

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

WINDHOVER, INC., and)	
JACQUELINE GRAY,)	
)	
Plaintiffs,)	
)	Cause No. 4:07CV00881-ERW
v.)	
)	
CITY OF VALLEY PARK, MO,)	
)	
Defendant.)	

DEFENDANT’S SUPPLEMENTAL MEMORANDUM ON THE PENDING MOTIONS FOR SUMMARY JUDGMENT REFLECTING DEPOSITIONS OF THE MAYOR AND BOARD OF ALDERMEN OF VALLEY PARK, MISSOURI

On October 5, 2007, this Court issued an Order permitting Plaintiffs to depose the Mayor and Board of Alderman by October 22, 2007. The last of those depositions occurred on October 19, 2007.¹ This Court also ordered “that any supplemental briefing on the pending motions for summary judgment is due no later than 10/26/07.” Order of October 5, 2007. The following memorandum summarizes the factual information gained from those depositions and applies such information to the relevant issues in

¹ The Defendant produced Alderman Randy Helton for Deposition a 2:55 PM on October 19, 2007. The deposition occurred at the offices of Plaintiffs’ counsel, Fernando Bermudez. During the deposition, when Mr. Helton was asked to look at documents by Plaintiffs’ counsel, he found that he had forgotten to bring his reading glasses with him to the deposition. Accordingly all present at the deposition agreed that any written material would be read aloud to Mr. Helton, as had been done at the deposition of Mayor Jeffrey Whitteaker. Helton Depo. 14-15. Mayor Depo. 76. Counsel for Defendant indicated that he would be “reasonable” in extending the time of the deposition if it proved necessary. Helton Depo. 18. Sixteen minutes into the deposition, however, Mr. Bermudez lost his temper while reading a document and declared, “This is ridiculous.” Mr. Bermudez abruptly terminated the deposition. *Id.* at 18-19. Plaintiffs later requested a second deposition of Mr. Helton. The City believes that it fully complied with this Court’s Order by producing the witness and being willing to do whatever was necessary to complete the deposition on October 19, 2007. Plaintiffs’ counsel unilaterally terminated the deposition, despite the fact that the deposition was occurring on the final weekday before this Court’s deadline of October 22, 2007. The City is therefore under no obligation to accommodate Plaintiffs’ demand to produce Mr. Helton (who works from 7:00 AM to 7:00 PM six days a week) a second time. However, in the interest of professional cooperation, Defense counsel have agreed to produce Mr. Helton for a second deposition on November 2, 2007. However, this Court’s order was not in any way modified by the behavior of Mr. Bermudez. Accordingly, Defendants are submitting this supplementary memorandum on October 26, 2007, as this Court ordered.

this case. Accordingly this memorandum is organized by subject area, rather than by deponent. Under each subject heading, the relevant statements by deponents (and any applicable case law) are presented.² As is explained below, Plaintiffs' depositions have only reinforced Defendant's Motion for Summary Judgment. The depositions have not yielded any information that strengthens Plaintiffs' position on the merits.

I. Plaintiffs' Equal Protection Claim Lacks Any Showing of Discriminatory Intent

As explained in Defendant's Memorandum Supporting Defendant's Motion for Summary Judgment, Plaintiffs do not possess standing to raise the hypothetical claims of third parties with no relationship to themselves, and Plaintiffs may not raise speculative injuries to themselves in order to satisfy the requirements of standing. Assuming *arguendo* that Plaintiffs could somehow overcome these barriers, thereby giving this Court jurisdiction to adjudicate Plaintiffs' Equal Protection Clause claim, Plaintiffs would still fall far short of demonstrating discriminatory intent on the part of the City. (Plaintiffs would also be unable to demonstrate discriminatory impact, because Plaintiffs have prematurely filed this lawsuit prior to any impact occurring.) Plaintiffs' slender reed, upon which their Equal Protection Clause argument rests, is an article from the *Riverfront Times* tabloid of February 28, 2007, that contained numerous misquotations and took the Mayor's statements entirely out of context.

A. The *Riverfront Times* is not a Trustworthy Source of Information

One widely-held opinion that came through loud and clear from the Board of Alderman is that the *Riverfront Times* tabloid is not a reliable source of information. According to Alderman Drake, "[T]his is a newspaper that is not a newspaper. ...I'm saying the *Riverfront Times* carries no media integrity whatsoever.... I give it no credibility." Drake Depo. 21-22. Not to put too fine a point on it, he

² The depositions and supporting materials are attached to this Memorandum as follows: Exhibit A-Mayor Jeffrey Whitteaker, Exhibit B-Daniel Adams, Exhibit C-John Brust, Exhibit D-Donald Carroll, Exhibit E-Steven Drake, Exhibit F-Randy Helton, Exhibit G-Michael Pennise, Exhibit H-Edgar Walker, Exhibit I-James White, Exhibit J-Declaration of Jeffrey Schaub, Exhibit K-SAVE MOU.

reiterated, “I don’t view the *Riverfront Times* as any form of legitimate media.” *Id.* at 75. Alderman Brust concurred: “I don’t think that’s a very good paper.” Brust Depo. 28. “I don’t really believe everything the *Riverfront Times* paper says.” *Id.* at 30. “I’ve heard people say there’s a lot of stuff in there, *Riverfront Times*, that’s not true or they got it out of proportion...” *Id.* at 31. As Alderman Drake surmised, the *Riverfront Times* deliberately engaged in “sensationalism” to sell advertisements. Drake Depo. 21. Of the reporter who wrote the story on Valley Park, he said, “I mean, she’s got a job to do. She produced a story that got a lot of people to pick up her newspaper.” *Id.* at 22. Such “reporting” cannot serve as credible evidence of discriminatory intent in an Equal Protection Clause challenge, particularly when the person being quoted disputes the article. And it falls far short of the U.S. Supreme Court’s requirement that “proof” of discriminatory intent be shown. “We have made clear that ‘proof of racially discriminatory intent or purpose is required’ to show a violation of the Equal Protection Clause.” *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 194 (2003) (quoting *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977)).

B. The Mayor was Misquoted in the *Riverfront Times*

Plaintiffs rest their allegation of discriminatory intent primarily upon the mention of two derogatory terms in the *Riverfront Times* article: “beaner” and “wetback.” However, as the article itself indicates, and the Mayor reiterated during his deposition, he was describing to the reporter terms that a city attorney would *not* want a City official to use. “[S]he had asked for examples of what might a city attorney or legal counsel recommend that you don’t say.” Mayor Depo. 70. Moreover, the reporter deceptively indicated to the Mayor that this portion of the discussion—concerning why a city attorney might be displeased about the fact that the interview was occurring or about certain terms being used—would be off the record. Mayor Depo. 118. The Mayor understood that “some of the questions that she would ask were examples that were suggestions of things that the legal counsel probably not recommend that you would ever say.” Mayor Depo. 91. It was the reporter who initiated questioning about offensive terms. “I was prompted by the interviewer, or the reporter, Kristen, on why, you know, the attorneys

would not want me to have correspondence with reporters and things that you would not say.” Mayor Depo. 115. Plainly, the reporter was laying a trap. She was asking the Mayor to talk about terms that should not be used, so that she could quote the Mayor as saying those terms. The reporter’s motivations became clear to the Mayor in retrospect. “I just believe that the reporter was on a mission to just have a nasty article that would maybe provoke different individuals and make a good controversial story which would, in turn, have a lot of people picking up that paper.” Mayor Depo. 115.

In another section of the article, the reporter attributed to the Mayor a statement including the phrases “Cousin Puerto Rico” and “Taco Whoever.” The Mayor denied making any such statement. Mayor Depo. 117. The depositions also revealed that in his conversations individual Aldermen shortly after the article was printed, the Mayor denied making such statements. As Alderman White stated, “He had told me that didn’t make some of those statements....” White Depo. 25. “[H]e actually cited the cousin Puerto Rico and Taco statement as being something that he never said to her and he didn’t know where that statement came from....” *Id.* at 26.

The reporter also insinuated that the Mayor had advocated the immigration-related ordinances in response to the arrival of an Hispanic family into a particular neighborhood. The Mayor flatly denied any such motivation, on his part, or on the part of any Alderman. “[T]hat’s ridiculous. I don’t know of any board member or myself that had such activity in their mind.” Mayor Depo. 125.

Desperate to find some indication, other than the *Riverfront Times* article, that the Mayor used derogatory terms, Plaintiffs erroneously seized upon the Mayor’s apology to the Board of Aldermen after the article was published. In that apology at the Board meeting of March 5, 2007, the Mayor stated that he had made a “mistake” that reflected poorly on the City. However, contrary to the assumption of Plaintiffs, the mistake that the Mayor acknowledged was not the use of derogatory terms; it was talking to the reporter in the first place. “I believe the mistakes were just talking to some of these newspaper and tabloid reporters who like to twist and turn facts and misquote words out of individuals’ discussions.” Mayor Depo. 121. During that meeting of the Board of Aldermen, the Mayor denied saying some of the quotations attributed to him by the *Riverfront Times*. “He said in the meeting that he didn’t say that.”

Pennise Depo. 38. The Mayor's public and private statements at the time that the derogatory statements in the tabloid article were either fabricated or taken out of context must be weighed heavily in any assessment of the article's credibility.

C. The Mayor Has Never Used Derogatory Terms to Refer to Hispanic Individuals

Not only did the Mayor not use derogatory terms to refer to Hispanic individuals in the interview with the *Riverfront Times* reporter, he *never* uses the terms ascribed to him. "I never use those terms in everyday language, and that question, those terms were put out as examples that the reporter had asked as what would be things that your attorney, attorneys would probably not want you to comment and talk about and that was all taken out of [context].... [T]he reporting was just, I think, intended to make [an] article that would have a lot of controversy and draw attention so people would pick up that magazine or paper." Mayor Depo. 114. Nor has the Mayor used any other derogatory terms in reference to Hispanic individuals, *Id.* 126, or a derogatory term to refer to a person of any other ethnicity or race. *Id.*

Every Alderman who was asked during the depositions confirmed that the Mayor does not use such terms. As Alderman Drake declared, "I have not heard him say any of these things." Drake Depo. 22, 75. Alderman White confirmed, "[I]t doesn't sound to me like anything that I've ever heard the Mayor say." White Depo. 17 "I have never ever heard the Mayor use those terms. He's never used them in my presence." *Id.* at 90. He added, "I have no reason to believe that he would [use them outside of my presence]." *Id.* at 90-91. Alderman Brust stated that he had never heard the Mayor use any derogatory terms either. Brust Depo. 61. Alderman Pennise stated the same thing, Pennise Depo. 70, as did Alderman Carroll. Carroll Depo. 51. These unanimous statements of people who have known and worked with the Mayor for years cannot be discounted.

Nor have the Aldermen used such derogatory language themselves. As Alderman White averred, "I've never heard any language like that used by any member of the Board of Aldermen at any time in my presence.... [T]hat language just doesn't fit with what I know Valley Park to be, and it certainly doesn't fit with what I am...." White Depo. 91-92. According to Alderman Pennise, "I had never heard any of

the aldermen use any derogatory terms. This isn't about, wasn't about race, it's just about the law."

Pennise Depo. 69-70. See also Carroll Depo. 51-52. Plaintiffs' mischaracterization of the motivations and actions of the Mayor is a weak one, to say the least. To prove discriminatory intent on the part of the City, Plaintiffs would also have to prove that the Board of Aldermen (who passed the Ordinance unanimously) acted with the same intent. Their depositions did not indicate such intent in any way.

D. The Motivations of the City in Enacting Ordinance 1722 Were Entirely Non-Discriminatory

The Mayor and every Alderman declared unequivocally in their depositions that there was no racial or ethnic bias motivating the enactment of Ordinance 1722. The Plaintiffs' allegations of racial bias were described by the Mayor as "totally ridiculous." Mayor Depo. 113 "[R]ace, color ... had no driving force in getting these ordinances enacted." *Id.* As Alderman Drake stated, "The press has created this entire [racial] agenda. I mean, this whole thing all started with the betterment of our community. I mean, that's all it is...." Drake Depo. 76. Alderman White reiterated, "[The *Riverfront Times* article] created, I believe, some racial overtones." White Depo. 23. Alderman Adams also agreed that racial overtones were cast on the City's actions by others. Adams Depo. 88.³

Plaintiffs' counsel also explored whether Ordinance 1722 was enacted in response to overcrowding in accommodations purchased by landscaping and tree-trimming companies in Valley Park, referring to an article quoting City Attorney Eric Martin on the subject. Mayor Depo. 81. Searching in vain for some form of racial or ethnic bias, Plaintiffs' counsel questioned the Mayor regarding the ethnicity of the workers housed in the overcrowded accommodations. The Mayor responded that he never saw, nor learned, nor cared to learn the race or ethnicity of the tenants. "The events ... were

³ Throughout this litigation, Plaintiffs have repeatedly stated their preposterous claim that it would be impossible for a complaint under Ordinance 1722 to be based on anything other than race. However, when asked what a valid complaint under the ordinance might be based upon, the Mayor himself offered an example that the Plaintiffs had apparently not considered—a complaint arising "if somebody would openly admit to a police officer" that he was unauthorized to work in the United States. Mayor Depo. 123. As the Mayor correctly noted, voluntary admissions are frequently the first indicators of violations of the law.

reported to me by other citizens, so I can't tell you if they saw blacks, whites, Hispanics, or Chinese." Mayor Depo. 85, 119-20. "I didn't care. Don't know." Mayor Depo. 84. He never had occasion to learn or inquire about their race at any time. Mayor Depo. 120.

The motivation of the Mayor in approving Ordinance 1722 was to protect jobs and wages of U.S. citizens and of aliens authorized to work in the United States. "I was quoted as saying that I've got some ideas and comparisons from another city [that was] taking such actions, but my concerns started many, many years ago. I'm a Teamster, union personnel man. ... I've got 29 years in the Teamsters, and my concern to get the ordinance underway was to prevent the deterioration of the wage structure and also to protect the wage of the legal—I said 'legal'—immigrant that needs [to be] protected within the community." Mayor Depo. 80. Ethnicity had nothing to do with it.

Alderman White offered the same justification for his support of Ordinance 1722. "[P]rotecting the American workers is a big issue with me, and I believe that ... you can't just turn a blind eye to any illegal activity but you need to do what you can to keep your community safe, you need to do what you can to protect American workers, and I believe that when you have American workers out there competing against people who are illegally in this country and are being paid a substandard wage, it's not good for anybody." White Depo. 93-94. Alderman Drake was driven by a similar motivation: "[T]he youth of the community used to always get jobs, you know, in those various entities, ... but it just doesn't happen anymore. I mean, the kids don't get those jobs, so they go to somebody else, and I guess the reason why they're going to [illegal aliens] is because it's a cheaper wage base...." Drake Depo. 74, 77. Alderman Carroll stated his belief that it was better to discourage employers from illegally hiring unauthorized aliens than to focus the ordinance on employees: "[T]he ordinance we have right now would be to hit the employer, as opposed to the employee, and try to cut them down from hiring illegals." Carroll Depo. 18.

In addition to protecting the wages and jobs of U.S. citizens and authorized alien workers, several of the Aldermen offered other justifications for Ordinance 1722. Alderman Drake explained that he saw the ordinance as a means of preserving tax dollars that would wrongly be spent on infrastructure and

services for illegal aliens. “[T]he one thing we can do is make sure we’re spending that money correctly for the people that are paying taxes to the City of Valley Park.” *Id.* at 16. “It’s my [constituents’] tax dollars that are being killed by it.” *Id.* at 73. Alderman White explained that he was driven in part by the desire to preserve the rule of law: “[T]o me, these ordinances were a no-brainer because I believe that all Americans are—it’s one of our obligations to follow the rule of law and be law-abiding citizens.” White Depo. 16. As Alderman Brust put it, “[If they’re legal, I’m behind ’em a hundred percent, but if they’re not legal, they’re aliens not legal, they need to be legal.” Brust Depo. 58.

E. The Informational Materials Included In the Friday Packets Do Not Reflect Discriminatory Intent

In a new attempt to find some indication of racial or ethnic discrimination Plaintiffs’ counsel turned their attention during the depositions to the letters and articles included under the “Information” tab in the “Friday Packet” of materials delivered to each Alderman before Board meetings. Plaintiffs’ counsel evidently believe that such materials might reflect discriminatory motives on the part of the City. However, contrary to Plaintiffs’ implication, the depositions revealed that the Mayor does not selectively choose what goes into the Information section of the Friday Packets. In fact, *every* signed letter received by the Mayor about *any* City business is placed in the Friday Packets. There was no selection of particular letters by the Mayor or by any other City official. “I just directed the Clerk to put in ... any signed letters or documents that I got, I always made sure they go into the packet so the board could read and consider any questions, or comments, or complaints....” Mayor Depo. 19, 55-56. The Mayor does not normally respond in writing to any letters sent to the City, regardless of whether the letters support or oppose City policies. As the Mayor explained, “I personally didn’t have the time to respond to each individual.” Mayor Depo. 64. “[T]here’s hundreds of letters weekly that come through that office, and generally, when someone has spoken their viewpoint, it’s pretty hard to change that, and I personally don’t have the time to reply to that many letters that were coming through.” Mayor Depo. 113.

In addition, news clippings mentioning the City of Valley Park or discussing issues relevant to the City were placed in the Information section of the Friday Packet, usually by the City Clerk or by the Assistant to the Mayor. Mayor Depo. 44-45; Pennise Depo. 51; Walker Depo. 28. The City Attorney also submitted material for inclusion in the Information Section of the Friday Packets. Mayor Depo. 53. Thus, any selective or ethnically-biased inclusion of materials would have to be a collusive effort of all four people.

Plaintiffs' counsel also suggested that certain political viewpoints regarding illegal immigration were "inappropriate," and that the Mayor should have excluded letters or articles espousing those viewpoints from the Friday Packet. Mayor Depo. 74. Plaintiffs' counsel seemed particularly exercised about a letter to the City from a Citizens Civil Defense Special Operations organization, dated January 15, 2007. The letter mentioned particular gangs associated with illegal aliens, many of which have the word "Latin" in the gang name. Plaintiffs' counsel seemed to be suggesting that a listing of such gang names (in the context of a discussion of the criminal impact of illegal immigration) was inappropriate. None of the Aldermen who were asked about the letter thought it was inappropriate. See Adams Depo. 48-51. More importantly, the Mayor made clear that he does not exclude any letter or article based on its political viewpoint. "[M]y personal idea of inappropriate and an alderman's idea of inappropriate might be different, so I try not to be the judge of what's right and wrong to go in the packet." Mayor Depo. 74. Nor did any of the Aldermen indicate that they had *ever* voiced any objection to material in the Information section of the Friday Packet. See Brust Depo. 13; Adams Depo. 51.

Finally, it should be noted that several of the Aldermen indicated that they do not read the material included in the Information Section in the Friday Packets. As Aldermen Brust stated, "[A] lot of times I don't even look at the back of the book, the information." Brust Depo. 12. He explained, "[T]here's a lot of stuff in there, people has wrote in and stuff, and I feel if they've got a complaint, they ought to come to the board." Brust Depo. 11. Others may read the information, but give it little or no weight in considering ordinances. "I don't know that I used that information to make my decision or even in consideration [regarding Ordinance 1722]. It was strictly information." Adams Depo. 57. And of

course, some Aldermen do read the material in the Information Section regularly. See Walker Dep. 23. Regardless, Plaintiffs' suggestion that the existence of a letter or article in the Information Section of the Friday Packets somehow reflects the legislative intent of the Mayor or the Board of Aldermen is simply not supported by the deposition statements of the Mayor and the Aldermen.

II. Plaintiffs' Due Process Claim Fails to Meet the *Salerno* Standard

In due process cases, “[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.” *U.S. v. Salerno*, 481 U.S. 739, 745 (1987). This Court need only conclude that a “set of circumstances exists under which the [ordinance] would be valid,” to resolve the due process challenge in this case. *Id.* Plaintiffs' counsel suggested during the depositions of the Mayor and the Board of Aldermen that the enforcement procedures of Ordinance 1722 were not clear, and that there might not be an opportunity for business entities to be heard. However, the depositions revealed to the contrary that business entities will receive numerous opportunities to present information to the city in hearings before the Code Enforcement Office, as well as in hearings before the Board of Adjustment. Moreover, any questions that business entities have about the operation of Ordinance 1722 will be answered directly by the City Attorney. Thus, Plaintiffs have no factual basis for claiming that the basic due process requirement of a meaningful opportunity to be heard that is appropriate to the circumstances, *Mathews v. Eldridge*, 424 U.S. 319, 333 (U.S. 1976), is not met. And Plaintiffs certainly have not satisfied the *Salerno* standard of establishing that due process would be denied in *every* case.

A. Ordinance 1722 Provides Multiple Opportunities to be Heard

As the text of Ordinance 1722 makes clear, and the Declaration of Code Enforcement Officer Jeffrey Schaub confirms, Ordinance 1722 provides multiple opportunities for business entity that is the subject of a complaint to be heard. Schaub Declaration, ¶¶ 10-13. Not only will a representative of the particular business entity be interviewed prior to the determination of whether a complaint is valid,

Section 4.B(3) of Ordinance 1722 allows the business entity to produce any information it wishes in a hearing before the Code Enforcement Office, and Section 5.D. allows a business entity or its employee to obtain a pre-deprivation or post-deprivation hearing before the Board of Adjustment of Valley Park, with the right of appeal to the Saint Louis County Circuit Court.

Plaintiffs' counsel asked many of the Aldermen whether they were familiar with the procedural minutiae of the enforcement process of Ordinance 1722. While several Aldermen were not able to recall such details, others such as Alderman Drake identified the procedural protections available to business entities. He pointed out that prior to the determination of any complaint's validity, the Code Enforcement Officer would conduct "an interview of the business that's in question." Drake Depo. 63. He also noted that there would be an interview when the business entity presented information to the City within three business days of being notified of a valid complaint, referring to Section 4.B(3) of the ordinance. *Id.* at 65. Alderman White noted that the Code Enforcement Officer would not be attempting to make determinations of any alien's status on his own. "I believe that ultimately, this ... would be utilizing some sort of a federal database, some sort of database that would be able to corroborate whether someone was to be legally or illegally into the country." White Depo. 82.

B. Plaintiffs Claims Regarding the Clarity of Ordinance 1722 are Unfounded

Despite the considerable length and detail found in the text of Ordinance 1722, Plaintiffs have suggested that its provisions do not provide clear guidelines for business entities. However, Plaintiffs confuse the guidelines for business entities with guidelines for City officials. The behavior by business entities that is prohibited by Ordinance 1722 is quite clear—it is the precisely the same behavior that is prohibited under federal law, 8 U.S.C. § 1324a(a)(1)-(2). "It is unlawful for any business entity to knowingly recruit, hire for employment, or continue to employ" an unauthorized alien. Ordinance 1722 § 4.A. What Plaintiffs point to, as an example of a provision of Ordinance 1722 that is unclear in their opinion, is what constitutes a "valid complaint" under Section 4.B(3). However, this is entirely beside the

point with respect to a due process challenge brought by a business entity. As long as the business entity's obligations are clear, a due process challenge based upon vagueness cannot stand.

In any case, the depositions demonstrated that there is sufficient clarity regarding the enforcement mechanisms of Ordinance 1722. Moreover, the Code Enforcement Officer will consult the City Attorney as a matter of course in assessing the validity of all complaints. "The Building Commissioner/Code Enforcement Officer would contact City Counsel before any action was taken, to verify what was the proper procedure in this matter." Mayor Depo. 124.

In the event that a business entity does have questions about any aspect of Ordinance 1722, those questions may be raised directly to the Board of Alderman and the City Attorney at an Aldermanic meeting. Plaintiffs were evidently unaware of this feature of small-town government in Valley Park. As the Mayor explained: "[W]e have a audience participation section that starts before every board meeting that allows anybody, ... anybody that attends the board meeting can, can fill out a speaker request form and ask any question about anything in the City limits of Valley Park, and a lot of times they ask about stuff that's not Valley Park related, but we try to give the residents the correct answer or give them the right place to go get the answer." Mayor Depo. 32. "[A]ny citizen or individual in the audience can get their questions answered about any ordinance right there at that meeting and we give them the answer, if we have it and can supply it at that current time." Mayor Depo. 33. In addition, any resident of Valley Park may call the City Attorney directly by telephone and ask questions about any ordinance. "I have told Mr. Martin to answer all questions and comments from the citizens that he can, legally within his means." Mayor Depo. 34.

III. Plaintiffs' Claims Regarding the Validity of Ordinance 1722 are Unfounded

Plaintiffs' constant questions regarding the fact that the Mayor accidentally signed an earlier draft of Ordinance 1722, as well as the correct version of Ordinance 1722 (enacted by the Board of Alderman) on February 14, 2007, still have not yielded any basis for challenging the validity of the ordinance. (Indeed, Plaintiffs' unexplained argument is moot in any event because Ordinance 1736 restated the text

of Ordinance 1722 in its entirety.) The depositions of the Mayor and Aldermen confirmed what Defendant has repeatedly explained to Plaintiffs: (1) the Mayor signed two versions because he accidentally signed a draft that was on his desk before signing the actual ordinance that was enacted by the Board; (2) the version enacted by the Board was the same version that appeared in the Friday Packets before the Board meeting and the same version certified by the City Clerk as the official text of Ordinance 1722.

The Mayor explained the accidental signing of the draft version as follows: “[T]his is probably a draft that was on my desk, ... and so possibly amongst the desk and the shuffling of the paperwork, [I] probably signed the draft, and then had to go back and sign the, the clear, clean document.” Mayor Depo. 98. Alderman Adams, who was Mayor of the City from 1998 to 2000, stated that a similar mix-up may have happened during his tenure as Mayor: “If I signed a ordinance in my packet and had not presented it to the City Clerk, she may have forwarded me another copy to be signed, unknowing.” Adams Depo. 35.

The Mayor also confirmed that the version included in the Friday Packet before the meeting was the same version that was enacted by the Board. There was no amending of the terms of the proposed ordinance during the meeting. Mayor Depo. 122-23. Alderman Pennise concurred. “Q. ... So whatever was in your book on that Friday packet is the one that you passed? A. Yes.” Pennise Depo. 31. Thus, it is quite easy to confirm the true text of Ordinance 1722—look at the Friday Packet before the meeting. The text of that ordinance matches precisely the text of Ordinance 1722 as certified by the City Clerk.

IV. The City Has Entered Into a Memorandum of Understanding with the Federal Government to Use the SAVE Program to Determine Aliens’ Statuses.

On September 12, 2007, the City entered into a Memorandum of Understanding (MOU) to use the SAVE Program operated by the federal government to allow city and state officials to receive federal verification of aliens’ immigration statuses. See SAVE MOU, attached as Exhibit K. During the depositions, Plaintiffs resorted to their now-familiar tactic of attempting to claim that an official document is not really valid. In this instance, Plaintiffs questioned most of the Aldermen about the

authority of Special Counsel to the City, Kris W. Kobach, to sign the Memorandum of Understanding on behalf of the City. Several Aldermen informed Plaintiffs' counsel that the Board had authorized Special Counsel Kobach to sign the MOU. Alderman Brust confirmed that the Board of Aldermen had approved the signing of the MOU. "Q. Was this approved by the Board of Aldermen? A. Yes." Brust Depo. 42. Alderman Adams also recalled authorizing the MOU: "I do not recall when we authorized Kobach, but I do know that it was taken up by the board." Adams Depo. 98. Asked again if he recalled whether the Board authorized Kobach to sign the MOU, he repeated: "My belief was yes." *Id.* at 110. Although Alderman White was absent from the meeting in question, he stated, "It's my opinion that [Kobach] is acting on behalf of the City." White Depo. 83. However, because the authorization occurred during executive session and was therefore not reflected in the minutes of the open meeting, Plaintiffs' counsel were evidently not satisfied with the sworn statements of the Aldermen.

In addition, many Aldermen correctly surmised that specific authorization of Special Counsel Kobach was probably not necessary in any event. As Alderman Drake noted, such an MOU was implicitly assumed by Ordinance 1722, which required the City to use SAVE or a similar process established by the federal government to obtain verification of aliens' work authorization status: "I believe that this was probably encompassed in some of the previous legislation." Drake Depo. 69. Alderman White concurred: "I don't believe [authorizing Kobach to sign the MOU] would be necessary." White Depo. 86. He explained, "[I]t seems like it's part of the whole ordinance of having these sort of agreements in place...." *Id.* at 87. Alderman Adams also doubted that the authorization of the MOU by the Board during executive session was actually required. Asked whether he thought it was necessary to specifically authorize Special Counsel Kobach to sign the MOU, Alderman Adams replied, "In my opinion, not specifically." Adams Depo. 112. In any event, such authorization was given by the Board.

V. Conclusion

In summary, Plaintiffs' depositions of the Mayor and Aldermen have not only failed to support Plaintiffs' claims, the depositions have actually undermined Plaintiffs' claims in four critical respects.

They have made clear that (1) there was no discriminatory intent on the part of the Mayor or the Board of Aldermen in enacting Ordinance 1722; (2) the Plaintiffs are unable to show any denial of due process, much less meet the *Salerno* standard; (3) Plaintiffs' claims about the validity of the enactment of Ordinance 1722 are as flimsy as ever; and (4) Plaintiffs' recent attempt to make the City's SAVE MOU disappear is unavailing. For all of these reasons, Defendant requests that this Court grant Defendant's Motion for Summary Judgment, which is now even more justified than it was when it was filed.

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 26th day of September, 2007:

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