

COPY

CAUSE NUMBER _____

THE STATE OF TEXAS AND	§	IN THE DISTRICT COURT
BELL COUNTY, TEXAS	§	
	§	
VS.	§	____TH JUDICIAL
	§	DISTRICT
	§	
THE CITY OF KILLEEN, TEXAS	§	BELL COUNTY, TEXAS

**PLAINTIFF'S ORIGINAL PETITION FOR DECLARATORY JUDGMENT
AND FOR TEMPORARY AND PERMANENT AND INJUNCTIVE RELIEF**

NOW COMES the State of Texas and Bell County, Plaintiffs herein,
complaining of the City of Killeen, Texas, Defendant herein, and for cause of
action, would show unto the Court as follows:

**I.
DISCOVERY CONTROL PLAN DESIGNATION**

- 1.01 By this action, Plaintiffs seek only non-monetary relief.
- 1.02 Discovery in this case is intended to be conducted under Level 2
pursuant to Rule 190.3 of the Texas Rules of Civil Procedure.

**II.
PARTIES**

2.01 The State of Texas, as Plaintiff, is represented by her District
Attorney, Henry Garza, and her County Attorney, Jim Nichols. Both elected
officials exercise the jurisdiction of their offices in and throughout Bell County,
Texas. Both officials reside in Bell County.

2.02 Plaintiff Bell County is represented by Bell County Attorney Jim Nichols.

2.03 The City of Killeen as Defendant is a home-rule municipal subdivision of the State of Texas located in Bell County, and may be served through the Mayor of Killeen, Debbie Nash-King, located at 101 North College Street, Killeen, Texas.

III. JURISDICTION, STANDING AND VENUE

3.01 The District Court has jurisdiction over the subject matter herein because both Plaintiffs, The State of Texas and Bell County, have standing to file suit for declaratory and injunctive relief. The suit revolves around a municipal ordinance affecting enforcement of state criminal law. The District Court has jurisdiction to determine declaratory and injunctive actions.¹

3.02 Article 5, Section 21 of the Texas Constitution provides that “County Attorneys shall represent the State in all cases...”. However, in those situations where there is both a County Attorney and District Attorney, those respective duties “...shall be regulated by the Legislature.” Texas Government Code Section 43.114 provides, “The voters of Bell County elect a district attorney for the 27th

¹ Texas Constitution Article 5, Section 8: “District Court jurisdiction consists of exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body. District Court judges shall have the power to issue writs necessary to enforce their jurisdiction.

Judicial District who represents the state in the district courts having jurisdiction in that county.” There is no distinction between criminal or civil cases. So while the ordinance deals with the prosecution of misdemeanor marijuana cases which is the purview of the Bell County Attorney² as the criminal prosecutor directly affected, a plain reading of the Government Code allows the District Attorney, Henry Garza, as the State’s attorney in this civil action.

3.03 The Bell County Commissioners unanimously authorized the County Attorney to seek the relief herein. County Commissioners have a general duty with respect to public safety and health of county residents³, and “The commissioners' court undoubtedly has the right to cause suits to be instituted in the name of and for the benefit of the county....”⁴

3.04 Both the State of Texas and Bell County have been harmed by Defendant’s action and this suit brings this Honorable Court to provide the judicial

² Texas Code of Criminal Procedure Article 2.02: “The county attorney shall attend the terms of court in his county below the grade of district court, and shall represent the State in all criminal cases under examination or prosecution in said county; and in the absence of the district attorney he shall represent the State alone and, when requested, shall aid the district attorney in the prosecution of any case in behalf of the State in the district court. He shall represent the State in cases he has prosecuted which are appealed.”

³ Texas Constitution Article 5, Section 18(b): “The County Commissioners so chosen, with the County Judge as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed.

⁴ Looscan v. County of Harris, 58 Tex. 511, 514 (1883).

remedy sought by declaring the ordinance unconstitutional and enjoining the Defendant from enforcing it.

3.05 Venue is proper in Bell County, Texas, because Defendant City of Killeen is located exclusively in Bell County and its ordinance which is the basis of Plaintiff's claims and causes of action has been enacted and given effect in Bell County, Texas.

IV. FACTS OF THE CASE

4.01 Through the ballot initiative process, the citizens of Killeen placed Proposition 'A' on the November 8, 2022, ballot. Proposition 'A' contained a city ordinance which would eliminate enforcement of marijuana laws by the Killeen Police Department. Proposition 'A' passed. On November 10, the Killeen Police Department Chief directed his officers by "special order" to cease misdemeanor marijuana arrests.

4.02 After certifying the election results, thereby adopting the Proposition, the Killeen City Council amended the ordinance on December 6, 2022. As codified and published, the modified ordinance is now in effect as City of Killeen Code of Ordinances Chapter 22 – Police, Article V – Marijuana Enforcement, attached hereto as Exhibit '1' and referred to throughout this Petition as "the Ordinance."

4.03 The neighboring City of Harker Heights faced the same election initiative proposition on November 8, 2022; however, after certification of the election results which tacitly adopted the proposition, the Harker Heights City Council repealed it on November 22, 2022.

4.04 On December 22, 2022, the Bell County Commissioners unanimously authorized the Bell County Attorney to file suit against the City of Killeen. *See* Plaintiffs' Exhibit '2.'

V.

CAUSE OF ACTION FOR DECLARATORY RELIEF AND REQUEST FOR INJUNCTIONS TEMPORARY AND PERMANENT

5.01 By this Action, Plaintiffs seek a declaration from the Court that

(a) the City of Killeen ordinance to eliminate low-level marijuana enforcement codified in Article V, Section 22-80 through 22-86 is inconsistent with state law and therefore invalid, void and unenforceable; and

(b) this same ordinance suspends state law and is therefore invalid, void, and unconstitutional.

5.02 Plaintiffs request an immediate temporary restraining order and injunction enjoining Defendant City of Killeen and its agents one and all from enforcing Article V of Chapter 22 of the City of Killeen Code of Ordinances.

Plaintiffs request that the City Secretary immediately remove from publication the ordinance in print forms, including online municipal code database. Plaintiffs request that, to any extent it may still be in effect, the Chief of Police countermand his order that followed the election until superseded by the adoption of the Ordinance. Finally, Plaintiffs request a permanent injunction against the City and its agents from enforcement of Article V Chapter 22, Killeen Texas Code of Ordinances. Plaintiffs request a permanent injunction in concert with the above following trial.

VI. LEGAL ANALYSIS

6.01 Plaintiffs believe that City of Killeen Ordinance Chapter 22 Article V is facially unconstitutional and inconsistent with numerous state laws that have supremacy over a municipal ordinance. Killeen is a home-rule municipality. As such, the City does not need any special grant from the State Legislature to enact various local laws.⁵ However, Article XI Section 5(a) of the Texas Constitution provides, “no...ordinance passed under [a city] charter shall contain any provision inconsistent with the Constitution of the State or the General laws enacted by the Legislature of this State.” As the Supreme Court of Texas ruled in *City of Laredo*

⁵ See *Southern Crushed Concrete, LLC v. City of Houston*, 398 S.W.3d 676 at 678 (Tex. 2013).

v. Laredo Merchants Association, “The question is not whether the Legislature can preempt a local regulation like the ordinance, but whether it has.”⁶

6.02 This Honorable Court need look no further than the Texas Local Government Code to see that the State has preempted Killeen’s ordinance. In its entirety, Section 370.003 reads:

MUNICIPAL OR COUNTY POLICY REGARDING ENFORCEMENT OF DRUG LAWS. The governing body of a municipality, the commissioners court of a county, or a sheriff, municipal police department, municipal attorney, county attorney, district attorney, or criminal district attorney 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.

6.03 Chapter 481 of the Texas Health and Safety Code contain various statutes making possession, manufacture, and delivery of marihuana a criminal offense.⁷ The most directly contradicted statute is Health and Safety Code 481.121:

OFFENSE: POSSESSION OF MARIHUANA. (a) Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally possesses a usable quantity of marihuana.
(b) An offense under Subsection (a) is:
(1) a Class B misdemeanor if the amount of marihuana possessed is two ounces or less;
(2) a Class A misdemeanor if the amount of marihuana possessed is four ounces or less but more than two ounces;

⁶ 550 S.W.3d 586 (Tex. 2018).

⁷ See generally Texas Health and Safety Code Sections 481.121:

6.04 Section 22-80 of Article V of the Killeen Ordinance is entitled “Ending Citations and Arrests for Misdemeanor Possession of Marijuana.” The Ordinance’s Section (a) forbids officers from issuing citations or making arrests for Class A or B misdemeanor marijuana possession; Section (d) forbids officers from signing complaints on such cases, a necessary step to bringing the offense to court.

6.05 Local Government Code 370.003 expresses the Legislature’s intent with the “unmistakable clarity” demanded by the courts.⁸ On the other hand, Killeen’s Ordinance ending citations and arrests for misdemeanor possession of marijuana is equally blunt. Plaintiffs see no way to reconcile the general law with the local regulation. The City of Killeen has adopted a policy whereby the State drug laws are not fully enforced. The Ordinance’s mitigation of penal enforcement by hamstringing police officers is precisely what the Local Government Code proscribes against. No entity, be it city, county, or district short of the Texas Legislature itself may reduce the enforcement impact of Chapter 481 of the Health and Safety Code.

6.06 The Killeen Ordinance is also inconsistent with the Texas Code of Criminal Procedure (CCP). While there are various Articles of that Code which the

⁸ See *City of Sweetwater v. Geron*, 380 S.W.2d 550 at 552 (Tex. 1964)

Ordinance negatively effects, Plaintiffs focus on Article 2.13 which defines the duties of Peace Officers for the most obvious and glaring examples:

(b) (4) [The officer shall] arrest offenders without warrant in every case where the officer is authorized by law, in order that they may be taken before the proper magistrate or court and be tried.⁹

and

(b) (1) in every case authorized by the provisions of this Code, [the officer shall] interfere without warrant to prevent or suppress crime;

Plaintiffs maintain that this Article requires officers to seize contraband so that a person cannot continue to violate the laws contravening possession. The Killeen Ordinance changes the nature of the CCP from mandatory to discretionary: “an officer may seize the marijuana.” Then this same Section perversely punishes the officer for doing his sworn duty. “If the officer seizes the marijuana, they must write a detailed report and release the individual...,”¹⁰ a report and offense that can never be acted upon by any member of the Killeen Police Department. Certainly this provision seeks to discourage officers from even confiscating the illegal drugs. An officer seeing marijuana in plain view would ask themselves why would they write a report for no one to read; no complaint to be signed; no arrestee to be taken before magistrate; a detailed report for paperwork’s sake. Worse yet, the officer

⁹ For application, see *Garza v. Harrison*, 574 S.W.3d 389 (Tex. 2019).

¹⁰ Code of Ordinances of the City of Killeen Texas, Chapter 22, Article V, Section 22-80 (c).

could be punished by the Ordinance to the point of termination from the police force for following Article 2.13 of the Code of Criminal Procedure. Under 22-85 of the Killeen Ordinance, any violation of [the Marijuana Enforcement] chapter may subject a Killeen police officer to discipline. The Chief of Police has plenary authority to terminate officers for violation of the marijuana Ordinance in question.¹¹

6.07 Another Ordinance inconsistency with State law is CCP Article 2.13 (b) (2) which states the officer “shall execute all lawful process issued to the officer by any magistrate or court.” Warrants extend to every part of the State.¹² The Killeen Ordinance makes no distinction between arrests with or without warrants. A plain reading of the ordinance prohibits a Killeen Officer from executing any lawful warrant for possession of marijuana (below felony levels). Again this directly contradicts an officer’s sworn duty under the law. If a Killeen Officer identifies an individual with a misdemeanor marijuana warrant from any other jurisdiction across the state, the Officer is faced with a dilemma: violate State law and fail your surrounding communities or violate local ordinance and lose your job.

¹¹ Killeen Municipal Code Chapter 22, Article V, Section 22-85 (a) Discipline: Any violation of this chapter may subject a Killeen police officer to discipline as provided by the Texas Local Government Code or as provided in city policy.

¹² See Texas Code of Criminal Procedure Article 15.06.

6.08 If direct contravention of State law were not enough, this Court could consider other grounds for invalidating the ordinance. The Ordinance sections 22-80(b)(1) and 22-82(b) are unconstitutionally vague regarding the “high priority” or “violent felony” categories that put police officers back in the position of mandatory arrest under CCP 2.13. The term “violent felony” is not defined. Additionally, the Killeen Ordinance does not define “arrest” and in caselaw,¹³ detention while seizing someone’s marijuana is an arrest. Such vagueness and overbreadth render the Ordinance unconstitutional because it fails to apprise people of the actions which might lead to arrest.

6.08 The Killeen Ordinance also usurps powers reserved solely to the Legislature. Article I, Section 28 of the Texas Constitution says that “[n]o power of suspending law in this state shall be exercised except by the legislature.” While the Defendant was careful not to reclassify misdemeanor amounts of marijuana as legal; it nevertheless barred enforcement of existing state law with regard to possession. Plaintiffs maintain that if one takes away the possibility of arrest on a criminal charge, one has effectively suspended that criminal law; recall that no citation shall issue either – there shall be no penalty whatsoever. A normal use of the word suspend would include “to set aside or make temporarily inoperative.”¹⁴

¹³ See e.g. State v. Saenz, 411 S.W.3d 488 (Tex. Crim. App. 2013)

¹⁴ Miriam Webster’s Collegiate Dictionary, Eleventh Edition.

To the extent that the Killeen Ordinance suspends existing law, it is blatantly unconstitutional.

6.09 Ordinances preempted by State law are unenforceable.¹⁵ Ordinances in direct conflict with a State statute are void when enacted.¹⁶ Plaintiffs ask this Honorable Court to for declaratory relief stating that the Killeen Ordinance is unenforceable and unconstitutional, requiring that Defendant remove the offending Article from its Code of Ordinances. Beyond that, Plaintiffs will show through harm analysis that injunctive relief is necessary.

6.10 The District Court may issue an injunction when Plaintiffs plead (1) a cause of action against the defendant, here for declaratory relief, (2) a probable right to the relief sought, and (3) a probable imminent, and irreparable injury in the interim.¹⁷

VI. HARM ANALYSIS

6.01 Texas Penal Code Section 1.02 lays out the various objectives of the criminal statutes contained in the Code. As a whole, they speak to the uniformity and collective judgment of the State Legislature. Section 1.02 (6) declares that one

¹⁵ See Southern Crushed Concrete, *supra*.

¹⁶ Young v. City of Seagoville, 421 S.W.2d 487 (Tex. Civ. App – Dallas 1967, no writ)

¹⁷ Abbott v. Anti-Defamation League Austin, Sw., & Texoma Regions, 610 S.W.3d 911 (Tex. 2020).

of the Penal Code's goals is "to define the scope of state interest in law enforcement against specific offenses and to systematize the exercise of state criminal jurisdiction." Texas courts recognize that the State has an actionable interest in maintaining uniform application of State laws.¹⁸ In fact, it is the basis and reason for the constitutional supremacy of state law over local ordinances

6.02 Plaintiffs can think of no greater need for uniformity than in the definition and application of criminal law. The Killeen Ordinance thwarts the legitimate goals of the Texas Penal Code and risks the creation of a patchwork code that would vary from city to city and county to county. State prosecutors would fail in their duty to seek justice because subservient political subdivisions could effectively opt out of their sworn duty to "uphold the laws" of this state by refusing to arrest or serve warrants of arrest on offenses of their choosing. Such is the case with the Killeen Ordinance.

6.03 Bell County is harmed by this same lack of uniformity in the application of the marijuana laws. When other states have legalized generally possession of marijuana, they have restricted the use of the drug to persons over 21 years of age. Killeen makes no distinction in its Ordinance. Currently there are more immediate consequences for a 17 year old being caught smoking a cigarette

¹⁸ City of Weslaco v. Melton, 308 S.W.2d 18 (Tex. 1957) and BCCA Appeal Group, Inc. v. City of Houston, 496 S.W.3d 1 (Tex 2016).

than a joint. Parents in Bell County must face the disturbing prospect that their children can go to Killeen secure in the knowledge that the worst that can happen is a Killeen Police Department officer may confiscate their marijuana. Bell County Commissioners and the Bell County Attorney are at a loss to explain how this can legally be. Caught drinking a beer – ticket and possible suspension of drivers license; caught smoking pot – nothing.

6.04 Killeen makes no provision for another agency to take over its misdemeanor marijuana warrants. The County Attorney does not have staff to complete what should have been Killeen's job in the first place. The City's position regarding prosecutions the County Attorney is eager to pursue is along the lines of, "we saved the information regarding the seizure if you want to come and get it."

VII. PRAYER

7.01 Plaintiffs request that Defendant City of Killeen, be cited to answer and appear herein and, after notice, show cause why declaratory relief should not be granted declaring City of Killeen Ordinance Chapter 22 Article V invalid,

unconstitutional and void as contrary to state statute.¹⁹ Plaintiffs request this Honorable Court declare the Ordinance invalid, void, and unconstitutional.

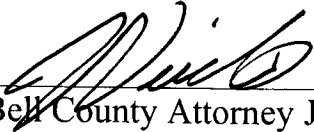
7.02 For a temporary injunction to issue, this Court should find that the City of Killeen will suffer no harm from voiding the Ordinance; the injunction will solve the complained of action; that Plaintiffs show immediate harm to law enforcement and general health and will suffer irreparable injury; the injunction does no disservice to the public; and that Plaintiffs are likely to succeed on the merits.²⁰

7.03 Plaintiffs request a permanent injunction for the same, relief as entitled under the Uniform Declaratory Judgment Act and the Texas Civil Practice and Remedies Code, trial costs, court costs, attorney's fees, and general and specific relief as plead or entitled under equity or law.

¹⁹Texas Civil Practice and Remedies Code Section 37.011: SUPPLEMENTAL RELIEF. Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application must be by petition to a court having jurisdiction to grant the relief. If the application is deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree to show cause why further relief should not be granted forthwith.

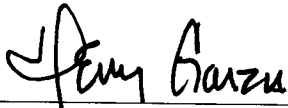
²⁰ Texas Rule of Civil Procedure 683: Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Respectfully submitted,



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ARTICLE V. - MARIJUANA ENFORCEMENT

EXHIBIT '1'

Sec. 22-80. - Ending citations and arrests for misdemeanor possession of marijuana.

- (a) Killeen 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 (b).
- (b) The only circumstances in which Killeen 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 a Killeen police commander, assistant chief of police, or chief of police; and/or (2) the investigation of a violent felony.
- (c) In every instance other than those described in (b), if a Killeen 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.
- (d) Killeen police officers shall not issue any charge for possession of marijuana unless it meets at least one (1) of the factors described in (b).

(Ord. of 11-8-22)

Sec. 22-81. - 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.

(Ord. of 11-8-22)

Sec. 22-82. - Prohibition against using city funds or personnel to conduct THC 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 22-80(b).
- (b) This prohibition shall not limit the ability of Killeen police to conduct toxicology testing to ensure public safety, nor shall it limit THC testing for the purpose of any violent felony charge.

(Ord. of 11-8-22)

Sec. 22-83. - Reserved.

Editor's note— Ord. No. 22-088, § I, adopted Dec. 6, 2022, repealed § 22-83, which pertained to prohibition against city police using the odor of marijuana or hemp as probable cause for search or seizure and derived from an ord. adopted Nov. 8, 2022.

Sec. 22-84. - Training and policy updates; community involvement.

- (a) The city manager and chief of police shall ensure that Killeen police officers receive adequate training concerning each of the provisions of this ordinance.
- (b) The city manager shall work with the Killeen Police Chief and other relevant stakeholders identified in (c) to update city policies and internal operating procedures in accordance with this ordinance. Actions that may be necessary include, but are not limited to: updating the Killeen Police Department General Manual; updating the training bulletin; training officers; and updating internal databases and systems.
- (c) The city manager shall arrange regular meetings to discuss the development of policies, procedures, and practices related to this ordinance, which shall include community stakeholders including: the police chiefs advisory panel; other interested stakeholders and community organizations; individuals directly impacted by arrests within the city; immigrant communities; and communities of color. These meetings shall be open to public participation, have minutes and agendas publicly accessible, and have audio and video recordings uploaded to the city's website.

(Ord. of 11-8-22)

Sec. 22-85. - Discipline.

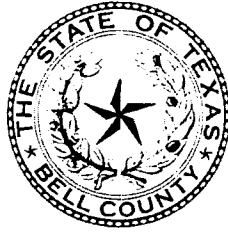
- (a) Any violation of this chapter may subject a Killeen police officer to discipline as provided by the Texas Local Government Code or as provided in city policy.

(Ord. of 11-8-22)

Sec. 22-86. - Reporting.

- (a) Within three (3) months of the adoption of this ordinance, and once per year thereafter, the city manager or their designee shall present to the city council, at a public meeting subject to the Texas Open Meetings Act, a report concerning the city's implementation of this ordinance.

(Ord. of 11-8-22)



AUTHORIZATION TO LITIGATE

WHEREAS the Chief of Police of the City of Killeen, Texas, a municipality within Bell County, promulgated Special Order 22-07 to eliminate low-level marijuana enforcement on November 10, 2022;

AND WHEREAS the Killeen City Council ratified Ordinance 22-089 on December 6, 2022, limiting police officers employed by the City of Killeen from enforcing marijuana laws, including citation, arrest, and testing of substances;

BE IT RESOLVED BY THE COMMISSIONERS OF BELL COUNTY, TEXAS, that the Bell County Attorney is authorized to file suit against the City of Killeen and its agents to enforce Texas Local Government Code section 370.003 by:

- 1) seeking declaratory relief in District Court against the City of Killeen's actions as unconstitutional; and
- 2) seeking injunctive relief in District Court against the City of Killeen from enforcing either the Special Order or Ordinance; and
- 3) seeking injunctive relief against the City of Killeen from punishing police officers for enforcing marijuana laws under the Health and Safety Code, Penal Code, and Code of Criminal Procedure; and
- 4) seeking declaratory relief authorizing Peace Officers licensed by the State of Texas to fully enforce marijuana laws as it is their duty to prevent and suppress crime under Section 2.13 of the Texas Code of Criminal Procedure.

PASSED AND APPROVED by the BELL COUNTY COMMISSIONERS COURT on this the 22nd day of December, 2022.

David Blackburn, County Judge

Russell Schneider, Commissioner, Pct. 1

Bill Schumann, Commissioner, Pct. 3

Bobby Whitson, Commissioner, Pct. 2

John Driver, Commissioner, Pct. 4

Attest:

Shelley Coston, County Clerk