STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

KENT COUNTY PROSECUTING ATTORNEY,

Plaintiff,

v

CITY OF GRAND RAPIDS,

Defendant,

and

DECRIMINALIZEGR, an unincorporated voluntary association,

Intervening Defendant.

_____/

Case No. 12-11068-CZ

Hon. Paul J. Sullivan

OPINION & ORDER

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Before the Court are the parties' competing motions for summary disposition. The underlying case involves a challenge to the validity of an amendment to the City of Grand Rapids' City Charter concerning the possession, control, use, and giving away of marijuana ("the charter amendment"). The Kent County Prosecuting Attorney ("plaintiff") filed this action against defendant City of Grand Rapids ("the City"), arguing that the charter amendment is

invalid. DecriminalizeGR ("DCGR") is an unincorporated association that sponsored the petition for the charter amendment and intervened as a defendant in this action after it was filed.

The underlying facts and some of the issues that must now be addressed are the same as discussed in the Court's January 23, 2013 opinion and order denying plaintiff's motion for a preliminary injunction ("the prior opinion"). However, as indicated in the prior opinion, that was not a final decision on the merits. The parties have now had the opportunity to further develop their arguments and provide additional briefing. The parties agree that there are no disputes regarding any facts relevant to plaintiff's challenge to the charter amendment, so all that is left are issues of law which the Court must now decide.

It has been said before, but it must be remembered that this case has nothing to do with whether or not the charter amendment is good or bad as a matter of public policy. The wisdom of the charter amendment is not at issue. Plaintiff's complaint is based on allegations that the charter amendment conflicts with Michigan law. The Court must now decide whether plaintiff is the proper party to raise these issues, and then, if so, whether his challenges have legal merit.

For the reasons explained below, the Court finds that plaintiff has standing to raise the challenges he has raised. However, he has failed to show that the charter amendment on its face conflicts with Michigan law. As such, summary disposition is GRANTED in favor of the City and DCGR. Plaintiff's complaint challenging the validity of the charter amendment is DISMISSED.

The City has further requested that the Court approve the City's proposed implementation of the charter amendment. However, as will be explained, there is no actual controversy at this time regarding implementation of the charter amendment. The Court is not in a position to preemptively approve or reject the City's plans based on hypothetical challenges. Accordingly, no decision is made today regarding whether the City's proposed implementation is proper.

This opinion will begin by setting forth the background and underlying facts of this case. Then, plaintiff's standing to raise these challenges will be discussed. Next, because the Court decides that plaintiff does have standing, the merits of the challenges will be decided. The City's request for preapproval of its proposed implementation of the charter amendment will then be briefly addressed. Finally, in hopes of clearing up potential confusion, this opinion will conclude with some clarification regarding the effects of the charter amendment.

I. FACTS AND BACKGROUND

The facts and background of this action were described in the prior opinion. For the sake of convenience and completeness, this section will restate what was previously set forth with a few slight revisions and updates.

In 2012, DCGR was organized and registered to sponsor a petition to amend the Grand Rapids City Charter ("the City Charter"). DCGR obtained the required signatures and submitted the petition to the Grand Rapids City Clerk, who certified the sufficiency of the petition and the signatures. The then-proposed charter amendment was to add (and eventually did add) the following language to Title XVIII of the City Charter:

(a) No person shall possess, control, use, or give away marijuana or cannabis, which is defined as all parts of the plant cannabis sativa l., whether growing or not; its seeds or resin; and every compound, manufacture, salt, derivative, mixture, or preparation of the above, unless such possession, control, or use is pursuant to a license or prescription as provided in Public Act 196 of 1971, as amended. This definition does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compounds, manufacture, sale, derivative, mixture or preparation of the mature stalks, except the resin extracted therefrom, fiber, oil or cake, or the sterilized seed of the plant which is incapable of germination.

(b) Violations of this section shall be civil infractions. Persons convicted of violating this section shall be fined $25.00 for the first offense, $50.00 for the second offense, $100.00 for the third or subsequent offense and no incarceration, probation, nor any other punitive or rehabilitative measure shall be imposed. Fines and all other costs shall be waived upon proof that the defendant is recommended by a physician, practitioner or other qualified health professional to use or provide the marijuana or cannabis for medical treatment. The court may waive all or part of the fine upon proof that the defendant attended a substance abuse program. It is an affirmative defense to a prosecution under this section that the use or intended use of the marijuana or cannabis relieves, or has the potential to relieve, the pain, disability, discomfort or other adverse symptoms of illness or medical treatment, or restores, maintains or improves, or has the potential to restore, maintain or improve, the health or medical quality of life of the user or intended user or users of the marijuana or cannabis. Requirements of this subjection shall not be construed to exclude the assertion of other defenses.

(c) In all arrests and prosecutions for violations of this section, appearance tickets and the relevant procedures set forth in Michigan Public Act 147 of 1968, as amended, shall be used.

(d) No Grand Rapids police officer, or his or her agent, shall complain of the possession, control, use, or giving away of marijuana or cannabis to any other authority except the Grand Rapids City Attorney; and the City Attorney shall not refer any said complaint to any other authority for prosecution.

(e) No Grand Rapids police officer, or his or her agent, shall complain and the City Attorney shall not refer for prosecution any complaint, of the possession, control, use, giving away, or cultivation of marijuana or cannabis upon proof that the defendant is recommended by a physician, practitioner or other qualified health professional to use or provide the marijuana or cannabis for medical treatment.

(f) Should the State of Michigan enact lesser penalties than that set forth in subsection (b) above, or entirely repeal penalties for the possession, control, use, or giving away of marijuana or cannabis, then this section, or the relevant portions thereof, shall be null and void.

For purposes of this action, the most relevant subsections are (a), (b), and (d). Subsections (a) and (b) combine to make the possession, control, use, or giving away of marijuana a civil infraction, punishable by fine and no incarceration. Subsection (d) forbids officers of the Grand Rapids Police Department (GRPD) from complaining of the possession, control, use, or giving away of marijuana to anyone other than the Grand Rapids City Attorney ("the City Attorney"), who is then prohibited from referring the complaints to other authorities for prosecution.[1]

The then-proposed charter amendment was labeled "Proposal 2" and included on the ballot of the November 6, 2012 general election. The ballot language read as follows:

> PROPOSAL 2
>
> PROPOSED AMENDMENT TO TITLE XVIII (MISCELLANEOUS PROVISIONS) OF THE CHARTER OF THE CITY OF GRAND RAPIDS, CONCERNING THE DECRIMINALIZATION OF MARIJUANA
>
> A proposal to decriminalize possession, control, use, or gift of marijuana, through a Charter amendment prohibiting police from reporting same to law enforcement authorities other than the City Attorney; prohibiting the City Attorney from referring same to other law enforcement authorities for prosecution; prohibiting City prosecution except as civil infractions enforced by appearance tickets with a maximum fine of $100.00 and no incarceration; waiving fines if a physician, practitioner or other qualified health professional recommends the defendant use marijuana; and providing an affirmative defense to prosecution for defendants intending to use marijuana to relieve pain, disability, or discomfort.

Proposal 2 passed after a substantial majority of those voting in the November 2012 general election voted in favor of the amendment. The final tally was 44,647 votes in favor and 31,207 votes in opposition, or in terms of percentage, roughly 58.5% in favor and 41.5% opposed.

The charter amendment was scheduled to be implemented on December 6, 2012. On November 30, 2012, plaintiff filed the present action in his official capacity as the Kent County Prosecuting Attorney. In this action, plaintiff raises two distinct challenges to the charter amendment. First, it is argued that subsections (a) and (b) render the charter amendment invalid because MCL 117.4*l* of the Home Rule City Act (HRCA) prohibits the City from creating a civil infraction for these types of marijuana-related offenses. Second, plaintiff argues that subsection (d) of the charter amendment improperly prohibits the GRPD and the City Attorney from referring complaints regarding marijuana to other authorities. Plaintiff expresses concern with the effects that the charter amendment may have on his ability to enforce state law.

On December 4, 2012, the Court initially granted a temporary restraining order stopping the implementation of the charter amendment. The Court believed at the time that plaintiff was

[1] The language of the charter amendment was modeled after a charter amendment originally passed in 1974 by the voters of the City of Ann Arbor. *See* Ann Arbor Charter, § 16.2 (amended by elections in 1990 and 2004). The most significant difference is that Ann Arbor's charter amendment also addresses the "sale" of marijuana, which is not addressed in Grand Rapids' charter amendment.

likely to succeed on the merits and that the charter amendment likely violated Michigan law. However, after receiving full briefing from the parties and having time to research and review the issues in depth, the Court had serious doubts regarding the legal merits of plaintiff's complaint. These doubts, which were explained in detail in the prior opinion, led to the temporary restraining order being lifted and plaintiff's motion for a preliminary injunction being denied on January 23, 2013. The parties now move for summary disposition, agreeing that the only issues remaining are legal rather than factual and it is time for a final decision.

II. WHETHER PLAINTIFF HAS STANDING TO BRING THESE CHALLENGES

As an initial matter, DCGR moves for summary disposition on the grounds that plaintiff lacks standing to bring this action. The question of standing "focuses on whether a litigant is a proper party to request adjudication of a particular issue . . . ." *Lansing Schools Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 355 (2010) (quotations omitted). As such, in this case the question is whether plaintiff—in his official capacity as the Kent County Prosecuting Attorney—is a proper party to raise these challenges to the validity of the charter amendment.

Plaintiff's complaint seeks a declaratory judgment pursuant to MCR 2.605, which provides in relevant part:

> (A) Power to Enter Declaratory Judgment.
>
> (1) In a case of ***actual controversy*** within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an ***interested party*** seeking a declaratory judgment, whether or not other relief is or could be sought or granted.
>
> (2) For the purpose of this rule, an action is considered within the jurisdiction of a court if the court would have jurisdiction of an action on the same claim or claims in which the plaintiff sought relief other than a declaratory judgment. [MCR 2.605(A) (emphasis added).]

"[W]henever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment." *Id.* at 372 (2010).

The City agrees with plaintiff that he has standing to bring this action. However, in a declaratory judgment action, the requirements of MCR 2.605 are jurisdictional and cannot be waived. That is, "[i]n the absence of an actual controversy, the trial court lacks subject-matter jurisdiction to enter a declaratory judgment." *Lansing Schools Educ Ass'n v Lansing Bd of Educ (on remand)*, 293 Mich App 506, 515 (2011) (quoting *Leemreis v Sherman Twp*, 273 Mich App 691, 703 (2007)). So, this is a threshold issue regardless of the City's lack of objection. Plaintiff must meet the "actual controversy" and "interested party" requirements of MCR 2.605(a).

Again, there are two separate and distinct challenges raised by plaintiff's complaint. Specifically, plaintiff challenges (1) the creation of a civil infraction and (2) the prohibition of reporting complaints of certain marijuana-related offenses to the prosecutor's office. These challenges are based on separate issues, and standing to raise each will be addressed separately.

A. STANDING TO CHALLENGE THE CREATION OF A CIVIL INFRACTION

Plaintiff has not alleged or provided any evidence of potential harm to his office resulting from the City's creation of a civil infraction. As explained in the prior opinion, plaintiff is not in a position requiring or even allowing him to enforce the charter amendment. He has not alleged a likelihood of being charged with a civil infraction. He has no supervisory power over the City or its police force.

However, plaintiff's theory is that he has standing to bring this challenge *on behalf of the State of Michigan* pursuant to MCL 49.153, which provides:

> The prosecuting attorneys shall, in their respective counties, appear for the state or county, and prosecute or defend in all the courts of the county, all prosecutions, suits, applications and motions whether civil or criminal, in which the state or county may be a party or interested.

According to plaintiff, the charter amendment's creation of a civil infraction conflicts with MCL 117.4*l*. He claims that in bringing this action he "is acting in his official capacity to enforce a state interest" and that he, "*representing the State of Michigan*, has the right to challenge the action of the City of Grand Rapids." (Plaintiff's Response Brief, pp. 7, 10 (emphasis added).)

Notably, the complaint does not allege that plaintiff is bringing this action on the State's behalf. Plaintiff, in his official capacity, is the only plaintiff listed. Plaintiff's current theory of standing based on MCL 49.153 appears to have been raised for the first time in these motions presently before the court.

It would arguably be more helpful and appropriate if the complaint named the State as a party or at least made it clear that plaintiff was acting on behalf of the State. However, MCL 49.153 does provide plaintiff with the power to appear on behalf of the State and assert the State's interest. There have also been other civil actions brought by county prosecutors in which a prosecutor was allowed to commence an action and make challenges on "behalf of the people of the State of Michigan". *See, e.g., Wayne Co Prosecutor v Dep't of Corrections*, 451 Mich 569, 576 (1996); *Michigan ex rel Oakland Co Prosecutor v Dep't of Corrections*, 199 Mich App 681, 693-94 (1993).

Plaintiff is now clearly asserting he is acting on behalf of the State. It is also undisputed that the City is prepared to implement the civil infraction portion of the charter amendment, which plaintiff alleges would be in violation of Michigan law. As such, plaintiff has asserted an actual controversy between the State and the City. The City and the State are also undoubtedly "interested parties". Generally one does not have standing to assert legal rights on behalf of another. *In re HRC*, 286 Mich App 444, 458 (2009). However, because MCL 49.153 explicitly grants plaintiff the ability to appear and raise challenges on behalf of the State, the Court finds

that plaintiff has standing to challenge whether the civil infraction portion of the charter amendment is consistent with Michigan law.[2]

B. STANDING TO CHALLENGE THE PROHIBITION OF COMPLAINTS TO THE PROSECUTOR'S OFFICE

Plaintiff's challenge to subsection (d) of the charter amendment (prohibiting certain marijuana-related complaints to authorities, including the prosecutor's office) is related to alleged interference with his rights and duties. Given that plaintiff has alleged that this provision interferes with the functions of his own office, there is not really a standing issue with respect to this aspect of the challenge. There are serious questions whether this provision actually interferes with plaintiff's rights and responsibilities, but that goes to the merits (discussed below) rather than his standing to raise the questions in the first place. Additionally, pursuant to MCL 49.153, plaintiff may also base his challenge on conflicts with the State's interests. Accordingly, the Court finds that plaintiff has standing to raise his challenges to subsection (d).

III. THE MERITS OF PLAINTIFF'S COMPLAINT

Because plaintiff has standing to raise these challenges, the merits of the challenges will now be decided. This section will first restate some basic law surrounding the powers of cities under Michigan law as was described in the prior opinion. The two principal challenges raised in plaintiff's complaint will then be addressed in turn. Additionally, plaintiff's motion for summary disposition raises the possibility of the charter amendment conflicting with the Michigan Medical Marihuana Act ("MMMA"). Although this potential conflict is not alleged in plaintiff's complaint, the Court will briefly address this and explain why plaintiff's new argument does not justify the relief he seeks.

A. THE POWERS OF HOME RULE CITIES UNDER MICHIGAN LAW

Grand Rapids is a "home rule city" incorporated under the laws of Michigan. The Michigan Constitution generally gives such cities broad power of self-government:

> Under general laws the electors of each city and village shall have the power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or enacted by the legislature for the government of the city or village. Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law. No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section. [Const 1963, art 7, § 22.]

[2] If it were not for MCL 49.153, then the Court would have little difficulty in determining plaintiff had no standing to challenge the creation of a civil infraction. Again, plaintiff has not alleged or provided evidence of any potential harm to his office from the existence of a civil infraction. There is no indication that plaintiff himself is an "interested party" or that there is an "actual controversy" between plaintiff's office and the City with respect to this issue.

The Michigan Constitution also provides that "[t]he provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor." Const 1963, art 7, § 34.

The Michigan Supreme Court has explained that generally "home rule cities enjoy not only those powers specifically granted, but they may also exercise all powers not expressly denied. Home rule cities are empowered to form for themselves a plan of government suited to their unique needs and, upon local matters, exercise the treasured right of self-governance." *City of Detroit v Walker*, 445 Mich 682, 690 (1994) (citing Const 1963, art 7, § 22). However, cities derive all of their power and authority from the Michigan Constitution and the Legislature. *City of Taylor v Detroit Edison Co*, 475 Mich 109, 115 (2006). As such, a city cannot enact an ordinance or charter amendment that conflicts with the general law of the state or is otherwise preempted. *People v Llewellyn*, 401 Mich 314, 322 (1977); Const 1963, art 7, § 22; MCL 117.36.

There are complex issues involved in this case, but all of the parties seem to agree on these basic principles. This case comes down to a simple question: Does the charter amendment conflict with state law?

B. THE CREATION OF A CIVIL INFRACTION

The merits of this challenge were discussed in the prior opinion. In plaintiff's motion for summary disposition, his arguments regarding this challenge are essentially identical to those previously raised. As such, much of the analysis from the prior opinion is carried over here along with further elaboration and clarification.

Plaintiff argues that the civil infraction portion of the charter amendment conflicts with MCL 117.4*l*(3) of the HRCA. This part of the HRCA provides that "[a]n ordinance shall not make an act or omission a municipal civil infraction or a blight violation if that act or omission constitutes a crime under any of the following: (a) Article 7 of the public health code, 1978 PA 368, MCL 333.7101 to 333.7545. . . . (j) Any law of this state under which the act or omission is punishable by imprisonment for more than 90 days." The possessing, controlling, using, or giving away of marijuana is a violation of Article 7 of the public health code and punishable by imprisonment for more than 90 days under state law, so according to plaintiff, the City cannot make this a civil infraction. However, the City has no *ordinance* making this a civil infraction. This is a charter amendment. Plaintiff argues that regardless of what the City calls it, the result is the same and the charter amendment is invalidated by MCL 117.4*l*(3).

This presents an issue of statutory interpretation. As explained by the Michigan Supreme Court:

> When interpreting the meaning of a statute, our primary goal is to discern the intent of the Legislature by first examining the plain language of the statute. Statutory provisions must be read in the context of the entire act, giving every word its plain and ordinary meaning. When the language is clear and unambiguous, we will apply the statute as written and judicial construction is not permitted. [*Driver v Naini*, 490 Mich 239, 246-47 (2011).]

The plain language of MCL 117.4*l*(3) bars only ordinances and not charter provisions. There is a clear and important distinction between a city's charter and its ordinances. The Michigan Constitution gives the voters of each city the power to "adopt and amend its charter", while a city operating under its charter is granted the power to "adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law". Const 1963, art 7, § 22 (emphasis added). Similarly, the HRCA forbids a charter amendment "unless approved by a majority of the electors voting on the question." MCL 117.5(e).

The distinction between an ordinance and charter provision is similar to that between a statute and constitutional provision. "The charter of the city is the fundamental law thereof, and all ordinances of the city, which are in conflict therewith, or violative of its mandates, are null and void, upon the same principle that a statute which contravenes the Constitution must fall." *Hubbard v Board of Trustees of Retirement System*, 315 Mich 18, 24 (1946) (quotations omitted). Ordinances are the legislative (and sometimes administrative) enactments of a city operating under its charter. Pursuant to the HRCA, in Grand Rapids the City Charter vests the City's legislative and administrative power with the City Commission. City Charter, Title V, § 1-2; MCL 117.3(a) (requiring cities to provide for the election of municipal legislative body). The City Charter further provides that, "[n]o ordinances . . . shall become effective without the concurrence of a majority of the Commission elected." City Charter, Title V, § 8. The voters of the City are given only limited legislative power under Title IV of the City Charter, which describes procedures for voter-initiated ordinances and referendums regarding ordinances previously approved by the City Commission. *See* MCL 117.4 (authorizing charter provisions providing for "the initiative and referendum on all matters within the scope of the powers of that city"). The procedures in Title IV are not at issue in this case because the voters of the City sought to enact a charter amendment rather than an ordinance.

The HRCA is filled with distinctions between charter provisions and ordinances. There are sections regarding what a charter must contain (*e.g.*, MCL 117.3), what a charter may contain (*e.g.*, MCL 117.4d), what cities may or may not do by ordinance (*e.g.*, MCL 117.4*l*), and what cities have no power to do at all (*e.g.*, MCL 117.5). The language is clear and no judicial construction is necessary or permissible. *See Driver, supra* at 247. MCL 117.4*l*(3) does not bar charter amendments.

Plaintiff argues that even if not barred by MCL 117.4*l*(3), issuing a civil infraction ticket based on the charter itself would then violate MCL 117.4i, which allows for a city charter to provide for "[t]he punishment of persons who violate city ordinances *other than ordinances described in* [*MCL 117.*]*4l*." MCL 117.4i(k) (emphasis added). Plaintiff reads this to mean that the City cannot create a civil infraction by charter when it could not do so by ordinance. However, the charter amendment does not provide for the "punishment of persons who violate city *ordinances*". There is no ordinance at issue in this case. The plain language of this section is clearly inapplicable.[3]

[3] When viewed only in the context of plaintiff's argument, MCL 117.4i(k) initially appears odd because it seems to forbid a charter from providing punishment for people who violate ordinances that could not have been issued in the first place. However, MCL 117.4i(k) references ordinances "described in 4*l*". All of the subsections in 4*l* other than subsection (3) actually *authorize* various ordinances. MCL 117.4i(k) contains a $500 limit on punishment and the "other than" language appears to have been added to allow the possibility of greater punishment of those ordinances authorized by 4*l*. *See City of Livonia v Goretski Construction Co*, 229 Mich App 279, 287-91 (1998) (upholding a

According to plaintiff, the Legislature was anticipating that an ordinance was the only way of accomplishing what it attempted to prohibit, and this is simply an unintended and impermissible circumvention of the HRCA. However, there is no legal basis for that assumption. Indeed, the HRCA itself seems to anticipate self-executing charter provisions and distinguishes these from ordinances. For example, MCL 117.31 provides that "[a]ll fines collected or received by the district court for or on account of *violations of the charter* ***or*** *ordinances of the city*, shall be distributed by the district court . . . ." (emphasis added).[4] It is presumed that the Legislature had full knowledge of these provisions. *See Johnson v Recca*, 492 Mich 169, 187 (2012).

Plaintiff also cites MCL 117.36, which provides that "[n]o provision of any city charter shall conflict with or contravene the provisions of any general law of the state." That begs the question: Which law does the provision conflict with or contravene? Plaintiff argues this is MCL 117.4*l* and/or 117.4i(k). However, as explained above, a charter amendment is not an ordinance, so there is no conflict or contravention of these provisions of law. Without any conflict or contravention, MCL 117.36 does not invalidate the charter amendment.

It must also be remembered that the civil infraction portion of the charter amendment does not permit anything. It merely prohibits. The charter amendment provides that "[n]o person shall possess, control, use, or give away marijuana or cannabis" and sets up a civil infraction for violation of that provision. Plaintiff concedes that field preemption does not apply. He acknowledges that the City could make the marijuana-related offenses criminal infractions with substantially lesser penalties than those under state law. Thus, his challenge with respect to the creation of a civil infraction depends entirely upon interpreting the word "ordinance" in MCL 117.4*l* and/or 117.4i(k) to include a "charter provision" or "charter amendment".

The Legislature can distinguish and has distinguished between the ability of a city's electors to amend a charter and the ability of a city to enact ordinances pursuant to its charter. There may be a variety of reasons why the Legislature would prohibit a city from doing by ordinance what its electors may do by charter amendment. Plaintiff has previously argued, "Call it a charter amendment; call it an ordinance; by any other name, it smells the same." However, that is not necessarily true; these are important structural distinctions which the Legislature is free to make. The Legislature decided to prohibit the creation of certain types of civil infractions by way of "an ordinance". Meaning must be given to the plain and unambiguous language chosen. The Court is in no position to assume an unintentional omission or amend the HRCA to "make it 'better.'" *Johnson, supra* at 187. It is the Legislature's job to amend statutes. No one involved in this case has disputed that the Legislature could bar the City's creation of a civil infraction; the Court simply finds today that the Legislature has not. If the Legislature agrees with plaintiff and disapproves of what the City and its voters have done, then the relevant

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fine in excess of $500 based on the "other than" language in MCL 117.4i(k) and explaining some of the legislative history). In short, it appears the language relied upon by plaintiff actually reflects an expansion of cities' powers and is irrelevant to this case.

[4] Moreover, although the plain language and structure of the statute resolves the issue, MCL 117.4*l*(3) appears to have been drafted in the 1990s, well after the City of Ann Arbor's nearly identical charter amendment was passed in 1974. (*See* footnote 1, *supra.*) That is, even though this had previously been made a civil infraction by charter amendment, the Legislature chose language only addressing ordinances.

statutes can be amended or new statutes can be enacted. Whether or not that should be done is a matter of policy that this Court is in no position to decide. Respectfully, plaintiff's arguments appear to be "directed at the wrong branch of government." *Johnson, supra* at 187.

Based on the foregoing, the Court finds that the charter amendment does not violate the plain and unambiguous language of MCL 117.4*l* or 117.4i.[5] Summary disposition is GRANTED in favor of the City and DCGR with respect to plaintiff's challenge to the civil infraction portion of the charter amendment.

C. THE PROHIBITION OF COMPLAINTS TO THE PROSECUTOR'S OFFICE

This challenge involves subsection (d) of the charter amendment, which provides that:

> No Grand Rapids police officer, or his or her agent, shall complain of the possession, control, use, or giving away of marijuana or cannabis to any other authority except the Grand Rapids City Attorney; and the City Attorney shall not refer any said complaint to any other authority for prosecution.

Plaintiff argues that this provision interferes with his office's rights, powers, and duties and otherwise conflicts with state law.

Plaintiff claims subsection (d) is completely invalid on its face and must be struck down regardless of how the City's officials might interpret and enforce it. Plaintiff has essentially taken an all-or-nothing approach. He has not made any alternative arguments related to narrowly interpreting the subsection or limiting its scope. "The prevailing rules regarding statutory construction . . . extend to the construction of home rule charters." *City of Detroit v Walker*, 445 Mich 682 (1994). When making this type of facial challenge to a charter provision, plaintiff must establish "that there is no set of circumstances in which the [charter provision] would be valid." *Hendee v Putnam Twp*, 486 Mich 556, 568 n 17 (2010). Charter provisions are "accorded a strong presumption of validity" and courts "have a duty to construe [a charter provision] as valid absent a clear showing of unconstitutionality." *People v Jensen*, 231 Mich App 439, 444 (1998). Additionally, "[t]he court will not go out of its way to test the operation of a law under every conceivable set of circumstances. The court can only determine the validity of a [charter amendment] in the light of the facts before it." *General Motors Corp v Read*, 294 Mich 558, 568 (1940).

Plaintiff's challenge to subsection (d) relies heavily on *Joslin v Fourteenth District Judge*, 76 Mich App 90 (1977), which plaintiff argues is "directly on point". *Joslin* addressed a situation in which two criminal defendants sought dismissal of charges based on a police officer's alleged violation of an Ypsilanti ordinance nearly identical to the charter amendment at issue in the present case. The *Joslin* Court explained that "municipal police are authorized to enforce state law." *Id.* at 96. In support of this, the *Joslin* Court pointed to MCL 764.15, which authorizes peace officers to make arrests without a warrant under certain circumstances. *Id.* Given that state law gave the police officers such authority, the *Joslin* Court held that "to the

[5] The Court finds that these statutes are unambiguous as applied to plaintiff's challenge to the charter amendment. However, it should be noted that even if there were some ambiguity, then the constitutional command to liberally construe the law in favor of cities would apply and the result would be exactly the same. *See* Const 1963, art 7, § 34.

extent section (d) [nearly identical to subsection (d) in this case] limits the authority of city police to enforce state law, we hold it void. Hence the district court properly denied defendants' motions to dismiss the state charges, section (d) of the ordinance being no bar to prosecution under the Controlled Substances Act." *Id.* *Joslin* makes clear that a city cannot remove a police officer's authority to enforce state law. Thus, a police officer's violation of an ordinance is not a defense to charges under state law.

However, just because a police officer has the authority to make an arrest and enforce state law does not mean the officer cannot be later subject to some form of discipline if he or she violates rules and guidelines set by a city. Police officers can be assigned limited duties and specific areas of focus based on a city's needs. "There is no doubt the control of a city police department is a function of local municipal government." *Royal v Police & Fire Comm of Ecorse*, 345 Mich 214, 219 (1956) (quotations omitted). Otherwise, there would be chaos. Each police officer could investigate and report whichever crimes he or she subjectively believed warranted the most attention. The statute relied upon in *Joslin* authorizes officers to make arrests not only for felonies, but also misdemeanors and ordinance violations when committed in the peace officer's presence. *See* MCL 764.15. If one accepts plaintiff's reading of *Joslin*, the City could not limit an officer's discretion to arrest for even the simplest misdemeanor or ordinance violation because state law authorizes such arrests. Furthermore, *Joslin* involved a city's exercise of legislative power by way of an ordinance and this case involves an amendment to the City Charter, which is the foundational law of the City.[6] The statement in *Joslin* does not mean police officers are entitled to do whatever they want regardless of the policies set by supervisors, officials, and electors. *Joslin* is not "directly on point", as suggested by plaintiff.[7]

Indeed, to the extent that plaintiff is alleging interference with his own rights, powers, and duties, *Joslin* actually supports the City and DCGR in this case. In light of *Joslin*, it is clear that whenever plaintiff receives a complaint from the GRPD or City Attorney, he will not have to worry about any potential defense related to the charter amendment. The prohibition in the charter amendment is a matter involving the administration of the City and its police force; complaints of violations of state law made to plaintiff's office could not be "tainted" by any violation of the charter amendment.

As explained in the prior opinion, plaintiff does not control or supervise the City's police force and has no right to direct the City's resources. Given that plaintiff has no entitlement to complaints from the GRPD in the first place, any incidental reduction in marijuana-related complaints resulting from the City's policies would not impermissibly interfere with plaintiff's rights and duties. The City is entitled to direct its police force in any number of ways based on its budget and needs. If plaintiff were allowed to require these marijuana-related complaints to be made to him at the City's expense, then that could presumably require the City to shift resources from other areas.

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[6] The Ypsilanti ordinance in *Joslin* happened to be voter-initiated, but that does not change the fact that it was a different type of enactment created under a different source of power.

[7] Moreover, as noted by the *Joslin* Court, that case involved a "woeful example of an adversary proceeding" with parties that had "chosen to avoid at all costs any discussion of opposing arguments." *Joslin, supra* at 95. The *Joslin* Court explained that "[g]iven . . . these unilateral arguments and our recognition that the underlying issues transcend the interests of the instant parties, we proceed to resolve only those questions pertaining to the facts at hand." *Id.* Plaintiff's extremely broad interpretation of *Joslin* seems particularly inappropriate in light of these statements.

That being said, there is a situation in which the language of the amendment hypothetically could interfere with plaintiff's rights and responsibilities: when complaints are made to plaintiff regarding an offense and the alleged offender also had marijuana. When complaints are made to plaintiff, it seems he is entitled to the full extent of the facts as known by the complaining officers or officials. It could be problematic if, for example, a criminal complaint was filed with the prosecutor for felonious assault, but the officer was obligated to conceal the fact that the alleged perpetrator was found with marijuana. However, this is not an issue at this time because the City Manager's affidavit suggests that GRPD officers will still be ordered to disclose marijuana-related offenses to the prosecutor when discovered along with other offenses. (City Manager's Affidavit, ¶ 9(C).) Plaintiff argues that this violates the plain language of subsection (d), but that is only based on his extremely broad reading of the terms "complain" and "complaint" as used in that subsection. These terms need not be interpreted as broadly as plaintiff suggests, and the Court will not declare subsection (d) invalid simply because of plaintiff's proposed interpretation.[8]

Interestingly, plaintiff does not seem to argue that the City's proposed implementation of the charter amendment would be invalid in itself. Instead, plaintiff states that "[t]he issue is not one of controlling the police, or directing the police department on the proper use of its resources. If the police were instructed to not investigate marijuana violations, the issue would be different." (Plaintiff's Response Brief, p. 10.) Plaintiff fails to acknowledge that the charter amendment effectively instructs the GRPD not to expend time and resources investigating and filing complaints simply for certain marijuana-related offenses. GRPD officers can simply issue a civil infraction ticket, which does not require the time and resources of initiating and following through with a formal criminal complaint. If the City Manager or GRPD officials could direct such a policy on their own (and it appears they could), then there does not seem to be any legal reason to prevent the voters of the City from directing such a policy by way of an amendment to the very document establishing the City and the GRPD.

In short, plaintiff has not shown any cognizable harm to his office or to the State resulting from subsection (d). Any number of decisions a city makes can affect the number and type of state law offenses that are investigated and reported. Not all laws can be enforced equally; a home rule city has the power to set priorities and regulate its police force. If the Legislature feels it is appropriate to limit a city's authority over its police force with respect to marijuana-related crimes or impose a duty on police officers to report these crimes to the prosecutor, then presumably it can do so. That is a policy choice. Unless and until the Legislature makes such a choice, the City has discretion to allocate resources and set policies according to perceived needs. Plaintiff's arguments again appear to be directed at the wrong branch of government.

Based on the foregoing, plaintiff has failed to show that subsection (d) is invalid on its face. Summary disposition is GRANTED in favor of the City and DCGR with respect to this challenge.

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[8] It should also be noted that the City's relatively narrow interpretations of "complain" and "complaint" are consistent with the charter amendment being interpreted as a matter of allocation of resources rather than an attempt to interfere with state law. If a formal complaint is already being made to the prosecutor regarding another offense, then there would be few (if any) additional resources needed to include truthful statements regarding marijuana.

D. ALLEGED CONFLICT WITH THE MICHIGAN MEDICAL MARIHUANA ACT

Plaintiff also alleges for the first time in his motion for summary disposition that the charter amendment conflicts with the Michigan Medical Marihuana Act ("MMMA"), MCL 333.26421 *et seq.* His argument seems to be that the medical defense to a civil infraction under the charter amendment has a different scope than the defenses in the MMMA, so there is a conflict and the charter amendment is invalid. However, the charter amendment creates a new municipal civil infraction with potential medical defenses *related to such an infraction.* It does not purport to affect state law violations. To the extent that the charter amendment's defenses might be broader than those under the MMMA, that would not matter whatsoever in a prosecution under state law. *See also Joslin, supra.* The MMMA provides no basis for invalidating the charter amendment.

Plaintiff has failed to demonstrate that the charter amendment necessarily conflicts with Michigan law. There are no genuine issues of fact regarding plaintiff's complaint, and the City and DCGR are entitled to judgment as a matter of law. *See* MCR 2.116(C)(10). Plaintiff's complaint must be dismissed.

IV. THE CITY'S REQUEST FOR APPROVAL OF ITS PROPOSED IMPLEMENTATION

As mentioned above, the City is now requesting that the Court approve the City's proposed implementation of the charter amendment. For example, the City argues that subsection (d) of the charter amendment does not apply to any felonies and asks the Court to approve of this interpretation. The City makes this suggestion based on the purported common law duties of police officers with respect to felonies, and argues that it is "harmonizing" the language of the charter amendment with other language in the charter.

Regardless of whether the City's interpretation is appropriate or not, the Court is in no position to decide the issue because there is no "actual controversy" at this time regarding the proposed implementation. The City seems to be simply looking for an advisory opinion. Because the Court holds today that the charter amendment will be allowed to be implemented, presumably plaintiff has no problem with still receiving felony marijuana complaints, so there is no controversy with plaintiff regarding this issue. The City suggests that there may be a controversy with DCGR. However, DCGR has stated that it always intended to allow the City to implement the rules and continue to work with the City to resolve any disputes. Although DCGR has responded to and opposed the City's new arguments, it has no lawsuit planned and does not seek to prevent the City from initially implementing the charter amendment as proposed. It must also be remembered that DCGR is simply an association which arranged for the charter amendment to be placed on the ballot. The proposed implementation could affect the obligations of police officers as well as the rights of a number of different groups of people potentially involved with marijuana-related activity. *See Lansing Schools Educ Ass'n (on Remand), supra* at 517 ("[A]s part of the requirement that there be an actual controversy, it is necessary that all the interested parties be before the court." (quotations omitted)).

The City has mentioned no one standing in the way of its implementation of the charter amendment. There is no indication of potential civil liability or any danger to the City from

implementing the charter amendment. It seems the worst that could happen from the City's perspective is someone with standing eventually challenging its interpretation and the City is compelled to do things differently from that point forward. There is simply no controversy and no reason why this should be decided at this time. There may come a time when further clarification will be needed. However, at this point that is merely speculation.

Based on the foregoing, the City's request for guidance in interpreting the charter amendment is not ripe and must wait for another day if and when the City's interpretation is challenged or the requirements of MCR 2.605 are otherwise met.

V. CONCLUSION AND CLARIFICATION

The voters of Grand Rapids had the power to amend the City Charter and plaintiff has failed to show that any section of the charter amendment necessarily conflicts with state law. Perhaps there may be future challenges regarding how the charter amendment is implemented by the City, but those potential issues are not ripe for a decision.

It must also be remembered that the charter amendment does not and could not change state and federal marijuana laws as they apply to Grand Rapids. It is still a crime for one to possess, control, use, or give away marijuana in Grand Rapids. The charter amendment merely creates a civil infraction in the City and directs the City's police resources away from some of these laws. Based on binding precedent from the Court of Appeals, it is clear that the existence of the charter amendment or a GRPD officer's violation of it will not provide any defense in a criminal prosecution. *Joslin v Fourteenth District Judge*, 76 Mich App 90 (1977). Furthermore, the terms of the charter amendment do not restrict law enforcement agencies and offices other than the GRPD and City Attorney. The Kent County Sherriff's Department, Michigan State Police, Kent County Prosecuting Attorney, and other law enforcement agencies and offices still have jurisdiction in Grand Rapids and are free to investigate and prosecute any marijuana-related offenses occurring in Grand Rapids. Those who violate state and/or federal laws relating to marijuana still risk the possibility of criminal prosecution for violation of the laws, even within the confines of the City of Grand Rapids.

Order

For the reasons explained above, the Court finds plaintiff has standing under MCR 2.605 to raise the challenges he has raised. However, plaintiff has failed to demonstrate that the charter amendment on its face conflicts with Michigan law. As such, summary disposition is GRANTED in favor of defendant City Grand Rapids and intervening defendant DecriminalizeGR. Plaintiff's complaint challenging the validity of the charter amendment is DISMISSED.

This is a final order that closes the case.

Dated: May 6, 2013

PAUL J. SULLIVAN

Paul J. Sullivan, Circuit Judge (P24139)