To: Megan Green

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Subject: The Proposed Ordinance to Curb Marijuana Enforcement Against Adults

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We are a government of laws—in fact, more laws than our law enforcement authorities could possibly enforce effectively. Where public funds for law enforcement are limited, citizens and their elected officials must assess which types of crimes represent the greatest threat to our communities, instructing their law enforcement officials to prioritize the investigation and prosecution of the most dangerous crimes while deemphasizing enforcement of crimes that create fewer overall problems for society.

Missourians live under laws that are enacted at the federal, state, and local levels, but the vast majority of law enforcement and prosecution takes place at the local level. Thus, although local authorities such as the Board of Aldermen cannot nullify or veto laws passed at the federal or state levels, they have the authority to pass ordinances that will focus the use of city resources on problems that the people, acting through their Board of Aldermen, see as the highest priorities for local law enforcement.

Having carefully considered evidence gathered from other cities and states that have recently decriminalized or legalized adult use of marijuana, the sponsors of the proposed bill have determined that the private growing, possession, or use of marijuana by adults poses a relatively minor threat to the health and safety of the public. For the reasons set forth in the preamble paragraphs of the bill, they believe that the City should no longer use its scarce resources to investigate or prosecute the cultivation, possession, and private use of marijuana by adults. In their view, the priority of law enforcement in the City of St. Louis must be the investigation and prosecution of violent crime.

There are a number of relatively common activities that are criminal offenses under state statutes, but which local law enforcement agencies rarely investigate or enforce. For example, state law makes it a criminal offense to engage in unlicensed gambling. *See* §§ 572.020-572.060, RSMo. Those laws could give police grounds to target people who get together to play poker or fill in a bracket for the NCAA basketball tournament. Law enforcement does not prioritize enforcement against these activities despite the fact that the state law prohibition on unlicensed gambling is still in place and these activities are still illegal. These activities are simply not a priority to local law enforcement.

The proposed Ordinance does not decriminalize possession and use of marijuana—federal and state laws are still in force. Rather, the Ordinance prohibits City law enforcement officials from using City resources to enforce those prohibitions against responsible adults. The City would still use its resources to enforce those laws against minors (under 21), those who provide marijuana to minors, and those who use or transfer marijuana in public. Through this Ordinance, the City is simply saying that if the state or federal governments wish to enforce marijuana prohibition, they must use their own personnel and resources to do so: the City intends to focus its efforts on matters more pressing to its residents.

The City is well within its authority to prioritize the use of its resources in this way. All duly-enacted ordinances are presumed to be valid and lawful. *McCollum v. Dir. of Revenue*, 906 S.W.2d 368, 369 (Mo. banc 1995). As a constitutional charter city, the City of St. Louis has "all powers which the general assembly of the state of Missouri has authority to confer upon any city, provided such powers are consistent with the constitution of this state and are not limited or denied either by the charter so adopted or by statute." Mo. Const. art. VI, § 19(a).

Thus, a court must uphold a city ordinance if: (1) the City acted within its Charter authority; and (2) the ordinance is not preempted. *Coop. Home Care, Inc. v. City of St. Louis*, 514 S.W.3d 571, 578 (Mo. banc 2017). The Ordinance meets these two criteria.

First, the City would act within its authority in enacting the Ordinance. The City has a general police power "to enact ordinances having a substantial and rational relation to the 'peace, comfort, safety, health, morality, and general welfare' of its inhabitants." *Missouri Dental Bd. v. Alexander*, 628 S.W.2d 646, 650 (Mo. banc 1982). In addition, the City has authority under the Charter to "do all things whatsoever expedient for promoting or maintaining the comfort, education, morals, peace, government, health, welfare, trade, commerce, or manufactures of the city or its inhabitants" (Charter, art. I, § 1(33)); and to exercise "all powers granted or not prohibited to it by law" (*Id.* at art. I, § 1(35)). If enacted, this bill would simply reprioritize the work of the City's own law enforcement agencies, including most notably the Metropolitan Police Department, in enforcing various criminal laws. Deciding how to invest the City's resources and deciding what enforcement priorities the Metropolitan Police Department should have are well within the City's charter authority.

Second, the ordinance is not preempted by state law. "Preemption of a local law by a statute may be express or implied. Express preemption occurs when the General Assembly has explicitly proscribed local regulation in a specific area." *Coop. Home Care*, 514 S.W.3d at 579. The ordinance does not regulate the adult cultivation, possession, or use of marijuana; it merely establishes that the City will not devote its scarce resources to the investigation or prosecution of these sorts of offenses. We have not identified any statute that would specifically and explicitly proscribe the City from adopting an ordinance that limits the use of city resources to enforce marijuana laws. Thus, the bill should not be found to be expressly preempted.

"Implied preemption can occur in either of two ways—through 'conflict' preemption or through 'field' preemption. Conflict preemption occurs when a local ordinance conflicts with a specific state statute either because it 'prohibits what the statute permits' or because it 'permits what the statute prohibits.'" *Id.* The bill would not prohibit what Missouri statutes permit, nor permit what statutes prohibit because the bill does not purport to legalize marijuana—rather, it states that, as a matter of local policy, the City of St. Louis will not devote its scarce public safety resources to enforcing marijuana laws against otherwise law-abiding adults.

The next type of preemption is field preemption. "[F]ield preemption occurs when the General Assembly has created a state regulatory scheme that is so comprehensive that it reasonably can be inferred that the General Assembly intended to occupy the legislative field, leaving no room for local

supplementation." *Id.* It cannot be said that the General Assembly has completely occupied the field of how City resources are used to enforce laws about controlled substances.

In fact, the Missouri Constitution suggests that regulation of police is a uniquely local concern. Article I, section 3 of the Missouri Constitution specifies that the citizens of this State "have the inherent, sole, and exclusive right" to regulate their police forces. This includes the right to direct and limit the way in which the police conduct themselves and the right to prioritize the enforcement of certain criminal laws over the enforcement of others.

The City makes similar decisions every day, with police officers deciding when, how, and against whom to proceed with criminal charges or—more to the point—when not to proceed with criminal charges. Under Missouri law, law enforcement has "broad discretion to determine when, if, and how criminal laws are to be enforced." *State v. Honeycutt*, 96 S.W.3d 85, 89 (Mo. banc 2003); *see State v. Elliott*, 502 S.W.3d 59, 65 (Mo. App. 2016); *State v. Dozler*, 455 S.W.3d 471, 473 (Mo. App. 2015); *State v. Clinch*, 335 S.W.3d 579, 583 (Mo. App. 2011). It has long been appreciated that police decisions not to invoke the criminal process largely determine the full extent and application of criminal laws. *See* Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 Yale L.J. 543, 543 (1960). That discretionary decision of whether to pursue criminal charges against someone found to possess or distribute a controlled substance is a discretionary decision. It is a decision that is generally not reviewable by courts or subject to legal challenge. *Honeycutt*, 96 S.W.3d at 89 (explaining that law enforcement discretion "is seldom subject to judicial review"); Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 Seton Hall Cir. Rev. 1, 5 (2009) ("[N]either a victim nor another interested party can contest a prosecutor's decision not to pursue a case."); Austin Sarat & Conor Clarke, *Beyond Discretion: Prosecution, the Logic of Sovereignty, and the Limits of Law*, 33 Law & Soc. Inquiry 387, 390-91 (2008) (describing law enforcement discretion as "legally authorized, but not legally regulated").

Furthermore, if enacted, the board bill would be akin to the United States Department of Justice's position on marijuana prosecution. Similar to the board bill, the Department of Justice outlined how it will exercise its prosecutorial discretion regarding marijuana laws in a 2013 memorandum. Memorandum from James M. Cole, Deputy Att'y Gen. to all U.S. Att'ys, Guidance Regarding Marijuana Enforcement 1 (Aug. 29, 2013). The memorandum states that the Department would prosecute marijuana possession and distribution only when it related to eight federal priorities: preventing distribution of marijuana to minors; preventing revenue from the sale of marijuana to be used to fund criminal enterprises or gangs; preventing the diversion of marijuana to jurisdictions that do not permit its use; preventing marijuana from being used as a pretext for trafficking of other illegal drugs; preventing violence and the use of firearms in cultivation and distribution of marijuana; preventing drugged driving; preventing the growing of marijuana on public lands; and preventing marijuana possession or use on federal property. *Id.* at 2. Where these could be locally adopted, the bill adopts these federal priorities as local priorities. In fact, the bill specifies that City resources will be used to keep marijuana from minors, to prevent its use in front of minors, and to prevent its use or possession on land owned or operated by the state or federal governments. Moreover, even if the Cole Memorandum is withdrawn and replaced by the current administration, it does not undermine the fact that local governments have the discretion to set their own priorities for the enforcement of laws.

Even though this proposed Ordinance is supported by the Missouri Constitution, the St. Louis City Charter, and existing case law, it is possible that the state government, the federal government, or another third party might bring a legal challenge to the Ordinance's validity. We cannot assess how likely such a challenge might be, but we feel confident that courts would uphold the Ordinance in regard to the simple legal issues discussed above.

One final legal matter warrants consideration. The state government might attempt to pass a statute that would require local governments to enforce marijuana prohibitions. Such an effort would raise the question of whether the state has the authority to obligate cities to direct their local resources in a manner that the city has chosen not to do. If the state attempts to require the City to enforce marijuana prohibitions it is possible that the Hancock Amendment would require the state to pay for such enforcement efforts.