No. 08-1681

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JACQUELINE GRAY; WINDHOVER, INC.,
Plaintiffs below,

Appellants,

vs.

CITY OF VALLEY PARK, MISSOURI,
Defendant below,

Appellee.

ON APPEAL FROM U.S. DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
NO. 4:07CV00881 ERW
HON. E. RICHARD WEBBER, U.S. DISTRICT JUDGE

BRIEF FOR *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND FILED IN SUPPORT OF DEFENDANT-APPELLEE FOR AFFIRMANCE OF THE JUDGMENT BELOW

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the FEDERAL RULES OF APPELLATE PROCEDURE, *Amicus Curiae* Eagle Forum Education & Legal Defense Fund makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations:

None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which

is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

Not applicable.

Dated: August 13, 2008

Respectfully submitted,

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STATEMENT OF IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF") is a nonprofit organization founded in 1981. For more than twenty-five years, it has defended American sovereignty before the state and federal legislatures and courts. Eagle Forum ELDF promotes adherence to the U.S. Constitution and has repeatedly opposed unlawful behavior, including illegal entry into and residence in the United States. Eagle Forum ELDF consistently stands in favor of enforcing immigration laws and allowing local governments to take steps to avoid the harms caused by illegal aliens. Eagle Forum ELDF also has long defended federalism, including the ability of state and local governments to protect themselves and to maintain order. For all of the foregoing reasons, Eagle Forum ELDF has a direct and vital interest in the issues presented before this Court.

Defendant-appellee City of Valley Park, Missouri ("City") consented to the filing of this brief, but plaintiffs-appellants Jacqueline Gray ("Gray") and Windhover, Inc. ("Windhover") denied their consent. Accordingly, Eagle Forum ELDF seeks the Court's leave to file this brief for the reasons set forth in the accompanying motion.

INTRODUCTION

The City adopted its Ordinance 1722 ("Ordinance") to combat the effects of illegal aliens on the City, and Gray and Windhover challenge the Ordinance as *inter alia* preempted by federal immigration law and in violation of federal equal-protection and anti-discrimination requirements. The district court ruled for the City, and Gray and Windhover appealed the district court's judgment, as well as the district court's denial of their motion to remand this action to state court. Eagle Forum ELDF respectfully submits that this Court should affirm the district court on the merits.

The following three subsections discuss the factual background to this litigation, the constitutional background of preemption, and the statutory background of federal immigration law.

Factual Background

Amicus curiae Eagle Forum ELDF adopts the City's Statement of the Case and of the Facts. *See* Appellee's Br. at A-D, 3-9.

Constitutional Background

Federal law preempts state law when the two conflict. U.S. CONST. art. VI, cl. 2. "State action may be foreclosed by express [statutory] language…, by implication from the depth and breadth of a [statute]

that occupies the legislative field, or by implication because of a conflict with a [statute]." *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 541 (2001) (citations omitted). In determining a statute's preemptive scope, congressional intent is "the ultimate touchstone." *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould,* 475 U.S. 282, 290 (1986) (citations omitted).

Accordingly, preemption analysis begins with a statute's text, "the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). Where Congress states its preemptive intent expressly, a court's only task is to determine the statute's preemptive scope. *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 517 (1992).

Both in finding preemption under federal law and in determining the preemptive scope of that federal law, courts apply a presumption against preemption for fields traditionally occupied by state and local government. *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947) ("presumption against preemption" applies to finding preemption); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (even after preemption found, "presumption against preemption" applies to determining the

federal statute's preemptive scope). When this "presumption against preemption" applies, courts will not assume preemption "unless that was the *clear and manifest purpose* of Congress." *Santa Fe Elevator,* 331 U.S. at 230 (emphasis added).

"[M]erely because the federal provisions were sufficiently comprehensive to meet the need identified by Congress [does] not mean that States and localities were barred from identifying additional needs or imposing further requirements in the field." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 717 (1985). Writing for a unanimous Court, Justice Marshall continued, "the regulation of health and safety matters is primarily, and historically, a matter of local concern." *Id.* at 719 (citing *Santa Fe Elevator*, 331 U.S. at 230).

As the Supreme Court recently recognized, *Santa Fe Elevator* applies if "the field which Congress is said to have pre-empted has been traditionally occupied by the States" or if there is no history of significant federal presence. *U.S. v. Locke,* 529 U.S. 89, 107-08 (2000) (quoting *Jones v. Rath Packing Co.,* 430 U.S. 519, 525 (1977)); *accord Buckman Co. v. Plaintiffs' Legal Comm.,* 531 U.S. 341, 347 (2001). *Locke* concerned environmental protection in the form of water quality,

but analyzed the narrower *maritime-commerce* field, making clear that courts must analyze preemption using the narrow field at issue (here, business licensing). *Accord Geier v. Am. Honda Motor Co.,* 529 U.S. 861, 910 (2000) (applying presumption to "common-law no-airbag suits," not to all tort law).

Statutory Background

The federal power is preeminent in the field of immigration and has been from the beginning of the Republic. *Hines v. Davidowitz,* 312 U.S. 52, 62 & n.9 (1947) (citing THE FEDERALIST NOS. 3, 4, 5, 42 and 80); *DeCanas v. Bica,* 424 U.S. 351, 354 (1976) (the "[p]ower to regulate immigration is unquestionably exclusively a federal power"). But the Supreme Court has never held that every "state enactment which in any way deals with aliens" constitutes "a regulation of immigration and thus [is] *per se* pre-empted by this constitutional power, whether latent or exercised." *DeCanas,* 424 U.S. at 355 (mere "fact that aliens are the subject of a state statute does not render it a regulation of immigration"). Instead, preemption hinges on what the state or local statute does and how it fits within the federal regulation of immigration.

Eight years after *DeCanas,* Congress enacted 8 U.S.C. §1324a as part of the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, §101(a)(1), 100 Stat. 3359, 3360 (Nov. 6, 1986) ("IRCA"), which provides various federal civil and criminal procedures and sanctions for the employment, recruitment, or referral for a fee for employment of "unauthorized aliens." *See* 8 U.S.C. §1324a(h)(2). Section 1324a(h)(2) also expressly preempts state and local sanctions for those same activities:

> 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). As indicated by the emphasized text, Section 1324a's savings clause expressly preserves authority for state and local licensing laws and other similar laws. *Id.*

The legislative history in the House provides an explanation of the preemptive section:

> The penalties contained in this legislation are intended to specifically preempt any state or local laws providing civil fines and/or criminal sanctions on the hiring, recruitment or referral of undocumented aliens.

> 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. 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.
>
> It is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by existing law.

H.R.Rep. No. 99-682(I), at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662 ("House Report").

SUMMARY OF ARGUMENT

Amicus curiae Eagle Forum ELDF respectfully submits: that the plaintiffs have standing (Section I) and present a ripe claim (Section II) based on their allegations and sworn statements of imminent effect, economic impact, and the Ordinance's requiring them to discriminate unlawfully against their prospective employees and contractors; that

the *Reynolds* litigation in state court cannot preclude this litigation because those state courts held that *Reynolds* has no practical effect on future litigation (Section III); that federal immigration law does not preempt state and local licensing and similar laws that address the hiring of illegal aliens (Section IV.B); and that the plaintiffs have not established the facial discrimination or animus against a suspect class required to subject the Ordinance to strict scrutiny (Section IV.C).

ARGUMENT

I. PLAINTIFFS HAVE STANDING TO CHALLENGE ORDINANCE

Standing involves a tripartite test of a cognizable injury to the plaintiff, caused by the defendant, and redressable by the court. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561-62 (1992). Causation and redressability pose "little question" when the government *directly* regulates a plaintiff, although the standing inquiry requires a heightened showing when the government regulates third parties, who then cause injury. *Id.* Moreover, to establish subject-matter jurisdiction, and thus present the opportunity for a merits ruling, a complaint's "general allegations embrace those specific facts that are necessary to support the claim." *Bennett v. Spear,* 520 U.S. 154, 168 (1997).

Significantly, standing doctrine has no nexus requirement outside taxpayer standing. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.,* 438 U.S. 59, 78-81 (1978). Thus, "once a litigant has standing to request invalidation of a particular [government] action, it may do so by identifying all grounds on which the [government] may have failed to comply with its statutory mandate." *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 353 & n.5 (2006) (interior quotations omitted). If the plaintiffs can establish standing against the Ordinance *on any one basis,* they can challenge the lawfulness of the Ordinance *on all bases:*

> [T]he fact of economic injury is what gives a person standing to seek judicial review under the statute, but once review is properly invoked, that person may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate.

Sierra Club v. Morton, 405 U.S. 727, 737 (1972).

Duke Power is instructive. There, the environmental plaintiffs based their standing on the aesthetic environmental injuries from power plants, but challenged the Price-Anderson Act's caps on damages from some hypothetical future nuclear accident as an unconstitutional taking. *Duke Power,* 438 U.S. at 73-74, 79-81. By analogy here, the

plaintiffs can challenge the Ordinance as *ultra vires,* preempted, or discriminatory, once they establish their standing on any grounds.

A. Plaintiffs Have First-Party Standing

Because the Ordinance directly regulates them, the plaintiffs do not face a heightened showing of causation and redressability. *Defenders of Wildlife,* 504 U.S. at 561-62. Striking the Ordinance obviously will redress the injuries that the Ordinance causes. In addition to the City's arguments on first-party standing, Appellee's Br. at 25-32, Eagle Forum ELDF focuses on two forms of standing that the plaintiffs' complaint established.

1. Plaintiffs Have First-Party Standing to Challenge the Alleged Requirement to Discriminate against Others

"[I]f a corporation can suffer harm from discrimination, it has standing to litigate that harm." *Thinket Ink Information Resources, Inc. v. Sun Microsystems, Inc.,* 368 F.3d 1053, 1059-60 (9th Cir. 2004) (quoting *Gersman v. Group Health Ass'n,* 931 F.2d 1565, 1568 (D.C. Cir. 1991), *vacated on other grounds,* 502 U.S. 1068 (1992)). With regard to employees and contractors, employers can assert their employees' and contractors' rights to be free from unlawful discrimination to avoid being *complicit* in that discrimination:

> When the law makes a litigant an involuntary participant in a discriminatory scheme, the litigant may attack that scheme by raising a third party's constitutional rights.

Lutheran Church-Missouri Synod v. F.C.C., 141 F.3d 344, 350 (D.C. Cir. 1998) (citing *Craig v. Boren,* 429 U.S. 190 (1976), and *Barrows v. Jackson,* 346 U.S. 249, 259 (1953)); *accord Thinket Ink,* 368 F.3d at 1059-60 (quoted *supra*). Because they would suffer injury from their own discrimination against their employees and contractors under the Ordinance's alleged coercion, the plaintiffs have standing to challenge that coercion as *ultra vires* or otherwise unlawful.[1]

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[1] Although Eagle Forum ELDF does not consider the Ordinance coercive, courts analyze subject-matter jurisdiction from *the plaintiffs'* merits views. *Campbell v. Minneapolis Public Housing Authority ex rel. City of Minneapolis,* 168 F.3d 1069, 1073 (8th Cir. 1999) ("inquiry into standing is not a review of the merits of [plaintiff's] claims"); *McConnell v. FEC,* 540 U.S. 93, 227 (2003) ("'standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal") (interior quotation omitted); *Southern Cal. Edison Co. v. F.E.R.C.,* 502 F.3d 176, 180 (D.C. Cir. 2007) ("in reviewing the standing question, the court… must therefore assume that on the merits the [plaintiffs] would be successful in [their] claims"); *Tyler v. Cuomo,* 236 F.3d 1124, 1133 (9th Cir. 2000) ("[w]hether a plaintiff has a legally protected interest (and thus standing) does not depend on whether he can demonstrate that he will succeed on the merits"). Under the plaintiffs' views, the Ordinance is coercive, *ultra vires,* discriminatory, and unconstitutional, which (if correct) certainly would present a case or controversy.

Plaintiffs can readily establish standing where government action purports to authorize conduct that otherwise would be illegal. *Simon v. Eastern Ky. Welfare Rights Org.,* 426 U.S. 26, 45 n.25 (1976) (privately inflicted injury is traceable to government action if the injurious conduct "would have been illegal without that action"); *City of Los Angeles v. Lyons,* 461 U.S. 95, 105-06 (1983) (government authorization sufficient to confer standing). Under the plaintiffs' merits views, the Ordinance requires discrimination against the plaintiffs' employees and contractors, which suffices for the plaintiffs to challenge the Ordinance as discriminatory.

2. Plaintiffs Have Standing Based on Economic and Regulatory Impact

While important, the Equal Protection Clause and civil rights statutes are not critical to this Court's standing inquiry. An "identifiable trifle" is sufficient injury to satisfy constitutional standing. *U.S. v. Students Challenging Regulatory Agency (SCRAP),* 412 U.S. 669, 689 n.14 (1973). Here, the plaintiffs have alleged that the Ordinance increases their operating costs and burdens. That quantum of economic harm suffices for the plaintiffs to challenge the Ordinance as unconstitutional:

> We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, a $5 fine and costs, and a $1.50 poll tax… The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation.

SCRAP, 412 U.S. at 690 (citations and interior quotations omitted); *Nat'l Wildlife Fed'n v. Agricultural Stabilization & Conservation Serv.,* 901 F.2d 673, 677 (8th Cir. 1990) (same); *Coalition for Env't v. Volpe,* 504 F.2d 156, 168 (8th Cir. 1974) (same). Thus, the plaintiffs plainly have "first-party" standing on economic grounds.

B. Plaintiffs Have Third-Party Standing

Under *Powers v. Ohio,* 499 U.S. 400, 411 (1991), a plaintiff can assert the rights of a third party if (1) the first-party plaintiff has suffered a constitutional injury in fact, (2) has a close relationship with the third party, and (3) "some hindrance" prevents the third party's asserting its own rights. For the reasons set forth in Section I.A, *supra,* the plaintiffs have constitutional standing. Second, prospective employees and contractors may qualify as a sufficiently close relationship to invoke third-party rights. *Nat'l Cottonseed Prod. Ass'n v. Brock,* 825 F.2d 482, 490 (D.C. Cir. 1987) (prospective customers); *Craig*

v. Boren, 429 U.S. 190, 194-95 (1976) (same); *Carey v. Population Services, Int'l,* 431 U.S. 678, 683 (1977) (same). Third, a prospective employee or contactor may find a sufficient hindrance either because the financial benefit of any particular Windhover contract may not match the costs of litigation or because litigation could expose the alien (if illegal) to deportation. *See, e.g., Powers,* 499 U.S. at 415 (finding hindrance where third party had "little incentive" to bring suit because "of the small financial stake involved and the economic burdens of litigation").[2]

Under the foregoing analysis, the plaintiffs have a plausible argument for establishing third-party standing to assert the equal-protection rights of their prospective employees and contractors. *See*

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[2] *Kowalski v. Tesmer,* 543 U.S. 125 (2004), rejected lawyers' federal-court attempt to assert prospective clients' rights (as opposed to existing clients' rights) where the prospective clients appeared not to be hindered in asserting their own rights in state-court actions and, "more fundamental[ly]," the attempt to assert those rights in federal court would "short circuit the State's adjudication of this constitutional question," in violation of *Younger v. Harris* abstention principles. *Tesmer,* 543 U.S. at 130-32. Nowhere does *Tesmer* signal that that one factor – namely, prospective versus existing clients – was sufficiently dispositive, in its own right, to overturn past Court precedent that allowed third-party standing based on prospective relationships.

also Bilello v. Kum & Go, LLC, 374 F.3d 656, 660-61 (8th Cir. 2004) (collecting cases on assertion of third parties' equal-protection rights). Under the circumstances, however, the plaintiffs can assert those anti-discrimination rights as first-party rights. *See* Section I.A.1, *supra.* As such, this Court need not resolve whether the plaintiffs can establish the hindrance prong of the *Powers* test for third-party standing because third-party standing adds nothing over the first-party discrimination-based injury that the plaintiffs assert.

II. CHALLENGE TO ORDINANCE IS RIPE

The ripeness doctrine seeks "[t]o prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Laboratories v. Gardner,* 387 U.S. 136, 148 (1967), *abrogated on other grounds, Califano v. Sanders,* 430 U.S. 99, 105 (1977); *Citizens for Equal Protection v. Bruning,* 455 F.3d 859, 863 (8th Cir. 2006) (same). As the City notes, the plaintiffs' discussion of standing appears at times to "veer[] into considerations of ripeness," *see* Appellee's Br. at 36, which may result in part from the overlap between the two doctrines. Like standing, "[t]he ripeness doctrine flows both from the Article III 'cases' and 'controversies' limitation and also from

prudential considerations for refusing to exercise jurisdiction." *Nebraska Pub. Power Dist. v. MidAmerican Energy Co.,* 234 F.3d 1032, 1037 (8th Cir. 2000); *Johnson v. Missouri,* 142 F.3d 1087, 1090 n.4 (8th Cir. 1998) ("standing and ripeness are technically different doctrines, [but] they are closely related in that each focuses on whether the harm asserted has matured sufficiently to warrant judicial intervention") (interior quotations omitted). Indeed, standing and ripeness can "perhaps overlap entirely." *Johnson,* 142 F.3d at 1090 n.4. The following two sections discuss constitutional and prudential ripeness.

A. Plaintiffs' Challenge Is Constitutional Ripeness

For its constitutional aspect, ripeness arises under the Article III requirement for a "case" or "controversy" and so resembles constitutional standing. *Id.* For the reasons set forth in Section I, *supra,* the plaintiffs have invoked federal jurisdiction to address a constitutional "case" or "controversy," and their claims therefore are *constitutionally* ripe.

B. Plaintiffs' Challenge Is Prudential Ripeness

Prudential ripeness poses a two-pronged test: (1) the issue's fitness for judicial decision, which "most often [means] that the issue is legal rather than factual," and (2) the hardship of withholding review,

which "is usually found if the regulation imposes costly, self-executing compliance burdens" or chills protected activity. *Minnesota Citizens Concerned for Life v. Federal Election Comm'n,* 113 F.3d 129, 132 (8th Cir. 1997). This litigation meets both prongs.

First, the question of Section 1324a's preemptive scope qualifies as the type of "case… more likely to be ripe [because] it poses a purely legal question and is not contingent on future possibilities." *See Nebraska Pub. Power,* 234 F.3d at 1038. Such purely legal questions would not benefit from further factual development and so are fit for judicial decision. *Public Water Supply Dist. No. 10 of Cass County, Mo. v. City of Peculiar, Mo.,* 345 F.3d 570, 572-73 (8th Cir. 2003).

Second, the plaintiffs' claims that "in the near future" they would hire employees or contractors provides sufficient immediacy, Appellee's Appendix, at A262; *City of Peculiar,* 345 F.3d at 573, and the "the public interest in having the legality of the statutes settled prevents a finding of nonjusticiability." *United Food & Commercial Workers Intern. Union, AFL-CIO, CLC v. IBP, Inc.,* 857 F.2d 422, 430 (8th Cir. 1988); *see also Solid State Circuits, Inc. v. U.S.E.P.A.,* 812 F.2d 383, 386-87 (8th Cir. 1987) (reporting obligations under challenged statute support finding a

sufficient hardship). Moreover, the dilemma that the plaintiffs allege of complying with the Ordinance at the cost of violating the civil rights of prospective employees and contractors is the sort of "Hobson's Choice [that] suggests the ripeness of the issue for review." *City of Auburn v. Qwest Corp.,* 260 F.3d 1160, 1172 (9th Cir. 2001). For the foregoing reasons, this plaintiffs' challenge is prudentially ripe.

III. *REYNOLDS* LITIGATION DOES NOT PRECLUDE THIS COURT'S RESOLVING THIS LITIGATION

Remarkably, the plaintiffs argue that prior state-court litigation between the City and Gray is preclusive on the merits. Appellants' Br. at 31-40. The City's brief deconstructs the plaintiffs' preclusion argument in detail. *See* Appellee's Br. at 37-72. Given that the proffered state-court judgment was *held* moot on appeal, Appellants' Br. at 34 n.11, Eagle Forum ELDF respectfully adds this short section to focus on the fact that the plaintiffs get the preclusion argument precisely backwards: the preclusive holding is that *there is no merits preclusion.*

Specifically, on appeal of the state-court judgment on which the plaintiffs rely, the Missouri Court of Appeals *held* that "[a]ny ruling this Court would make regarding the enforcement provisions of these two repealed ordinances *would have no practical effect* on any existing

controversy." *Reynolds v. City of Valley Park,* 254 S.W.3d 264, 266 (Mo. App. 2008) (emphasis added). Under that *holding,* the disposition of the prior state litigation on which the plaintiffs would rely has "no practical effect" on this litigation. That holding is binding on Gray, who was a party in the *Reynolds* litigation.

It is less clear whether *Reynolds* is binding in litigation between Windhover and the City. As a non-party, Windhover cannot be bound by the *Reynolds* litigation except through the relationship between Gray and Windhover. *Montana v. U.S.,* 440 U.S. 147, 153 (1979) (under "the related doctrines of collateral estoppel and res judicata, is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction… cannot be disputed in a subsequent suit between the same parties or their privies") (interior quotations omitted, alteration in original); *cf. Nelson v. Adams USA, Inc.,* 529 U.S. 460, 466 (2000) (distinguishing between judgment against corporation and judgment against its president and sole shareholder on liability issues). To the extent that Windhover qualifies as Gray's privy, of course, it is bound by the Missouri Court of Appeals' no-practical-effect holding to the same extent as Gray.

On the other hand, if Windhover qualifies as both non-party and non-privy, it cannot bind a government litigant like the City, *see U.S. v. Mendoza,* 464 U.S. 154, 162-63 (1984) ("nonmutual offensive collateral estoppel simply does not apply against the government in such a way as to preclude relitigation of issues such as those involved in this case"); *State of Idaho Potato Comm'n v. G & T Terminal Packaging, Inc.,* 425 F.3d 708, 714 (9th Cir. 2005) ("*Mendoza*'s rationale applies with equal force to [an] attempt to assert nonmutual defensive collateral estoppel against… a state agency"); *Hercules Carriers, Inc. v. Claimant State of Fla., Dept. of Transp.,* 768 F.2d 1558, 1578 (11th Cir. 1985) (same), unless preclusion potentially applies as a matter of *state* law. 28 U.S.C.A. §1738; *Sondel v. Northwest Airlines, Inc.,* 56 F.3d 934, 937 (8th Cir. 1995). Here, Missouri law *generally* would not find the proffered judgment preclusive in a non-party's litigation against state or local government, *Board of Educ. of City of St. Louis v. City of St. Louis,* 879 S.W.2d 530, 532 (Mo. 1994),[3] even if the Missouri Court of Appeals had

[3] *Board of Educ. of City of St. Louis* extended to cities an earlier Missouri Supreme Court decision that followed *Mendoza* in rejecting nonmutual preclusion of state agencies. *Board of Educ. of City of St. Louis,* 879 S.W.2d at 532 ("[*Mendoza*'s] policy… outweighs any benefit

(Footnote cont'd on next page)

not *specifically* held that *Reynolds* has "no practical effect." *Reynolds,* 254 S.W.3d at 266. Either way, this Court should reject the plaintiffs' preclusion arguments as baseless.

IV. ORDINANCE SURVIVES FACIAL CHALLENGE

The district court ruled against the plaintiffs on the merits, and the plaintiffs appealed that judgment. For strategic reasons in this Court, however, the plaintiffs elected to brief only their jurisdictional and collateral estoppel arguments, notwithstanding that the appellate rules allowed them nearly 5,000 more words. *Compare* FED. R. APP. P. 32(a)(7)(B) (allowing 14,000 words) *with* Appellants' Br. at 43 (using 9,289 words). That strategic choice does not deprive this Court of the ability to consider the merits of the district court's decision.

Indeed, the plaintiffs' preclusion argument asks this Court to reverse *on the merits,* Appellants' Br. at 40, because "[r]es judicata is not a jurisdictional issue; rather, it is an affirmative defense." *U.S. v.*

(Footnote cont'd from previous page.)

gained from allowing third parties to offensively assert collateral estoppel against a government entity. This Court reaffirms *Shell Oil Co.,* and holds that the Board, a stranger to the original suit, may not assert collateral estoppel against the City.") (citing *Shell Oil Co. v. Director of Revenue,* 732 S.W.2d 178, 182 (Mo. 1987)).

Metropolitan St. Louis Sewer Dist., 952 F.2d 1040, 1043 (8th Cir. 1992). Significantly, the City demonstrates that preclusion itself relies on the underlying preemption merits, Appellee's Br. at 68-72, which requires this Court to assess the preemption merits merely to evaluate the plaintiffs' preclusion argument. *See U.S. Nat. Bank of Oregon v. Independent Ins. Agents of America, Inc.,* 508 U.S. 439, 447 (1993) ("court may consider an issue antecedent to and ultimately dispositive of the dispute before it, *even an issue the parties fail to identify and brief*") (interior quotations and alterations omitted, emphasis added).[4]

A. Facial Challenges Fail if Ordinance Is Lawful under *Any* Factual Circumstances

The district court held – and the plaintiffs do not dispute – that plaintiffs bring a facial challenge to the City's Ordinance. *Gray v. City of Valley Park, Missouri,* 2008 WL 294294, *19 n.26, *22 (E.D. Mo. 2008), (Appellants' Appendix, at 34 n.26, 40). Under *U.S. v. Salerno,* 481 U.S.

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[4] Appellate courts "review judgments… not decisions." *Thompson v. Missouri Bd. of Probation & Parole,* 39 F.3d 186, 189 n.2 (8th Cir. 1994); *Schweiker v. Hogan,* 457 U.S. 569, 585 & n.24 (1982) (appellee may raise new arguments on appeal "as a basis on which to affirm [the lower] court's judgment"). Accordingly, "[a]n appellee may urge any ground for affirmance supported by the record." *Thompson,* 39 F.3d at 189 n.2.

739, 745 (1987), a "facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."

"The fact that [a statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Id.; accord Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494 n.5 (1982). As the Supreme Court recently emphasized, facial invalidation is counter to the judicial preference not to "nullify more of a legislature's work than is necessary." *Ayotte v. Planned Parenthood,* 546 U.S. 320, 329 (2006). Facial challenges also interfere with the norm of statutory construction that enables avoidance of constitutional questions based on how narrowly a law is applied. *Broadrick v. Oklahoma,* 413 U.S. 601, 613 (1973); *cf. New York v. Ferber,* 458 U.S. 747, 767 (1982) ("a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court").

As this Circuit has recognized, *Salerno* means that a "facial challenge… requires [the Court] to look carefully at [the] regulations to determine whether they may be constitutionally applied under *any* set of factual circumstances." *Sherbrooke Turf, Inc. v. Minnesota Dept. of Transp.,* 345 F.3d 964, 971 (8th Cir. 2003) (emphasis in original). Because the Ordinance is within the City's police powers and non-discriminatory, the plaintiffs cannot meet the *Salerno* test.

B. Federal Law Does Not Preempt the Ordinance

Federalism permits and encourages state and local government to experiment with measures that enhance their general welfare and safety. This federalism is central to our system of government, as Justice Kennedy wrote in the seminal ruling:

> [F]ederalism was the unique contribution of the Framers to political science and political theory. Though on the surface the idea may seem counter-intuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one.

U.S. v. Lopez, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring) (citing Henry Friendly, "Federalism: A Foreword," 86 Yale L. J. 1019 (1977) and G. Wood, *The Creation of the American Republic, 1776-1787*, pp. 524-532, 564 (1969)).

With respect to illegal immigration, the seminal United States Supreme Court precedent is the unanimous decision of *De Canas v. Bica*, 424 U.S. 351 (1976), which upheld a state law penalizing the employment of illegal aliens. Our system of dual sovereignties provides ample room for federal, state, and local government to address the various impacts of illegal aliens. Indeed, *DeCanas* upheld the state law because "it focuses directly upon these *essentially local problems* and is tailored to combat effectively the perceived evils." *Id.* at 357 (emphasis added). Nothing in IRCA or any other congressional enactment has in any way limited that local authority or suggested that illegal immigration is to be protected, respected, or tolerated.

1. Ordinance Plainly Is within Police Power

Prior to IRCA's enactment, the City plainly "possess[ed] broad authority under [its] police powers to regulate the employment relationship to protect workers within the [City]." *DeCanas,* 424 U.S. at 356. Similarly, prior to IRCA, federal law did not trench that "broad authority."

> [Courts] will not presume that Congress, in enacting [federal immigration law], intended to oust state authority to regulate the employment relationship… in a manner consistent with

> pertinent federal laws. 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.

DeCanas, 424 U.S. at 357 (interior quotations and citations omitted). Far from finding congressional intent to preempt state regulation of alien employment practices, *DeCanas* "rejected the pre-emption claim… because Congress *intended* that the States be allowed, to the extent consistent with federal law, [to] regulate the employment of illegal aliens." *Toll v. Moreno,* 458 U.S. 1, 13 n.18 (1982) (citing *DeCanas,* 424 U.S. at 361) (interior quotations omitted, second alteration in original). Thus, prior to IRCA's enactment, it is indisputable that the City's police power included the authority to adopt the Ordinance and to regulate the business licenses of entities within the City's borders.

2. Protecting the Community from Illegality is the Essence of the Police Power

Moreover, that "broad authority" to combat illegality is central to the "police power." "Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself." *Jacobson v. Massachusetts,* 197 U.S. 11, 27 (1905). Indeed, "the suppression of [violent crime] has always been the prime object of the States' police

power." *U.S. v. Morrison,* 529 U.S. 598, 615 (2000) (invalidating federal encroachment into the state domain); *Slaughter-House Cases*, 16 Wall. 36, 62 (1873) (holding that the states have traditionally enjoyed great latitude under their police powers to legislate as "'to the protection of the lives, limbs, health, comfort, and quiet of all persons'") (quoting *Thorpe* v. *Rutland & Burlington R. Co.*, 27 Vt. 140, 149 (1855)). The plaintiffs' view would take from the City the "right to protect itself" against the unlawful taking up of residency and employment. The lawlessness that follows is predictable and, if a community's "right to protect itself" is recognized, entirely preventable.

3. Congress Would Not Reverse *DeCanas* and Restrict Police Power *Sub Silentio*

Where, as here, state and local government not only have traditionally occupied the field of business licensing and other similar laws but also have been affirmed by the Supreme Court in taking such action (notwithstanding its focus on immigration status), the presumption against preemption applies. *Santa Fe Elevator,* 331 U.S. at 230. That presumption requires "clear and manifest" congressional intent before courts will hold a new federal law to displace the traditional state and local exercise of police power in the field. *Id.*

Numerous alternate rules of construction lead to the same elevated threshold against federal preemption. *See U.S. v. Bass*, 404 U.S. 336, 349 (1971) ("[u]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"); *Gonzales v. Oregon*, 546 U.S. 243, 275 (2006) (where "Congress did not have this far-reaching intent to alter the federal-state balance and the congressional role in maintaining it," state law must remain applicable); *Chemical Mfrs. Ass'n v. N.R.D.C.,* 470 U.S. 116, 128 (1985) ("absent an expression of legislative will, we are reluctant to infer an intent to amend the Act so as to ignore the thrust of an important decision"); *cf. Nat'l Ass'n of Home Builders v. Defenders of Wildlife,* 127 S.Ct. 2518, 2532 (2007) ("repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest") (interior quotations omitted, alteration in original). As explained in the next section, IRCA fails all of these tests.

4. IRCA Did Not Displace Police Power

The prior three subsections establish that (1) the City had the police-power authority to regulate the employment of illegal aliens prior to IRCA's enactment in 1986; (2) that the Ordinance falls squarely

within that police power; and (3) that Congress would not have displaced that police power (and the related Supreme Court decisions) *sub silentio* in IRCA. This subsection completes the analysis by demonstrating that IRCA emphatically did not displace that police power.

At the outset, Section 1324a(h)(2)'s plain language saves state and local authority for licensing and similar laws, which (of course) is an area that state and local historically have occupied. Thus, while Section 1324a(h)(2) plainly establishes express preemption, it equally plainly saves the state and local authority recognized in *DeCanas*. Given the express statutory language and the presumption against preemption to interpret the preemptive scope of statutory language, Section 1324a(h)(2) clearly does not preempt the Ordinance. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.,* 545 U.S. 546, 568 (2005) ("the authoritative statement is the statutory text, not the legislative history"); *Medtronic,* 518 U.S. at 485 (presumption against preemption applies to determining statute's preemptive scope). This Court can begin and end its preemption inquiry with Section 1324a(h)(2)'s plain language.

Should the Court wish to proceed to analyze the legislative history, however, the available history does not alter the outcome. The House Report plainly enumerates certain preempted actions (namely, civil and criminal sanctions for employment, recruitment, and referrals) while also enumerating non-preempted actions (namely, denying licenses to those found to have violated immigration laws and "fitness to do business laws"). House Report, at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. at 5662. Although the House Report does not expressly authorize enforcement of a state or local ordinance prior to federal enforcement of immigration laws, the House Report also does not expressly preempt that either. *Id.* Given the presumption against preemption, even in interpreting expressly preemptive statutes, *Medtronic, supra,* the House Report does not provide a "clear and manifest" congressional intent to preempt that which *DeCanas* allowed. *See also Chemical Mfrs. Ass'n,* 470 U.S. at 128 ("absent an expression of legislative will, we are reluctant to infer an intent to amend the Act so as to ignore the thrust of an important decision"). In short, nothing suggests that Congress at any time intended to preempt state and local actions like the Ordinance.

C. Ordinance Is Not Discriminatory

Targeted against what popularly are known as illegal aliens, the Ordinance "discriminates" based on illegality, not on alienage or race. Where, as here, the state or local law does not "discriminate[] against aliens *lawfully admitted* to this country," it is constitutional. *DeCanas,* 424 U.S. at 358 n.6 (emphasis added); *cf. I.N.S. v. National Center for Immigrants' Rights,* Inc., 502 U.S. 183, 196 n.11 (1991). As such, the Ordinance is subject to review under the rational-basis test, not strict scrutiny. *Plyler v. Doe,* 457 U.S. 202, 223 (1982) ("[u]ndocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy'"). Consistent with *DeCanas,* the Ordinance readily meets the rational-basis test.

Indeed, the plaintiffs' facial equal-protection challenge lacks any foundation beyond an information-and-belief allegation of racial animus and statements attributed to the City's mayor.[5] Given the opportunity

[5] Because there is no history applying the Ordinance, the plaintiffs cannot (and do not) bring an as-applied challenge that demonstrates that the City enforces the Ordinance in a discriminatory manner.

for discovery, however, the plaintiffs failed to produce evidence to justify their allegations on information and belief. While such information-and-belief allegations can support a day in court, *see Rotella v. Wood,* 528 U.S. 549, 560 (2000) (discussing FED. R. CIV. P. 11(b)(3)), those mere allegations cannot control on the merits. As the district court found based on the evidence adduced, the City's Aldermen enacted the Ordinance based on the higher crime rates, fiscal hardships, impaired City services, diminished quality of life, and endangered public security and safety that illegal aliens bring to the City. *Gray,* 2008 WL 294294, at *26 (Appellants' Appendix, at 44-45). There is no evidence of the sort of racial animus needed to invalidate an otherwise-valid enactment on its face.

The Aldermen acted entirely within the City's police power and within their duty to their community. The Ordinance does not facially discriminate on the basis of race or alienage, and its facial "discrimination" against illegality is not the sort of discrimination that the law prohibits.

CONCLUSION

For the foregoing reasons, Eagle Forum ELDF respectfully submits that the plaintiffs have standing and a ripe challenge to the Ordinance, that the *Reynolds* litigation does not preclude this Court's reaching the merits, and that this Court should affirm the decision below on the merits because neither IRCA nor federal civil-rights requirements preempt the Ordinance.

Dated: August 13, 2008

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BRIEF FORM CERTIFICATE

Pursuant to Rules 29(c)(5) and 32(a)(7)(C) of the FEDERAL RULES OF APPELLATE PROCEDURE, I certify that the attached "Brief for *Amicus Curiae* Eagle Forum Education & Legal Defense Fund Filed in Support of Defendant-Appellee for Affirmance of the Judgment Below" is proportionately spaced, has a typeface of Century Schoolbook, 14 points, and contains 6,336 words, including footnotes, but excluding this Brief Form Certificate, the Table of Citations, the Table of Contents, the Corporate Disclosure Statement, and the Certificate of Service. The foregoing brief was created in Microsoft Word 2007, and I have relied on that software's word-count feature to calculate the word count.

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of August, 2008, I have caused two copies of the foregoing "Brief for *Amicus Curiae* Eagle Forum Education & Legal Defense Fund Filed in Support of Defendant-Appellee for Affirmance of the Judgment Below" to be served by first-class U.S. mail, postage prepaid, to the following:

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In addition, I certify that on the same day, I served a virus-free digital copy in Portable Document Format ("PDF") via electronic mail to the foregoing email addresses, with a compact disc ("CD") copy to the "MALDEF" counsel who have not agreed to service by electronic mail. In addition, I certify that on the same day, I sent an original, nine copies, and a CD with a virus-free PDF digital copy to the Clerk of the Court via *Federal Express,* next-day delivery, for filing in this matter.

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