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

STEPHANIE REYNOLDS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
JAMES ZHANG,	)	
	)	Cause No. 06-CC-3802
Intervenor,	)	
	)	Division 13
v.	)	
	)	
CITY OF VALLEY PARK, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' MOTION FOR ORDER TO SHOW CAUSE AND CONTEMPT

FACTUAL BACKGROUND

1. On July 17, 2006, Ordinance 1708 was enacted by the City of Valley Park.

2. On September 22, 2006, Plaintiffs filed the lawsuit of *Reynolds v. Valley Park*, 06-CC-3802, in the Circuit Court of the County of St. Louis, seeking invalidation of Ordinance 1708.

3. On September 26, 2006, Ordinance 1715 was enacted by the City of Valley Park. Ordinance 1715 repealed and replaced Ordinance 1708.

4. On September 27, 2006, the plaintiffs in *Reynolds* amended their petition to seek a declaration that Ordinance 1715 was void and an injunction restraining the enforcement of Ordinance 1715.

5. On February 5, 2007, the Board of Aldermen passed, and on February 14, 2007, the Mayor approved, Ordinance 1722.

6. After February 5, 2007, counsel for Defendants contacted counsel for Plaintiffs and offered to stipulate that Plaintiffs could amend their petition to challenge Ordinance 1722 (as well as Ordinance 1721). Defendants sought to allow plaintiffs to address the many new aspects of Ordinance 1722 and give them the opportunity to challenge the current ordinance.

7. After February 5, 2007, counsel for Plaintiffs declined to challenge the validity of Ordinance 1722 and declined to amend their petition to include Ordinance 1722.

8. On March 1, 2007, the Circuit Court of the County of St. Louis (J. Wallace) held a hearing on the questions of whether Ordinances 1708 and 1715 were moot, and whether the Court could issue a declaratory judgment regarding particular challenges to those repealed ordinances under state law.

9. At the March 1, 2007, hearing counsel for Plaintiffs reiterated that they were challenging *only* the (repealed) Ordinances 1708 and 1715.

10. On March 12, 2007, the Circuit Court of the County of St. Louis issued its decision, holding that "Ordinance No. 1708 and Ordinance No. 1715 are declared void." *Reynolds v. Valley Park*, No. 06-CC-3802, slip op. at 8. The Court did not evaluate the validity of Ordinance 1722 at any point in its eight-page decision and did not enjoin the enforcement of Ordinance 1722. *Id.*

11. The Defendants had not yet submitted any briefs to the Court concerning the merits of the claim that the employment provisions of the repealed ordinances (1708 and 1715) were in violation of state law, at the time of the March 12, 2007, decision by Circuit Court of the County of St. Louis in *Reynolds*. Nor had

any party submitted any briefs to the Court as to whether Ordinance 1722 violated state law in any respect.

12. On March 14, 2007, Jacqueline Gray (a Plaintiff in this matter) filed the lawsuit of *Windhover, Inc. and Jacqueline Gray v. Valley Park* in the Circuit Court of the County of St. Louis. That case raised similar challenges based on federal and state law against Ordinances 1721 (concerning the rental of apartments to illegal aliens) and 1722 (concerning the employment of unauthorized aliens).

13. On May 1, 2007, the City of Valley Park removed the *Windhover* case to the U.S. District Court for the Eastern District of Missouri, Case No. 4:07cv00881-ERW. And on May 21, 2007, that court denied Windhover and Gray's motion to remand. The case is still pending before U.S. District Court for the Eastern District of Missouri.

14. On June 4, 2007, Defendants substantially modified Ordinance 1722 (via Ordinance 1732) by adding the word "knowingly" to Section 4.A: "It is unlawful for any business entity to *knowingly* recruit, hire for employment, or continue to employ, or to permit, dispatch, or instruct any person who is an unlawful worker to perform work in whole or in part within the City." Ordinance 1722 § 4.A.

15. On July 18, Defendants enacted Ordinance 1735, effectively repealing Ordinance 1721 (concerning the rental of apartments to illegal aliens).

16. The obligations imposed by Ordinance 1722 were in effect from its enactment on February 14, 2007. But the enforcement mechanisms were until the Temporary Restraining Order "now in force" on February 14, 2007, was dissolved. The effective date provision read: "This Ordinance shall become effective from and after its passage and approval by the Mayor in repealing Ordinance 1708 and

Ordinance 1715, provided that the enforcement of the provisions contained within Sections Two, Three, Four, Five and Six shall be effective upon the termination of any restraining orders or injunctions *now in force* in Cause No. 06CC-3802 now pending in St. Louis County, Missouri, in Division 13." Since the temporary restraining order was neither continued nor terminated, ambiguity existed concerning the date upon which enforcement could begin. On August 9, 2007, the City of Valley Park passed Ordinance 1736, clarifying that Ordinance 1722 was effective immediately but staying the enforcement mechanism therein until December 1, 2007.

15. Two Motions for Summary Judgment regarding Ordinance 1722 are currently pending before the U.S. District Court for the Eastern District of Missouri in the case of *Windhover, Inc. and Jacqueline Gray v. Valley Park*, Case No. 4:07cv00881-ERW. Those motions raise virtually all of substantive issues that were raised by the Plaintiffs in this case against Ordinances 1708 and 1715.

16. The Judge in *Windhover* stated on August 10, 2007, his intention to hold a hearing on the Defendant City of Valley Park's Motion for Summary Judgment in the month of September 2007.

ARGUMENT

A. *Missouri Hospital Association* Prohibits this Court from Expanding the Scope of its March 12, 2007, Injunction to Include Ordinance 1722 Through a Contempt Citation

Two cases mandate dismissal of Plaintiffs' Motion. In particular, *Missouri Hospital Association v. Air Conservation Commission of Missouri*, 900 SW2d 263 (Mo. App. W.D. 1995), makes clear that a court cannot through a contempt proceeding expand the scope of an initial injunction to include a subsequent, but

nearly identical, law. In that case, the circumstances were strikingly similar to the case at bar. The Air Conservation Commission of Missouri (ACC) had promulgated new rules that were "essentially identical" to rules that the trial court had enjoined in an earlier proceeding. *Id.* at 265. In a contempt action, the plaintiff Missouri Hospital Association, sought a judicial citation penalizing the ACC and prohibiting it from enforcing the new rules. The trial court agreed to do so and expanded the scope of its injunction in the subsequent citation. The trial court originally decreed that Defendant was *restrained from enforcing voided rules*, to-wit: "10 CSR 10-6.160 and 10 CSR 10-6.190, as said rules are void and of no force and effect." 900 SW2d at 266. At the contempt hearing, the trial court found the Defendant had proposed a new rule essentially identical to the voided rules. After so finding, the trial court enjoined the state agency from proposing or promulgating identical rules and ordered the payment of attorney fees. *Id.*

Only the portion of the order pertaining to the expanded permanent injunction was appealed by the State. The Court of Appeals held that a contempt hearing could not be a platform for broadening the earlier injunction. The court noted with respect to the contempt citation: "The restraint against *proposing or promulgating essentially identical rules* is broader than the restraint against enforcing the voided rules [in the original injunction]." *Id.* at 266. The Court of Appeals held the trial court exceeded its jurisdiction by imposing a broader restraint than the original injunction in a contempt proceeding. The Court of Appeals stated that the first injunction was final and non-modifiable, and that under any circumstances a civil contempt proceeding is an improper tool by which to seek an injunction against subsequent lawmaking. A contempt proceeding is a separate and

distinct proceeding from a petition for an injunction. Therefore, the Court of Appeals struck down the expanded restraints imposed by the new trial court order. In so doing, the Court of Appeals stated that an earlier injunction may not be expanded either expressly *or by implication* in a contempt proceeding:

> The trial court's pronouncement in an earlier proceeding *may not be expanded by implication in a contempt proceeding*. *Carter County R-1 School Dist. v. Palmer*, 627 S.W.2d 664,665 (Mo. App. 1982). *Missouri Hospital Assoc.*, 900 S.W. 2d at 266.

In the case at bar, Plaintiffs are requesting that this Court do exactly that—expand the scope of this Court's March 12, 2007, injunction (which only mentioned Ordinances 1708 and 1715; "Ordinance No. 1708 and Ordinance No. 1715 are declared void") to also encompass Ordinance 1722. Plaintiffs now pray for this Court to "impos[e] appropriate punishment, enjoining enforcement of Ordinances No. 1722 and No. 1736, for attorney fees and for such other and further relief as may be deemed appropriate." Plaintiffs' Motion for Order to Show Cause and Contempt, August 16, 2007. Plaintiffs are asking this court to exceed its authority, in clear violation of Missouri law.

Missouri Hospital Association also spelled out an additional problem for Plaintiffs in the case at bar. The appeals court held that "[t]he prayer for relief in a motion for contempt delineates the scope of the contempt proceedings." 900 S.W.2d at 267. Because plaintiffs in that case removed from their prayer a request for a per diem fine and/or imprisonment, the Court of Appeals held that it was improper for the trial court to issue a contempt order without a sanction for enforcement as it becomes a merely advisory order. The Court of Appeals noted that the motion should have been dismissed when the prayer deleted a request for fines or imprisonment. Finally, the court refused to uphold the trial court's award of

attorney fees to the prevailing party against the State, holding that because of the advisory nature of its order and because no specific statute authorizes an award of attorney fees against the State, that portion of the contempt findings would be overturned. *Id.*

The facts in *Missouri Hospital Association*, are remarkably similar to the case at bar, including the scope of the first court order which prohibited enforcement of specific regulations but didn't prohibit the fashioning of new similar regulations. However, the Valley Park facts are even more compelling than *Missouri Hospital Association* in that Valley Park had fashioned its new ordinance *prior* to the rendition of the March 12, 2007, decree. But the Plaintiffs simply refused to consider it. Further, in *Missouri Hospital Association*, no prayer seeking fines or imprisonment was requested, in this matter the first time a request for a fine appears is by a memorandum in support of a motion for contempt mailed to counsel for Defendant two days prior to the scheduled hearing.

Another case of considerable relevance here is *State ex rel City of Pacific v. Winston V. Buford*, 534 SW2d 819 (Mo. App E.D. 1976). In that case, the respondent judge was prohibited from hearing a contempt citation against the City of Pacific for failing to take certain affirmative actions to pay the salary and emoluments due the City marshal after the court had enjoined the impeachment of that elected official. The Court of Appeals declared the such contempt citation would exceed the authority of the trial judge:

> By his contempt motion, Albertson would have the Circuit Court cite the City for contempt for "its refusal to set aside and hold for naught its [impeachment] acts . . ." As we have previously noted, the judgment of the trial court does not call for such affirmative acts by the City.... If in the contempt proceeding the court were to require such affirmative action, it would violate the established principle that

> "to support a charge of contempt for disobedience thereof, *an order will not be expanded by implication in the contempt proceeding but must be so specific and definite as to leave no reasonable basis for doubt as to its meaning*." *G v. Souder*, 305 S.W.2d 883, 885 (Mo.App. 1957). The court may not by implication include requirements not specified in the original judgment.... If an act is not required, there can be no contempt for failure to perform it. 534 S.W.2d at 821 (emphasis added).

The same principle applies in the case at bar. The injunction of March 12, 2007, is limited to its *express terms*. Any contempt citation must be based on "specific and definite" terms in the original injunction. Plaintiffs wrongly ask this Court to exceed its authority by expanding the reach of that injunction.

However, even assuming *arguendo* that this Court had the authority to do what Plaintiffs are asking it to do, Plaintiffs' motion fails on numerous factual grounds.

B. The Plaintiffs have misrepresented two crucial facts.

There is a particularly salient misstatement in Plaintiffs' Motion to Show Cause and Contempt: Plaintiffs' erroneous claim that this Court reviewed the "penalty" provision in Ordinance 1722.

First, Plaintiffs make the following claim regarding Ordinance 1722 in paragraph 9 of their Motion:

> "Defendant had full knowledge of the contents of the court's judgment when they adopted Ordinance No. 1722 and Ordinance No. 1736, and acted willfully and in contempt of the court's judgment."

This claim is obviously erroneous, because the *Reynolds* judgment *had not yet been rendered* when the City enacted Ordinance 1722. The Valley Park Board of Aldermen passed Ordinance 1722 on February 5, 2007. On February 14, 2007, Ordinance 1722 was approved by the Mayor. On the same day, Valley Park

Ordinance No. 1724 was also enacted, amending the effective date of Ordinance No. 1722. However, the *Reynolds* court did not rule until March 12, 2007, nearly a month after Ordinance 1722 was enacted. Thus, it would have been impossible for the City to "have full knowledge of the court's judgment" because the *Reynolds* judgment did not yet exist.

Second, Plaintiffs gravely mischaracterize this Court's order of March 12, 2007. Plaintiffs claim that this Court ruled on the merits of the employment provisions of Ordinance 1715. Tellingly, the Plaintiffs do not cite any specific text in the March 12, 2007, order. Plaintiff's Motion for Order to Show Cause and Contempt, ¶ 7. Then Plaintiffs take the next step and deceptively assert that "Defendants have effectively simply renumbered and reenacted the Ordinance already held unlawful." Id., ¶ 8. Neither one of these assertions is true, as a careful reading of this Court's March 12, 2007, order makes clear.

This Court confined itself to the issues of (1) whether Ordinances 1708 and 1715 were moot, (2) whether specific provisions of those ordinances were inconsistent with state law. The only provision concerning business permits that this Court ruled upon was the original provision found in Ordinance 1708, which contained a provision denying approval or renewal of a business permit "for a period of not less than five (5) years from its last offense." Ordinance 1708 § 2. It was this five-year-minimum denial of a business permit that this Court found excessive. In the March 12, 2007, order, this Court stated it clearly: "Ordinance No. 1715 conflicts with Mo.R.Stat. § 79.470 in that it penalizes a violation of its provisions by ... forcing a business to forego a business permit, or renewal of a business permit, for a period of 'not less than five (5) years.'" *Reynolds v. Valley*

Park, No. 06-CC-3802, slip op. at 6-7 (¶10). (This Court mistakenly indicated that the five-year provision was located in Ordinance 1715, when it was actually located in Ordinance 1708).[1] The *Reynolds* decision is quite clear in this regard. The only provision of Ordinance 1708 or 1715 concerning business permits that the *Reynolds* court held to be unauthorized by state law was the five-year-minimum denial of a business permit found in Ordinance 1708. *No such provision exists in Ordinance 1715 or Ordinance 1722*. Thus, it is pure fantasy to say that the Court ruled on the completely different employment provisions of Ordinance 1722, which contain no such five-year-minimum denial. Indeed, Ordinance 1722 operates on the principal that a license can only be temporarily suspended during the period that the business entity is knowingly employing an unauthorized alien, after the business entity has been informed of that fact.

C. The Plaintiffs repeatedly declined to seek a ruling on Ordinance 1722.

During the period between the passage of Ordinance 1722 by the Valley Park Board of Aldermen on February 5, 2007, and the hearing before the Circuit Court of the County of Saint Louis, counsel for Defendants repeatedly offered to consent to Plaintiffs amending their petition to address Ordinance 1722 (and its companion Ordinance 1721, concerning harboring in rental units). Defendants assumed that Plaintiffs would not wish to seek a ruling on a repealed ordinance when a new and different ordinance was in place. Strangely, Plaintiffs repeatedly declined this

[1] This Court also mentioned the same provision of Ordinance 1708 in the preceding paragraph of its decision: "Ordinance No. 1708 conflicts with Mo.R.Stat. § 79.470 in that it provides for a fine of 'not less than Five Hundred Dollars ($500.00),' and the loss of a business permit (or its renewal) for a violation of its provisions." *Reynolds v. Valley Park*, No. 06-CC-3802, slip op. at 6 (¶9).

invitation and instead pushed forward to seek a ruling on the more vulnerable repealed ordinances. At the March 1, 2007, hearing before this Court, counsel for Defendants reiterated under oath that such an offer had been made to the *Reynolds* Plaintiffs.

> Q: ...[D]id the City of Valley Park and the Defendants offer to substitute Ordinance 1721 and 1722 in place of 1708 and 1715 and have the Court's preliminary injunction apply to it?
>
> A: Yes Sir
>
> ...
>
> Q: And that offer was not accepted?
>
> A: That's correct.

Transcript of Court Proceedings, Circuit Court of the County of Saint Louis, March 1, 2007, at 47-48. During that interchange, Judge Wallace specifically acknowledged that she was aware that the offer had been made by Defendant: "But the court does know that you all made that offer." *Id.*

Counsel for Plaintiffs also made clear at the March 1, 2007, hearing that *only* Ordinances 1708 and 1715 were before the court: "But the law is clear that this court can and should decide the validity of the entirety of both Ordinances 1708 and No. 1715 on any ground that this court believes that it should be voided." *Id.* at 18. And that is precisely what the court did, limiting its adjudication only to those Ordinances.

D. This court expressly limited its review to Ordinances 1708 and 1715.

During the March 1, 2007, hearing, this Court was quite clear that it was limiting its inquiry to Ordinances 1708 and 1715. This court stated that it was so limiting itself at the commencement of the hearing: "We're going [to] today have a

brief argument on whether or not the court can consider if 1708 and 1715 are void or that the repeal of those two ordinances takes that issue out [of] the court's hands as being moot, and then we're going move to Plaintiffs' motion for judgment...." Transcript of March 1, 2007, hearing, 5.

Ordinance 1722 was involved only with respect to mootness. Specifically, Defendant had argued that the repeal of Ordinances 1708 and 1715, coupled with their replacement by Ordinances 1721 and 1722, rendered moot any challenge to the validity of the former ordinances. The *Reynolds* plaintiffs responded that under the precedent of *Northeastern Florida Chapter of the Assoc. Gen. Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993), the court could nonetheless review the repealed ordinances as long as they were "sufficiently similar" to the new ordinances, and the "challenged conduct" might therefore continue. *Id.* at 662-63, n.3. Transcript of March 1, 2007, hearing, 19-20. Accordingly, there was some discussion at the March 1, 2007, hearing concerning the scope and nature of Ordinances 1721 and 1722. See *id.* at 14-25, 48-55.

It is in this respect that Plaintiffs in the case at bar misleadingly quote from this Court's March 12, 2007, order, by omitting important words from their quotation. Plaintiffs offer the following deceptively-altered quotation to suggest that the *Reynolds* court reviewed the validity of Ordinances 1721 and 1722:

> . . . the court finds the new ordinances [Ordinance No. 1721 and Ordinance No. 1722] are "sufficiently similar" to the old ordinances in that they are aimed at the same people and conduct and include some of the same penalties. Given that the substance of the new ordinances is the same, the court concludes the challenged conduct will continue.

Plaintiff's Motion for Order to Show Cause and Contempt, ¶ 6. The fragment quoted conceals what this Court was actually concerned about—mootness under the

City of Jacksonville precedent. The full text in the *Reynolds* opinion of March 12, 2007, reads as follows:

> Without deciding whether Defendant City of Valley Park has effectively repealed Ordinance No. 1708 and Ordinance No. 1715, *the court finds and concludes under R.E.J., Inc. v. City of Sikeston, 142 S.W.3d 744 (Mo. banc. 2004), and Northeastern Florida Chapter of the Assoc. General Contractors of America v. City of Jacksonville, 508 U.S. 656, 661-62 (1993), this case is not moot. When a party files suit seeking to void a local ordinance, a defendant cannot unilaterally moot the litigation by repealing the ordinance. Id. Furthermore,* the court finds the new ordinances are "sufficiently similar" to the old ordinances in that they are aimed at the same people and conduct and include some of the same penalties. Given that the substance of the new ordinances is the same, the court concludes the challenged conduct will continue. City of Jacksonville, supra, 508 U.S. at 662-63 and n. 3.

Reynolds, slip op. at 5) (emphasis added). The italicized words were not quoted by Plaintiffs. They illustrate exactly what this Court was determining —similarity for the purpose of determining mootness under the *City of Jacksonville* test. This Court did not, as Plaintiffs claim, "consider[]" the validity of Ordinance 1722 in any other respect.

Moreover, Plaintiffs pointedly fail to quote the following statement of fact from the *Reynolds* order: "Defendant has represented to this court that it recently repealed Ordinance No. 1715, and admitted into evidence the new ordinances *only for the purpose of its argument on mootness. Plaintiffs have not amended their pleadings to put the issue of the validity of the new ordinances before the court.*" *Reynolds*, slip op. at 3 (¶10) (emphasis added). That simple fact—that the validity of the new ordinances under state law was never before this Court on March 1, 2007—is one that Plaintiffs cannot avoid.

E. This Court did not adjudicate any issue applicable to Ordinance 1722.

Plaintiffs acknowledge that this Court was aware of Ordinance 1722's enactment, yet it did not enjoin Ordinance 1722. Rather, this Court concluded that repealed Ordinances 1708 and 1715 were not moot and reached the merits of challenges *only to the repealed ordinances* on three narrow state law grounds: (1) that the fine of not less than five hundred dollars for knowingly leasing a rental unit to an illegal alien in Ordinance 1708 was excessive; (2) that the provisions of Ordinance 1715 were in conflict with Missouri law requiring 30 days' notice and judicial process before a landlord may evict a tenant; and (3) that certain other provisions in Ordinances 1708 and 1715 (including the minimum-five-year denial of a business permit in Ordinance 1708) exceeded the authority of the City under state law. *Reynolds*, slip op. at 6-7 (¶¶ 9-11).

Plaintiffs deceptively claim that this Court ruled upon the broad question of whether a municipality may suspend a municipal business permit while the permit holder is in violation of federal immigration law by knowingly employing an unauthorized alien. As noted above, the only employment provision that the this Court found to be impermissible under state law was the *five-year-minimum* denial of a business permit, found in Ordinance 1708 § 2. As the *Reynolds* order stated, the repealed ordinance conflicted with Missouri law because it "penalizes a violation of its provisions ... by forcing a business to forego a business permit, or renewal of a business permit, for a period of 'not less than five (5) years.'" *Reynolds*, slip op. at 6-7 (¶ 10). It is important to note that the order *specifically quoted* the five-year-minimum denial of a business permit found in Ordinance 1708 § 2. In the preceding paragraph, this Court equated this five-year-minimum denial to a "loss" of the permit, not merely a suspension of the permit. *Reynolds*, slip op. at 6 (¶ 9).

This court did not in any way consider or adjudicate a challenge to the temporary suspension of a business permit only while the business entity is in violation of federal law, as Ordinance 1722 § 4.B(4-6) stipulates. Nor did the court consider the twenty-day suspension for second or subsequent violations under Ordinance 1722 § 4.B(7).

Indeed, only at the very end of the March 1, 2007, hearing did the issue of the denial of business permits even come up. In the closing minutes of the hearing, the Court reiterated that it was *only* considering the merits of challenges to two aspects of the harboring sections of Ordinances 1708 and 1715:

> THE COURT: All right. So to be clear then, the court did let everyone know that I was concerned about the excessive fines part in 1708 and the more than 30 day—or less than 30 day notice to tenants contained in the 1715, or vice-versa, I'm not sure which. Your position is the court can sever those out?
>
> MR. LEONATTI: Yes.

Transcript of March 1, 2007, hearing, 87-88. This, along with the mootness question, was all that counsel for Defendant had been notified would be considered at the March 1, 2007, hearing. Then counsel for Plaintiffs interjected and urged the Court to also consider adjudicating the five-year-minimum employer provision of Ordinance 1708:

> MS. WISNIEWSKI: Well, Your Honor, first of all, our position is that there's excessive fines for both the employment provision and the housing provision. I mean, again, you know, you come down to what has the State authorized as a punishment that a municipality can dish out. They haven't authorized a municipality to revoke a business license with no notice and then say, *We're never going to give you one for five years*. That is not an acceptable penalty.

Transcript of March 1, 2007, hearing, 88 (emphasis in original). It is important to note that counsel for Plaintiffs made this request to the Court only to specifically

adjudicate the five-year-minimum denial of business permits in Ordinance 1708. *See also id.* at 82. Counsel's reference to the revocation "with no notice" (which is a plausible reading of Ordinance 1708, but not of Ordinance 1715) also indicates that she was referring to Ordinance 1708. Eleven days later, this Court followed the prompting of counsel for the Plaintiffs and expanded the scope of the Court's review specifically to include the five-year business permit denial provision of Ordinance 1708. *Reynolds*, slip op. at 6-7. However, the Court did not review the validity of the more complex business permit provisions in Ordinance 1715. *Id.*

In paragraph 9 of the Court's conclusions of law, the Court states that "Ordinance No. 1708 conflicts . . . in that it provides for a fine of 'not less than Five Hundred Dollars ($500.00),' and the loss of a business permit (or its renewal) for a violation of its provisions." *Reynolds*, slip op. at 6. Plainly, in this paragraph the Court was referring to Ordinance 1708. Then, in paragraph 10 of the Court's conclusions of law, the court begins by referring to Ordinance 1715 and its harboring sections, but then plainly refers to the business permit section of Ordinance 1708, saying that it "forc[es] a business to forego a business permit, or renewal of a business permit, for a period of 'not less than five (5) years.'" *Reynolds*, slip op. at 6-7. Thus, this Court ruled on the rental provisions of both Ordinance 1708 and Ordinance 1715, *but on the employment provision of Ordinance 1708 only*—just as counsel for Plaintiffs requested. Nowhere does the March 12, 2007, *Reynolds* order state that the temporary suspension of a business permit during the period that the business entity is violating federal immigration law by knowingly employing an unauthorized alien is inconsistent with state law.

E. Ordinance 1722 differs significantly from Ordinances 1708 and 1715.

As noted above, this Court only mentioned the five-year denial of business permits found in Ordinance 1708 § 2. There is no identical provision to be found in Ordinance 1722. It is beyond any doubt that this Court did not rule on any specific provision in 1708 or 1715 that is *identical* to a provision found in Ordinance 1722. Ordinance 1722 differs markedly from the ordinances at issue in *Reynolds*. Nevertheless, Plaintiffs gloss over these differences and now urge this Court to issue an injunction on regarding Ordinance that has *never been briefed before this Court*, and *has never been the subject of this Court's adjudication.*

The specific distinctions between Ordinance 1722 and the earlier Ordinances are numerous. First, *nothing* in the text of Ordinance 1708 is repeated in the text of Ordinance 1722. Second, and perhaps most importantly, one of the most significant changes between Ordinance 1715 and 1722 (as amended by Ordinance 1732 on June 4, 2007) is the addition of the word "knowingly" in Section 4.A: "It is unlawful for any business entity to *knowingly* recruit, hire for employment, or continue to employ, or to permit, dispatch, or instruct any person who is an unlawful worker to perform work in whole or in part within the City." Ordinance 1722 § 4.A. Clearly, *the addition of a scienter requirement is a significant and far-reaching difference* in the ordinances. The scope of behavior prohibited by Ordinance 1722 is vastly smaller than the behavior prohibited by Ordinances 1708 and 1715.

Moreover, none of the many provisions in Section 5 of Ordinance 1722 are found in either of the earlier ordinances (Ordinance 1708 and 1715). Section 5.A stipulates that the ordinance applies only prospectively to hires after the effective

date of the ordinance. Section 5.B describes in detail three actions that a business entity may take to correct a violation of the ordinance once the business entity is notified of a violation. Section 5.C provides that no enforcement occurs if federal verification of an individual's work authorization is delayed for any reason. Section 5.D offers business entities and employees an opportunity to challenge any enforcement action before Board of Adjustment of Valley Park, subject to appeal to the Circuit Court of the County of St. Louis. And Section 5.E requires that all city officials, including the Board of Adjustment, must defer to the federal government's determinations of any alien's work authorization status. Ordinance 1722 §§ 5.A-E. Most importantly, the specific provisions in Ordinances 1708 that this Court found fault with is not present in Ordinance 1722. *Reynolds*, slip op. at 6-7.

The impact of these differences in Ordinance 1722 is far-reaching. The knowledge requirement of Section 4.A reduces the scope of potential violations considerably. The addition of the provisions of Section 5 significantly affects the duration of any business permit suspension that might occur. If the business entity believes that a mistake has been made regarding the work authorization of an employee, the business entity may seek second and successive verifications of work authorization by the federal government, providing any additional information that the employee offers. During this reverification period, the business entity's permit cannot be suspended. Ordinance 1722 § 5.B.2. This reduces the duration of any suspension of a business permit that might occur. A business permit can only be suspended *after* the business entity has had the opportunity to pursue reverification of the work authorization of the employee in question.

Section 5 of Ordinance 1722 also reduces the scope of possible employees whose employment might lead to the suspension of a business permit. The prospective application restriction of Section 5.A is more than it might appear at first glance. The obligations of Ordinance 1722 only apply to the hiring of *future* employees. This ensures that no employer is caught unawares and faces the suspension of a business permit for the hiring of an unauthorized alien in the past. This drastically reduces the scope of the suspension of business permits that might occur under Ordinance 1722.

Therefore, Ordinance 1722 not only stands well outside the express terms of this Court's March 12, 2007, order; it also cannot possibly be considered to be implicitly covered by this Court's order—even if this Court possessed the authority to expand an injunction by implication in a contempt cititation (which it does not).

As noted above, Defendants were willing to allow Plaintiffs to amend their petition to include Ordinance 1722 before the March 1, 2007, hearing. But Plaintiffs would have none of it. They preferred only to litigate the more vulnerable provisions of Ordinances 1708 and 1715. Now Plaintiffs seek to have it both ways. Even though this Court *has never adjudicated the merits of Ordinance 1722*, Plaintiffs seek an injunction from this Court enjoining its enforcement. Such an order would not only be outside of this Court's authority under clearly established precedent, it would be patently unjust—as the merits of Ordinance 1722 and its materially different provisions have never been briefed or presented to this Court.

For all of these reasons, but particularly because this Court does not possess the authority to do what Plaintiffs ask, Defendants respectfully request that this

Court grant Defendants' motion for dismissal of Plaintiffs Motion for Order to Show Cause and Contempt.

ERIC M. MARTIN, MBEN 27466
109 Chesterfield Business Parkway
Chesterfield, MO 63005-1233
636-530-1515
636-530-1556 (FAX)
emartin772@aol.com

KRIS W. KOBACH, KS 17280
(admitted pro hac vice)
Professor of Law
University of Missouri—Kansas City
5100 Rockhill Rd.
Kansas City, MO 64110-2499
913-638-5567
816-235-5276 (FAX)
kobachk@umkc.edu

Attorneys for Defendants

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was mailed, first-class postage prepaid, this _____ day of September, 2007, to:

Saint Louis University Legal Clinic
John J. Ammann
ammannjj@SLU.edu
Susan McGraugh
mcgraugh@SLU.edu
321 North Spring
St. Louis, MO 63108
314-977-2778
314-977-3334 (FAX)

Bryan Cave LLP
Linda Martinez
lmmartinez@bryancave.com
Elizabeth Ferrick
elizabeth.ferrick@bryancave.com
Rhiana Sharp
rhiana.sharp@bryancave.com
One Metropolitan Square
St. Louis, MO 63102
314-259-2000
314-259-2020 (FAX)

SCHLICTER, BOGARD & DENTON
Kathy A. Wisniewski
kwisniewski@uselaws.com
100 South Fourth Street, Suite 900
St. Louis, MO 63102
314-621-6115
314-621-7151 (FAX)

WASHINGTON UNIVERSITY SCHOOL OF LAW, CIVIL RIGHTS AND COMMUNITY JUSTICE CLINIC
Karen Tokarz
tokarz@wulaw.wustl.edu
Margo Schlanger
mschlanger@wulaw.wustl.edu
One Brookings Drive, CB 1120
St. Louis, MO 63130
314-935-9097
314-935-5356 (FAX)

Catholic Legal Assistance Ministry
Marie A. Kenyon
kenyonm@SLU.edu
321 N. Spring Avenue
St. Louis, MO 63108
314-977-3993
314-997-3334 (FAX)

Ituarte and Schulte LLC
Jesus Ituarte
ituarte_j@sbcglobal.net
2200 Pestalozzi Street
St. Louis, MO 63118
314-865-5400
314-865-5401 (FAX)

Anthony B. Ramirez, P.C.
Anthony B. Ramirez
AnthonyRamirez@ramirezlawfirm.com
1015 Locust Street, Suite 735
St. Louis, MO 63101
314-621-5237
314-621-2778 (FAX)

Alan J. Baker
Attorney at Law
1620 S. Hanley
St. Louis, MO 63144
314-647-2850
314-647-5314 (FAX)

Anthony E. Rothert
tony@aclu-em.org
American Civil Liberties Union of
Eastern Missouri
454 Whittier Street
St. Louis, MO 63108
314-652-3114
314-652-3112 (FAX)

Daniel J. Hurtado
dhurtado@jenner.com
Gabriel A. Fuentes
Jenner & Block LLP
330 North Wabash Avenue
Chicago, IL 60611-7603
312-923-2645

Fernando Bermudez
Bermudez@stlouislaw.com
Green and Jacobson, P.C.
7733 Forsyth Blvd., Suite 700
St. Louis, MO 63105
314-862-6800
314-862-1606 (FAX)

Omar C. Jadwat
Ojadwat@aclu.org
Jennifer C. Chang
jchange@aclu.org
American Civil Liberties Union Foundation
39 Drumm Street
San Francisco, CA 94111
415-343-0770
415-395-0950 (FAX)

Ricardo Meza
rmeza@maldef.org
Jennifer Nagda
jnagda@maldef.org
Mexican American Legal Defense
and Educational Fund
11 E. Adams, Suite 700
Chicago, IL 60603
312-427-0701
312-427-0691 (FAX)

Eric M. Martin