffs hypothetical future injury falls short on both counts.

Plaintiffs' assertion that Plaintiff herself will suffer such "injury" in the future is entirely based on conjecture. Plaintiffs do not allege that they are presently employing any Hispanic employees. As a result, their standing to assert this claim rests on all six events occurring in the following speculative chain of events: (1) Plaintiffs will hire an employee in the future, (2) an Hispanic employment applicant will come forward and seek the job, (3) Plaintiffs will elect to hire that applicant, (4) some resident of Valley Park will learn about the employee's employment with Plaintiff, (5) that resident will be motivated by racial animus to file a complaint against Plaintiff under Ordinance 1722, and (6) that complaint will not be rejected outright by the City as one based on ethnicity. This chain of events is exactly the sort of speculative injury that the Supreme Court rejected in the landmark case of *Lujan*. Speculation cannot establish an Article III injury for standing purposes. *Lyons v. City of Los Angeles*, 461 U.S. 95,105-106 (1983). In addition, for this speculative injury to occur, unidentified third parties must take actions (2), (4), and (5). An unidentified Hispanic worker must come forward and seek employment with Plaintiff, and an unidentified resident of the City must file a complaint driven by racial animus. The Supreme Court has repeatedly made clear that for standing to exist, the injury may not be "'the result [of] the independent action of some third party not before the court.'" *Lujan*, 504 U.S. at 560-61 (*quoting Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976)). Plaintiffs rely on the independent action of not one, but two, third parties not before the court.

Plaintiffs' state action deficiency is even worse on this new claim because the City has expressly discouraged and disqualified the ethnicity-based complaints that Plaintiffs speculate may occur. Ordinance 1722 contains a blanket anti-discrimination clause: "Any complaint which alleges a violation on the basis

of national origin, ethnicity, or race shall be deemed invalid and shall not be enforced." Ordinance 1722 § 4.B(2). This is an extraordinary provision. Even if the business entity that is the subject of the complaint is in violation of the ordinance, the City will take no action on such a complaint. In addition, City officials are not permitted to consider race, ethnicity, or national origin when they enforce Ordinance 1722. City officials may only consider race/ethnicity/origin-*neutral* factors when deciding whether a complaint is a valid one that warrants further investigation. Ordinance 1722 § 4.B(1). With this blanket policy rejecting such discriminatory complaints, Plaintiffs' claim lacks the "close nexus between the State and the challenged action" which is necessary if seemingly private behavior "may be fairly treated as that of the State itself." *Jackson*, 419 U.S. at 351

III. Plaintiffs' Due Process Claim is Meritless

The fundamental requirement of due process is a meaningful opportunity to be heard that is appropriate to the circumstances. *Matthews v. Eldridge*, 424 U.S. 319, 333 (U.S. 1976). There is no rigid set of procedural requirements that must be satisfied. Indeed, "[t]he judicial model of an evidentiary hearing is neither required, nor even the most effective, method of decision-making in all circumstances." *Id*. at 348. As long as the party subject to the revocation of a license has notice and a meaningful opportunity to be heard, due process is satisfied. *Goldberg v. Kelly*, 397 U.S. 254, 268-69, (1970). Plaintiffs' Amended Response Memorandum asserts that both notice and a meaning opportunity to be heard are missing from Ordinance 1722. However Plaintiffs assertions are plainly incorrect. Their claims are facially invalid because they cannot be squared with the plain text of Ordinance 1722. Indeed, the plain text of Ordinance 1722 provides notice as well as multiple meaningful opportunities to be heard, including judicial evidentiary hearings. In so doing, it goes well beyond the minimum requirements of due process.

Plaintiffs' claim that Ordinance 1722 fails to provide notice is nothing more than a simple assertion in one sentence, without any supporting case law or any explanation. Pl. Amd. Resp. Memo. 31. In fact, there are multiple instances of notice in Ordinance 1722. First, all business entities within the City of Valley Park are placed on notice at the time of applying for a business permit when they must sign an

affidavit stating that they do not knowingly utilize the services of or hire any unlawful worker. Ordinance 1722 § 4.A. Ordinance 1722 operates prospectively only, so employment contracts entered into prior to the effective date of the Ordinance cannot provide the basis for enforcement against an employer. Ordinance 1722 § 5.A. Any business entity in the City can fully immunize itself against violations of the ordinance by verifying the work authorization of its future employees through the E-Verify Program. Ordinance 1722 § 4.B(5). This safe harbor provision allows a business owner to ascertain the legal status of any employee through the chosen mechanism established by the federal government. Thus, business entities are given adequate notice of the requirements of the ordinance and are provided an administrative mechanism for ensuring and confirming that they are not violating the ordinance in the future. Second, the ordinance provides notice to the business entity after the City determines that a complaint is valid. At that point, the City notifies the business entity of the complaint and requests information concerning the employee(s) in question. At that point, the business entity can provide any information that it wishes to provide to the City. Ordinance 1722 § 4.B(3). Third, after the federal government issues a final verification regarding the employees' work authorization, the City notifies the business of that verification. Ordinance 1722 § 4.B(4). Clearly, these three junctures of notice meet the requirements of due process.

Ordinance 1722 provides multiple meaningful opportunities to be heard, including judicial evidentiary hearings. In so doing, it goes well beyond the minimum requirements of due process. Plaintiffs' most significant error in their Amended Response Memorandum is that they fail to recognize that, in addition to the many opportunities to be heard that occur at specific points in the enforcement process under Section 4 of Ordinance 1722,[9] the judicial evidentiary hearings of Section 5.D. alone are sufficient to meet the "meaningful opportunity to be heard" requirement of due process. Section 5.D. provides as follows.

> Venue for Judicial Process. Any business entity subject to a complaint and subsequent enforcement under this Ordinance, or any employee of such a business entity, may challenge the enforcement of this Ordinance with respect to such entity or individual before the Board of Adjustment of the City of Valley Park, Missouri, subject to the right

[9] These multiple opportunities to be heard are described in detail in Defendant's Memorandum Supporting Defendant's Motion for Summary Judgment 35-36.

> of appeal to the St. Louis County Circuit Court. Such an entity or individual may alternatively challenge the enforcement of this Ordinance with respect to such entity or individual in any other Court of competent jurisdiction in accordance with applicable law, subject to all rights of appeal.

Ordinance 1722 § 5.D. What Plaintiffs fail to recognize is that this judicial process may be utilized by a business entity or employee *at any time* once the enforcement mechanisms of Section 4 begin. Once a complaint is filed and the City begins determination of whether the complaint is valid, enforcement has begun (even though no suspension of a business license is possible yet), and the business entity or employee may seek an injunction before the Board of Adjustment with full panoply of procedural protections that apply in a judicial hearing. Plaintiffs erroneously assume that this process only occurs post-deprivation. Pl. Amd. Resp. Memo. 35. Plaintiffs also make the empty argument that the ordinance fails to lay out the judicial standards for reviewing a challenge. *Id*. at 35-36. The judicial standards in evaluating a challenge to the enforcement of Ordinance 1722 are the same standards that apply in any Missouri state court in which a challenge is made to the enforcement of a municipal ordinance. It is not necessary for an ordinance to recite such standards for the requirements of due process to be met. If it were, then virtually every ordinance of every municipality in the state of Missouri would be unconstitutional. Not surprisingly, Plaintiffs offer no case law directly on point.

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

Plaintiffs also make the claim that Ordinance 1722 fails to provide adequate guidance to business entities. Pl. Amd. Resp. Memo. 30. Here again, the answer if evident on the face of the Ordinance. The various provisions of Section 4.B provide lengthy guidance to business entities in the event that they are the subject of a complaint. In addition, the provisions of Section 5.B describe options available to a business

entity seeking to correct a violation; and Section 5.D. describes judicial remedies available to any business entity that wishes to challenge the enforcement of the ordinance. Plaintiffs also fail to note that current federal law already requires them to determine the immigration status of an employee. 8 U.S.C. §§ 1324a(a), 1324a(b). And Plaintiffs do have a way of determining the work authorization of prospective employees. They may scrutinize documents presented by the employee, as they are already required to do by federal law, *id*.; and they may utilize the E-Verify Program, along with more than 19,000 other employers across the country, to verify the work authorization of employees with the federal government over the internet. There are multiple avenues for a business to ensure that it meets the requirements of Ordinance 1722.

Plaintiffs also assert that the suspension of a license when a business entity refuses to provide identity information about an employee in question after three days constitutes a deprivation of the license without any prior due process. Plaintiffs incorrectly refer to this as an "automatic suspension procedure." Pl. Amd. Resp. Memo. 31-32. There are two errors in Plaintiffs' argument. First, as noted above, *the full judicial process of Section 5.D. is available before any suspension occurs*. A business entity may go straight to the Board of Adjustment and seek a temporary restraining order prohibiting the City from proceeding any further in acting upon the complaint. Second, assuming for the sake of argument that Section 5.D. did not exist, it is permissible for a license to be suspended when the subject of a complaint refuses to provide information to the state. This has been well established in the context of driving under the influence statutes, where a driver's license may be suspended if the driver refuses to consent to a "breathalyzer" test. As the Supreme Court has explained:

> The District Court, in holding that the Due Process Clause mandates that an opportunity for a further hearing before the Registrar precede a driver's suspension, overstated the risk of error inherent in the statute's initial reliance on the corroborated affidavit of a law enforcement officer. The officer whose report of refusal triggers a driver's suspension is a trained observer and investigator. He is, by reason of his training and experience, well suited for the role the statute accords him in the presuspension process.

Mackey v. Montrym, 443 U.S. 1 (1979). Similarly, the City officials who investigate complaints to determine if they are valid are suited to reduce the risk of error in this process. In any case, full judicial process is available if the business entity wishes to trigger the protections of Section 5.D.

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

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

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

R.S.Mo. § 79.479. The limitations on penalties and offenses has no bearing upon the authority of cities of the fourth class to issue, suspend, or revoke business permits. Plaintiffs again fail to offer any case law suggesting that R.S.Mo. § 79.479 may somehow restrict the issuance and suspension of business permits.

Missouri cities of the fourth class have long possessed the authority to issue business licenses to business entities in their jurisdiction, and to use that licensing authority to regulate such business entities. This authority is statutorily recognized in R.S.Mo. § 94.270: "The mayor and board of aldermen shall have power and authority to regulate and to license … merchants of all kinds, grocers, confectioners, restaurants, butchers, taverns, hotels, public boardinghouses … manufacturing and other corporations or institutions … and all other business, trades and avocations whatsoever." R.S.Mo.§ 94.270. The power to issue such licenses necessarily includes the power to suspend, revoke, or decline to issue such licenses. *Horton v. Clark*, 316 Mo. 770, 781 (Mo. 1927). The courts of Missouri continue to adhere to the fundamental principle that a city has the power to revoke a license that it has issued. *Riverside-Quindaro Bend Levee Dist. v. Mo. Am. Water Co.*, 117 S.W.3d 140 (Mo. Ct. App. 2003). Unlawful action by a business entity is

a well-established basis for the revocation of a municipal business permit. The courts of Missouri have accordingly recognized a city's "power to suspend or revoke licenses on final adjudication of violation of city ordinances." *State ex rel. Jimmy's Western Bar-B-Q, Inc. v. Independence*, 1975 Mo. App. LEXIS 1800 (Mo. Ct. App. 1975). Thus Valley Park is well within its authority under state law.

Plaintiffs also fail to address the fact that a Missouri city may act within it police powers to protect the general health, safety, or welfare of the public. Businesses may be "reasonably regulated in the interest of the public welfare" by a city using its police powers. *McLellan v. Kansas City*, 379 S.W.2d 500, 504 (Mo. 1964) Conditions imposed on licensing are also a manifestation of the police powers of a Missouri city. *Horton v. Clark*, 316 Mo. 770, 781 (Mo. 1927). "[I]n the exercise of its police power, the city could regulate the conduct of the business here involved and could employ licensing as a means for such regulation." *McLellan v. Kansas City*, 379 S.W.2d at 505. An ordinance is presumed to be a valid exercise of the police power and the party challenging the ordinance has the burden of showing that it is unreasonable, see *Miller v. City of Town & Country*, 62 SW3d 431, 437 (Mo.App. E.D. 2001), *citing Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959); *St. Louis v. Liberman*, 547 S.W.2d 452, 457 (Mo. 1977); *McClellan v. Kansas City*, 379 S.W.2d at 504-05. Plainly, protecting the jobs of U.S. citizens and authorized alien workers against loss to unauthorized aliens, and protecting their wages against depression resulting from the presence of illegal labor are measures that serve the welfare of the public.

Plaintiffs contend that any doubt about the City's power under state law should be resolved against the City. However, if reasonable minds differ as to whether a particular ordinance bears a substantial relationship to the protection of the general health, safety, or welfare of the public, then the issue must be decided *in favor* of the ordinance. *Lewis v. City of University City*, 2004 Mo .App. Lexis 1119. Conditioning the retention of a business permit upon compliance with federal immigration laws governing the employment of unauthorized aliens serves the welfare of legal workers in Valley Park and the interest of all Valley Park residents in preserving the rule of law.

CONCLUSION

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

Respectfully submitted by

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served on Plaintiffs' counsel of record, listed below, by operation of the Court's ECF/CM system, this 27th day of September, 2007:

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