IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

VALARIE WHITNER, VINCENT BLOUNT, and MILDRED BRYANT, individually and on behalf of all others similarly situated,	)	Cause No.: 4:15-cv-01655-RWS
Plaintiffs,	)	
v.	)	
CITY OF PAGEDALE, a Missouri municipal Corporation,	)	
Defendant.	)	

DEFENDANT CITY OF PAGEDALE'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS COUNT IV AND PLAINTIFF MILDRED BRYANT'S CLAIMS FROM PLAINTIFFS' CIVIL RIGHTS CLASS ACTION COMPLAINT

COMES NOW Defendant City of Pagedale ("Defendant"), by and through the undersigned counsel, and for its Reply Memorandum in Support of its Motion to Dismiss Count IV and Plaintiff Bryant's Claims from Plaintiffs' Civil Rights Class Action Complaint, states as follows:

Nothing in Plaintiffs' Memorandum in Opposition effectively refutes the arguments made in Defendant's Motion to Dismiss Count IV and Plaintiff Bryant's Claims from Plaintiffs' Civil Rights Class Action Complaint ("Defendant's Motion to Dismiss"). Without waiving any arguments contained Defendant's Motion to Dismiss, the following arguments respond to points raised in Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss.

I. THIS COURT SHOULD NOT DENY DEFENDANT'S RULE 12(b)(6) MOTION AS UNTIMELY BUT RATHER CONSIDER IT AS IF IT WERE STYLED AS A RULE 12(c) MOTION FOR A JUDGMENT ON THE PLEADINGS.

The Eighth Circuit has found that Rule 12(b)(6) motions, if filed after an answer has been submitted, is to be considered as if it had been styled a Rule 12(c) motion for judgment on the

pleadings. *Westcott v. Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990) ("This distinction is purely formal, because we review this 12(c) motion under the standard that governs 12(b)(6) motions.")[1]; *see also Assefa Gabrel Egziabher v. Parks*, 2012 U.S. Dist. LEXIS 36191, at *3 (W.D. Ark. Mar. 16, 2012) (citing *Wescott*). This Court has recently followed this practice and allowed such motions as if they had been styled a Rule 12(c) motion. *Ixtepan v. Beelman Truck Co.*, 2015 U.S. Dist. LEXIS 29653, at *7 (E.D. Mo. Mar. 11, 2015); *see also Walker Mgmt. v. Affordable Communities*, 912 F. Supp. 455, 458 (E.D. Mo. 1996) (allowing an untimely Rule 12(b)(6) motion when the basis of the argument was included in the answer). Therefore, this Court should consider Defendant's Motion to Dismiss as if it were styled a Rule 12(c) motion for judgment on the pleadings, and the standard of review is the same.

II. COUNT IV DOES NOT STATE A VIABLE FEDERAL CLAIM BECAUSE ACTING IN EXCESS OF POLICE POWERS IS NOT, PER SE, A VIOLATION OF FEDERAL LAW.

Count IV is based on Plaintiffs' argument that a municipality violates federal law when it acts beyond its police power. (*See* Doc. #1, ¶¶ 126-134.) The cited case law by Plaintiffs, however, demonstrates that a municipality acting beyond its police power only violates federal law when some aspect of the Constitution or federal law is triggered. The cases Plaintiffs cite each involve violations under some specific constitutional amendment.[2]

Plaintiffs completely miss the point of Defendant's Motion to Dismiss when asserting that case law "does not hold that municipalities that exceed their statutory grant of power or immune from suit under the federal rights laws," or that municipalities "have a blank check to use that power to violate federally protected rights." (*See* Doc. #26, p. 7.) Such statements

[1] Plaintiffs even admit that "the substantive standards for motions to dismiss and motions for judgment on the pleadings are the same." (*See* Doc. #26, p. 4 n.1).

[2] *See Mugler v. Kansas*, 123 U.S. 623, 657, 8 S. Ct. 273, 295 (1887) (addressing whether exceeding police powers violated the Fourteenth Amendment (specifically, whether government action constituted a taking)); *Goldblatt v. Hempstead*, 369 U.S. 590, 591, 82 S. Ct. 987, 988 (1962) (same); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 683, 98 S. Ct. 2018, 2032 (1978) (same); *Pottinger v. Miami*, 810 F. Supp. 1551, 1562 (S.D. Fla. 1992) (addressing whether exceeding police powers violated the Eighth Amendment (overbreadth)).

blatantly misconstrue Defendant's position. The fact that some aspect of federal law must be invoked in a 42 U.S.C. § 1983 action does not immunize state police powers. Defendant does not dispute that a municipality may violate federal law by exceeding police powers if such acts constitute a violation of federal law. The issue here, however, is whether a claim that a municipality exceeded police powers, absent any alleged violation of a constitutional amendment or other federal law, amounts to a sufficient 42 U.S.C. § 1983 cause of action. Plaintiffs have failed to cite any case law, and Defendant can find none, where the alleged exceeding of police powers amounted to a 42 U.S.C. § 1983 action. For this reason, Count IV of Plaintiff's Civil Rights Class Action Complaint fails as a matter of law.

III. PLAINTIFF MILDRED BRYANT DOES NOT PRESENT A JUSTICIABLE CONTROVERSY BECAUSE SHE LACKS STANDING AND HER CLAIMS ARE NOT RIPE.

Plaintiffs argue that Plaintiff Mildred Bryant ("Plaintiff Bryant") does have standing and that her claims are ripe because the threat of law enforcement against her is a sufficiently imminent injury-in-fact. Plaintiffs primarily rely on two cases to support this arugment: *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014), and *Steffel v. Thompson*, 415 U.S. 452, 94 S. Ct. 1209 (1974). These cases, however, are significantly distinguishable from the present action.

In *Susan B. Anthony List*, a pro-life advocacy organization planned to make a billboard criticizing a local politician about his voting record, and the billboard company refused to display the message after the politician threatened legal action pursuant to a false statement statute. 134 S. Ct. at 2339. The advocacy organization then sought a pre-enforcement challenge to the false statement statute on First and Fourteenth Amendment grounds. *Id.* at 2345. The Court reversed dismissal, finding that the advocacy organization demonstrated an injury in fact sufficient for Article III standing because (1) the organization alleged "an intention to engage in a course of conduct arguably affected with a constitutional interest" by pleading specific

statements that they intend to make in future election cycles; (2) the intended future conduct was "arguably proscribed" by the statute in that it covered the subject matter of the intended speech; and (3) there was a substantial threat of future enforcement because there was a history of past enforcement in that the organization was the subject of a complaint in a recent election cycle. *Id.* at 2343-45.

In *Steffel v. Thompson*, the petitioner and other individuals were distributing handbills at a shopping center, and the group left after police officers told them they would be arrested for violating a state trespass law unless they stopped. 94 S. Ct. at 1214. Two days later, the petitioner and another individual returned to the shopping center and began handbilling. *Id.* They were again told by the police to stop handbilling or they would be arrested. *Id.* The petitioner left to avoid arrest, while the companion stayed and was arrested. *Id.* In response, the petitioner filed a complaint challenging the state law for violating the petitioner's First and Fourteenth Amendments. *Id.* at 1213. The Court reversed dismissal on standing grounds and found that the threat of enforcement amounted to an injury-in-fact. *Id.* at 1215-16.

The present situation is readily distinguishable from these two cases. In *Susan B. Anthony List*, the statute at issue arguably chilled First Amendment free speech rights. *Susan B. Anthony List*, 134 S. Ct. at 2336. There, the petitioners allegedly voiced an intention to exercise their First Amendment rights, and the respondent attempted to prohibit such speech by filing a complaint with the state elections commission. *Id.* at 2339, 2343. Similarly, in *Steffel*, the petitioner also claimed that the statute at issue chilled First Amendment free speech rights. *Steffel*, 94 S. Ct. at 1213. Importantly, the *Steffel* petitioner's conduct was altered as a result of the threatened enforcement: the petitioner **left the area** to avoid arrest. *Id.* at 1214.

While *Susan B. Anthony List* and *Steffel* involved prior restraints on First Amendment

free speech rights that altered people's courses of conduct as a result of threats of enforcement, Plaintiff Bryant essentially claims that her due process rights might be violated if allegedly unfair ordinances are unfairly enforced against her. Again, she has only received a warning. She has not been fined, summoned to court, or, importantly, been caused to change her conduct in any way. Actually chilling First Amendment speech is different than potential future enforcement possibly violating due process rights. Plaintiff Bryant lacks standing until she is truly aggrieved in some way. *See Susan B. Anthony List*, 134 S. Ct. at 2342. For similar reasons, Plaintiff Bryant's claims are not ripe for determination in that her injuries are not "certainly impending" but are rather "contingent on future possibilities." *Pub. Water Supply Dist. No. 10 v. City of Peculiar*, 345 F.3d 570, 573 (8th Cir. 2003).

WHEREFORE, for the reasons stated herein and in its previously filed Motion to Dismiss Count IV and Plaintiff Bryant's Claims from Plaintiffs' Civil Rights Class Action Complaint, Defendant City of Pagedale respectfully requests that this Court grant its Motion to Dismiss Count IV and Plaintiff Bryant's Claims from Plaintiffs' Civil Rights Class Action Complaint, enter an Order dismissing Count IV for failure to state a claim and dismissing Plaintiff Mildred Bryant's claims for lack of a justiciable controversy, and for such other and further relief that this Court deems just and proper.

BEHR, McCARTER & POTTER, P.C.

By: */s/ Timothy J. Reichardt*
Timothy J. Reichardt, #57684MO
Andrew T. Tangaro, #64193MO
Joseph C. Vitale, #67336MO
7777 Bonhomme Avenue, Suite 1400
St. Louis, MO 63105
Telephone: (314) 862-3800
Facsimile: (314) 862-3953
Email: treichardt@bmplaw.com
Email: atangaro@bmplaw.com
Email: jvitale@bmplaw.com
Attorneys for Defendant City of Pagedale

CERTIFICATE OF SERVICE

The undersigned certifies that on the 21st day of January, 2016, a true and accurate copy of the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system and served upon all parties of record via the Court's electronic filing system.

/s/ Timothy J. Reichardt