IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

FREE THE NIPPLE – SPRINGFIELD RESIDENTS PROMOTING EQUALITY, et al.,	)	
Plaintiffs,	)	Case No. 6:15CV3467-BP
v.	)	
CITY OF SPRINGFIELD, MISSOURI,	)	
Defendant.	)	

SUGGESTIONS IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

I. Introduction

On September 14, 2015, in direct response to Plaintiffs' protests, Springfield repealed its indecent exposure ordinance and replaced it with a new law to reinforce and augment sex-based distinctions. The new ordinance restricts women—and only women—from publicly showing any portion of their breasts below the top of the areola when such a showing is "likely to cause affront or alarm." The new ordinance includes exceptions for female breast exposure if it is "necessarily incident to breast-feeding an infant" or for the purpose of "adult entertainment." The new ordinance also eliminates its predecessor's restriction on covered male genitalia such that men are now permitted to show their "covered genitals in a discernibly turgid state."

Plaintiffs filed this suit because Springfield's new ordinance violates the First Amendment as a content-based restriction on protected expression, violates the Fourteenth Amendment's Due Process Clause because it does not give fair warning about what conduct is criminal, violates the Fourteenth Amendment's Equal Protection Clause by treating men differently than women for the purpose of perpetuating traditional gender roles and without

persuasive justification for different treatment based on sex, and conflicts with state law allowing breast-feeding and the expression of breast milk. Compl., ECF No. 2. Plaintiffs also filed a motion for preliminary injunction (ECF No. 5), which is unopposed. *See* Local Rule 7.0(d).

II. The motion to dismiss should be denied

A. Plaintiffs have standing

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), a plaintiff must prove constitutional standing by showing: (1) an injury-in-fact, which is an invasion of a legally protected interest that is concrete and particularized, and actual or imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the conduct complained of that is fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the Court; and (3) a likelihood that the injury will be redressed by a favorable decision. *Republican Party of Minn., Third Cong. Dist. v. Klobuchar*, 381 F.3d 785, 791-92 (8th Cir. 2004). Defendant does not dispute that Plaintiffs satisfy the second and third prongs, but suggests that there is no associational standing and that Plaintiffs have not been injured.

1. Free the Nipple and its members have standing

Free the Nipple – Springfield Residents Promoting Equality has associational standing to bring this case in a representative capacity. "It has long been settled that even in the absence of injury to itself, an association may have standing solely as the representative of its members." *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Brock*, 477 U.S. 274, 281 (1986) (alterations and quotation omitted). "An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted

nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) (citing *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)).

The individual members of Free the Nipple have standing to sue in their own right. The new ordinance, adopted September 14, 2015, has chilled the expressive activity of the association's members, including the individual plaintiffs. Prior to September 14, they engaged in expressive activity that was specifically targeted and outlawed by the new ordinance. Since September 14, they have not—because of the new ordinance. This is not surprising given that the new ordinance was adopted for the explicit purpose of making their expressive activity illegal.

The interests that Free the Nipple seeks to protect are germane to the organization's purpose. The purpose of Free the Nipple is to "advocate for gender equality by challenging the double standards, hypocrisies, and sexualization of women that supports laws and policies that treat women as inferior to men." ECF No. 2 at ¶ 6. In this case, Plaintiffs seek to protect the free speech, equal protection, and due process rights of women together with enforcing their statutory right to breast-feed their children and express breast milk. They are challenging an ordinance that was designed for the purpose of preventing their expressive activity and that explicitly treats women differently than men by criminalizing expressive activity that is legal if engaged in by a man, but illegal if engaged in by a woman. The interests advanced in this litigation are germane to Free the Nipple's purpose.

Neither the claims asserted nor the relief requested would require each individual member of Free the Nipple to participate. "[W]hether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought." *Warth v. Seldin*, 422 U.S. 490, 515 (1975). Plaintiffs seek declaratory and

prospective relief as well as nominal damages. Such relief does not require individualized proof. *See Hunt*, 432 U.S. at 344 (holding that request for declaratory and injunctive relief does not require individualized proof); *see also Brock*, 477 U.S. at 287 (finding that case raising issue of pure law does not require individualized proof); *Risdal v. Halford*, 209 F.3d 1071, 1072 (8th Cir. 2000) (noting that an award of nominal damages is mandatory upon find a violation of a constitutional right without a need to prove actual injury).

2. Plaintiffs have suffered and continue to suffer an injury-in-fact

Plaintiffs have suffered and continue to suffer an injury-in-fact because of the new ordinance. As asserted in the Amended Complaint, "Plaintiffs plan to participate in additional protest, like the one held in August 2015, to advocate for gender equality by challenging the double standards, hypocrisies, and sexualization of women that supports laws and policies that treat women as inferior to men." ECF No. 2 at ¶ 38. They have not engaged in that expressive activity, however, because Defendant has now criminalized their expressive conduct. "Because their expressive activity has now been made a criminal act, they must choose between risking arrest and imprisonment or self-censoring their expressive activity." *Id*.

"To establish injury in fact for a First Amendment challenge to a state statute, the plaintiff needs only to establish that he would like to engage in arguably protected speech, but that he is chilled from doing so by the existence of the statute." *281 Care Comm. v. Arneson*, 766 F.3d 774, 780 (8th Cir. 2014) *cert. denied*, 135 S. Ct. 1550 (2015) (quotation and citation omitted). Plaintiffs have established that they would like to engage in the same expressive activity that they engaged in before the ordinance was changed to criminalize their protest, but that they are chilled from doing so by the existence of the new ordinance. "The relevant inquiry is whether a party's decision to chill his speech in light of the challenged statute was objectively

reasonable." *Id.* at 780-81 (quotation and citations omitted). "Reasonable chill exists when a plaintiff shows an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by the statute, and there exists a credible threat of prosecution." *Id.* at 781 (quotation, citations, and alteration omitted).

"Self-censorship can itself constitute injury in fact." *Id.* at 780 (citation omitted). It is not surprising that Plaintiffs have self-censored given that, as they allege and as Defendant's exhibits demonstrate, "[i]Imposing such self-censorship is the intent of the ordinance." ECF No. 2 at ¶ 38. Defendant enacted the new ordinance for the purpose of making Plaintiffs' expressive activity illegal. Under these circumstances, it is objectively reasonable for Plaintiffs to abstain from engaging in the targeted expressive activity, since they comprise very group of people Defendant intended to chill.

Defendant touts that it has not prosecuted Plaintiffs for a violation of the new ordinance. Defendant's failure to act is not noble restraint; rather, Plaintiffs have not violated the new ordinance because Defendant has successfully chilled their expressive activity by enacting the new ordinance. The reason the new ordinance has not been enforced against Plaintiffs is that Plaintiffs have altered their expressive activity to conform to the new ordinance. The official policy of the City is the ordinance, and it is not contradicted by any policy of *not* enforcing the ordinance. Moreover, Defendant's failure to prosecute Plaintiffs for their August protest does not diminish the objective reasonableness of the chilling effect Plaintiffs are currently experiencing because in August—before the new ordinance was enacted— their expressive activity was not illegal. Now it is.

The pre-enactment remarks of the City Attorney suggesting that the new ordinance might not be able to be enforced without violating the First Amendment does not alter the conclusion

that the chilling effect of the ordinance on Plaintiffs is reasonable. First, a majority of the City Council rejected the City Attorney's advice and enacted the new ordinance despite his reservations about the constitutionality of doing so. Second, although the City Attorney opined that the ordinance might not be enforceable against activity protected by the First Amendment, Defendant argues in its motion to dismiss that Plaintiffs' expressive activity, which is targeted by the new ordinance, is *not* protected by the First Amendment. In light of this belief, it is reasonable for Plaintiffs to expect arrest and prosecution if they were to repeat their expressive activity from August.

Plaintiffs plead that they intend to engage in arguably protected expressive activity, as they have in the past, by exposing a portion of their breasts below a point immediately above the top of the areola. Plaintiffs plead that they have refrained from doing so because, as Plaintiffs are female, this expressive conduct is prohibited by the new ordinance and, thus, they fear arrest and prosecution. Because the new ordinance has caused a chilling effect on Plaintiffs' ability to engage in arguably protected speech, it has caused an injury in fact. Additionally, their self-censorship is objectively reasonable because new ordinance is of recent vintage and was enacted in response to, and for the purpose of outlawing, their expressive activity. For these reasons, Plaintiffs allege they are suffering an injury in fact.

B. Plaintiffs state a claim upon which relief may be granted

Dismissal under Federal Rule of Civil Procedure 12(b)(6) is allowed only where the complaint fails to state a claim upon which relief can be granted. *Cook v. ACS State & Local Soluntions, Inc.*, 663 F.3d 989, 992 (8th Cir. 2011). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted). Moreover, in

considering such a motion, the "court assumes all facts in the complaint to be true and construes all reasonable inferences from those facts most favorably to the complainant." *Minnesota Majority v. Mansky*, 708 F.3d 1051, 1055 (8th Cir. 2013), *cert. denied*, 134 S. Ct. 824 (2013).

1. *Count I states a claim under the Free Speech Clause of the First Amendment*

In Count I of their Amended Complaint, Plaintiffs assert that the new ordinance impermissibly curtails their free-speech rights by criminalizing their expressive conduct without constitutionally sufficient justification. ECF No. 2 at ¶¶ 43-48.

In their suggestions in support of their motion for preliminary injunction, Plaintiffs explain that their conduct is protected by the First Amendment and that because the new ordinance is content-based in four different ways,[1] strict scrutiny is the appropriate standard of review to apply to it. *See* ECF No. 9, pp. 6-9. Plaintiffs respectfully incorporate those arguments here. For the reasons provided in that brief, the new ordinance does not serve any compelling government interest and, even if it did, is not properly tailored. *See id.* 10-12. Regardless, determining that the ordinance could withstand strict scrutiny would require resorting to evidence outside the pleadings and those materials necessarily embraced by the pleadings, which is not appropriate at this stage. *See Mansky*, 708 F.3d at 1056 (quoting *Noble Sys. Corp. v. Alorica Cent., LLC*, 543 F.3d 978, 982 (8th Cir. 2008)).

Defendant relies upon *Hightower v. City and County of San Francisco*, 77 F. Supp. 3d 867 (N.D. Cal. 2014), to support its position that Plaintiffs' Count I fails to state a claim. *Hightower* involved a challenge to a San Francisco ordinance criminalizing the public exposure

[1] The ordinance is content based because: (1) it criminalizes some instances of toplessness, but not others, based on each instance's function or purpose, *see, e.g., Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015); (2) it criminalizes Plaintiffs' expressive conduct based on others' reactions, *see, e.g., McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014); (3) it criminalizes certain speakers, but not others, for engaging in identical expressive conduct, *see, e.g., Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 658 (1994); and (4) it was adopted by Defendant *solely because* of Plaintiffs' protests and was aimed explicitly against chilling future protests. *See Reed*, 135 S. Ct. at 2227 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

of genitalia. The *Hightower* ordinance did not regulate breasts in any way. It did not prohibit women—or men—from displaying their breasts for particular purposes, or for any reason at all. More importantly, it had none of the features that make the Springfield ordinance content based; it did not single out certain purposes, certain reactions, or certain speakers, and it was not adopted for a discriminatory purpose. *See id.* at 872-73 (quoting text of ordinance). Because the San Francisco ordinance was written differently than the Springfield ordinance, it makes sense that the *Hightower* court applied the more deferential *O'Brien* test.[2]

But even if the *O'Brien* test were appropriate here, the Springfield ordinance does not pass muster for the reasons provided in Plaintiffs' suggestions in support of their motion for preliminary injunction. *See* ECF No. 9, pp. 12-14; ECF No. 2 at ¶¶ 24-30. To conform to *O'Brien*, a regulation must meet each of its four prongs, *see O'Brien*, 391 U.S. at 376-77, including its third prong: furthering a "governmental interest [] unrelated to the suppression of free expression." *Id.* at 377. In its motion to dismiss, Defendant fails to deny that its interest was related to the suppression of free expression. *See* ECF No. 15, pp. 7-8. Indeed, it would be challenging to support such an argument because, as Plaintiffs allege, Springfield's lawmakers enacted the new ordinance explicitly *because of* Plaintiffs' expressive conduct and explicitly *in order to* chill them from engaging in future expression. *See* ECF No. 2 at ¶¶ 21-28; ECF No. 9, pp. 13-14. Plaintiffs state a claim in Count I.

2. *Count II states a claim under the Due Process Clause of the Fourteenth Amendment*

In Count II of their Amended Complaint, Plaintiffs assert that the new ordinance violates due process. It does so it two ways. First, it "fails to provide persons of ordinary intelligence a

[2] *Hightower* was decided before *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). It is not clear if the court would have applied a more exacting scrutiny post-*Reed*. In any event, *Hightower* preserved one of Plaintiffs' First Amendment claims, which the parties subsequently settled. *See Taub v. City & Cnty. of San Francisco*, No. 3:12CV05841-EMC, ECF No. 135 (June 22, 2015). The dismissed claims have been appealed to the Ninth Circuit. *See Taub v. City & Cnty. of San Francisco*, No. 15-16415 (notice of appeal filed July 14, 2015).

reasonable opportunity to understand when exposing the female breast below a point immediately above the top of the areola is prohibited and authorizes or encourages arbitrary and discriminatory enforcement." ECF No. 2 at ¶ 50. Second, "[i]n addition, as applied to breast-feeding mothers, [the new ordinance] fails to provide persons of ordinary intelligence a reasonable opportunity to understand when exposing the female breast below a point immediately above the top of the areola would be considered 'necessarily incident to breast-feeding an infant' and, thus, authorizes or encourages arbitrary and discriminatory enforcement." *Id.* at ¶ 51.

Defendant fails to address the first due process problem. Plaintiffs' suggestions in support of their motion for preliminary injunction, which are incorporated by reference, explain why Plaintiffs are likely to prevail on this claim. ECF No. 9 at 14-16. For the same reasons Plaintiffs are likely to prevail on their due process claim, they have stated a claim upon which relief can be granted as to this claim.

Defendant's discussion of the second due process problem highlights the lack of notice and opportunity for arbitrary and discriminatory enforcement. The new ordinance prohibits women from exposing their breasts below a point immediately above the top of the areola. ECF No. 2 at ¶ 23. Defendant apparently recognizes that exposing one's breast below a point immediately above the top of the areola is necessary for breast-feeding by expressly including an exception to the ordinance for "exposure of the female breast necessarily incident to breast-feeding an infant." *Id*. at ¶ 30. Defendant does *not* include an exception for expressing breast milk; yet, "express[ing] breast milk" also "results in exposure of the breast below a point immediately above the top of the areola." *Id*. at ¶ 32. And the breast-feeding exception only

permits mothers to avoid criminal sanction for exposing their breasts when breast-feeding an infant, which "is widely understood to refer to a person aged 0-12 months." *Id*. at ¶ 31.

Defendant claims that there can be no confusion about whether its limited exception is really as limited as it is on its face because Springfield cannot violate state law. We agree that Springfield cannot enact an ordinance that conflicts with state law. *See*, *infra.* § II.B.4. However, the fact that the new ordinance on its face prohibits what state law permits—i.e., the expression of breast milk and breast-feeding children older than twelve months—fails to provide notice of what is, or is not, allowed and encourages arbitrary or discriminatory enforcement. The limited exception for breast-feeding of infants exacerbates the confusion by making clear that Defendant has considered the new ordinance's implications related to breast milk and has nonetheless chosen to include an exception far narrower than state law.

3. *Count III states a claim under the Equal Protection Clause of the Fourteenth Amendment*

In Count III of their Amended Complaint, Plaintiffs allege that the new ordinance violates the Equal Protection Clause of the Fourteenth Amendment because it is a gender-based classification neither supported by, nor substantially related to, a constitutionally sufficient justification. *See* ECF No. 2 at ¶¶ 52-56. The ordinance creates a gender-based classification that does not serve any important governmental objective and that is not substantially related to the achievement of any such objective. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 532-33 (1996); *Lawson v. Kelly*, 58 F. Supp. 3d 923, 934-35 (W.D. Mo. 2014). Defendant does not—and could not—deny that the new ordinance creates a gender-based classification. *See, e.g.*, ECF No. 9-4 (text of ordinance) (criminalizing certain exposure of "the female breast"). Therefore, Defendant bears the burden of establishing an "exceedingly persuasive justification" for making such a classification. *See Virginia*, 518 U.S. at 524 (quoting *Mississippi Univ. for Women v.*

Hogan, 458 U.S. 718, 724 (1982)). Plaintiffs allege specific facts that demonstrate that Defendant has no persuasive justification for criminalizing women—and only women—for certain conduct, *see* ECF No. 2 at ¶¶ 54-56, and that the ordinance is unrelated to the achievement of any legitimate governmental interest. *See id.* ¶¶ 22-29, 46-48, 56. Taking Plaintiffs' complaint as true and resolving all factual inferences in their favor, as the Court must do at this stage, Defendant has not met that burden.

Defendant relies upon a pre-*Virginia* case from the Fourth Circuit Court of Appeals to support its proposition that Plaintiffs have not stated a claim for relief under the Equal Protection Clause. *See United States v. Biocic*, 928 F.2d 112 (4th Cir. 1991). In that case, the court upheld a woman's public-indecency conviction for sunbathing topless. It made this determination after a full federal criminal trial, not upon a motion to dismiss. But even if it had a similar procedural posture, *Biocic* would be inapposite. That court based its rationale on its "assum[ption]" that there were "anatomical differences" between male breasts and female breasts, *see id.* at 115, which Plaintiffs allege do not exist, at least for all men or for all women. *See* ECF No. 2 at ¶ 17; *see also* ECF No. 9, p. 11 n.9; *Virginia*, 518 U.S. at 550 ("generalizations about 'the way women are,' estimates of what is appropriate for *most women*, no longer justify denying opportunity to women . . . ."). Further, even if it were otherwise on point, the *Biocic* decision is 25 years old. The court explicitly acknowledged it was only addressing the state of constitutional law "at this time." *See id.* at 116 n.4. In fact, one of the three *Biocic* panel judges wrote a separate concurrence to underscore that "[a]n increasingly large number of persons comprising the body politic does not agree with [bare female breasts falling within] the definition of indecency" and that the court had to "bear[] in mind how rapidly the country passed through the era in the 1890s when men first began to swim bare breasted." *Id.* at 117; *see also id.* at 118 ("The time may well

soon come, as it has already with the French and others, when the perceived public sense of outrage will wane."). Further, that judge stated that, had the female defendant "offered some justification other than the non-offensive worship of the sun, [he] would find no difficulty in dissenting" from upholding her conviction. *Id.*

Defendant also cites another pre-*Virginia* decision, *M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981), which—like *Biocic*—was decided upon a full evidentiary record, not at the motion to dismiss stage. In *M.*, a divided Court upheld a state statutory rape law prohibiting males from engaging in sexual intercourse with minor females. A plurality of the Court found minor females not similarly situated to minor males, for the purpose of intercourse, because of the risk of pregnancy. The law at issue in *M.* did not regulate female breasts, which are anatomically identical to male breasts, but rather sexual contact involving genitalia, which are anatomically different. Further, the *M.* law regulated the conduct of men, not of women. *See Virginia*, 518 U.S. at 533 (holding that sex classifications were constitutionally used to compensate women for particular economic disparities they had suffered and to promote equal employment opportunity, but not to "create or perpetuate the legal, social, and economic inferiority of women"). In addition, unlike in this case, the state's justification for the statutory rape law did not depend on the moral sensibilities of passersby; nor was the law enacted specifically to suppress expressive conduct.

Here, in contrast, Plaintiffs have alleged that the ordinance at issue "perpetuate[s] the legal[] [and] social . . . inferiority of women," *Virginia*, 518 U.S. at 533-34, by being wielded as a tool to shut down their protests against the precise type of invidious legal discrimination they believe the Springfield City Code already codified by stigmatizing women's bodies. In addition, Defendant's decision to exempt exposure of the female breast for the purpose of adult

entertainment makes clear that the sex-based classification in the ordinance is not substantially related to the achievement of any of Defendant's proffered objectives.

4. *Count IV states a claim that Defendant's ordinance conflicts with state law*

In Missouri, a municipal ordinance that conflicts with state law is void and unenforceable. *E.g., City of Dellwood v. Twyford*, 912 S.W.2d 58, 59 (Mo. banc 1995). To determine if a conflict exists, a court must determine whether the local ordinance "permits that which the statute prohibits" or "prohibits that which the statute permits." *Page W., Inc. v. Cmty. Fire Prot. Dist. of St. Louis*, 636 S.W.2d 65, 67 (Mo. banc 1982).

In their Amended Complaint, Plaintiffs allege that the new Springfield ordinance conflicts with Mo. Rev. Stat. § 191.918. *See* ECF No. 2 at ¶¶ 58-64. That state statute provides that "[t]he act of a mother breast-feeding a child or expressing breast milk in a public or private location where the mother and child are otherwise authorized to be shall not . . . [b]e considered an act of . . . indecent exposure . . . for purposes of . . . municipal law." *Id.* at ¶ 58 (quoting Mo. Rev. Stat. § 191.918). Yet Defendant has enacted an ordinance prohibiting "exposure of . . . the female breast below a point immediately above the top of the areola" in a place open to public view when it "is likely to cause affront or alarm," possibly[3] excepting certain kinds of breast-feeding,[4] but making no exception whatsoever for expression of breast milk. As Plaintiffs alleged, exposing this portion of the female breast is necessary or incidental to their expression of breast milk. ECF No. 2 at ¶ 32. It is not clear to Plaintiffs when exposure of their breasts for the purpose of expressing milk "is likely to cause affront or alarm." In fact, in light of

[3] Defendant includes in the new ordinance the language "necessarily incident," which is not found in Section 191.918. Because some women use special clothing or accessories to avoid exposing any portion of their breasts while breast-feeding a child in a place open to public view, an ordinary person would reasonably believe no exposure is "necessarily" incidental to breast-feeding in public, and therefore the exemption covers a null set of behaviors. *See* ECF No. 2 at ¶ 32 (alleging that Plaintiffs' exposure of the criminalized portion of their breasts is "incidental, but not necessary" to breast-feeding their children).

[4] The ordinance exempts exposure "necessarily incident" to breast-feeding an "infant." It does not incorporate the more inclusive term "child," used in Section 191.918.

Springfield council members' public statements, Plaintiffs reasonably believe that any such exposure of their breasts will be deemed likely to cause affront or alarm. *See* ECF No. 2 at ¶ 35. As such, they cannot reliably comply with the new ordinance while also exercising their right to express milk in public as protected by Missouri state law. The new ordinance therefore directly contravenes the admonition in Section 191.918 that "[a] municipality shall not enact an ordinance prohibiting or restricting a mother from breast-feeding a child or expressing breast milk in a public or private location where the mother and child are otherwise authorized to be." The ordinance "prohibits that which [Section 191.918] permits," *Page*, 636 S.W.2d at 67, and therefore conflicts with state law.

Defendant appears to argue that because state statutes supersede conflicting local ordinances, Plaintiffs cannot challenge a conflicting local ordinance. This is simply not the law. *See, e.g., Edwards v. City of Ellisville*, 426 S.W.3d 644, 661-62 (Mo. Ct. App. 2013) (permitting and then upholding a challenge to a local ordinance that conflicted with state law).

III. Conclusion

For these reasons, Defendant's motion to dismiss should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 19, 2015, a copy of the foregoing was electronically filed with the Court using the CM/ECF system, which sent notification to counsel of record.

/s/ Anthony E. Rothert