**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MISSOURI**
**EASTERN DIVISION**

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

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS COUNT IV AND PLAINTIFF MILDRED BRYANT'S CLAIMS FROM PLAINTIFFS' CIVIL RIGHTS CLASS ACTION COMPLAINT**

## I. INTRODUCTION

Defendant city of Pagedale (the "City") moves to dismiss Count IV of the complaint of Plaintiffs Valarie Bryant, Vincent Blount, and Mildred Bryant (together, the "Plaintiffs") under Fed. R. Civ. P. 12(b)(6) ("Rule 12(b)(6)"). Pagedale also seeks to dismiss Ms. Bryant from the case under Fed. R. Civ. P. 12(b)(1) ("Rule 12(b)(1)"). This Court should deny the City's motion for three reasons. First, the City's motion to dismiss Count IV under Rule 12(b)(6) is untimely. Second, even if this Court were to entertain the City's effort to dismiss Count IV, Plaintiffs state a plausible claim regarding the City's misuse of its police power. Third, the City's Rule 12(b)(1) fails because this Court has jurisdiction over all of Ms. Bryant's claims. Plaintiffs' complaint establishes that Ms. Bryant faces a credible threat of prosecution that creates a real, substantial

controversy between her and the City and that can, and should, be resolved by this Court. She therefore has standing and her claims are neither unripe nor moot.

## II. FACTS

Plaintiffs filed their complaint on November 4, 2015. Civil Rights Class Action Compl., *Whitner v. City of Pagedale*, No. 4:15-cv-01655-RWS (E.D. Mo. Nov. 4, 2015), ECF No. 1 (the "Complaint"). The Complaint alleges the following facts, among others.

- Ms. Bryant is a resident of Pagedale. Complaint ¶ 16.
- Ms. Bryant received a building inspection report from the City that explicitly threatened future court summonses or fines if she did not cure alleged violations of the City's municipal code regarding her home. Complaint ¶¶ 20, 81.
- The City's building inspection report demanded, among other things, that all Ms. Bryant's windows have blinds, matching curtains, or other such "window treatment." It also ordered her to remove vegetation from her driveway and cut back other weeds. Complaint ¶ 82.
- Ms. Bryant is 84-years-old, lives alone, and she cannot do some of the work demanded by the City. Complaint ¶¶ 17, 21.
- The deadline the City gave to Ms. Bryant in the building inspection report has elapsed and she now faces the threat of fines or imprisonment from the City for her alleged violations. Complaint ¶ 84.
- Ms. Bryant anticipates being threatened with tickets or actually ticketed by the City in the future. Complaint ¶ 64.
- Ms. Bryant believes that she cannot financially or physically keep up with the

demands the City has made regarding her property. Complaint ¶ 66.

- Since 2010, the City has increased the number of non-traffic related tickets by 495%. Complaint ¶ 32.
- In 2013, the Pagedale Municipal Court heard 5,781 cases, or an average of 241 cases for each twice-monthly session. Complaint ¶ 48.
- Ms. Bryant's fellow-named plaintiffs, Valarie Whitner and Vincent Blount, have been threatened with fines and then subsequently ticketed and fined for conditions around their home. These fines have caused them financial difficulties. Complaint ¶¶ 14, 15, 67-80.
- There is no indication that the City intends to halt its code enforcement policies or change its municipal code to remove code provisions that have led to the threats against Ms. Bryant. Complaint ¶ 65.

The City filed its responsive pleading to the Complaint on December 7, 2015. Def. City Pagedale's Answer Affirm. Defenses Pls.' Compl., *Whitner v. City of Pagedale*, No. 4:15-cv-01655-RWS (E.D. Mo. Dec. 7, 2015), ECF No. 17 (the "Answer"). Fifteen days later, the City filed the instant motion seeking, among other things, to have this Court dismiss Count IV of the Complaint pursuant to Rule 12(b)(6). Def. City Pagedale's Mot. Dismiss Count IV Pl. Mildred Bryant's Claims Pls.' Civil Rights Class Action Compl., *Whitner v. City of Pagedale*, No. 4:15-cv-01655-RWS (E.D. Mo. Dec. 21, 2015), ECF No. 21; Def. City Pagedale's Mem. Law Supp. Its Mot. Dismiss Count IV Pl. Mildred Bryant's Claims Pls.' Civil Rights Class Action Compl., *Whitner v. City of Pagedale*, No. 4:15-cv-01655-RWS (E.D. Mo. Dec. 21, 2015), ECF No. 22 (the "Memorandum").

## III. ARGUMENT

### I. This Court Should Deny the City's 12(b)(6) Motion Because it is Untimely

The City's motion to dismiss Count IV is untimely. The Federal Rules of Civil Procedure state that motions to dismiss under Rule 12(b)(6) "must be made before pleading if a responsive pleading is allowed." Fed. R. Civ. P. 12(b). The City filed its Answer on December 7, 2015, while it filed the instant motion to dismiss under Rule 12(b)(6) on December 21, 2015—fifteen days late. The City has provided no reason for filing a nonconforming motion, nor has it sought an extension. This Court should therefore deny the City's motion to dismiss Count IV.

### II. Count IV States a Viable Federal Claim

#### A. Standard for Motions for Judgment on the Pleadings

The City filed its motion out of time and this Court should deny it for that reason alone. Nonetheless, courts sometimes treat an untimely motion under Rule 12(b)(6) as a motion for a judgment on the pleadings under Fed. R. Civ. P. 12(c) ("Rule 12(c)"). *See Patrick v. Rivera-Lopez*, 708 F.3d 15, 18 (1st Cir. 2013); *St. Paul Ramsey Cty. Med. Ctr. v. Pennington Cty.*, 857 F.2d 1185, 1187 (8th Cir. 1988). In reviewing a motion for judgment on the pleadings under Rule 12(c), the court must accept as true all factual allegations set out in the complaint and construe the complaint in the light most favorable to the plaintiff, drawing all inferences in her favor. *R.N. v. Cape Girardeau 63 Sch. District*, 858 F. Supp. 2d 1025, 1028 (E.D. Mo. 2012). "A motion to dismiss for failure to state a claim is disfavored, especially when one's civil rights are at stake." *McGlone v. Bell*, 681 F.3d 718, 728 (6th Cir. 2012).[1] The complaint's allegations

[1] While *McGlone* and other cases discussed in this memorandum concern motions to dismiss, the substantive standards for motions to dismiss and motions for judgment on the pleadings are the same. *Schnuck Markets, Inc. v. First Data Merchant Data Servs. Corp.*, 2015 U.S. Dist. LEXIS 100187, at *7 n. 3 (E.D. Mo., July 31, 2015).

must show that its claims are plausible, but it need not establish any probability of success on those claims. *Zumwalt v. City of Wentzville*, No. 4:10CV561RWS, 2010 WL 2710496, at *2 (E.D. Mo. July 7, 2010) (quoting *Braden v. Wal–Mart Stores*, 588 F.3d 585, 594 (8th Cir.2009)). A court should not dismiss a claim simply because it is doubtful that the plaintiff will be able to prove all of the necessary factual allegations or it appears that relief is very remote and unlikely. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007).

Applying those strict standards to the City's motion, Claim IV states a plausible federal claim for relief and this Court should not dismiss it. Indeed, Count IV pleads a well-established cause of action under the federal constitution and the sole case on which the City relies does nothing to undermine that fact.

**B. Count IV States a Viable Federal Claim**

Count IV of the Complaint alleges that the City has made a number of harmless conditions illegal in excess of its police power. The Complaint alleges that "[a]s a direct and proximate result of the City's actions, the named Plaintiffs have suffered, and will continue to suffer, irreparable injury to their constitutional rights." Complaint ¶ 132. The Complaint then seeks "[d]eclaratory and injunctive relief … to remedy the City's unconstitutional conduct of ticketing, convicting, and fining defendants for harmless activities." Complaint ¶ 134. The City moves to strike, citing *XO Missouri, Inc. v. City of Maryland Heights*, 362 F.3d 1023, 1027 (8th Cir. 2004). It argues that that case establishes that the City's police power is conferred by the state and thus there is no federal cause of action present. Memorandum 3.

**1. The City Violates the Federal Constitution When it Exceeds its Police Power**

The City is wrong that there is no violation of a federal right when a state or local government exceeds its police power. The U.S. Supreme Court has long recognized that, when the government acts beyond its police power, it violates the Constitution and, moreover, it is the duty of the courts to recognize as much:

> It does not at all follow that every statute enacted ostensibly for the promotion of [public morals, public health, or public safety], is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation cannot rightfully go. … If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and *thereby give effect to the Constitution*.

*Mugler v. Kansas*, 123 U.S. 623, 661 (1887) (emphasis added). The Supreme Court reiterated its two-part test for determining the limits of the states' (and, by extension, municipalities') police powers in *Goldblatt v. Town of Hempstead*: "The classic statement of the rule . . . is still valid today: . . . '[F]irst, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.'" 369 U.S. 590, 594-95 (1962) (quoting *Lawton v. Steele*, 152 U.S. 133, 137 (1894)). Similarly, courts have found municipal ordinances to be unconstitutionally overbroad when such ordinances regulate conduct beyond the reach of the state's police powers:

> [A] law may be overbroad, even if it is clear and precise, if it reaches conduct that is constitutionally protected or conduct that is beyond the reach of the state's police power. . . .
>
> [T]he challenged ordinances as applied to [plaintiffs] are overbroad to the extent that they result in class members being arrested for harmless, inoffensive conduct that they are forced to perform in public places.

*Pottinger v. City of Miami*, 810 F. Supp. 1551, 1577 (S.D. Fla. 1992) (citations omitted).

The Complaint alleges the City violated the U.S. Constitution when it exceeded its police powers. This created a recognized federal cause of action. The City's motion on this point should therefore be denied.

**2. The Source of Governmental Power Does Not Determine Whether the Misuse of That Power Violates the Constitution**

Citing *XO*, the City nonetheless argues that, because the City's police power derives from the state, an act in excess of that power is an issue of state, not federal, law and no federal cause of action exists. The City misreads *XO.* That case says nothing about 42 U.S.C. § 1983 and it certainly does not hold that municipalities that exceed their statutory grant of power are immune from suit under the federal civil rights laws.

*XO* dealt with whether the Missouri Legislature could pass a law that limited the police power of a city. The court found that it could: "[A] state is free to define the scope of its cities' powers and cities must operate within the limits imposed by the state." *XO*, 362 F.3d at 1027. *XO* thus stands for the proposition that the police power of the state belongs to the state and it can delegate as much or as little as it wants to a subordinate entity and that, once having delegated, alter the extent of that delegation as it wishes. *Id.* It does not hold that, because the state delegated its police power to a municipal entity, those entities have a blank check to use that power to violate federally protected rights.

Indeed, to accept the City's premise would mean that no municipal entity in Missouri could be liable when it interfered with federal civil rights because every "[Missouri] municipal corporation … is a creature of the legislature, possessing only those powers expressly granted or

those necessarily or fairly implied in or incidental to express grants, or those essential to the declared objects of the municipality." *Anderson v. City of Olivette*, 518 S.W.2d 34, 39 (Mo. 1975). But courts have long struck down municipal laws in cases arising under 42 U.S.C. § 1983. *See Monell v. Dep't Soc. Servs.*, 436 U.S. 658, 690 (1978) (plaintiffs can sue cities for monetary, injunctive, and declaratory relief under 42 U.S.C. § 1983).

The statutory source of a municipality's power is irrelevant to the issue of whether that municipality can be held liable under 42 U.S.C. § 1983. This Court should therefore deny the City's motion on this point.

## III. Ms. Bryant's Claims are Justiciable and This Court Should Reject the City's Arguments Under Rule 12(b)(1)

Next, the City attempts to dismiss Ms. Bryant from the case under Rule 12(b)(1) by alleging that she does not have standing and that her claims are not ripe. The City errs on these points as well—Ms. Bryant faces an imminent threat of being ticketed by the City and subjected to the City's municipal court system, giving her a very real personal stake in this proceeding. She therefore has standing and her claims are ripe.

### 1. Standard for Motions to Dismiss Under Rule 12(b)(1)

There are two kinds of challenges that a movant may bring under Rule 12(b)(1): facial and factual. The City's motion presents a facial challenge because it contests the sufficiency of Plaintiffs' pleadings. *Const. Party of Pa. v. Aichele*, 757 F.3d 347, 358 (3d Cir. 2014); *C.S. ex rel. Scott v. Missouri State Bd. of Educ.*, 656 F. Supp. 2d 1007, 1011 (E.D. Mo. 2009). In reviewing a facial challenge, the court must only consider the allegations of the complaint and documents referenced in and attached to it, and it must do so in the light most favorable to the

plaintiff. *Aichele*, 757 F.3d at 358. In a facial attack, the court applies the same standard of review it would use in considering a motion to dismiss under Rule 12(b)(6)—that is, the court must construe the alleged facts in favor of the nonmoving party. *Id*.

**2. Ms. Bryant Presents a Justiciable Controversy**

**A. Ms. Bryant has Standing to Bring Her Claims**

In order to demonstrate standing under Article III of the U.S. Constitution, a plaintiff must demonstrate "(1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'likel[ihood]' that the injury 'will be redressed by a favorable decision.'" *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)) (alterations in the original).

The City does not challenge the second or third prongs of the standing analysis here, nor could it. The City—and the City alone—threatens Ms. Bryant with ticketing and operates the municipal court she argues violates constitutional requirements; no third party is involved. *See Lujan*, 504 U.S. at 560 (in order to satisfy the second prong of the standing inquiry, the injury at issue must be traceable to the defendant and not be the result of the actions of an independent third party not before the court). Moreover, a decision by this Court that declares such threatened tickets and municipal court practices unconstitutional and enjoins their application to Ms. Bryant would provide her with redress. *NiGen Biotech, LLC v. Paxton*, 804 F.3d 389, 397 (5th Cir. 2015) (when a plaintiff alleges the imminence of a future violation, a prayer for injunctive relief satisfies redressability).

Instead, the City claims that, because the City has yet to ticket Ms. Bryant or subject her to its municipal court, she has yet to suffer an "injury in fact." *See* Memorandum 5-6. An injury

satisfies Article III standing requirements if it is "concrete and particularized," "actual and imminent," and not "conjectural or hypothetical." *SBA List*, 134 S. Ct. at 2341 (citation and quotation marks omitted). Despite the City's suggestion that a plaintiff does not have standing until the government actually tickets them or subjects them to its judicial system, "[a]n allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur." *Id.* (quoting *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1150 (2013)). In other words, when the government threatens the enforcement of the law against an individual, "an actual arrest, prosecution, or other enforcement is not a prerequisite to challenging the law." *SBA List*, 134 S. Ct. at 2342*; see also Davis v. FEC*, 554 U.S. 724, 734 (2008) ("[T]he injury required for standing need not be actualized. A party facing prospective injury has standing to sue where the threatened injury is real, immediate, and direct").

*SBA List* and *Steffel v. Thompson*, 415 U.S. 452 (1974)—both unmentioned by the City—determine the outcome here. In *Steffel*, police officers threatened to arrest the plaintiff for distributing handbills. The plaintiff left to avoid being arrested, but the police arrested his fellow handbiller. The plaintiff sued and the U.S. Supreme Court held that he had alleged a credible threat of enforcement. The government's threat, the plaintiff's statement that he wished to continue handbilling, and his companion's arrest and prosecution all demonstrated that his concern with arrest was not "chimerical." *Steffel*, 415 U.S. at 459 (citation and quotation marks omitted). Similarly, in *SBA List*, the Court determined that a plaintiff had standing because the government had enforced the statute it complained of about 20 to 80 times a year and the government had not disavowed enforcement in the future. *SBA List*, 134 S. Ct. at 2345. *See also Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) ("When the plaintiff has

alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he 'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.'") (quoting *Doe v. Bolton*, 410 U.S. 179, 188 (1973)).

Here, Ms. Bryant has been directly and explicitly threatened with ticketing by the City. She has not been able to make the repairs demanded by the City in the time period it allotted for compliance. She is still under order to make home repairs she cannot physically make. As opposed to the 20 to 80 prosecutions a year in *SBA List*, the City's ticketing policies here resulted in 241 cases per twice-monthly session of its municipal court. The City has not disclaimed its intention to enforce its municipal code against Ms. Bryant and she anticipates being ticketed by the City in the future. The City has increased the number of non-traffic related tickets it has issued by 495% in five years. Her co-plaintiffs have been threatened and then ticketed for similar kinds of violations. Like the plaintiffs in *Steffel* and *SBA List*, Ms. Bryant thus faces a credible threat of immediate prosecution (to put it mildly). This qualifies as an "injury in fact" and Ms. Bryant has standing to bring her claims against Pagedale.

**B. Ms. Bryant's Claims are Ripe**

Next, the City argues that Ms. Bryant's claims are not ripe for the same reason that she does not have standing—the City has yet to ticket Ms. Bryant or subject her to its municipal court system. Memorandum 6-7. Article III standing and ripeness issues often "boil down to the same question." *SBA List*, 134 S. Ct. at 2341 n.5 (citation and quotation marks omitted). For the same reasons that Ms. Bryant has standing, her claims are also ripe: she faces the very real possibility of this municipality ticketing her and subjecting her to its municipal court system.

The ripeness inquiry focuses on the fitness of the issues for judicial examination and the hardship of the parties that would result if the court were to withhold consideration. *Parrish v. Dayton*, 761 F.3d 873, 875 (8th Cir. 2014). In particular, the courts look to whether the harm asserted has matured enough to warrant judicial intervention. *Id*. The fitness prong is concerned with issues of finality, definiteness, and whether any additional facts have yet to develop. *Id.* Here, as is discussed above, there is no indication that the City's direct and explicit threats against Ms. Bryant are contingent or hypothetical, especially in light of the fact that the City vigorously enforces its Municipal Code and Ms. Bryant does not have the capacity to make the changes to her property that the City demands. Moreover, the City's code is definitive—it is not proposed rules, an advisory to homeowners, or a guide to best practices. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 151 (1967) (challenge to regulation satisfied the fitness prong because the regulation was final, definite, and came with the threat of civil and criminal sanctions). Instead, the municipal code is the law that governs homeowners in Pagedale, the City zealously enforces it against violators, and the City has clearly indicated that it intends to apply it to Ms. Bryant. The Code and the City's administration of it are therefore fit for judicial examination.

With regard to the hardship prong, the courts consider "both the traditional concept of actual damages—pecuniary or otherwise—and also the heightened uncertainty and resulting behavior modification that may result from delayed resolution." *Nebraska Public Power Dist. v. MidAmerican Energy Co.*, 234 F.3d 1032, 1038 (8th Cir. 2000). Ms. Bryant is currently out of compliance with the Code, she cannot come into compliance with the City's demands, and the City has stated that her failure to comply within a time period that has since expired will result in ticketing. This leaves her facing the prospect that the City could ticket her at any moment. If she

were ticketed, in addition to any financial penalties, she would become subject to the City's municipal court system. Ms. Bryant thus faces government policies that "require[] an immediate and significant change in the conduct of [her] affairs with serious penalties attached to noncompliance." *Abbott Labs*, 387 U.S. at 153. In such circumstances, "access to the courts… must be permitted." *Id.*

**C. Ms. Bryant's Claims are Not Moot**

The City implies—without explicitly stating—that it will not take action against Ms. Bryant based on the building inspection report. The City could declare that it will not enforce the Code against Ms. Bryant and then argue that her claims are moot. Even though the City has not claimed that Ms. Bryant's claims are moot, Plaintiffs nonetheless briefly discuss why Ms. Bryant's claims would not be moot even if the City were to disclaim any action against her.

"It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. If it did, the courts would be compelled to leave the defendant free to return to his old ways… A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to return." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000) (quotation marks, citations, and alterations omitted). Thus, "[t]he defendant faces a heavy burden of showing that the challenged conduct cannot reasonably be expected to start up again." *Lankford v. Sherman*, 451 F.3d 496, 503 (8th Cir. 2006) (citation and quotation marks omitted).

As discussed above, the City relentlessly issues tickets and shows no signs of stopping now. Even if it were to disclaim the intent to ticket Ms. Bryant based on the building inspection

report, there is nothing to stop it from issuing tickets to her in the future based on the same, or similar, code violations. It is too late in the game for the City to announce it has quit and not be held liable for its conduct. For these reasons, Ms. Bryant's claims are not moot.

## IV. CONCLUSION

For these reasons, Plaintiffs respectfully request that this Court deny the City's motion.

DATED this 8th day of January, 2016.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 8th day of January, 2016, the forgoing ***PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS COUNT IV AND PLAINTIFF MILDRED BRYANT'S CLAIMS FROM PLAINTIFFS' CIVIL RIGHTS CLASS ACTION COMPLAINT*** was filed using the courts ECF/CM E-Filing system, and was served via operation of the courts electronic filing system on the following:

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