

Plaintiffs the State of Ohio *ex rel.* Ohio Attorney General Mike DeWine, Lucas County Prosecutor Julia R. Bates, and Lucas County Sheriff John Tharp bring this action for declaratory and preliminary and permanent injunctive relief and allege that:

INTRODUCTION

1. This case involves specific provisions of the City of Toledo’s recently adopted municipal drug ordinance that:

- establish a gag rule, in conflict with the laws of the State, prohibiting Toledo police officers and the Toledo City Attorney from reporting to “any other authority for prosecution or for any other reason” such state law criminal offenses as trafficking in marijuana -- even in massive amounts and on school grounds;
- conflict with Ohio’s duly enacted felony drug possession and drug trafficking laws by reciting, for example, that people convicted of trafficking in or controlling marijuana or hashish even in massive amounts and on school grounds “shall not be fined and no incarceration, probation, [or] any other punitive or rehabilitative measure shall be imposed;” and
- further conflict with Ohio’s duly enacted felony drug abuse laws by renewing a policy that people who illegally possess even massive amounts of Schedule III, IV, or V drugs, including trafficked and illegally possessed Xanax, Valium, Anabolic Steroids, or some forms of prescription painkillers, shall be subject only to misdemeanor penalties.

2. Although inaccurately characterized by promoters as consistent with Ohio law penalizing bulk marijuana trafficking and as reducing penalties only to “the minimum allowed by the State,” provisions of the Ordinance in fact directly conflict with state law by eliminating all

penalties on, for example, a drug cartel's importation of thousands of pounds of marijuana to be marketed in school playgrounds.

3. "Section 3, Article XVIII of the Constitution of Ohio ... authorizes municipalities to adopt and enforce within their limits only such local police regulations as are not in conflict with general laws" of the State. *City of Cleveland v. Betts*, 168 Ohio St. 386 (syl.) (1958) (municipal ordinance making carrying a concealed weapon a misdemeanor conflicted with state statute making such offense a felony, and thus was invalid).

4. The State of Ohio through its Attorney General Mike DeWine, and Lucas County Prosecutor Julia Bates and Lucas County Sheriff John Tharp, therefore bring this declaratory judgment action seeking a determination by this Court that these identified provisions of the Ordinance that are in conflict with Ohio law are invalid and null and void, and asking that the effect of these specific, problematic provisions be preliminarily and permanently restrained and enjoined from operation and effect.

5. This action thus does not seek to have the Ordinance invalidated in full, but rather seeks to have particular identified provisions invalidated to the full extent that they are in conflict with Ohio law.

PARTIES

6. Attorney General Mike DeWine brings this action as the chief law officer of the State of Ohio, a sovereign State of the United States.

7. Lucas County Prosecutor Julia R. Bates brings this action as the Prosecuting Attorney for Lucas County, Ohio and in conjunction with the authority granted her under *Ohio Revised Code* §309.08, including her duties within this jurisdiction to prosecute felony charges on behalf of the State.

8. Lucas County Sheriff John Tharp brings this action as the Sheriff for Lucas County, Ohio and in conjunction with the authority granted him under *Ohio Revised Code* §311.07, including his law enforcement responsibilities within this jurisdiction relating to felony drug matters.

9. Defendant City of Toledo is a political subdivision of the State. It is a municipal corporation authorized under Section 3 of Article XVIII of the Constitution of Ohio to exercise powers of local self-government and to adopt and enforce within its limits “such local police, sanitary and other similar regulations, as are not in conflict with general laws” of Ohio.

10. Defendant Adam Loux is the Law Director of the City of Toledo and is sued only in that official capacity. As Law Director, he oversees a Prosecutorial Section charged with prosecuting misdemeanor offenses in Toledo Municipal Court.

11. Also in that capacity, Mr. Loux putatively is subject to the gag order adopted by Toledo Ordinance precluding him from reporting to “any other authority for prosecution of for any other reason” state criminal law offenses -- including felony offenses he is not empowered to prosecute -- relating to marijuana.

JURISDICTION AND VENUE

12. This declaratory judgment action is brought pursuant to *Ohio Revised Code* §§ 2721.02; 2721.03; and 2712.12. The accompanying request for injunctive relief is brought pursuant to *Ohio Revised Code* §2727.02 *et seq.* and *Ohio R. Civ. P.* 65.

13. Jurisdiction in this Court also is proper pursuant to *Ohio Revised Code* §109.16, in that this is an action prosecuted by the Attorney General in behalf of the State or in which the State is interested, and one or more of the defendants resides or may be found in Lucas County, where the City of Toledo is located.

14. Venue here is proper pursuant to *Ohio R. Civ. P.* 3(B)(1), (2), (3), (4), and (6).

BACKGROUND

A. Ohio's Home Rule Amendment

15. Section 3 of Article XVIII of Ohio's Constitution confers upon municipalities the "authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

16. Thus, "a police regulation in a municipal ordinance may not validly contravene a statutory enactment of general application throughout the state, and must give way if it is in conflict therewith." *Betts*, 168 Ohio St. at 388.

17. Municipal drug ordinances are police power regulations, and drug statutes duly enacted by the State of Ohio are laws of general application throughout the State. *City of Niles v. Howard*, 12 Ohio St.3d 162, 164 (1984) ("The drug laws of the state of Ohio are clearly statutes setting forth police regulations and are, therefore, 'general laws'.").

18. Where a local police power or similar regulation is in conflict with any general statutory enactment of the State, that provision of the local ordinance shall be found invalid as contrary to Ohio's constitutional structure. *Betts*, 168 Ohio St. at syllabus.

19. A municipal ordinance and State law need not be in direct opposition to reflect a conflict that renders the ordinance invalid. The Supreme Court of Ohio has "also recognized that a municipal ordinance is in conflict with state law when there is a significant discrepancy between the punishments imposed" for the same sort of behavior under the ordinance and under State law. *Mendenhall v. Akron*, 117 Ohio St. 3d 33, 41 (2008).

20. Thus, for example, even if a municipal ordinance "does not permit what the statute prohibits, and vice versa, it does contravene the expressed policy of the state with respect to

crimes by deliberately changing an act which constitutes a felony under state law into a misdemeanor, and this creates the kind of conflict contemplated by the Constitution. Conviction of a misdemeanor entails relatively minor consequences, whereas the commission of a felony carries with it penalties of a severe and lasting character.” *Betts*, 168 Ohio St. at 389.

21. Similarly, “if the municipal ordinance does more than simply impose a greater penalty – by changing the character of an offense, for example – the ordinance and statute are in conflict.” *Mendenhall*, 117 Ohio St. 3d at 42.

B. The Toledo Drug Ordinance

22. After Toledo’s City Council by an August 26, 2014 vote of 11 – 1 declined to adopt what proponents styled the “Sensible Marihuana Ordinance,” the proposed Ordinance was submitted by initiative petition to the electors of the City of Toledo at the September 15, 2015 primary election.

23. The Ordinance passed by roughly 6,800 votes, 11,663 to 4,911, and was certified by the Lucas County Board of Elections on September 29, 2015.

24. A true and accurate copy of the Ordinance as so adopted is attached as Exhibit A.

25. The Ordinance among other things revises and adds to Toledo Municipal Code Chapter 513 (“Drug Abuse Control”). It also repeals Section 749.08 of that Code (“drugs prohibited”).

26. The Ordinance conflicts with the general laws of the State of Ohio in various respects. This declaratory judgment and injunctive relief action addresses only the particular provisions identified in the paragraphs below.

CLAIMS

COUNT ONE -- The Ordinance's gag order creating Section 513.15(j) of the Toledo Municipal Code conflicts with Ohio law and is invalid.

27. Plaintiffs restate and reallege each of the statements and allegations set forth in paragraphs 1 - 26 above.

28. Section 2 of the Ordinance purports to create a new Section 513.15(j) of the Toledo Municipal Code, reciting: "No Toledo police officer, or his or her agent, shall report the possession, sale, distribution, trafficking, control, use, or giving away of marihuana or hashish to any other authority except the Toledo City Attorney; and the City Attorney shall not refer any said report to any other authority for prosecution or for any other reason."

29. This gag rule provision thus purports to prohibit any Toledo police officer and the Defendant City Attorney from reporting even State felony drug offenses to the proper authorities for appropriate felony prosecution.

30. The Toledo City Attorney lacks authority and jurisdiction to represent the State of Ohio in prosecuting felony drug offenses.

31. Under the terms of the gag rule, police who come upon members of a drug trafficking cartel in possession of, say, 2,500 pounds of marijuana, or distributing large quantities of marijuana on school grounds, could report that conduct only to the Toledo City Attorney. And the Toledo City Attorney himself would be precluded from reporting the matter to State authorities for prosecution under the State's felony drug laws.

32. The Toledo City Attorney would be left, at most, to pursue a case within the limited misdemeanor jurisdiction of the Toledo Municipal Court (if the charges required for even such prosecution were not precluded under the Ordinance as reports "to any other authority") – and

then under an Ordinance that also purports to abolish all incarceration, fines, or even probation for any such offense.

33. The Ordinance also would preclude truthful, entirely accurate alerts to school authorities, child welfare officers, or “any other authority,” even including reports required by State law.

34. The gag rule Section 513.15(j) conflicts with and indeed obstructs many aspects of Ohio general law and the express public policy of the State.

35. To take but a few examples, this gag rule subsection of the Ordinance conflicts not only with numerous provisions of Ohio’s felony drug laws, but also:

- Conflicts with the requirement of Ohio Revised Code § 2921.22 that apart from certain exceptions not relevant here, “no person, knowing that a felony has or is being committed, shall knowingly fail to report such information to law enforcement authorities.”
- Conflicts with the requirement of Ohio Revised Code § 2935.03(A)(1) that a “municipal police officer ... shall arrest and detain, until a warrant can be obtained, a person found violating, within the limits of the political subdivision, ... a law of this state....”
- Conflicts with the requirement of Ohio Revised Code § 737.11 that the “police force of a municipal corporation shall ... enforce” not only the ordinances of the municipality, but also “all criminal laws of the state ...,” as well as with State dereliction of duty and reporting statutes including R.C. 2921.44(A)(2).

36. As the Lucas County Court of Appeals has emphasized: “state law places an affirmative duty on peace officers to *enforce* the criminal ... laws of Ohio” *State v. White*, 988 N.E. 2d 595, 634 (6th Dist. App. 2013) (emphasis in original), *aff’d* 142 Ohio St. 3d 277, 286 (2015) (municipal police officers have a “mandatory duty to enforce criminal laws”).

37. The Ordinance’s gag rule conflicts with the general law of Ohio, violates Section 3 of Article XVIII of Ohio’s Constitution, and is invalid in full, and Plaintiffs are entitled to a declaration to that effect from this Court.

COUNT TWO -- The Ordinance’s provisions creating Sections 513.15(e)-(g) of the Toledo Municipal Code purporting to establish a city drug trafficking offense under which trafficking in marijuana or hashish – in any quantity and in any location – cannot be punishable by incarceration, fine, probation or “any other punitive or rehabilitative measure” conflict with Ohio law and are invalid.

38. Plaintiffs restate and reallege each of the statements and allegations set forth in paragraphs 1 – 37 above.

39. Section 2 of the Ordinance purports to create new Sections 513.15(e)-(g), which recite that trafficking in marijuana or hashish shall be what the Ordinance terms a “fifth degree felony drug offense” under which violators “shall not be fined[,] and no incarceration, probation, nor [sic] any other punitive or rehabilitative measure shall be imposed.”

40. The Ordinance’s reference here to a “fifth degree felony drug offense” does not describe a fifth degree felony drug trafficking offense under Ohio law, and rather seeks to adopt a singular municipal use for that terminology.

41. The City of Toledo is not empowered to establish or amend Ohio felony law. And municipal authorities are not authorized to prosecute felony offenses under State law.

42. These marijuana and hashish trafficking provisions of the Ordinance conflict with Ohio general law.

43. They create a “significant discrepancy between the punishments imposed” for drug trafficking under the Ordinance as opposed to State law. They “contravene the expressed policy of the state with respect to crimes by deliberately changing an act which constitutes a felony under state law” into a newly designated municipal offense that “entails relatively minor consequences.” Indeed, the Ordinance specifically excludes the possibility of prison time, fines, or “any ... rehabilitative measure” for trafficking in marijuana or hashish.

44. Ohio law punishes trafficking in marijuana (Ohio Revised Code § 2925.03(C)(3)) or hashish (Ohio Revised Code § 2925.03(C)(7)) as felony offenses, punishable by sentences

depending on the quantity of the drug involved and on whether the offense is committed in the vicinity of a school or juvenile.

45. All such State law trafficking offenses carry at least potential prison sentences, in addition to fines, mandatory driving suspensions, and other sanctions and potential drug rehabilitation measures.

46. Thus, for example, trafficking in between 20 and 200 grams of marijuana or under ten grams of hashish carries a potential prison sentence of 6 to 12 months (6 to 18 months if in the vicinity of a school or juvenile), with a driving suspension and a fine of up to \$2,500. R.C. 2925.03.

47. To take but a few other examples: trafficking in at least twenty thousand but less than forty thousand grams of marijuana, or in at least one thousand but less than two thousand grams of hashish in solid form, carries a mandatory prison sentence of between five to eight years (or ten years if committed in the vicinity of a school or juvenile). R.C. 2925.03(C)(3)(f) and (7)(f). Trafficking in at least forty thousand grams of marijuana or at least two thousand grams of hashish in solid form carries a mandatory prison term of eight years (ten years if committed in the vicinity of a school or juvenile). R.C. 2923.03(C)(3)(g) and (7)(g). These offenses also carry fines and license suspensions, among other serious consequences.

48. But the Ordinance says that such offenders shall not be fined, incarcerated, placed on probation, or subject to “any other punitive or rehabilitative measure.”

49. Because the Ordinance’s marijuana and hashish trafficking provisions conflict with the general law of Ohio in violation of Section 3 of Article XVIII of the Constitution of Ohio, they are invalid in full, and Plaintiffs are entitled to a declaration to that effect from this Court.

COUNT THREE -- The Ordinance’s provisions creating Sections 513.15(b)(3) and (d)(3) of the Toledo Municipal Code purporting to establish a city drug offense under which possession of state felony amounts of marijuana or hashish (in unlimited amounts) cannot be punishable by incarceration, fine, probation or “any other punitive or rehabilitative measure” conflict with Ohio law and are invalid.

50. Plaintiffs restate and reallege each of the statements and allegations set forth in paragraphs 1 - 49 above.

51. Section 2 of the Ordinance purports to create new Sections 513.15(b)(3) and (d)(3), which recite that the penalty for possession of any amount of marijuana equal to or exceeding 200 grams, or any amount of solid hashish equal to or exceeding ten grams, or any amount of liquid hashish equal to or exceeding two grams shall be what the Ordinance terms a “fifth degree felony drug abuse offense” under which violators “shall not be fined[,] and no incarceration, probation, nor [sic] any other punitive or rehabilitative measure shall be imposed.”

52. The Ordinance’s reference here to a “fifth degree felony drug offense” does not describe a fifth degree felony drug trafficking offense under Ohio law, and rather seeks to adopt a singular municipal use for that terminology.

53. The City of Toledo is not empowered to establish or amend Ohio felony law. And municipal authorities are not authorized to prosecute felony offenses under State law.

54. These marijuana and hashish provisions of the Ordinance conflict with Ohio general law.

55. They create a “significant discrepancy between the punishments imposed” for possession of significant amounts of drugs under the Ordinance as opposed to State law. They “contravene the expressed policy of the state with respect to crimes by deliberately changing an act which constitutes a felony under state law” into a newly designated municipal offense that “entails relatively minor consequences.” Indeed, the Ordinance specifically excludes the possibility of prison time, fines, or “any ... rehabilitative measure” for possession even of massive amounts of marijuana or hashish.

56. Ohio law punishes possession of large amounts of marijuana (R.C. 2925.11(C)(3)(c)-(g)) or large amounts of hashish (R.C. 2925.11(C)(7)(c)-(g)) as felony offenses, punishable by sentences depending on the quantity of the drug involved.

57. Under State law, such large quantity possession offenses carry at least potential prison sentences, in addition to fines, mandatory driving suspensions, and other sanctions and potential drug rehabilitation measures.

58. Thus, to take but a few examples, possession of at least 5,000 grams but less than 20,000 grams of marijuana bears a presumption under State law of a prison term of between one to five years, with a driving suspension and a fine of up to \$ 10,000.00. Possession of at least 20,000 grams but less than 40,000 grams is punishable under State law by a mandatory prison term of between five to eight years, driving suspension, and a \$15,000.00 fine. And under State law, possession of forty thousand or more grams of marijuana carries a mandatory eight year prison sentence, a driving suspension, and a \$15,000 fine. *See* R.C. 2925.11(C)(3)(e)-(g).

59. To take but a few other examples under State law, possession of at least 250 grams but less than 1,000 grams of solid hashish, or of at least 50 grams but less than 200 grams of liquid hashish, carries the presumption of a 1 -5 year prison term; the possession of at least 1,000 but less than 2,000 grams of solid hashish, or of at least 200 grams but less than 400 grams of hashish in liquid form entails a mandatory prison term of between five to eight years; and the possession of 2,000 grams or more of solid form hashish, or of 400 or more grams of liquid form hashish, brings a mandatory eight year prison sentence, all with fines, driving suspension, and other sanctions. R.C. 2925.11(C)(7)(e-g).

60. But the Ordinance says that such offenders shall not be fined, incarcerated, placed on probation, or subject to “any other punitive or rehabilitative measure.”

61. Because the Ordinance's large scale marijuana and hashish possession provisions conflict with the general law of Ohio in violation of Section 3 of Article XVIII of the Constitution of Ohio, those particular Ordinance provisions are invalid in full, and Ohio is entitled to a declaration to that effect from this Court.

COUNT FOUR – The Ordinance's provisions renewing parts of Section 513.03 of the Toledo Municipal Code purporting to establish a city drug abuse offense under which (among other matters) illegal possession of large quantities of Schedule III, IV, or V drugs is set at a misdemeanor level, despite State law making various such offenses felonies of the second degree carrying mandatory prison terms, conflict with Ohio law and are invalid to that extent.

62. Plaintiffs restate and reallege each of the statements and allegations set forth in paragraphs 1 - 61 above.

63. Section 2 of the Ordinance purports to reenact much of repealed Section 513.03 of the Toledo Municipal Code, again as Section 513.03.

64. As adopted under the Ordinance, these provisions recite that a person who possesses a "controlled substance" is guilty of (misdemeanor) drug abuse.

65. Section 513.01(b) of the Ordinance defines "controlled substance" to mean "a drug, compound, mixture, preparation or substance included in Schedule I, II, III, IV, or V." To the extent that this section defines what are State felony drug offenses to be misdemeanor offenses with lower or no penalties under the Toledo Municipal Code, this Section 513.03 conflicts with the general law of Ohio and is invalid.

66. More specifically, Section 2 of the Ordinance recites as Section 513.03(d)(1) that "If the drug involved is a compound, mixture, preparation or substance included in Schedule III, IV or V[,], drug abuse is a misdemeanor of the third degree, and if the offender has previously been convicted of a drug abuse offense, drug abuse is a misdemeanor of the second degree."

67. Under Ohio Revised Code § 2925.11(C)(2), possession of such Schedule III, IV, or V drugs (including various non-prescribed depressants, pain killers, or anabolic steroids) can be a felony offense of the second, third, fourth, or fifth degree, depending on amount or whether the offender has a previous drug abuse conviction. Thus, to take but two examples, if the amount of the drug involved is less than bulk, a second offender is guilty of a fifth degree felony, while if the amount of the drug involved equals or exceeds fifty times the bulk amount, possession of the drugs is a second degree felony carrying a mandatory prison term.

68. These provisions of the Ordinance create a “significant discrepancy between the punishments imposed” for possession of these drugs and the felony provisions of general Ohio law. They “contravene the expressed policy of the state with respect to crimes by deliberately changing an act which constitutes a felony under state law” into a municipal offense that “entails relatively minor consequences.”

69. To the full extent that they conflict with the general laws of Ohio in violation of Section 3 of Article XVIII of the Constitution of Ohio, they are invalid, and Plaintiffs are entitled to a declaration to that effect from this Court.

COUNT FIVE – Plaintiffs are entitled to injunctive relief against the operation of those provisions of the Ordinance as identified above that conflict with Ohio general law in violation of Article XVIII, Section 3 of the Ohio Constitution.

70. Plaintiffs restate and reallege each of the statements and allegations set forth in paragraphs 1 - 69 above.

71. The provisions of the Ordinance identified above that conflict with the general laws of Ohio violate the Ohio Constitution and pose an imminent threat of irreparable harm to the State and its criminal law enforcement system, for which there is no adequate remedy at law if they are not enjoined from operation and effect.

72. Injunctive relief precluding the operation of the identified provisions of the Ordinance that conflict with the general laws of Ohio is in the public interest, best serves the expressed public policy of the State of Ohio, and advances the requirements of the Ohio Constitution. Defendants can advance no legitimate interest in pursuing Ordinance provisions that conflict with the general law of the State and that therefore cannot withstand scrutiny under Ohio Constitution Article XVIII, Section 3. Plaintiffs are entitled to the injunctive relief they seek.

PRAYER FOR RELIEF

Plaintiffs therefore respectfully request that this Court:

- Enter judgment in their favor on each Count of this Complaint;
- Declare that the provisions of the Ordinance identified above as in conflict with the general laws of the State of Ohio – those Ordinance provisions creating Toledo Revised Code Sections 513.15(j) (the gag rule); 513.15(e)-(g) (no fine, incarceration, probation, or rehabilitation for trafficking even in massive amounts of marijuana or hashish); 513.15(b)(3) and (d)(3) (same for possession of felony and even unlimited amounts of marijuana or hashish); 513.03 (establishing as misdemeanors various State law felony drug offenses, to the extent that the section conflicts with State law on drug felonies for Schedule I, II, III, IV, or V drugs) – are illegal, invalid, without effect, and null and void;
- Preliminarily and permanently enjoin the effect and operation of these specific Ordinance provisions as identified above and restrain Defendants from observing, exercising, and putting them into effect; and
- Grant them such other relief as the Court finds just and appropriate.

Respectfully submitted,

MICHAEL DEWINE (0009181)
Ohio Attorney General

FREDERICK D. NELSON (0027977)*
Senior Advisor to the Ohio Attorney General
30 East Broad Street, 17th Floor

BRIDGET E. COONTZ (0072819)
Assistant Attorney General
30 East Broad Street, 16th Floor
Columbus, Ohio 43215
Tel: 614-728-4947; Fax: 614-466-5087
frederick.nelson@ohioattorneygeneral.gov
bridget.coontz@ohioattorneygeneral.gov

MICHAEL L. STOKES (0064792)
Assistant Attorney General
One Government Center, Suite 1340
Toledo, Ohio 43604
Tel: 419-245-2550 Fax: 419-245-2520
michael.stokes@ohioattorneygeneral.gov

*Counsel for Plaintiff the State of Ohio ex rel. Ohio
Attorney General Mike DeWine*

JULIA R. BATES
Lucas County Prosecutor

KEVIN A. PITUCH (0040167)*
EVY M. JARRETT (0062485)
Assistant Lucas County Prosecutors
700 Adams St. Suite 250
Toledo, Ohio 43604
Tel: 419-213-4700; Fax: 419-213-2011
kpituch@co.lucas.oh.us
ejarrett@co.lucas.oh.us

*Counsel for Plaintiffs Lucas County Prosecutor
Julia R. Bates and Lucas County Sheriff John Tharp*