

Cause No. _____

THE STATE OF TEXAS,
Plaintiff,

V.

CITY OF AUSTIN; KIRK PRESTON
WATSON, Mayor of Austin; PAIGE ELLIS,
Mayor Pro Tem of Austin; NATASHA
HARPER-MADISON, VANESSA
FUENTES, JOSE VELASQUEZ, JOSE
“CHITO” VELA, RYAN ALTER,
MACKENZIE KELLY, LESLIE POOL,
ZOHAI B “ZO” QADRI, and ALISON
ALTER, Members of the City Council of
Austin; JESUS GARZA, Interim City Manager
of Austin; and ROBIN HENDERSON, Interim
Chief of Police of Austin; in their official
capacities,
Defendants.



















In the District Court of

Travis County, Texas

419TH, DISTRICT COURT

Judicial District

**Plaintiff's Original Verified Petition,
Application for Temporary Injunction and Permanent Injunction**

The City of Austin (“Austin”), a home-rule city, adopted an ordinance designed to eliminate marijuana enforcement. This ordinance, and a corresponding Austin Police Department General Order (“APD General Order”), constitute a policy under which Austin will not fully enforce laws relating to drugs, including Chapter 481. Chapter 481 makes possession of marijuana and drug paraphernalia an offense. Thus, the ordinance and the APD General Order violate and are preempted by section 370.003 of the Texas Local Government Code: “The governing body of a municipality [or a] municipal police department ... may not adopt a policy under which the entity will not fully enforce laws relating to drugs, including Chapters 481 and 483, Health and Safety Code, and federal law.” The ordinance is also unconstitutional. “[N]o...ordinance passed under [Austin’s] charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State.” TEX. CONST. art. XI, § 5.

Consequently, the State of Texas files this Original Petition and Application for Temporary and Permanent Injunction asking the Court to (1) declare the ordinance and the APD General Order *ultra vires* and (2) order Defendants to (a) repeal the Ordinance, (b) cancel the APD General Order, (c) fully enforce the drug laws in chapter 481, (d) not discipline any employee of the City of Austin for enforcing the drug laws in Chapter 481, and (e) modify city policies and internal operating procedures to the extent that they have been updated in response to the Ordinance.

Discovery Control Plan

1. If discovery were needed, it would be intended to be conducted under Level 2 of Texas Rule of Civil Procedure 190.3. But this is a case of pure law and discovery is unneeded.

Claims for Relief

2. Plaintiff seeks injunctive relief. Therefore, this suit is not governed by the expedited actions process in Tex. R. Civ. P. 169.

Venue

3. Venue is proper in Travis County under section 15.002(a)(1) and (a)(3) of the Texas Civil Practices and Remedies Code.

Sovereign Immunity Inapplicable

4. Neither sovereign immunity nor governmental immunity applies to the State of Texas's *ultra vires* claim. "The basic justification for th[e] *ultra vires* exception to sovereign immunity is that *ultra vires* acts—or those acts without authority—should not be considered acts of the state at all." *Hall v. McRaven*, 508 SW.3d 232, 238 (Tex. 2017) (internal quotation marks and citations omitted). As a result, "*ultra vires* suits do not attempt to exert control over the state—they attempt to reassert the control of the state over one of its agents." *Id.*

5. Further, Texas Civil Practice and Remedies Code Sec. 37.006(b) states "In any proceeding that involves the validity of a municipal ordinance or franchise, the municipality must be made a party and is entitled to be heard." This has been consistently construed as a legislative waiver of governmental immunity in situations like the one at issue here. *Tex. Educ. Agency v. Leeper*, 893

S.W.2d 432, 446 (Tex. 1994); *Tex. Lottery Comm’n v. First State Bank of DeQueen*, 325 S.W.3d 628 (Tex. 2010).

Parties

6. Plaintiff is the State of Texas. *State v. Hollins*, 620 S.W.3d 400, 410 (Tex. 2020) (citing *State v. Naylor*, 466 S.W.3d 783, 790 (Tex. 2015) (“As a sovereign entity, the State has an intrinsic right to enact, interpret, and enforce its own laws.”); *Yett v. Cook*, 115 Tex. 205, 221, 281 S.W. 837, 842 (1926) (“That the state has a justiciable ‘interest’ in its sovereign capacity in the maintenance and operation of its municipal corporations in accordance with law does not admit of serious doubt.”)).

7. Defendant City of Austin is a home-rule municipality.
8. Defendant Kirk Preston Watson is the Mayor of Austin.
9. Defendant Paige Ellis is the Mayor Pro Tem of Austin and Councilmember for District #8.
10. Defendant Natasha Harper-Madison is Councilmember for District #1.
11. Defendant Vanessa Fuentes is Councilmember for District #2.
12. Defendant Jose Velasquez is Councilmember for District #3.
13. Defendant Jose “Chito” Vela is Councilmember for District #4.
14. Defendant Ryan Alter is Councilmember for District #5.
15. Defendant Mackenzie Kelly is Councilmember for District #6.
16. Defendant Leslie Pool is Councilmember for District #7.
17. Defendant Zohaib “Zo” Qadri is Councilmember for District #9.
18. Defendant Alison Alter is Councilmember for District #10.
19. Defendant Jesus Garza is Interim City Manager of Austin.
20. Defendant Robin Henderson is Interim Chief of Police of Austin.

21. All Defendants are sued in their official capacities.

22. All Defendants may be served with process through Jesus Garza, Interim City Manager, at City Hall, 301 W. 2nd, 3rd Floor, Austin, Texas 78701.

Facts

23. On July 3, 2020, APD General Order 308.9 relating to possession of marijuana became effective (Exhibit 1). The APD General Order was updated and on September 8, 2020 (Exhibit 2) and is still in effect today. It states:

308.9 MISDEMEANOR POSSESSION OF MARIJUANA (POM)

For Class A and B POM offenses, officers should only make an arrest or issue a citation as otherwise permitted by 308.3 and 308.4 of its order if doing so as part of:

(a) the investigation of a high priority, felony-level narcotics case, or

(b) the investigation of a violent felony.

In all other Class A or Class B POM cases, and when officers have probable cause to believe the substance is marijuana, officers shall seize the marijuana, write a detailed report titled “possession of marijuana” and release the individual if POM is the sole charge. Officers shall deposit the marijuana according to GO 618.6.2 Submitting Narcotics and Narcotics Paraphernalia. In the event there are offenses in addition to POM, officers should take appropriate enforcement for those additional offenses, but should not charge for the POM offenses unless it meets one or both of the factors identified in paragraphs (a) or (b) of this order. In addition, the officers will complete a “POM Class A/B with no charges filed” template which is required for the disposal of the marijuana.

accordance with the newly voted Proposition A to eliminate low-level marijuana enforcement that was held in the general election on November 8, 2022, the following will take effect immediately:

24. Through the ballot initiative process, the citizens of Austin placed Proposition A on the May 7, 2022, ballot. Proposition A contained a city ordinance which would regulate how APD

enforces certain marijuana laws governed by Chapter 481 of the Texas Health and Safety Code. Proposition A passed.

25. The Austin City Council codified and published the ordinance, which is now in effect as City of Austin Code of Ordinances Title 16 – Austin Freedom Act of 2021, Chapter 16-1 – Elimination of Marijuana Enforcement (“the Ordinance”).¹

26. The Ordinance reads as follows:

CHAPTER 16-1 – ELIMINATION OF MARIJUANA ENFORCEMENT

Sec. 16-1-1 – ENDING CITATIONS AND ARRESTS FOR MISDEMEANOR POSSESSION OF MARIJUANA.

Austin Police Officers shall not issue citations or make arrests for Class A or Class B misdemeanor possession of marijuana offenses, except in the limited circumstances described in Section 16-1-1(B).

(A) The only circumstance in which Austin Police Officers are permitted to issue citations or make arrests for Class A or Class B misdemeanor possession of marijuana are when such citations or arrests are part of: (1) the investigation of a felony level narcotics case that has been designated as a high priority investigation by an Austin Police Commander, assistant chief of police, or chief of police; and/or (2) the investigation of a violent felony.

(B) In every instance other than those described in Section 16-1-1(B), if an Austin Police Officer has probable cause to believe that a substance is marijuana, an officer may seize the marijuana. If the officer seizes the marijuana, they must write a detailed report and release the individual if possession of marijuana is the sole charge.

(C) Austin Police Officers shall not issue any charge for possession of marijuana unless it meets at least one of the factors described in Section 16-1-1(B).

¹ Available at

https://library.municode.com/tx/austin/codes/code_of_ordinances?nodeId=TIT16AUFRAC2021_CH16-1ELMAEN

Sec. 16-1-2 – CITATIONS FOR POSSESSION OF DRUG RESIDUE OR DRUG PARAHERNALIA SHALL NOT BE ISSUES IN LIEU OF POSSESSION OF MARIJUANA CHARGE.

(A) A class C misdemeanor citation for possession of drug residue or drug paraphernalia shall not be issued in lieu of a possession of marijuana charge.

Sec. 16-1-3 – PROHIBITION AGAINST USING CITY FUNDS OR PERSONNEL TO CONDUCT THE CONCENTRATION TESTING.

(A) No City funds or personnel shall be used to request, conduct, or obtain tetrahydrocannabinol (THC) testing of any cannabis-related substance to determine whether the substance meets the legal definition of marijuana under state law, except in the limited circumstances of a police investigation pursuant to Section 16-1-1(B).

(b) This prohibition shall not limit the ability of Austin Police to conduct toxicology testing to ensure public safety, nor shall it limit THC testing for the purpose of any violent felony charge.

Legal Analysis

27. Because Austin is a home-rule municipality, it has “the full power of self-government” and does not need a special grant from the Legislature to enact local ordinances. *S. Crushed Concrete, LLC v. City of Houston*, 398 S.W.3d 676, 678 (Tex. 2013). However, “no...ordinance passed under [Austin’s] charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State.” TEX. CONST. art. XI, § 5.

28. Under State law, “The governing body of a municipality ... [or] a municipal police department ... may not adopt a policy under which the entity will not fully enforce laws relating to drugs, including Chapters 481 and 483, Health and Safety Code, and federal law.” Tex. Local Gov’t Code § 370.003.

29. Chapter 481 of the Health and Safety Code provides that possession of marijuana and drug paraphernalia are offenses. Tex. Health and Safety Code §§ 481.121, .125.

30. Section 16-1-1 of the Ordinance prohibits Austin police officers from issuing citations or making arrests for Class A or Class B misdemeanor possession of marijuana. Thus, it is a policy under which Austin will not “fully enforce ... Chapter 481.” Therefore, section 16-1-1 violates § 370.003.

31. Section 16-1-2 of the Ordinance prohibits Austin police officers from issuing Class C misdemeanor citations for “possession of drug residue [sic; there is no such offense] or drug paraphernalia ... in lieu of a possession of marijuana charge.” Thus, it is a policy under which Austin will not “fully enforce ... Chapter 481.” Therefore, section 16-1-2 violates § 370.003.

32. Section 16-1-3 of the Ordinance prohibits city funds and personnel “to request, conduct, or obtain tetrahydrocannabinol (THC) testing of any cannabis-related substance to determine whether the substance meets the legal definition of marijuana under state law” except in certain circumstances. Thus, section 16-1-3 is a policy under which Austin will not “fully enforce ... Chapter 481.” Therefore, it violates § 370.003.

33. APD General Order 308.9 is also a policy under which Austin will not “fully enforce ... Chapter 481.” Therefore, APD General Order 308.9 violates § 370.003.

34. Because the Ordinance and APD General Order 308.9 violate section 370.003 of the Local Government Code, Defendants “may not adopt” them. Tex. Loc. Gov’t Code § 370.003.

35. Although local ordinances are presumed valid, if an ordinance is unmistakably and clearly at odds with a statute, the ordinance is preempted. *Dall. Merchant's & Concessionaire's Ass’n v. City of Dallas*, 852 S.W.2d 489, 491 (Tex. 1993).

36. In a preemption challenge, a local ordinance - even a reasonable one - “is unenforceable to the extent it conflicts with the state statute.” *Id.* (citation omitted).

37. The Ordinance directly conflicts with the state statute; thus it is unenforceable. *See id.* (citing *City of Brookside Vill. v. Comeau*, 633 S.W.2d 790, 796 (Tex.1982), *cert. denied*, 459 U.S. 1087, 103 S.Ct. 570 (1982)).

38. Moreover, the Ordinance is unconstitutional. “[N]o...ordinance passed under [Austin’s] charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State.” TEX. CONST. art. XI, § 5.

39. In an *ultra vires* case, a plaintiff must allege, and ultimately prove, that an officer acted without legal authority or failed to perform a ministerial act. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009).

40. Defendants lack legal authority to adopt the Ordinance and APG General Order 308.9. Tex. Loc. Gov’t Code § 370.003.

41. Defendants lack the constitutional authority to adopt the Ordinance. TEX. CONST. art. XI, § 5.

Request for a Declaratory Judgment

42. The State of Texas requests that the Court issue a declaratory judgment that the Ordinance and APD General Order 308.9 are *ultra vires* and void.

Application for a Temporary Injunction

43. The State is entitled to a temporary injunction. To obtain a temporary injunction, the State must prove (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002).

44. The State has a cause of action against Defendants for *ultra vires* acts. *Hollins*, 620 S.W.3d at 405.

45. The State has a probable right of recovery. The City of Austin has no authority to pass the Ordinance and the Austin Police Department has no authority to issue APD General Order 308.9. Tex. Loc. Gov’t Code § 370.003; TEX. CONST. art. XI, § 5.

46. “When the State files suit to enjoin *ultra vires* action by a local official, a showing of likely success on the merits is sufficient to satisfy the irreparable-injury requirement for a temporary injunction.” *Hollins*, 620 S.W.3d at 410.

47. Further, “An injury is irreparable if the injured party cannot be adequately compensated in damages, or if the damages cannot be measured by any certain pecuniary standard.” *Butnaru*, 84 S.W.3d at 204; *City of Dallas v. Brown*, 373 S.W.3d 204, 208 (Tex. App.—Dallas 2012, pet. denied).

48. Consequently, the State is entitled to a temporary injunction.

49. The Court should issue a temporary injunction enjoining Defendants from enforcing the Ordinance and APD General Order 308.9 and ordering Defendants to (a) repeal the Ordinance, (b) cancel APD General Order 308.9, (c) fully enforce the drug laws in Chapter 481, (d) not discipline any employee of the City of Austin for enforcing the drug laws in Chapter 481, and (e) modify city policies and internal operating procedures to the extent that they have been updated in response to the Ordinance or the APD General Order.

Application for Permanent Injunction

50. The State of Texas requests trial on the merits, where it will seek a permanent injunction enjoining Defendants from enforcing the Ordinance and APD General Order 308.9 and ordering Defendants to (a) repeal the Ordinance, (b) cancel APD General Order 308.9, (c) fully enforce the drug laws in Chapter 481, (d) not discipline any employee of the City of Austin for enforcing the drug laws in Chapter 481, and (e) modify city policies and internal operating procedures to the extent that they have been updated in response to the Ordinance or the APD General Order.

Prayer

Therefore, the State of Texas seeks the following relief:

- a. A temporary and permanent injunction enjoining Defendants from enforcing Title 16, Chapter 16 of the City of Austin Code of Ordinances.
- b. A temporary and permanent injunction ordering Defendants to repeal the Ordinance.
- c. A temporary and permanent injunction ordering Defendants to cancel APD General Order 308.9.

- d. A temporary and permanent injunction ordering Defendants to fully enforce the drug laws in Chapter 481 of the Texas Health and Safety Code.
- e. A temporary and permanent injunction ordering Defendants not to discipline any Austin employee for enforcing the drug laws in Chapter 481 of the Texas Health and Safety Code.
- f. A temporary and permanent injunction ordering Defendants to modify city policies and internal operating procedures to the extent that they have been updated in response to the Ordinance or APD General Order 308.9.
- g. All other relief as the Court deems equitable and just.

Date: January 30, 2024

Respectfully submitted.

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COUNSEL FOR PLAINTIFF

308 Misdemeanor Citation

308.9 Misdemeanor Possession of Marijuana

For Class A and B POM offenses, officers should only make an arrest or issue a citation as otherwise permitted by section 308.3 and 308.4 of this general order if doing so as part of:

- (a) the investigation of a high priority, felony-level narcotics case, or
- (b) the investigation of a violent felony.

In all other Class A or B POM cases, and when officers have probable cause to believe the substance is marijuana, officers shall seize the marijuana, write a detailed report titled "possession of marijuana" and release the individual if POM is the sole charge. Officers shall deposit the marijuana as evidence. In the event there are offenses in addition to POM, officers should take appropriate enforcement action for those additional offenses, but should not charge for the POM offense unless it meets one or both of the factors identified in paragraphs (a) or (b) of this general order.

CHAPTER 16-1. - ELIMINATION OF MARIJUANA ENFORCEMENT.

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§ 16-1-1 - ENDING CITATIONS AND ARRESTS FOR MISDEMEANOR POSSESSION OF MARIJUANA.

Austin Police Officers shall not issue citations or make arrests for Class A or Class B misdemeanor possession of marijuana offenses, except in the limited circumstances described in Section 16-1-1(B).

- (A) The only circumstances in which Austin Police Officers are permitted to issue citations or make arrests for Class A or Class B misdemeanor possession of marijuana are when such citations or arrests are part of:
 - (1) the investigation of a felony level narcotics case that has been designated as a high priority investigation by an Austin Police Commander, assistant chief of police, or chief of police; and/or
 - (2) the investigation of a violent felony.
- (B) In every instance other than those described in Section 16-1-1(B), if an Austin Police Officer has probable cause to believe that a substance is marijuana, an officer may seize the marijuana. If the officer seizes the marijuana, they must write a detailed report and release the individual if possession of marijuana is the sole charge.
- (C) Austin Police Officers shall not issue any charge for possession of marijuana unless it meets one or both of the factors described in Section 16-1-1(B).

Source: Ord. No. 20220118-002, Pt. 1, 1-28-22/election of 5-7-22.

§ 16-1-2 - CITATIONS FOR POSSESSION OF DRUG RESIDUE OR DRUG PARAPHERNALIA SHALL NOT BE ISSUED IN LIEU OF A POSSESSION OF MARIJUANA CHARGE.

- (A) A class C misdemeanor citation for possession of drug residue or drug paraphernalia shall not be issued in lieu of a possession of marijuana charge.

Source: Ord. No. 20220118-002, Pt. 1, 1-28-22/election of 5-7-22.

§ 16-1-3 - PROHIBITION AGAINST USING CITY FUNDS OR PERSONNEL TO CONDUCT THC CONCENTRATION TESTING.

EXHIBIT 2

- (A) No City funds or personnel shall be used to request, conduct, or obtain tetrahydrocannabinol (THC) testing of any cannabis-related substance to determine whether the substance meets the legal definition of marijuana under state law, except in the limited circumstances of a police investigation pursuant to Section 16-1-1(B).
- (B) This prohibition shall not limit the ability of Austin Police to conduct toxicology testing to ensure public safety, nor shall it limit THC testing for the purpose of any violent felony charge.

Source: Ord. No. 20220118-002, Pt. 1, 1-28-22/election of 5-7-22.

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Heather Dyer on behalf of Heather Dyer

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APPLICATION FOR TEMPORARY INJUNCTION AND PERMANENT
INJUNCTION

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Associated Case Party: STATE OF TEXAS

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