



STATE OF KANSAS  
OFFICE OF THE ATTORNEY GENERAL

**DEREK SCHMIDT**  
ATTORNEY GENERAL

MEMORIAL HALL  
120 SW 10TH AVE., 2ND FLOOR  
TOPEKA, KS 66612-1597  
(785) 296-2215 • FAX (785) 296-6296  
WWW.AG.KS.GOV

March 5, 2015

ATTORNEY GENERAL OPINION NO. 2015- 4

The Honorable Mark Kahrs  
State Representative, 87th District  
State Capitol, Room 286-N  
300 S.W. 10th Avenue  
Topeka, Kansas 66612

The Honorable Steven R. Brunk  
State Representative, 85th District  
State Capitol, Room 285-N  
300 S.W. 10th Avenue  
Topeka, Kansas 66612

Re: Constitution of the State of Kansas—Corporations—Cities' Powers of Home Rule.

Cities and Municipalities—Ordinances of Cities—Initiative and Referendum Ordinances—Petition for Proposed Ordinances; Requirements; Passage or Election; Form of Ballot Approval, effect; Amendment or Repeal; Publication

Synopsis: A city would exceed the city's home rule powers by adopting an ordinance that is preempted because it conflicts with a uniform state criminal statute. Thus, the ordinance would be void. Cited herein: K.S.A. 12-3013; K.S.A. 2014 Supp. 12-4106; K.S.A. 12-4111; 21-2501a; K.S.A. 2014 Supp. 21-5102; 21-5705; 21-5706; 21-5709; 21-6602; 21-6611; 21-6810; K.S.A. 22-2202; K.S.A. 2014 Supp. 65-4105; Kan. Const. Art. 2, § 17 and Kan. Const. Art 12 § 5; 18 U.S.C. § 922; 27 C.F.R. § 478.11.

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Dear Representatives Kahrs and Brunk:

As State Representatives for the 87<sup>th</sup> and 85<sup>th</sup> Districts, respectively, you ask our opinion whether the proposed amendments to Section 5.26.040 of the Code of the City of Wichita, Kansas, would be preempted by state law because the amendments would conflict with uniform state statutes. In our opinion, the answer is yes.

### ***Background***

K.S.A. 12-3013 prescribes the procedure that city electors may, by petition, initiate to directly propose and enact local legislation independent of the local governing body. If the petition is signed by the requisite number of qualified electors, the governing body must either enact the ordinance without alteration or hold an election. If an election is held and the majority of the electorate votes in favor of the proposed ordinance, the ordinance becomes valid and binding without alteration.<sup>1</sup> Such ordinance shall not be repealed or amended except by a vote of the electors at a subsequent election or by the governing body after passage of 10 years from the effective date.<sup>2</sup> The initiative and referendum process is not available for proposed ordinances that are administrative ordinances, ordinances relating to a public improvement to be paid wholly or in part by the levy of special assessments, or ordinances subject to referendum or election under another statute.<sup>3</sup>

Attorney General opinions rely on the facts presented in the opinion request or obtained from interested parties.<sup>4</sup> You provided us a copy of a blank petition that included what appears to be a copy of amendments proposed by the Marijuana Reform Initiative to Section 5.26.040 of the Code of the City of Wichita, Kansas (hereafter, "proposed ordinance"), which is file-stamped October 15, 2014. The petition was filed with the City Clerk on January 7, 2015.<sup>5</sup> The proposed ordinance was not included in or attached to the petition filed with the City Clerk.<sup>6</sup> On January 27, 2015, the City Council adopted

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<sup>1</sup> K.S.A. 12-3013(b) and (c).

<sup>2</sup> K.S.A. 12-3013(c).

<sup>3</sup> K.S.A. 12-3013(e)(1), (2), and (3).

<sup>4</sup> We do not opine on whether the petition and proposed ordinance comply with the requirements of K.S.A. 12-3013 and thus, whether the question may properly be placed on the ballot. However, because the proposed ordinance was not filed with the petition, as required by K.S.A. 12-3013, we are unable to confirm what ordinance language, if any, would be on the ballot. This filing deficiency suggests a threshold procedural infirmity from the facts that are known to us. It also is unclear to us whether the subject matter within the proposed ordinance is a legislative matter that may be proposed by initiative or whether the process used was legally impermissible for the ordinance proposed. If the proposed ordinance is determined to be administrative, it is not subject to initiative and referendum pursuant to K.S.A. 12-3013(e)(1). We note that the proposed ordinance contains elements that appear to be administrative in nature, such as the provisions regarding the reporting and handling of criminal justice information.

<sup>5</sup> *Minutes*, City of Wichita City Council Meeting, January 27, 2015.

<sup>6</sup> *Id.*

Ordinance No. 49-936 to submit the ballot question to a vote of the citizens of the City of Wichita.<sup>7</sup>

The language presented to us from the petition circulated by the Marijuana Reform Initiative and from Ordinance No. 49-936 adopted by the City is as follows:

SHALL THE FOLLOWING BE ADOPTED?

An ordinance reducing the penalty for first offense conviction for possession of thirty-two (32) grams or less of criminal sativa I, otherwise known as marijuana, and/or drug paraphernalia related thereto, by persons twenty-one (21) years of age or older, to an infraction with a fine not to exceed fifty dollars (\$50.00).

YES \_\_\_\_\_ NO \_\_\_\_\_

The language from the proposed ordinance is as follows:<sup>8</sup>

SECTION 5.26.040 OF THE MUNICIPAL CODE OF THE CITY OF WICHITA, KANSAS, SHALL BE REPEALED IN ITS ENTIRETY AND THE SUBSTITUTE PROVISIONS SET FORTH BELOW SHALL BE ADOPTED.

(a) Except as provided at Subsections (b) and (c) herein, a violation of the provisions of this Chapter is a misdemeanor and, upon conviction, the sentence shall be a fine not to exceed two thousand five hundred dollars (\$2,500.00), and/or imprisonment of up to twelve (12) months in the Sedgwick County Jail.

(b) A conviction of any person twenty-one (21) years of age or older of Section 5.26.010 for possession of one [*sic*] (32) grams or less of cannabis sativa L., or otherwise known as marijuana, as defined by Section 5.25.005(i) [*sic*], for the first offense, is an infraction and the sentence shall be a fine not to exceed fifty dollars (\$50.00) and no incarceration, probation, nor any other punitive or rehabilitative measure shall be imposed. For convictions under this Subsection for offenses in the Old Town Entertainment District, as defined by Section 5.05.020, the sentence shall be the mandatory minimum fine set forth at Section 5.05.030 and no incarceration, probation, nor any other punitive or

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<sup>7</sup> *Id.*

<sup>8</sup> This language was provided to us with the opinion request, and we have compared it with language provided to us at our request by the City of Wichita and also with language posted on the website for the Marijuana Reform Initiative. All three versions appear to be identical; thus, we presume this is the language that is in fact proposed for adoption by Wichita electors. However, we cannot confirm that as a matter of law because no ordinance was filed with the petition as required by K.S.A. 12-3013.

rehabilitative measure, shall be imposed; however, pursuant [sic] Section 5.05.030(b), the Court may order community service in lieu of mandatory minimum fine in accordance with the provisions thereof. Nothing in this Subsection shall be construed to restrict eligibility for diversion in lieu of further proceeding or deferred judgment pursuant [sic] Section 1.06.010 *et seq.*

(c) A conviction of any person twenty-one (21) years of age or older of Section 5.26.030 for possession of drug paraphernalia, as defined by Section 5.25.005(f), for the first offense, involving cannabis sativa L., or otherwise known as marijuana, as defined by Section 5.25.005(i) [sic], is an infraction and the sentence shall be a fine not to exceed fifty dollars (\$50.00) and no incarceration, probation, nor any other punitive or rehabilitative measure. For convictions under this Subsection for offenses in the Old Town Entertainment District, as defined by Section 5.05.020, the sentence shall be the mandatory minimum fine set forth at Section 5.05.030 and no incarceration, probation, nor any other punitive or rehabilitative measure shall be imposed; however, pursuant [sic] Section 5.05.030(b), the Court may order community service in lieu of mandatory minimum fine in accordance with the provisions thereof. Nothing in this Subsection shall be construed to restrict eligibility for diversion in lieu of further proceeding or deferred judgment pursuant [sic] Section 1.06.010 *et seq.*

(d) The intent of Subsections (b) and (c) of this Chapter is to reduce first offense convictions pursuant [sic] Sections 5.26.010 and 5.26.030 for cannabis sativa L., or otherwise known as marijuana, as defined by Section 5.25.005(i) [sic], to be an infraction, and not a misdemeanor. For the purpose of determining whether a conviction is a first or subsequent offense under Subsections (b) and/or (c), any conviction or convictions resulting from the same incident occurring after July 1, 2015, shall constitute a first offense and any subsequent conviction or convictions occurring within one (1) year thereafter shall constitute a subsequent offense. Nothing herein shall be construed to restrict law enforcement officers of the City of Wichita, Kansas, to complain of violations of offenses other than Subsections (b) and (c) of this Chapter. No law enforcement officer of the City of Wichita, Kansas, or his or her agent, shall complain of violations of these Subsections to any other authority except the City Attorney of the City of Wichita, Kansas; and, furthermore, the City Attorney of the City of Wichita, Kansas, or any of his or her authorized assistants, shall not refer any said complaint to any other authority for prosecution. No convictions pursuant [sic] Subsections (b) and/or (c) of this Chapter shall be recorded as a misdemeanor to the Kansas Bureau of Investigation Central Repository or any other state or federal law enforcement reporting agency.

(e) Should the State of Kansas enact lesser penalties than that set forth in Subsections (b) and (c) of this Chapter for possession of cannabis sativa L., or otherwise known as marijuana, as described therein, or possession of drug paraphernalia, as further described therein, then these Subsections, or relevant portions thereof, shall be null and void. The invalidity or unenforceability of any provisions of Subsections (b) and (c) shall not affect the validity or enforceability of other provisions thereof, which shall remain in full force and effect.

(f) In addition to any other sentence authorized by this Chapter, any person convicted of having violated the terms of this Chapter, while under twenty-one (21) years of age, shall be ordered to submit to and complete a community-based alcohol and drug safety action program certified pursuant to K.S.A. 8-1008 and amendments thereto and to pay a fee for such evaluation. If the judge finds that the person is indigent, the fee may be waived.

Currently, Section 5.26.040 of the Code of the City of Wichita, Kansas, provides that a conviction for possession of marijuana or of drug paraphernalia related to marijuana is a misdemeanor punishable by a fine not to exceed \$2,500 and/or imprisonment in the county jail for up to 12 months. These crimes and penalties are parallel to those crimes and penalties provided for in state statute.<sup>9</sup>

### ***Preemption***

The principle that cities cannot enact laws that contradict state law is found in the Home Rule Amendment to the Kansas Constitution.<sup>10</sup> The Home Rule Amendment grants cities the power to enact legislation to govern local affairs, “subject only to enactments of the legislature of statewide concern applicable uniformly to all cities [and] to other enactments of the legislature applicable uniformly to all cities . . . .”<sup>11</sup> In addition, the Home Rule Amendment states that city home rule powers “shall be liberally construed for the purpose of giving to cities the largest measure of self-government.”<sup>12</sup>

Cities’ home rule power is not unlimited. “[H]ome rule power does not authorize cities to act where the state legislature has precluded municipal action by clearly preempting the field with a uniformly applicable enactment.”<sup>13</sup> Kansas courts have identified two means by which a state statute may overrule a city’s home rule power: (1) if there is a conflict

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<sup>9</sup> K.S.A. 2014 Supp. 21-5706 and 21-5709.

<sup>10</sup> Kan. Const. Art. 12, § 5.

<sup>11</sup> Kan. Const. Art. 12, § 5(b).

<sup>12</sup> Kan. Const. Art. 12, § 5(d).

<sup>13</sup> *Kansas City Renaissance Festival Corp. v. City of Bonner Springs*, 269 Kan. 670, 673 (2000).

between the local regulation and a state statute; or (2) if the state legislature has preempted the field of regulation.<sup>14</sup>

An “[e]nabling act is uniformly applicable to all cities or counties if it authorizes all cities or counties to perform certain acts. Such statutes are state law and preempt the field of their application without use of preemptive language, unless there are express exceptions in the statutes or unless the statutes pertain to police power regulations.”<sup>15</sup> By court-imposed exception to constitutional and statutory home rule, a “[m]unicipality has the right to legislate by ordinary ordinance or resolution *nonconflicting* local police power laws even though there are state laws on the subject uniformly applicable to all municipalities.”<sup>16</sup> The issue at the core of your question, therefore, is whether the proposed ordinance, which relates to the city’s exercise of its police power, would conflict with state law. If the proposed ordinance would be in conflict with state law, then it is preempted and the city lacks power or authority to enact it.

A local ordinance is conflict preempted where it permits what the state statute forbids or prohibits what the statute authorizes.<sup>17</sup> The Kansas Supreme Court has found there is no conflict between the provisions of a local ordinance and state law when the ordinance is parallel or identical to the state law,<sup>18</sup> the ordinance supplements or adds to the state law,<sup>19</sup> or the ordinance provides for standards of performance that are higher than those set by state law.<sup>20</sup> In contrast, the Supreme Court has held that a city cannot classify a crime as a misdemeanor in an ordinance when the Kansas Legislature has classified the crime in state statute as a felony.<sup>21</sup>

What is apparent from these cases is that uniform state law establishes a *minimum standard* that must be met by the local ordinance if the city intends to use its police power to exercise concurrent jurisdiction with the state. Where a city ordinance provides a standard below the minimum standard set by the state, the ordinance is in conflict with the state law and is invalid.

Drug laws, statutory powers and duties of law enforcement officers and criminal information reporting statutes are plainly enactments of the legislature that are of

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<sup>14</sup> *State ex rel. Kline v. Bd. of Comm’rs of Unified Gov’t of Wyandotte County/Kansas City*, 277 Kan. 516, 526-27 (2004), citing *City of Junction City v. Lee*, 216 Kan. 495, 498-499 (1975) (superseded by statute as stated in *Blevins v. Hiebert*, 247 Kan. 1 (1990)).

<sup>15</sup> *Blevins v. Hiebert*, 247 Kan. 1, 11 (1990).

<sup>16</sup> 247 Kan. at 8 (emphasis added).

<sup>17</sup> 216 Kan. at Syl. ¶ 6.

<sup>18</sup> *City of Garden City v. Miller*, 181 Kan. 360 (1957).

<sup>19</sup> *Hutchinson Human Relations Commission v. Midland Credit Management, Inc.*, 213 Kan. 308 (1973).

<sup>20</sup> *Leavenworth Club Owners Association v. Atchison*, 208 Kan. 318 (1971).

<sup>21</sup> See *State v. Jenkins*, 295 Kan. 431, 442 (2012) (a city cannot classify third and subsequent offenses for theft as a misdemeanor where a state statute classifies such offenses as a felony) and *City of Junction City v. Cadoret*, 263 Kan. 164, 170 (1997) (a city cannot classify third and subsequent offenses for driving under the influence as a misdemeanor where a state statute classifies such offenses as a felony).

statewide concern and that apply uniformly to all cities.<sup>22</sup> In our view, the proposed ordinance would impermissibly conflict with uniform state law as discussed below.

### *I. Possession of Marijuana*

K.S.A. 2014 Supp. 21-5706(b)(3) provides that it is unlawful for any person to possess a controlled substance, including “any hallucinogenic drug designated in subsection (d) of K.S.A. 65-4105.” Marijuana is such a controlled substance.<sup>23</sup> The first conviction for possession of marijuana is a class A nonperson misdemeanor offense.<sup>24</sup> A class A nonperson misdemeanor is punishable by a fine not to exceed \$2,500<sup>25</sup> and/or imprisonment in the county jail for up to 12 months.<sup>26</sup>

In its current form, Section 5.26.040(a) is parallel to K.S.A. 2014 Supp. 21-5706 and thus is valid. However, Section (b) of the proposed ordinance would eliminate the parallel between state law and the city ordinance by decreasing the penalty for the first offense conviction for possession of 32 grams or less of Cannabis sativa L. by any person 21 years or older and by changing the penalty from a misdemeanor to “an infraction” punishable only by “a fine not to exceed fifty dollars (\$50.00),” an amount less than what is authorized by state statute. Section (b) of the proposed ordinance would conflict with state law in at least four ways.

First, the proposed ordinance impermissibly attempts to lower the penalty established by state law for certain illegal conduct. The Kansas Supreme Court in *State v. Jenkins*<sup>27</sup> held that cities can adopt an ordinance relating to a local police power, even though there is a state law on the subject uniformly applicable to all municipalities, as long as the ordinance does not conflict with the state statute. In *Jenkins*, the Court found a conflict when a city ordinance classified the offense as a misdemeanor, but the legislature had classified the crime as a felony.<sup>28</sup>

The permissible classifications of crimes are established by state law. Under the Kansas Criminal Code, a crime is defined as:

An act or omission defined by law and for which, upon conviction, a sentence of death, imprisonment or fine, or both imprisonment and fine, is

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<sup>22</sup> See Kan. Const. Art. 2, § 17 which provides that all laws of a general nature shall have a uniform operation throughout the state; *Blevins v. Hiebert*, 247 Kan. 1, 11 (1990).

<sup>23</sup> K.S.A. 2014 Supp. 65-4105(d)(16).

<sup>24</sup> K.S.A. 2014 Supp. 21-5706(c)(2)(A).

<sup>25</sup> K.S.A. 2014 Supp. 21-6611(b)(1).

<sup>26</sup> K.S.A. 2014 Supp. 21-6602(a)(1).

<sup>27</sup> 295 Kan. 432, 442 (2012).

<sup>28</sup> Whether the *Jenkins* opinion relied on the fact that the city did not have jurisdiction over the felony offense is irrelevant here. The municipal court has jurisdiction to hear and determine cases involving violations of ordinances of a city, including concurrent jurisdiction over felony possession of marijuana. See K.S.A. 2014 Supp. 12-4104.

authorized or, in the case of a traffic infraction or a cigarette or tobacco infraction, a fine is authorized. Crimes are classified as felonies, misdemeanors, traffic infractions and cigarette or tobacco infractions.<sup>29</sup>

The criminal code does not recognize the general term “infraction” as a classification, only “traffic infraction” and “tobacco infraction.” Thus, the conflict between the proposed ordinance and state law is even more acute than the conflict found impermissible by the Supreme Court in *Jenkins*. In *Jenkins*, the Supreme Court rejected a city’s attempt to reclassify certain criminal conduct from one category recognized by state law, a felony, to a lesser category recognized by state law, a misdemeanor. But here, not only would the proposed ordinance recategorize certain criminal conduct to a lesser category, but the lesser category it proposes – “an infraction” – is not recognized by state law. Because Kansas does not authorize the classification of “an infraction” generally, nor specifically for the crime of possession of marijuana, the proposed amendment to Section 5.26.040 would conflict with Kansas law.

That conclusion is buttressed because the proposed reclassification would reduce the available penalty by eliminating the potential for jail time and lowering the amount of the fine to less than what is established by state law. The elimination of jail time as a sentencing option and the reduction in the potential fine would not supplement or add to the state law but instead would lower the standard established by state law. Thus, we believe that where the legislature classified certain criminal acts as felonies or misdemeanors, a city ordinance conflicts with state law when it attempts to reclassify the same acts to be infractions subject to lesser penalties.

Further, because the proposed ordinance does not treat a first offense conviction as a misdemeanor, it would have the effect in many cases of indirectly reclassifying conduct that currently is a felony under state law – subsequent convictions for possession of marijuana – as a lesser offense. This effect results from the requirement in the proposed ordinance that a first conviction for marijuana possession may be counted as a prior conviction in fewer circumstances than under state law. The effect is that at least one additional conviction, beyond the requirements of state law, would be necessary before an individual could be convicted of felony possession of marijuana. In this manner, the reclassification in the proposed ordinance undermines the state felony statute by causing certain repeat conduct that currently is punishable as a felony to instead be punishable only as a lesser offense, even under state law. This provision is not parallel to but instead is below the standard set by the state, and thus there is a conflict that precludes municipal action.

Second, to the extent subsection (d) of the proposed ordinance attempts to create a one-year decay period that would redefine a second conviction one year or more after the first offense conviction so that it is counted only as another first conviction, such attempt would be impermissible as conflicting with K.S.A. 2014 Supp. 21-6810(d)(3)(A). State law recognizes no such decay factor for prior convictions. Because the provision

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<sup>29</sup> K.S.A. 2014 Supp. 21-5102.



would make it possible to have numerous “first convictions” for possession of marijuana, as long as each conviction is spaced more than one year apart from the prior conviction, an individual’s criminal history potentially would never accumulate. This would undermine the provisions of state law that provide for increasing penalties for repeat offenses for the crime of possession of marijuana, and ultimately would undermine felony provisions of state law that would attach (without the decay period) to subsequent convictions for possession of marijuana, regardless of the timing.

Third, the ordinance proposes to establish an amount of marijuana as the demarcation for classification as an “infraction” rather than a misdemeanor, effectively adding an additional factual element the prosecution must prove. Currently, possession of a specific amount of marijuana is not required to be alleged or proven by the prosecution because it is not an element of the crime in either the current ordinance or in state law. Whereas possession of a small amount of marijuana is a misdemeanor under state law and must be considered and scored in criminal history pursuant to K.S.A. 2014 Supp. 21-6810(d)(5), the proposed ordinance would reclassify the possession of that same amount of marijuana, up to 32 grams, as an infraction.

The statute and the ordinance would no longer be parallel, and the ordinance would conflict with state law since the ordinance is seeking to remove a crime that must be considered and scored for criminal history purposes. It would undermine the city’s jurisdiction over the prosecution of felony possession of marijuana under K.S.A. 2015 Supp. 12-4104(a)(5) or the state’s prosecution for the same under K.S.A. 2014 Supp. 21-5706(b)(3) because the criminal history score would be inaccurate in the event of any subsequent convictions for possession of marijuana.

Fourth, the ordinance proposes to impose an age restriction by allowing persons 21 years or older to receive a more lenient sentence. Under state law, adult convictions do not require a specific age to be alleged or proven in a prosecution for possession of marijuana. The addition of this age factor appears to be another way to prevent the attachment of criminal history as stated above. Again, the statute and ordinance would no longer be parallel, and the ordinance would allow conduct that state law prohibits and undermine the state system of collecting accurate criminal history in order to enhance the penalties for recidivist marijuana possession convictions accordingly.

In our opinion, any one or more of the above conflicts between the proposed ordinance and state law would result in conflict preemption of the proposed ordinance, rendering it void.

## *II. Possession of Drug Paraphernalia related to Marijuana*

K.S.A. 2014 Supp. 21-5709(b)(2) makes it unlawful for any person to use or possess with intent to use any drug paraphernalia to “store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body.” The first

and subsequent convictions of possession of paraphernalia are class A nonperson misdemeanor offenses.<sup>30</sup>

In its current form, Section 5.26.040(a) of the Code of the City of Wichita, Kansas, is parallel to K.S.A. 2014 Supp. 21-5709 and thus is valid. However, Section (c) of the proposed ordinance would eliminate the parallel between state law and the city ordinance by decreasing the penalty for the first offense conviction for possession of drug paraphernalia involving Cannabis sativa L. by any person 21 years or older. If the proposed ordinance were adopted by the electors in Wichita, Section 5.26.040 would be amended so that a first conviction of the offense as redefined by the proposed ordinance would be “an infraction” punishable by “a fine not to exceed fifty dollars (\$50.00).” Section (c) of the ordinance would conflict with state law in at least two ways.

First, the proposed ordinance impermissibly attempts to lower the penalty established by state law from a class A misdemeanor to an infraction. In accord with the analysis above, the Kansas Criminal Code does not recognize the term “infraction” as a classification in this context. An ordinance that purports to lower the classification of a crime below that set by the state law is in conflict with state law and is void.

Additionally, such classification conflicts with state law because it lessens the potential penalty from the standard that is provided for by state law.

Second, the proposed ordinance singles out persons 21 years or older to receive a lesser penalty for a conviction, which would render the ordinance no longer parallel to state law. As stated above, a city ordinance cannot classify the same acts to be a lesser offense than provided for in state law without causing a conflict. This proposed reclassification appears to be another way to prevent attachment of criminal history which is required to be considered and scored pursuant to K.S.A. 2014 Supp. 21-6810(d)(5).

Either one of the above conflicts between the proposed ordinance and state law would result in conflict preemption of the proposed ordinance, rendering it void.

### *III. Duties of Law Enforcement Officers to Enforce State Law*

Section (d) of the proposed ordinance proposes to prohibit City of Wichita law enforcement officers from complaining “of violations of these Subsections to any other authority except the City Attorney of the City of Wichita, Kansas.” That *de facto* gag rule for Wichita police officers, if enacted, would directly conflict with the duties of all Kansas law enforcement officers, including those employed by the City of Wichita, as set forth in state statute.

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<sup>30</sup> K.S.A. 2014 Supp. 21-5709(e)(3).

K.S.A. 12-4111 provides:

The governing body [of a city] may employ law enforcement officers who shall have power to execute all process issued by any municipal judge within the state and delivered to him or her for that purpose, to detain persons, to place them in custody, and to arrest them, pursuant to the terms of this act.

*The powers of law enforcement officers with respect to the code of criminal procedure shall not be reduced by this code.*<sup>31</sup>

The very definition of a "law enforcement officer" under Kansas law is, *inter alia*, a person who "make[s] arrests for violation of the laws of the state of Kansas . . . ." A city ordinance that purports to prohibit a "law enforcement officer" from enforcing state law would be in clear conflict with the K.S.A. 22-2202(13), which defines "law enforcement officer" as follows:

"Law enforcement officer" means any person who by virtue of office or public employment is *vested by law with a duty* to maintain public order or *to make arrests for violation of the laws of the state of Kansas* or ordinances of any municipality thereof or with a duty to maintain or assert custody or supervision over persons accused or convicted of crime, and includes court services officers, parole officers and directors, security personnel and keepers of correctional institutions, jails or other institutions for the detention of persons accused or convicted of crime, while acting within the scope of their authority.<sup>32</sup>

Kansas law enforcement officers, including those employed by the City of Wichita, have a legal duty to enforce state law, which necessarily includes the authority to present cases for prosecution when appropriate to state authorities. A local ordinance, such as the proposed ordinance, that proposes to direct law enforcement officers to abandon that statutory duty is in conflict with state law and void.

#### *IV. Offense Recording and Reporting by City Police*

Section (d) of the proposed ordinance also would prohibit City of Wichita law enforcement officers from recording a misdemeanor for a conviction of section (b) or (c) with any state or federal law enforcement reporting agency.

An ordinance which purports to prohibit a law enforcement officer from recording or reporting a misdemeanor for a conviction of section (b) or (c) of the proposed ordinance

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<sup>31</sup> Emphasis added.

<sup>32</sup> Emphasis added.

to any state or federal law enforcement reporting agency would be in clear conflict with K.S.A 21-2501a which provides:

(a) All law enforcement agencies having responsibility for law enforcement in any political subdivision of this state, on forms approved by the attorney general, shall maintain a permanent record of all felony and misdemeanor offenses reported or known to have been committed within their respective jurisdictions.

(b) All law enforcement agencies having the responsibility of maintaining a permanent record of offenses shall file with the Kansas bureau of investigation, on a form approved by the attorney general, a report on each offense for which a permanent record is required within 72 hours after such offense is reported or known to have been committed.

By prohibiting City of Wichita law enforcement officers, and/or the Wichita Police Department, from fulfilling statutory obligations to report crimes committed in the city, the proposed ordinance would undermine the purpose of the state statute described above, which is to ensure the accurate compilation of criminal justice information in Kansas. The resulting inaccuracy injected into criminal history record information because of the reporting ban would cause other significant problems in addition to future sentencing inaccuracies. We do not attempt to discern them all here, but one example would be the effect on prosecutions under 18 U.S.C. § 922(g)(3), the federal law prohibiting certain marijuana users from possession of any firearms or ammunition.<sup>33</sup>

The proposed ordinance would conflict with and undermine state law and, thus, would be void.

#### *V. Reporting of Offenses by Municipal Judge*

Additionally, the municipal judge is under a separate duty, pursuant to K.S.A. 12-4106(e), to ensure that “information concerning dispositions of city ordinance violations that result in convictions comparable to convictions for offenses under Kansas criminal statutes is forwarded to the Kansas bureau of investigation central repository. This information shall be transmitted, on a form or in a format approved by the attorney general, within 30 days of final disposition.”

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<sup>33</sup> 18 U.S.C. § 922(g)(3) provides, “It shall be unlawful for any person who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802) to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.” See also 27 C.F.R. § 478.11, which describes the meaning of “unlawful user of or addicted to any controlled substance.”

Subsection (d) of the proposed ordinance states, in pertinent part:

No convictions pursuant [*sic*] Subsections (b) and/or (c) of this Chapter shall be recorded as a misdemeanor to the Kansas Bureau of Investigation Central Repository or any other state or federal law enforcement reporting agency.

The proposed ordinance would improperly redefine conduct made criminal by state law so that it is no longer “comparable to convictions for offenses under Kansas criminal statutes.” In so doing, it would undermine the purpose of the state statutory system of reporting, which is to ensure the accurate compilation of criminal justice information in Kansas. A city ordinance that purports to prohibit, either directly or by such redefinition, a municipal judge from making a report as required by K.S.A. 2014 Supp. 12-4106(e) would be in clear conflict with the state law and would be void.

### ***Conclusion***

Based upon the above analysis, we conclude that a court would find the proposed ordinance void because it would conflict with uniform state laws in numerous ways. In our opinion, even if the ordinance has been properly placed upon the April ballot – and we are unsure that it has been<sup>34</sup> – a public vote to adopt it would have no legal force or effect.

Sincerely,

Derek Schmidt  
Kansas Attorney General

Athena E. Andaya  
Deputy Attorney General

DS:AA:sb

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<sup>34</sup> See footnote 4 above.