UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

903 WEST WASHINGTON LLC, et al.,

Plaintiffs,

v.

CITY OF JACKSON, et al.,

Defendants.
_____/

Case No. 2:22-cv-11110

HONORABLE STEPHEN J. MURPHY, III

OPINION AND ORDER DENYING LEAVE TO FILE AN AMENDED RESPONSE [12] AND GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS [6]

Plaintiffs, three limited liability companies that own properties in Jackson, Michigan, filed the present action against the City of Jackson and several city officials and employees. ECF 1. Plaintiffs challenged the constitutionality of a municipal ordinance that requires certain properties to register with the City and be subject to periodic building inspections by City officials. Defendants jointly moved to dismiss. ECF 6. Plaintiffs filed a forty-three-page response brief, ECF 10, PgID 460–502, and Defendants replied, ECF 11. Less than one month after Defendants filed the reply brief, Plaintiffs moved for leave to file an amended response to the motion to dismiss and for leave to file a sur-reply to any later reply by Defendants. ECF 12. Defendants opposed the motion. ECF 13. For the following reasons, the Court will strike Plaintiffs' response brief for violating the Local Rules, moot Plaintiffs' motion for

leave to file an amended response brief, and grant in part and deny in part the motion to dismiss.[1]

BACKGROUND[2]

Plaintiffs' lawsuit centers on two portions within Chapter 14 of the City's Code of Ordinances: the "Non-Owner-Occupied Residential Property Registry" (NOORPR) ordinance and the "Foreclosed, Vacant and Abandoned Property Registry" (FVAPR) ordinance. ECF 1, PgID 5–8. A non-owner-occupied residential dwelling or unit is:

> any residential dwelling or unit constructed, intended, or currently used as a habitable space in which the owner of the dwelling or unit does not reside, or where individuals other than or in addition to the owner reside, whether pursuant to an oral or written lease or for other valuable consideration including, but not limited to, cash, barter of goods and services, and imputed rent.

ECF 6-2, PgID 314 (Section 14-3).[3] Under Section 14-4, before an owner of a non-owner-occupied residential dwelling rents or leases the property, the owner must register the dwelling with the City. *Id.* at 316. To register, the owner must "pay the required application fees and all outstanding inspection fees and applicable late charges." *Id.* at 317 (Section 14-6).

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[1] The Court will resolve the motions without a hearing. *See* Fed. R. Civ. P. 78(b); E.D. Mich. L.R. 7.1(f)(2).

[2] Because the Court must view all facts in the light most favorable to the nonmoving party, *see Bassett v. N.C.A.A.*, 528 F.3d 426, 430 (6th Cir. 2008), the Court's recitation does not constitute a finding or proof of any fact.

[3] The Court may consider Chapter 14 of the City Code of Ordinances (ECF 6-2), an "exhibit[] attached to [D]efendant's motion to dismiss, . . . without converting the motion to one for summary judgment" because it is "referred to in the complaint and [is] central to the claims contained therein." *Gavitt v. Born*, 835 F.3d 623, 640 (6th Cir. 2016) (citations omitted).

Chapter 14 also includes an "inspection regimen" for non-owner-occupied residential dwellings. ECF 1, PgID 14. The inspections are intended "to safeguard the health, safety[,] and welfare of the occupants of dwellings and of the general public." ECF 6-2, PgID 332 (Section 14-42). The ordinance authorizes "the chief building official, chief of police[,] and fire official . . . to make or cause to be made such inspections of dwellings . . . as are necessary to enforce the provisions of this article." *Id.* In cases of emergency, when the cited City officials have "reasonable grounds to believe that a condition hazardous to health or safety exists on the premises and requires immediate attention," those officials "have the right to enter at any time" for an inspection. *Id.* But "[i]n a nonemergency situation or where the owner or occupant of any dwelling demands a warrant for inspection of the premises, the chief building official, chief of police or fire official shall obtain a warrant from a court of competent jurisdiction." *Id.* Owners of a non-owner-occupied residential dwelling are "charged by the chief building official for inspections conducted pursuant to this article." *Id.* at 334 (Section 14-43).

If a City official observes a violation of the ordinance during the inspection, "the chief building official or his or her authorized representative shall file a written report of such violation." *Id.* at 335 (Section 14-44). Within fourteen days of an inspection, the owner of the property is to receive a notice of violations and an order of correction. *Id.* (Section 14-45).

Owners of "foreclosed, vacant or abandoned property within the city" must "register the structure with the department of neighborhood and economic

operations." *Id.* at 373 (Section 10-403(1)). And like the process to register a non-owner-occupied residential dwelling, the owner of a foreclosed, vacant, or abandoned property must pay registration fees and disclose certain information about the property. *Id.* at 374 (Section 14-403(2)–(3)).

Owners of foreclosed, vacant, or abandoned properties must maintain and secure their property according to several requirements, including keeping the property "in a secure manner," "free of trash, junk, and debris," "properly winterized so as to prevent bursting of pipes," and more besides. *Id.* at 376–77 (Section 14-408). The City may also charge various fees, including "[a]n annual registration fee," "[a] failure to register fee," "[a] monthly monitoring fee," [a]n inspection fee," and other "[a]dministrative charges . . . for search warrants, title searches, boarding and securing, removal of rubbish and debris[,] and preparation for prosecution." *Id.* at 379 (Section 14-413).

LEGAL STANDARD

"Federal courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). For that reason, courts may dismiss cases for "lack of subject-matter jurisdiction" at any time. Fed. R. Civ. P. 12(b)(1). When a defendant challenges subject-matter jurisdiction, the plaintiff bears the burden of proving jurisdiction. *Mich. S. R.R. Co. v. Branch & St. Joseph Ctys. Rail Users Ass'n, Inc.*, 287 F.3d 568, 573 (6th Cir. 2002). When a defendant factually attacks whether the plaintiff properly alleged a basis for subject-matter jurisdiction, the trial court does not presume the truth of the complaint's allegations. *Ohio Nat'l Life Ins. Co. v.*

United States, 922 F.2d 320, 325 (6th Cir. 1990). And the "trial court has wide discretion to allow affidavits, documents[,] and even a limited evidentiary hearing to resolve disputed jurisdictional facts." *Id.* (citations omitted).

The Court may grant a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) if the complaint fails to allege facts "sufficient 'to raise a right to relief above the speculative level,' and to 'state a claim to relief that is plausible on its face.'" *Hensley Mfg. v. ProPride, Inc.*, 579 F.3d 603, 609 (6th Cir. 2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007)). The Court views the complaint in the light most favorable to the plaintiff, presumes the truth of all well-pleaded factual assertions, and draws every reasonable inference in the nonmoving party's favor. *Bassett*, 528 F.3d at 430. But the Court will not presume the truth of legal conclusions in the complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). If "a cause of action fails as a matter of law, regardless of whether the plaintiff's factual allegations are true or not," then the Court must dismiss. *Winnett v. Caterpillar, Inc.*, 553 F.3d 1000, 1005 (6th Cir. 2009).

In a Rule 12(b)(6) motion, courts can only "consider the [c]omplaint and any exhibits attached thereto . . . [and] items appearing in the record of the case and exhibits attached to defendant's motion to dismiss so long as they are referred to in the [c]omplaint and are central to the claims contained therein." *Bassett*, 528 F.3d at 430 (citation omitted); *see also Decoration Design Sols., Inc. v. Amcor Rigid Plastics USA, Inc.*, 553 F. Supp. 3d 424, 427 (E.D. Mich. 2021) (Murphy, J.).

DISCUSSION

The Court will first explain why it must strike Plaintiffs' response brief and deny as moot their motion to file an amended response brief. After, the Court will grant in part and deny in part the motion to dismiss.

I. Plaintiffs' Response Brief

In response to the motion to dismiss, Plaintiffs filed a forty-three-page brief. ECF 10. Under Local Rule 7.1(d), "each motion and response to a motion must be accompanied by a single brief" "[u]nless the Court permits otherwise." And "[t]he text of a brief supporting a motion or response, including footnotes and signatures, may not exceed [twenty-five] pages. A person seeking to file a longer brief may apply ex parte in writing setting forth the reasons." E.D. Mich. L.R. 7.1(d)(3). Rule 7.1 also warns that "[a]ttempts to circumvent the [local rule] in any way may be considered an abusive practice which may result in the motion or response being stricken as well as sanctions being imposed under [Local Rule] 11.1."

Plaintiffs exceeded Local Rule 7.1(d)'s page-length directive by eighteen pages. *See* PgID 460–502. In fact, Plaintiffs' argument section does not even begin until page twenty-four of the brief that was filed. *Id.* at 483. Because Plaintiffs flouted the local rules, they had almost twice the space that Defendants had to brief the motion to dismiss. *Compare* ECF 10, *with* ECF 6. And the Court cannot allow that inequity to pass. The Court will thus order the Clerk of the Court to strike Plaintiffs' response brief under Local Rule 7.1. *Id.* ("Attempts to circumvent the [local rule] in any way may . . . result in the . . . response being stricken."). Because the response brief will

be stricken, the Court will also order the Clerk of the Court to strike Defendants' reply brief.

After Defendants filed their reply, Plaintiffs moved for leave to file an amended response brief under Federal Rule of Civil Procedure 15. ECF 12, PgID 555. In the motion, Plaintiffs sought to lengthen their forty-three-page brief. *Id.* at 555–56. But the Court has ordered the original response brief stricken because it violated the Local Rules. Accordingly, the Court will deny as moot Plaintiffs' motion to amend their now-stricken response brief. The Court will thus resolve the motion to dismiss based on only Defendants' motion to dismiss brief, ECF 6.

II. Motion to Dismiss

Plaintiffs raised eighteen claims in the complaint. ECF 1, PgID 60–133. Defendants moved to dismiss every claim. ECF 6, PgID 309. The Court will first address Defendants' standing and limitations-period arguments. After, the Court will address Plaintiffs' due process and § 1983 claims. The Court will last resolve Defendants' arguments as to claims twelve through eighteen.

A. Standing

A federal court must assure itself that it has subject-matter jurisdiction over a case. *See* 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1393 (3d ed. 2022). "Standing is a jurisdictional requirement. Thus, if a plaintiff lacks standing, the federal court lacks subject-matter jurisdiction." *Thompson v. Equifax Info. Servs., LLC*, 441 F. Supp. 3d 533, 539 (E.D. Mich. 2020) (citations omitted).

Standing is established when three elements are met. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). First, a plaintiff must show that he or she "suffered an injury in fact" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Id.* (internal quotation marks and citations removed). Second, the plaintiff must show that there is "a causal connection between the injury and the conduct complained of" that is "fairly traceable to the challenged action of the defendant." *Id.* (cleaned up). And third, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (internal quotation marks and quotation omitted).

"That a suit may be a class action adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Lewis v. Casey*, 518 U.S. 343, 357 (1996) (cleaned up).

Defendants argued that Plaintiffs lacked standing to bring their Fourth Amendment claims and their claims related to unreasonable inspection fees because they failed to allege an injury-in-fact. ECF 6, PgID 289–99. Plaintiffs alleged that although the City had completed no warrantless inspections, the City's imposition of an inspection fee caused Plaintiffs to choose between "relinquish[ing] their right to be free of unreasonable searches" or paying a fine. ECF 1, PgID 112.

Construing the facts in Plaintiffs' favor, *Bassett*, 528 F.3d at 430, Plaintiffs have alleged an injury-in-fact and have standing to bring their Fourth Amendment

claim relating to the NOORPR ordinance, claim eleven. Plaintiffs alleged that they had to pay a fee—$255 per instance—if they refused to consent to a warrantless administrative search. ECF 1, PgID 32–34, 97. The fee was alleged to be actually billed against Plaintiffs, so it is concrete and particularized to the alleged Fourth Amendment violation. *Id.* at 32–34, 42, 48, 50, 97, 109, 131 (describing the amount as a "failure to allow access penalty" or a "lock out fee") (internal quotation marks omitted); ECF 1-20; ECF 1-29. Whether the inspection fee was unreasonable or levied in violation of the Constitution is a merits issue, not a standing issue.

What is more, although Defendants are correct that Plaintiffs never asserted that the City conducted a warrantless search, ECF 6, PgID 298; *see generally* ECF 1, the Fourth Amendment claim intertwines with the question of whether the fees were reasonable. Indeed, if the City's "lock out fee" were found to be an unreasonable fine levied against a property owner for not abandoning "their right to be free of unreasonable searches," ECF 1, PgID 32–34, 112, then the Fourth Amendment might be implicated, even if the City conducted no search. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013) ("[R]egardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them."). Thus, Plaintiffs did not need to allege that the City conducted warrantless searches to properly bring a Fourth Amendment claim.

Last, Defendants' reliance on *Vonderhaur v. Village of Evendale* and *Estate of Fluegge v. City of Wayne* is misplaced because the facts of *Vonderhaur* are distinguishable. *See* ECF 6, PgID 298–99. In *Vonderhaur*, the plaintiff lacked standing because he could show no imminent injury-in-fact. 906 F.3d 397, 400–01 (6th Cir. 2018). There, the city's inspection ordinance allowed officials to search a property with either the consent of the owner or through a warrant. *Id.* at 401. Those facts are similar to those relating to the ordinance here. *See* ECF 1, PgID 14–15. But the plaintiff in *Vonderhaur* raised no claim about a fee for refusing to consent to a search. That factual distinction precludes the Court from applying *Vonderhaur*'s straightforward holding here.

And in *Estate of Fluegge*, property owners sued their city because an ordinance required them "to give up their rights to be free from unreasonable searches as a condition of selling or renting their property." 442 F. Supp. 3d 987, 994 (E.D. Mich. 2020). There, the owners "challeng[ed] the [c]ity's right to inspect residential property that an owner wants to rent or sell, and [the right] to charge a fee." *Id.* at 996. But that court found the fee charged for conducting the inspection was implied in the city's power "to regulate land use in order to maintain or improve the quality of life within [its] communit[y]." *Id.* at 669–97. In contrast, Plaintiffs alleged that the City offered a trade-off of sorts: pay the fine, avoid the search. *See* ECF 1, PgID 32–34. That is, Plaintiffs never alleged that the fee was *compensation* for an inspection; rather, they alleged that it was a fee to *avoid* an inspection. And that distinction is

important for the standing analysis. The Court will therefore not dismiss Plaintiffs' eleventh claim for lack of standing.

But Plaintiffs' Fourth Amendment claim relating to the FVAPR ordinance, claim five, must be dismissed for lack of standing. Plaintiffs' claim alleged that the FVAPR ordinance fails because Section 14-403 allows for "authorized staff of the city to enter the premises for purposes of the inspection." *Id.* at 80. Plaintiffs argued that the rule allowed for "unfettered access to [owners'] registered foreclosed, vacant[,] or abandoned property" and therefore violated the Fourth Amendment. *Id.* at 80–81. But none of Plaintiffs' properties were registered as foreclosed, vacant, or abandoned properties, and Plaintiffs lodged no allegation that the City conducted a search on any of Plaintiffs' properties pursuant to Section 14-403. *See generally* ECF 1, PgID 3–59. Instead, Plaintiffs appeared to raise the claim on behalf of potential class members who had registered their properties as foreclosed, vacant, or abandoned and thus had to "surrender their Fourth Amendment rights by [providing] to the city, with their property registration, '[a] statement allowing authorized staff of the city to enter the premises for purposes of inspection.'" *Id.* at 135. But "even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Lewis*, 518 U.S. at 357 (cleaned up). Because Plaintiffs failed to allege an injury that implicates the Fourth Amendment as to the FVAPR ordinance, the Court will dismiss the fifth claim.

B. Limitations Period

Defendants argued that all claims asserted on behalf of Plaintiff 321 West Mason, as well as all claims against seven Defendants, must be dismissed because the claims bear on events that occurred more than three years before Plaintiffs filed the complaint. ECF 6, PgID 304–05 & n.10. The limitations period for claims brought under § 1983 is equal to the period for personal injury actions in the State in which the case is filed. *Wallace v. Kato*, 549 U.S. 384, 387 (2007) (citations omitted). In Michigan, personal injury actions carry a limitations period of three years. Mich. Comp. Laws § 600.5805(2). Accordingly, § 1983 civil rights suits must also be filed within three years. *Wolfe v. Perry*, 412 F.3d 707, 714 (6th Cir. 2005) (citations omitted).

Plaintiffs filed the present action on May 21, 2022. ECF 1. The relevant limitations period thus began to run on May 21, 2019. Defendants Frank Donovan, Dennis Diffenderfer, Scott Barnett, Charlie Williams, Jerry Stackhouse, and Tim Basore all left the City's employment well before May 21, 2019. ECF 6, PgID 305; ECF 6-3, PgID 414–15 (LaPorte Affidavit). Thus, the § 1983 claims against those Defendants are time-barred and must be dismissed.

Similarly, Defendant Timothy Pickett "last served as a Code Enforcement Official for the City of Jackson on May 17, 2015." ECF 6-3, PgID 414. Plaintiffs raised no allegation that Defendant Pickett tried to enforce Chapter 14 against any of the Plaintiffs in his new role as the "Assistant Director of Public Works." *Id.*; *see* ECF 1.

Consequently, the § 1983 claims against Defendant Pickett are also time-barred and must be dismissed.

Last, Plaintiffs alleged facts relating to Plaintiff 321 West Mason that occurred before May 21, 2019. Plaintiffs claimed that "[o]n December 13, 2018, the structure located at 321 West Mason was razed by the city of Jackson as a direct result of arbitrary, and unlawful application by city Chief Building Official Brian Taylor of an arbitrary, capricious and constitutionally void for its vagueness Chapter 14-72 Jackson City roofing Code." ECF 1, PgID 70–71. Plaintiffs also claimed that "[s]ince the adoption and promulgation of . . . [the] Chapter 14-72 ordinance on February 23, 2012, through [May 21, 2022], the city of Jackson has unlawfully razed structures, levied fines, and forced the unnecessary absorption of costs for the repair and/or replacement of roofs upon many . . . [p]roperty owners." *Id.* at 72–73. Plaintiffs therefore appeared to allege damages that extend beyond the limitations period. Any damages incurred from Defendants' conduct related to Plaintiff 321 West Mason before May 21, 2019 are thus not recoverable under the three-year limitations period.

C. Due Process Claims (One, Two, Three, Four, Six, Seven, Eight, Nine, Ten)

Defendants lodged two arguments against Plaintiffs' due process claims. First, Defendants argued that *City of Los Angeles v. Patel*, 576 U.S. 409 (2015) does not render Chapter 14 constitutionally invalid. ECF 6, PgID 300–02. And second, they contended that the City can charge registration and inspection fees. *Id.* at 302–03. The Court finds neither argument persuasive.

First, Plaintiffs never cited *Patel* in any of their due process claims. *See* ECF 1, PgID 60–78, 82–108 (claims one through four and six through ten). Plaintiffs appeared only to rely on *Patel* in the Fourth Amendment context. *Id.* at 108–13 (claim eleven). Thus, Defendants' argument that *Patel* does not render Chapter 14 unconstitutional is inapposite to the due process claims.

Defendants' second argument that the City can charge registration and inspection fees also falls short. Defendants framed Plaintiffs' argument about unconstitutionally vague registration and inspection fees as a mere "disagreement over the need for ordinances and enforcement." ECF 6, PgID 302. But the framing is too broad.

Defendants first summarily claimed that Plaintiffs "cannot meet [the] burden" to show that "Chapter 14 of the City Code is invalid under all circumstances." *Id.* at 300. But Defendants never developed the argument that the fees "do[] not exceed the City's authority to maintain and improve the quality of life for residents of the City." *Id.* at 302 (citations omitted). Even if that point were true, the argument fails to address Plaintiffs' many vagueness challenges as to several sections in the ordinance. *See* ECF 1, PgID 60–63 (vagueness as to Chapter 14-42(3)), 64–68 (vagueness as to Chapter 14-13), 69–74 (vagueness as to Chapter 14-72), 74–78 (vagueness as to Chapter 14-403), 82–86 (same). Defendants' attack on the claims that challenge Chapter 14 on vagueness grounds is therefore insufficient and must be denied. *See Uduko v. Cozzens*, 975 F. Supp. 2d 750, 758 (E.D. Mich. 2013) ("[T]he Court is not obligated to make Defendants' arguments for them, and a skeletal and

conclusory argument is insufficient to support [a motion to dismiss].") (collecting cases).

And Defendants' argument lacks any specificity as to how claims seven through ten, which lodge facial challenges to separate provisions of the ordinance, fail to state a claim. *See* ECF 6, PgID 302–03; ECF 1, PgID 87–89 (challenging Chapter 14-7), 91–95 (challenging Chapter 14-42.1), 98–02 (challenging Chapter 14-45), 105–07 (challenging Chapter 14-51). The Court will thus deny the motion to dismiss claims one, two, three, four, six, seven, eight, nine, and ten.

D. Fourth Amendment Claim (Claim Eleven)

Plaintiffs reasoned that Chapter 14 is unconstitutional because, even though it requires a city official to obtain an administrative warrant, the law also allows those warrants to be issued ex parte. ECF 1, PgID 112. According to Plaintiffs, the ex parte exception deprives Plaintiffs of the opportunity for "pre[]compliance review before a neutral magistrate." *Id.* at 112 (citing *Patel*, 135 S. Ct. at 2542). Defendants moved to dismiss Plaintiffs' Fourth Amendment claim on the merits because Plaintiffs' argument about precompliance review "is based on an inaccurate interpretation of [] *Patel*." ECF 6, PgID 293 n.7, 300–02.

In *Patel*, the Supreme Court reaffirmed the holding "that absent consent, exigent circumstances, or the like, in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker." 576 U.S. at 420 (citations omitted). The Court also clarified that those subject to the administrative search

"remain free to consent to searches . . . and police can compel them to turn [] over [guest registries] if they have a proper administrative warrant—including one that was issued ex parte—or if some other exception to the warrant requirement applies, including exigent circumstances." *Id.* at 423 (italics removed and footnote omitted).

Put simply, Chapter 14 complies with the rule set forth in *Patel* and does not present a Fourth Amendment violation. For one, Plaintiffs never claimed that the City searched their properties without a warrant. *See* ECF 1. Indeed, it is undisputed that the ordinance provides for the City to conduct an administrative search of a property without owner consent under two circumstances: (1) in an emergency, which is an exigent circumstance; or (2) pursuant to a warrant obtained "from a court of competent jurisdiction." *See* ECF 6-2, PgID 332 (Section 14.42). Thus, the "opportunity to obtain precompliance review before a neutral decisionmaker" is not in issue. *Patel*, 576 U.S. at 420. To be sure, *Patel* clarified that in the case of exigent circumstances or an administrative warrant (even one issued ex parte), officials may conduct a search without precompliance review. *Id.* at 423. Under *Patel* then, precompliance review is not required for City officials to carry out a search under a valid administrative warrant. *See Berkemeier v. City of Jackson*, No. 19-12132, 2022 WL 4378687, at *8 (E.D. Mich. Sept. 22, 2022) (Cleland, J.) ("*Patel* merely stands for the proposition that if a government agency *forgoes* formally seeking a warrant before conducting an administrative search, it must afford the interested party 'an opportunity to have a neutral decisionmaker review an officer's demand to search . . . before he or she faces penalties for failing to comply.'"). Plaintiffs' Fourth

Amendment facial challenge against the Chapter 14 ordinance therefore fails because the law is valid even if it does not afford owners precompliance review. The Court will thus grant Defendants' motion to dismiss as to the remaining Fourth Amendment claim, claim eleven.

E. Assumpsit (Claim Twelve)

Defendants argued that they are entitled to dismissal as to claim twelve for assumpsit because "Michigan [has] abolished [a]ssumpsit as an independent cause of action." ECF 6, PgID 306. "In 1963, assumpsit was abolished as an independent cause of action." *Friess v. City of Detroit*, No. 17-14139, 2019 WL 1379865, at *9 (E.D. Mich. Mar. 27, 2019) (citing *Fisher Sand & Gravel Co. v. Neal A. Newbie, Inc.*, 494 Mich. 543, 564 (2013)). And although "the remedies traditionally available under assumpsit remain," "[a] remedy . . . is not a cause of action." *Id.* (quotation and citation omitted). The Court will thus dismiss Plaintiffs' stand-alone claim for assumpsit, claim twelve.

F. Municipal Liability (Claim Thirteen)

Plaintiffs' thirteenth claim alleged that the City, "through their policies and customs," deprived homeowners of their due process rights. ECF 1, PgID 114. "A plaintiff raising a municipal liability claim under § 1983 must demonstrate that the alleged federal violation occurred because of a municipal policy or custom." *Burgess v. Fischer*, 735 F.3d 462, 478 (6th Cir. 2013) (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978)). A plaintiff can show an illegal policy or custom by alleging one of the following: "(1) the existence of an illegal official policy or legislative enactment; (2) that an official with final decision making authority ratified illegal

actions; (3) the existence of a policy of inadequate training or supervision; or (4) the existence of a custom of tolerance or acquiescence of federal rights violations." *Id.* (citation omitted); *see Monell*, 436 U.S. at 690 ("Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers."). And a municipality "may not be sued under § 1983 for an injury inflicted solely by its employees or agents." *Monell*, 436 U.S. at 694.

Defendants argued that the claim should be dismissed because, "[a]s presented, the [claim] does not allege a substantive cause of action[] but instead restates that the City's practices constitute official policy." ECF 6, PgID 306. But Plaintiffs' claim alleged that their due process rights were violated because of an ordinance—a "legislative enactment." *Burgess*, 735 F.3d at 478; ECF 1, PgID 114–17; *see Connick v. Thompson*, 563 U.S. 51, 60–61 (2011) ("Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law.") (collecting cases). Thus, an ordinance enacted by the City's lawmakers that Plaintiffs have alleged to have been drafted in violation of the Constitution is an "action for which the municipality is actually responsible." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986).

Plaintiffs did, however, appear to assert that the City should be liable for actions taken by "Code Enforcement Officials" for arbitrary application of Chapter

14. *See* ECF 1, PgID 114–16. The assertion appears to improperly point liability toward the City for actions taken by City employees. *See id.* Yet "a municipality cannot be held liable under § 1983 on a respondent superior theory." *Monell*, 436 U.S. at 691 (italics removed). And Plaintiffs never suggested that the City ratified or acquiesced in such actions or that the City inadequately trained or supervised the employees. *See* ECF 1, PgID 114–16; *see also Burgess*, 735 F.3d at 478. The Court will therefore grant in part Defendants' motion as to the portions of Plaintiffs' claim that assert liability against the City for actions that its employees took. Plaintiffs may proceed with discovery on their *Monell* claim against the City on only an "existence of an illegal official policy or legislative enactment" theory of liability. *Burgess*, 735 F.3d at 478. The motion to dismiss is therefore granted in part and denied in part as to claim thirteen.

G. Unjust Enrichment (Claim Fourteen)

Defendants framed Plaintiffs' unjust enrichment claim as an "allegation [] based on the argument that the fees were collected pursuant to an unconstitutional inspection and registration ordinance." ECF 6, PgID 307. They moved to dismiss the unjust enrichment claim because "Plaintiffs' constitutional challenge should be dismissed, [and] therefore there is no inequity stemming from the City's registration and fee requirements." *Id.* at 308. But the Court did not dismiss all of Plaintiffs' claims relating to the City's inspection and registration fee requirements. And an unjust enrichment claim lies "when a party has and retains money or benefits which in justice and equity belong to another." *Wright v. Genesee Cnty.*, 504 Mich. 410, 418

(2019) (internal quotation marks and quotation omitted). It follows then, that the unjust enrichment claim must remain if the underlying constitutional claims relating to fees survive a motion to dismiss. Accordingly, the Court will not summarily dismiss Plaintiffs' unjust enrichment claim because claims remain that involve fees levied by the City under Chapter 14.

H. Independent § 1983 Claim (Claim Seventeen)

Plaintiffs' seventeenth claim raised a "violation of 42 U.S.C. § 1983." ECF 1, PgID 121. The claim reasserted Plaintiffs' previously alleged constitutional violations and sought to refute a qualified immunity defense by the individual Defendants. But each of Plaintiffs' claims that raised constitutional violations referenced § 1983. ECF 1, PgID 63, 68, 73–74, 77–78, 81, 86, 89–90, 95–96, 102–03, 107–108. Plaintiffs' independent § 1983 claim, therefore, "is merely a repetition of those counts." *MS Rentals, LLC v. City of Detroit*, 362 F. Supp. 3d 404, 412 (E.D. Mich. 2019). Plus, § 1983 "is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes." *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979). The Court will therefore dismiss claim seventeen, the independent § 1983 claim. Plaintiffs' § 1983 claims that are incorporated into the non-dismissed substantive claims, however, are not dismissed.

I. Injunctive and Declaratory Relief (Claims Fifteen, Sixteen, Eighteen)

Like Plaintiffs' assumpsit claims, the Court will dismiss the claims for injunctive and declaratory relief because such claims are "remedies dependent on the

viability [of] the [substantive] claims." *MS Rentals, LLC*, 362 F. Supp. 3d at 412. And Plaintiffs even referenced equitable relief in their substantive claims. *See* ECF 1, PgID 63, 68–69, 74, 78, 81–82, 86–87, 90, 96, 103, 108. Claims fifteen, sixteen, and eighteen thus appear to restate parts of Plaintiffs' earlier claims. The Court will therefore dismiss the claims for injunctive and declaratory relief because they are not independent causes of action.[4] *See Turaani v. Sessions*, 316 F. Supp. 3d 998, 1015 (E.D. Mich. 2018) (citing *Goruoka v. Quicken Loan, Inc.*, 519 F. App'x 926, 929 (6th Cir. 2013)) ("[I]njunctive and declaratory relief are remedies and not independent causes of action.").

CONCLUSION

Because Plaintiffs seriously violated the Local Rules, the Court will order the Clerk of the Court to strike Plaintiffs' response brief, ECF 10, and Defendants' reply brief, ECF 11. The Court will also deny as moot Plaintiffs' motion to file an amended response.

Next, the Court will grant in part and deny in part Defendants' motion to dismiss. Claims five, eleven, twelve, fifteen, sixteen, seventeen, and eighteen are dismissed. The motion to dismiss as to claim thirteen is also denied in part, consistent with the analysis set forth in this Opinion and Order. Moreover, any claims that arise from damages incurred based on Defendants' conduct relating to Plaintiff 321 West Mason before May 21, 2019 are dismissed. And based on the relevant limitations

[4] The Court's order does not limit Plaintiffs' ability to seek injunctive or declaratory relief as to their substantive claims.

period, Defendants Frank Donovan, Dennis Diffenderfer, Scott Barnett, Charlie Williams, Jerry Stackhouse, Tim Basore, and Timothy Pickett are dismissed. Claims one, two, three, four, six, seven, eight, nine, ten, thirteen in part, and fourteen remain.

ORDER

WHEREFORE, it is hereby **ORDERED** that the Clerk of the Court must **STRIKE** Defendants' response brief [10] and Plaintiffs' reply brief [11].

IT IS FURTHER ORDERED Plaintiffs' motion for leave to file an amended response [12] is **DENIED AS MOOT**.

IT IS FURTHER ORDERED that the motion to dismiss [6] is **GRANTED IN PART AND DENIED IN PART**.

IT IS FURTHER ORDERED that Defendants Frank Donovan, Dennis Diffenderfer, Scott Barnett, Charlie Williams, Jerry Stackhouse, Tim Basore, and Timothy Pickett are **DISMISSED**.

IT IS FURTHER ORDERED that any damages incurred due to Defendants' conduct relating to Plaintiff 321 West Mason before May 21, 2019 is **NOT RECOVERABLE** under the three-year limitations period.

SO ORDERED.

s/ Stephen J. Murphy, III
STEPHEN J. MURPHY, III
United States District Judge

Dated: December 9, 2022

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on December 9, 2022, by electronic and/or ordinary mail.

s/ David P. Parker
Case Manager