

IN THE DISTRICT COURT OF
LANCASTER COUNTY, NEBRASKA

<p>NEBRASKA FIREARMS OWNERS ASSOCIATION, a Nebraska non-profit corporation, TERRY FITZGERALD, DAVE KENDLE, RAYMOND BRETTHAUER, D.J. DAVIS,</p> <p><i>Plaintiffs,</i></p> <p>v.</p> <p>CITY OF LINCOLN, NEBRASKA, a municipal corporation, LEIRION GAYLOR BAIRD, in her official capacity as the Mayor of the City of Lincoln,</p> <p><i>Defendants.</i></p>	<p>CIVIL NO. CI 23-4254</p> <p>PLAINTIFFS' AMENDED MOTION FOR PRELIMINARY INJUNCTION</p>
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AMENDED MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Neb. Rev. Stat. §§ 25-1063 and 25-1064, Plaintiffs move this Court for a temporary injunction enjoining the Defendants from enforcing their executive order prohibiting firearms from public spaces (Executive order 97985) and the City of Lincoln’s ordinance prohibiting firearms in parks and park facilities, Lincoln Municipal Code § 12.08.200, until the Court can rule on the merits of the complaint.

Respectfully submitted this 22nd day of February, 2024.

/s/ Seth Morris

Seth Morris (NE Bar No. 25803)

seth@libertylawnebraska.com

LIBERTY LAW GROUP

1201 “O” Street, Suite 304

Lincoln, Nebraska 68508

(402) 865-0501

Jacob Huebert* (TX Bar No. 24129465)

jhuebert@libertyjusticecenter.org

Loren A. Seehase* (HI Bar No. 10414)

lseehase@libertyjusticecenter.org

Noelle Daniel* (KS Bar No.29461)

ndaniel@libertyjusticecenter.org

LIBERTY JUSTICE CENTER

440 N. Wells Street, Suite 200

Chicago, Illinois 60654

(312) 637-2280

Attorneys for Plaintiffs

** Admitted Pro Hac Vice*

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MEMORANDUM IN SUPPORT OF AMENDED MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

This motion for preliminary injunction seeks to protect Plaintiffs' right to bear arms free from government overreach. Plaintiffs Nebraska Firearms Owners Association ("NFOA"), Terry Fitzgerald, Dave Kendle, Raymond Bretthauer, and D.J. Davis seek a preliminary injunction to prevent Defendants City of Lincoln and Lincoln Mayor Leirion Gaylor Baird (collectively "City") from continuing their illegal and unconstitutional deprivation of Nebraskans' constitutional right to carry a weapon.

Earlier this year, the Nebraska State Legislature enacted LB 77, which established "constitutional carry" statewide, and nullified and prohibited any and all local regulations of firearms not expressly authorized by state law. The City, however, promptly defied LB 77 by failing to repeal its firearm regulations and issuing an executive order regulating firearms. An executive order issued by the Mayor bans all weapons from the City's properties, including all City parks, hiking trails, recreational facilities, parking lots, and approach sidewalks. A City ordinance, Lincoln Municipal Code § 12.08.200, additionally bans firearms from the City's parks and park facilities.

State law expressly preempts the Mayor’s order and the ordinance banning firearms in City parks and park facilities. Indeed, a recent Opinion of the Nebraska Attorney General analyzed the order in detail and concluded that LB 77 preempts it. In addition, the Mayor’s order violates the separation of powers. Plaintiffs therefore seek a preliminary injunction to protect their rights under state law.

FACTUAL BACKGROUND

I. Legislative Bill 77 repeals all permit requirements for concealed carry firearms.

Legislative Bill 77 (“LB 77”)—which the Governor signed into law on April 25, 2023, and which became effective on September 1, 2023—is comprehensive legislation that removes obstacles to the right to keep and bear arms and establishes uniformity of firearm laws statewide.¹ The intent of this legislation was to (1) create uniformity of concealed carry laws across the state by eliminating political subdivisions’ powers to regulate firearms and (2) to remove the permit requirement for a concealed weapon. *Id.*; Neb. Rev. Stat. § 13-330. LB 77 elaborates that its purposes are:

to prohibit regulation of weapons by cities, villages, and counties; to provide for the carrying of a concealed handgun without a permit; to change provisions relating to other

¹ <https://nebraskalegislature.gov/FloorDocs/108/PDF/Slip/LB77.pdf>.

concealed weapons; to provide for requirements, limits, and offenses relating to carrying a concealed handgun; to provide an affirmative defense; to create the offense of carrying a firearm or destructive device during the commission of a dangerous misdemeanor; to change provisions of the concealed handgun permit act; to provide penalties; to change, provide, and eliminate definitions; to harmonize provisions; and to repeal the original sections.

Neb. LB 77 (2023).

LB 77 amended 20 statutes in 8 different chapters, including chapters regarding the powers given to political subdivisions, criminal laws, and personal property. *Id.*

The very first section LB 77 amended deprives local governments of any authority to regulate firearms not expressly authorized by state law:

- (1) The Legislature finds and declares that the regulation of the ownership, possession, storage, transportation, sale, and transfer of firearms and other weapons is a matter of statewide concern.
- (2) Notwithstanding the provisions of any home rule charter, counties, cities, and villages shall not have the power to:
 - a. Regulate the ownership, possession, storage, transportation, sale, or transfer of firearms or other weapons, except as expressly provided by state law; or
 - b. Require registration of firearms or other weapons.

- (3) Any county, city, or village ordinance, permit, or regulation in violation of subsection (2) of this section is declared to be null and void.

Id.; Neb. Rev. Stat. § 13-330. LB 77 repealed provisions of state law that had previously allowed local governments to punish and prevent the carrying of concealed weapons, Neb. Rev. Stat. § 14-102 (Metropolitan Class), § 15-255 (Primary Class), § 16-227 (First Class), § 17-556 (Second Class and Villages).

Before LB 77’s passage, the Concealed Handgun Permit Act contained a list of locations where carrying a concealed handgun was prohibited. That list included private property—that is, “a place or premises where the person, persons, entity, or entities in control of the property or employer in control of the property has prohibited permit holders from carrying concealed handguns into or onto the place or premises.” Neb. Rev. Stat. § 69-2441(1) (2022).

LB 77 moved this private property exception out of the enumerated list into its own subsection, and it moved the entire list out of the Concealed Handgun Permit Act (Chapter 69 “Personal Property”, Article 24 “Guns”) to the criminal statutes (Chapter 28 “Crimes and Punishments”, Article 12 “Offenses Against Public Health and Safety”). Now the private property exception states:

[A] person shall not carry a concealed handgun into or onto any place or premises where the person, persons, entity, or entities in control of the place or premises or employer in control of the place or premises has prohibited the carrying of concealed handguns into or onto the place or premises.

Neb. Rev. Stat. § 28-1202.01(2). The enumerated list of prohibited places remains largely the same and still prohibits the carrying of a concealed handgun into numerous government facilities, such as law enforcement offices, jails, courtrooms, polling places, local government meetings, and state legislative meetings. Neb. Rev. Stat. § 28-1202.01(3).

On April 25, 2023, the Governor of Nebraska signed LB 77 into law. The bill did not contain an effective date, which made its default effective date three months after the end of the legislative session.² The 2023 legislative session ended on June 1, 2023,³ so LB 77 took effect three months later, on September 1, 2023.

² https://nebraskalegislature.gov/feature/faq_process.php, last visited November 24, 2023.

³ <https://nebraskalegislature.gov/FloorDocs/Current/PDF/Journal/r1day88.pdf>, last visited November 24, 2023.

II. The Mayor issues an executive order banning weapons on City property.

On September 1, 2023, the Mayor of Lincoln issued executive order number 97962, titled “Weapons Policy” (“Weapons Ban”).⁴ The stated purpose of the order is to “prohibit[] the possession of weapons in all vehicles, buildings, and facilities owned, leased, controlled, or maintained by the City of Lincoln” *Id.* It states that “No individual shall possess or cause to be present a weapon in or on any City property or City vehicle. This prohibition applies regardless of whether an individual possesses a valid concealed carry permit or license issued by any jurisdiction.” *Id.* “Weapons” include firearms, stun guns, knives with blades longer than 3.5 inches, explosives, devices powered by spring, compressed air or gas, “or any other instrument the use of which is intended or likely to cause death or serious bodily injury.” *Id.* The exceptions are limited to weapons out of view and locked in vehicles, law enforcement, security personnel, government officials with approval to carry weapons, and a person with permission from the Mayor. *Id.* “Any person who violates this

⁴ <https://media.socastsrcm.com/wordpress/wp-content/blogs.dir/2741/files/2023/09/lincoln-weapons-police-9-1-23-eo-97962.pdf>.

policy shall be considered to be trespassing and subject to criminal and civil penalties....” *Id.* The Weapons Ban was effective September 1, 2023. *Id.*

III. The Mayor amends the executive order banning weapons on City property.

On September 12, 2023, the Mayor issued executive order, number 97985 (“Amended Weapons Ban”), to “rescind[] and supersede[] the Weapons Policy adopted by Executive Order 97962 dated September 1, 2023.”⁵ The order added an asserted authority under state law, stating: “The City of Lincoln . . . has inherent property rights to regulate the property owned and/or controlled by it. Neb. Rev. Stat. § 28-1202.01 recognizes the City’s property rights to control weapons, and specifically allows the prohibition of carrying concealed handguns with a permit and/or license into or onto properties under its control.” *Id.* The Amended Weapons Ban added an exception to the prohibition of weapons on City property for “[a]ny person possessing a weapon in or on a shooting range or archery operated, supervised, or maintained by the City.” *Id.* It also clarified that the public sidewalks to which it applies include only approach sidewalks, not the public streets and

⁵ <https://perma.cc/RBL8-MKXB>, also attached as Exhibit 1.

sidewalks that run parallel to the City property. *Id.* The effective date of the Amended Weapons Ban was September 12, 2023. *Id.* The penalty for violation of the Amended Weapons Ban is criminal trespassing and civil penalties. *Id.*

IV. A City ordinance additionally bans weapons in City parks and park facilities.

In addition, a City ordinance, Lincoln Municipal Code § 12.08.200 (the “Park Weapons Ordinance”)⁶, bans firearms and other weapons in City parks and park facilities. It provides:

- a. It shall be unlawful for any person to possess or discharge, or cause to be discharged, within any park or park facility, any firearm, including, but not limited to, any pistol, revolver, shotgun, or rifle.
- b. It shall be unlawful for any person to possess or discharge, or cause to be discharged, within any park or park facility, any air rifle, bow and arrow, crossbow, toy pistol, toy gun, slingshot, or any other air, gas, manually operated or spring operated gun, weapon, apparatus, or instrument designed or intended to be used for the purpose of throwing or projecting missiles of any kind by any means whatsoever, whether the instrument is called by any name set forth above or by any other name.
- c. Notwithstanding the foregoing, the Director of the Parks and Recreation Department may designate areas in certain parks and park facilities to allow various

⁶ <https://online.encodeplus.com/regs/lincoln-ne/doc-viewer.aspx#secid-9456>, also attached as Exhibit 2.

organized programs to engage in the activities described herein.

- d. The provisions of subsections (a) and (b) of this section shall not apply to duly authorized Parks and Recreation Department employees or law enforcement officers acting in the course of their duty. (Ord. [19959](#) §2; December 16, 2013; prior Ord. [17365](#) §1; June 29, 1998: P.C. § [12.08.120](#); Ord. 12600 § 1; June 25, 1979: Ord. 10868 § 1; July 23, 1973: Ord. 3489 § 30-112, as amended by Ord. 5775; July 12, 1954).

Violation of the Park Weapons Ordinance is a misdemeanor punishable by imprisonment for up to six months, a fine of up to \$500.00, or both. Lincoln Code § 12.08.340.

IV. The Amended Weapons Ban and Park Weapons Ordinance injure Plaintiffs.

A. The Amended Weapons Ban and Park Weapons Ordinance injure Plaintiff NFOA's members.

The Amended Weapons Ban and the Park Weapons Ordinance (collectively, the "Bans") injure the members of Plaintiff NFOA and the individual Plaintiffs.

NFOA is a volunteer organization that advocates for gun safety and protection of the right to keep and bear arms in Nebraska, whose president and members advocated for the passage of LB 77. Exhibit 3, Declaration of Patricia Harrold ¶¶ 7, 12. NFOA's members carry a firearm for self-defense, and many carry them for self-defense in the

City of Lincoln's public parks. *Id.* ¶ 11. The Bans, however, prevent those members from carrying a firearm in the City's public parks and has thus injured them.

B. The Amended Weapons Ban and the Park Weapons Ordinance injure the individual Plaintiffs.

The Amended Weapons Ban injures Plaintiff Terry Fitzgerald. Mr. Fitzgerald carries a concealed firearm wherever he is legally allowed to do so. Exhibit 4, Declaration of Terry Fitzgerald ¶ 3. Before the Ban, he would regularly go through walks in his neighborhood and hikes through City parks, around lakes and trails, always carrying his concealed weapon. *Id.* ¶ 4. Now, however, he does not because he would be unable to defend himself. *Id.*

The Ban also injures Plaintiff Dave Kendle. Mr. Kendle carries a concealed firearm all of the time, wherever he is legally able to do so. Exhibit 5, Declaration of Dave Kendle ¶ 4. Before the Ban, he and his wife would take their grandchildren to City playgrounds and parks after school and on weekends. *Id.* ¶ 3. When doing so, he would always carry a concealed weapon because he considered it "critical for the safety of myself, my wife, and grandchildren." *Id.* Now, however,

because the Ban prohibits him from carrying his firearm in the parks, they no longer go there. *Id.*

The Ban also injures Plaintiff Raymond Bretthauer. Mr. Bretthauer carries a concealed firearm for self-defense more than 50 percent of the time. Exhibit 6, Declaration of Raymond Bretthauer ¶¶ 7, 9. He and his wife frequently use City walking trails, bike trails, and dog parks. *Id.* ¶ 6. Before the Ban, he would typically lawfully carry his concealed firearm when doing so. *Id.* Now, however, the Ban prohibits this, so he is not able to use the parks or other City property unless he does not carry a firearm. *Id.* ¶ 10. The Ban forces him to “either choose to participate in outdoor activities without the ability to protect myself in the event of being in danger, or . . . knowingly break the law,” which he is not willing to do. *Id.*

The Ban also injures Plaintiff D.J. Davis. He carries a concealed firearm wherever he is legally able to do so, taking care to obey the law. Exhibit 7, Declaration of D.J. Davis ¶ 5. Before the Ban, he visited City properties weekly, always carrying a concealed firearm. *Id.* ¶ 6. Now, however, he cannot do so without violating the law.

Before the Mayor imposed the Weapons Ban and Amended Weapons Ban, the individual Plaintiffs lawfully carried firearms in

City parks as authorized by the Concealed Handgun Permit Act, Neb. Rev. Stat. § 69-2441, which allowed concealed carry permit holders to “carry a handgun anywhere in Nebraska,” subject to exceptions enumerated in the statute. Since then, however, the City has asserted—in support of its motion to dismiss Plaintiffs’ original complaint in this case—that the Park Weapons Ordinance bars Plaintiffs from carrying concealed firearms in City parks, notwithstanding their permits. *See* Defs.’ Br. in Supp. of Mot. to Dismiss at 15. Thus, Plaintiffs are injured by the Park Weapons Ordinance as well because they cannot exercise their right to carry a firearm in city parks and park facilities without facing the threat of prosecution under the Ordinance.

LEGAL STANDARD

A plaintiff may seek a preliminary injunction against acts “in violation of the plaintiff’s rights respecting the subject of the action,” which “would produce great or irreparable injury to the plaintiff.” Neb. Rev. Stat. § 25-1063. A court should grant an injunction where “the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice.” *County of Cedar v. Thelen*, 305 Neb. 351, 357, 940 N.W.2d 521, 526 (Neb. 2020) (footnote omitted).

A Nebraska trial court has further stated that “a party seeking a temporary injunction must show (1) irreparable harm; (2) probability of success on the merits; (3) the balance of hardships; and, if relevant, (4) the balance of public interest favors the issuance of the injunction.” *Wren v. W. Corp.*, No. CI 18-7731, 2021 Neb. Trial Order LEXIS 1899, *6-7 (May 20, 2021).

“When an action is brought to enforce a statute or make effective a declared policy of the Legislature,” however, “the standards of public interest and not the requirements of private litigation measure the propriety of the need for injunctive relief.” *Hogelin v. City of Columbus*, 274 Neb. 453, 464, 741 N.W.2d 617 (2007).

ARGUMENT

I. Plaintiffs are entitled to temporary and permanent injunctive relief prohibiting the City’s enforcement of the Amended Weapons Ban and the Park Weapons Ordinance.

Plaintiffs are entitled to a preliminary injunction against the Amended Weapons Ban and the Park Weapons Ordinance because the public interest favors enjoining City officials from enforcing an order that is contrary to state law.

Plaintiffs also satisfy the traditional preliminary-injunction factors. They are likely to succeed on the merits of their preemption claim

because the State has declared existing local firearms null and void, and has prohibited local governments from enacting *any* firearms regulations, except as expressly authorized by state law, and the Ban and the Park Weapons Ordinances are firearms regulations that are not authorized by state law. Plaintiffs are also likely to succeed on the merits of their separation-of-powers claim against the Amended Weapons Ban because the Mayor lacks authority to legislate on this or any other matter. Without an injunction, Plaintiffs will suffer irreparable harm—loss of their right to bear arms in public places. And the balance of hardships and the public interest favor protecting Plaintiffs’ rights against the City’s unlawful acts.

A. Plaintiffs are likely to succeed on the merits of their preemption and separation-of-powers claims.

1. Plaintiffs are likely to prevail on their preemption claim because LB 77 expressly preempts local firearms regulations.

a. State law expressly preempts the City’s Amended Weapons Ban and Park Weapons Ordinance.

Plaintiffs are likely to prevail on their preemption claim because LB 77 expressly preempts local firearm regulations, including the Amended Weapons Ban and the Park Weapons Ordinance.

Nebraska recognizes three types of preemption: (1) express preemption, (2) field preemption, and (3) conflict preemption.” *State v. Albarenga*, 313 Neb. 72, 84, 982 N.W.2d 799, 810 (Neb. 2022) (footnote omitted). “In all three cases, the touchstone of preemption analysis is legislative intent.” *Id.* (footnote omitted).

“State preemption arises with respect to municipal ordinances or township laws and flows from the principle that municipal legislation is invalid if it is repugnant to, or inconsistent with, state law.” *Id.*, 313 Neb. at 83, 982 N.W.2d at 810 (citing 5 Eugene McQuillin, *The Law of Municipal Corporations* § 15:19 (3d ed. 2022)). “Preemption of municipal ordinances by state law is based on the fundamental principle that municipal ordinances are inferior in status and subordinate to the laws of the state.” *Id.*, 313 Neb. at 83-84, 982 N.W.2d at 810 (citing *Malone v. City of Lincoln*, 294 Neb. 516, 883 N.W.2d 320 (2016)).

“Express preemption occurs when the Legislature has expressly declared in explicit statutory language its intent to preempt local laws.” *Butler County Dairy, L.L.C. v. Butler County*, 285 Neb. 408, 431, 827 N.W.2d 267, 287 (2013) (cleaned up). For a local law to be expressly preempted, the legislation should include “provisions

explicitly stating in some manner that (1) the legislation preempts local laws related to the subject matter of the legislation, (2) a certain subject is governed solely by the legislation, or (3) political subdivisions are prohibited from enacting any local law conflicting with the legislation.” *Albarenga*, 313 Neb. at 85, 982 N.W.2d at 811.

Here, LB 77 declares regulation of firearms “a matter of statewide concern,” Neb. Rev. Stat. § 13-330(1), and expressly preempts Lincoln’s Amended Weapons Ban and Park Weapons Ordinance. LB 77 states that “counties, cities, and villages shall not have the power to [] regulate the ownership, possession, storage, transportation, sale, or transfer of firearms or other weapons, except as expressly provided by state law.” Neb. Rev. Stat. § 13-330(2). And it states that “[a]ny county, city, or village ordinance, permit, or regulation in violation of subsection (2) of this section is declared to be null and void.” Neb. Rev. Stat. § 13-330(3).

This meets all three *Albarenga* standards. It meets the first two because Section 13-330 states that the regulation of firearms and weapons is a matter of statewide concern and that any local laws regulating the same are null and void except as expressly authorized by state law, meeting prongs 1 and 2 of the *Albarenga* standard. Also,

because Section 13-330 revokes all power of political subdivisions to create laws regulating firearms and other weapons, and renders all such laws invalid, governments are prohibited from enacting any laws that conflict with this section, meeting prong 3 of the *Albarena* standard.

The Amended Weapons Ban and Park Weapons Ban conflict with state law because they regulate the possession of firearms and other weapons. The Amended Weapons Ban prohibits the “*possession of weapons*” Ex.1 (emphasis added). The Park Weapons Ordinance makes it “unlawful for any person” (with limited exceptions not relevant here) to “possess . . . any firearm, including but not limited to, any pistol, revolver, shotgun, or rifle” “within any park or park facility.” Lincoln Code § 12.08.200(a). It also bans various other weapons, including air guns, bows and arrows, slingshots, and other instruments “used for the purpose of throwing or projecting missiles of any kind.” *Id.* § 12.08.200(b). Therefore, the Amended Weapons Ban and Park Weapons Ordinance conflict with, and are preempted by, LB 77.

The Douglas County District Court recently considered an executive order issued by the Mayor of Omaha substantially similar to the Amended Weapons Ban, and entered a preliminary injunction against

it based on LB 77’s preemption. *See* Order on Plaintiffs’ Motion for Temporary Injunction, *Neb. Firearms Owners Ass’n v. City of Omaha*, No. CI 23-9905 (Douglas County Dist. Ct. Feb. 9, 2024) (“Omaha Order”), attached as Exhibit 8. The Omaha order prohibits firearms on city property, including “all City managed buildings/facilities/Parks/public spaces and surrounding areas such as sidewalks, driveways, and parking lots under the City’s control.” *Id.* at 1-2. The court concluded that the plaintiffs in that case were “likely to succeed” in their preemption challenge because the mayor’s order’s regulation of firearms was “repugnant to, or inconsistent with, state law”—i.e., LB 77. *Id.* at 9 (quoting *Albarenga*, 313 Neb. at 83, 982 N.W.2d at 810). This court should enjoin the Amended Weapons Ban and Park Weapons Ordinance for the same reason.

The Attorney General of Nebraska recently issued an opinion on whether LB 77 preempts the Amended Weapons Ban—specifically, its regulation of the “possession of firearms and other weapons in public spaces, *e.g.*, public parks, trails, and sidewalks”—and agreed with Plaintiffs that it does. Opinion of the Att’y Gen. of Nebraska No. 23-

009 (Dec. 15, 2023) (“Attorney General Opinion”).⁷ As the Attorney General explained, for a municipal action to be “null and void” under LB 77, it “must (1) regulate, (2) cover ‘the ownership, possession, transportation, sale, or transfer of firearms or other weapons,’ and (3) not be grounded in some express authority provided elsewhere in state law.” *Id.* at 4 (quoting Neb. Rev. Stat. § 13-330). The Attorney General concluded that the “second and third factors clearly apply” to the Amended Weapons Ban because it “concern[s] the possession of firearms or other weaponry” and cites no state law giving the City authority to “regulate the possession of weaponry” (because, as far as the Attorney General is aware, no such state law exists). *Id.* at 4-5. The Attorney General further concluded that the Amended Weapons Ban “regulate[s]” possession of weapons because (as discussed further below) its restriction on possession of firearms in “quintessentially public spaces” is not merely an exercise of “proprietary” authority but is “aimed at society as a whole” and the “interests of the public at

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<https://ago.nebraska.gov/sites/ago.nebraska.gov/files/docs/opinions/Opinion%20No.%2023-009%20-%20Opinion%20for%20Senator%20Tom%20Brewer.pdf>.

large” and thus constitutes an exercise of the City’s *regulatory* authority. *Id.* at 5-10.

b. The private property exception does not authorize political subdivisions’ exercise of regulatory authority over public spaces.

LB 77’s exception for rules on private property cannot save the Amended Weapons Ban or the Park Weapons Ordinance because they are exercises of the City’s regulatory authority, not its proprietary authority as the legal owner of public spaces. The Nebraska Attorney General’s opinion on LB 77’s preemption of the Amended Weapons Ban is instructive on this point.

It is true that municipalities do, “like all other persons or legal entities with a possessory interest in real property, enjoy fundamental property rights recognized at common law.” Attorney General Opinion at 5 (citing *Henry v. City of Lincoln*, 93 Neb. 331, 140 N.W. 664, 666 (1913)). And as a result of that authority, “there are places where, relying solely on its fundamental common law proprietary authority, a municipality can restrict (or even ban entirely) the possession of firearms or other weapons.” *Id.* at 6 (footnote omitted).

But “the proprietary authority of municipal corporations over quintessential public spaces, such as public parks, trails, and

sidewalks, is limited.” *Id.* at 7 (footnote omitted). Those “spaces are held in trust for public use and are presumptively open to and accessible by the public at large.” *Id.* (citing *Hague v. Comm. For Indus. Org.*, 307 U.S. 496, 515 (1939); *United States v. Kokinda*, 497 U.S. 720, 743-74 (1990) (Brennan, J., dissenting)). That means those spaces in general *cannot* be treated as though they are a municipality’s private property, even if the municipality is the legal owner:

“Wherever the title of streets and parks may rest . . . [the] use of [these] public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.” *Hague*, 307 U.S. at 515; *accord Abboud v. Lakeview, Inc.*, 237 Neb. 326, 336, 466 N.W.2d 442, 449 (1991) (“A park is for the benefit of and his held in trust by a city for the public.”).

Therefore, when a municipality enacts rules governing conduct on such public places, “they only possess regulatory powers”—not proprietary powers. *Am. Tel. & Tel. Co. v. Vill. of Arlington Heights*, 156 Ill.2d 399, 409, 620 N.E.2d 1040, 1044 (Ill. 1993). *See also Hague*, 307 U.S. at 515 (“The privilege of a citizen . . . to use streets and parks . . . may be *regulated* in the interest of all.”) (emphasis added); *Bldg. & Constr. Trades Council of Metro. Dist. v. Assoc. Builders & Contractors*

of Mass./R.I., Inc., 507 U.S. 218, 227 (1993); *City of Buffalo v. State Bd. of Equalization & Assessment*, 260 N.Y.S.2d 710, 713 (N.Y. Sup. Ct. 1965), *rev'd on other grounds*, 272 N.Y.S. 2d 168 (N.Y. App. Div. 1966) (“The distinction between [a city’s proprietary and regulatory] capacities is not semantical; nor are the differences insignificant.”).

Further, as the Attorney General has explained, a municipality acts in its regulatory capacity when it “engages in action that is ‘public in nature’ or ‘in furtherance of general law for the interest of the public at large.’” Attorney General Opinion at 5 (quoting *Gates v. City of Dallas*, 704 S.W.2d 737, 738 (Tex. 1986)). Exercises of regulatory power include actions “aimed at society as a whole” and actions “historically undertaken exclusively by the State as one of its unique civic responsibilities.” *Sebastian v. State*, 93 N.Y.2d 790, 795 (N.Y. 1999).

The Amended Weapons Ban is, on its face, “aimed at society as a whole” and the “interests of the public at large.” It states that it is “intended to protect and promote the health, safety, and welfare of *all* community residents” Ex. 1 (emphasis added). Thus, the Amended Weapons Ban is an exercise of the City’s regulatory authority, not its proprietary authority.

So is the Park Weapons Ordinance. By its terms, it is directed at regulating the conduct, and protecting the safety, of the community as a whole—i.e., anyone who would use the City’s parks. It does not just regulate the conduct of City employees but rather expressly *exempts* Parks and Recreation Department employees and law enforcement officers acting in the course of their duty. Lincoln Code § 12.08.200(d). And violation of the Ordinance is punishable by criminal penalties, including fines and imprisonment. *Id.* § 12.08.340.

In analyzing and enjoining Omaha’s executive order substantially similar to Lincoln’s Amended Weapons Ban, the Douglas County District Court rejected the City of Omaha’s argument that it was exercising its proprietary authority, noting that Omaha’s order “appears to be an action taken for the public welfare pursuant to governmental or police power,” was to “be enforced by a law enforcement agency,” could “carry a criminal penalty,” and was enacted “to make citizens feels safe.” Omaha Order (Exhibit 8) at 11-12. For the same reasons, the City of Lincoln cannot invoke its proprietary authority to save the Amended Weapons Ban and Park Weapons Ordinance in this case.

Moreover, interpreting the private property exception to apply to political subdivisions would conflict with the rest of LB 77. Rules of statutory interpretation require that a law cannot be interpreted to be an absurd result.⁸ Section 28-1202.01(2) should be read *in pari materia* with the rest of the Constitutional Carry bill to have a consistent interpretation. LB 77 revoked all power given to political subdivisions to regulate firearms and other weapons. Neb. Rev. Stat. § 13-330. LB 77 also repealed the power to punish and prevent the carrying of concealed weapons in every sub-chapter that grants powers to the various sized political subdivisions.⁹ Further, the Legislature

⁸ Courts should “reconcile different provisions of the statute[] so they are consistent, harmonious, and sensible.” *Rodgers v. Nebraska State Fair*, 288 Neb. 92, 101, 846 N.W.2d 195, 202 (Neb. 2014) (citation omitted). “Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme, giving effect to every provision.” *State v. Yzeta*, 313 Neb. 202, 209, 983 N.W.2d 124, 130 (Neb. 2023) (citation omitted). “Components of a series or collection of statutes pertaining to a certain subject matter are *in pari materia* and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.” *Heist v. Neb. Dep’t of Corr. Servs.*, 312 Neb. 480, 492, 979 N.W.2d 772, 782 (Neb. 2022) (citation omitted).

⁹ LB 77 revoked that power of cities of metropolitan class, section 14-102; revoked the power of cities of a primary class to “prevent use of firearms” and “prohibit carrying of concealed weapons,” section 15-255; revoked the power of cities of a first class to “regulate, prevent, and

specifically prohibited concealed handguns from *specific* government buildings—showing that it contemplated and determined the municipal properties on which the right to bear arms should be restricted.¹⁰ *See* Neb. Rev. Stat. § 28-1202.01(3). Reading all of these provisions together, it is clear that the Legislature did not want any political subdivisions to regulate, punish, or prevent *any* aspect of firearms: the use, carrying, ownership, possession, storage, sale, transportation, or transfer.

As the Attorney General has explained (Attorney General Opinion at 9 n.5), this means that the Amended Weapons Ban would be preempted *even if* it were an exercise of proprietary authority. “A governmental authority cannot evade an express restriction on its regulatory authority through the exercise of its proprietary power.” *Id.*

punish the carrying of concealed weapons,” section 16-227; and revoked the power of cities of a second class and villages to “regulate, prevent, and punish the carrying of concealed weapons,” section 17-556.

¹⁰ Those properties include a: (1) “police, sheriff, or Nebraska State Patrol station;” (2) “detention facility, prison, or jail;” (3) “courtroom or building which contains a courtroom;” (4) “polling place during a bona fide election;” (5) “meeting of the governing body of a county, public school district, municipality, or other political subdivision;” (6) “meeting of the Legislature or a committee of the Legislature;” and (7) “any other place or premises where handguns are prohibited by state law.” Neb. Rev. Stat. § 28-1202.01(3).

(citing *Wis. Dep't of Indus., Lab. & Hum. Rels. v. Gould Inc.*, 475 U.S. 282, 290-91 (1986)). “In exercising its proprietary power, a municipality may not act beyond the purposes of [a] statutory grant of power or contrary to express statutory or constitutional limitations.” *Burns v. City of Seattle*, 161 Wash. 2d 129, 154 (Wash. 2007). “When a municipality attempts to subvert a regulatory restriction in this way, even a legitimate exercise of proprietary power will be treated as if it were an exercise of regulatory authority, and any applicable limitations constraining an exercise of regulatory authority in that context will be respected.” Attorney General Opinion at 9 n.5 (citing *Gould*, 475 U.S. at 291; *Friends of the Eel River v. N. Coast R.R. Auth.*, 3 Cal. 5th 677, 736-37 (Cal. 2017)).

c. A Home Rule Charter does not protect the City against state law preemption.

Lincoln’s home rule charter does not allow the City to contravene the state constitution or state laws. The home rule charter provision of the Nebraska Constitution (Article XI, Section 2) provides: “Any city having a population of more than five thousand (5000) inhabitants may frame a charter for its own government, consistent with and subject to the constitution and laws of this state” “It is well

established that under a home rule charter, a city's power must be consistent with and subject to the constitution and laws of this state. . . ." *Home Builders Ass'n v. City of Lincoln*, 271 Neb. 353, 360, 711 N.W.2d 871, 877 (Neb. 2006)Ne. Nebraska appellate courts have not hesitated to strike down local laws, enacted under home rule charters, that conflict with state law.¹¹

Here, the City of Lincoln's charter does *not* provide the authority to regulate arms, firearms, guns, or any related weapons. Moreover, even if the Charter did provide the power to regulate firearms, LB 77 would still supersede that. The City of Lincoln charter does not and cannot authorize the City to regulate areas that the Legislature has specifically designated as state matters, nor does it provide the authority to regulate in contravention of state law. Therefore, the

¹¹ *Jacobberger v. Terry*, 211 Neb. 878, 320 N.W.2d 903 (Neb. 1982) (state statute requiring the division of metropolitan cities into districts for proportionate representation in elections was a matter of statewide concern and therefore took precedence over any conflicting home rule charters); *Midwest Employers Council, Inc. v. Omaha*, 177 Neb. 877, 131 N.W.2d 609 (Neb. 1964) (City of Omaha did not have power to legislate in the field of fair employment and civil rights because the power had not been expressly or impliedly granted to the city and they were matters of statewide concern, not purely local or municipal concern).

Defendants cannot use the City Charter to avoid LB 77's preemption of the Amended Weapons Ban and the Park Weapons Ordinance.

2. Plaintiffs are likely to succeed on the merits of their separation-of-powers claim against the Amended Weapons Ban because the Mayor lacks any authority to create law.

In addition, the Amended Weapons Ban is unconstitutional because the Mayor lacks any authority to legislate through an executive order.

Article IV, Section 12 of the Lincoln City Charter grants the Mayor the authority to: (1) exercise supervision over executive activities; (2) enforce the City charter and ordinances; (3) exercise the power of appointment and removal; (4) submit an annual budget to the City Council; (5) exercise supervision over City purchasing; (6) prepare an annual report; (7) promote commercial and industrial growth; and (8) “[e]xercise such other powers and perform such other duties as may be prescribed by this charter, ordinances and resolutions and applicable laws.” Conversely, “[a]ll legislative powers of the city shall be exclusively vested in the council and shall be exercised by it in the manner and subject to the limitations set forth in [the City’s] charter.” Lincoln Charter, Art. 4, § 8.

The Amended Weapons Ban may purport to simply adopt a policy, but it has the force and effect of law. Before the executive order, all Nebraskans with a concealed carry permit could lawfully carry a concealed weapon in city parks. Exhibits 3 – 7. Now they cannot. The order does not just apply to city workers; it applies to all Nebraskans who want to use Lincoln city parks, recreational facilities, and hiking trails, which includes the approach sidewalk and parking lot.

Violation of the Amended Weapons Ban is enforceable by the Lincoln Police Department, and violators will “be considered to be trespassing and subject to criminal and civil penalties, to include being banned from the premises.” Ex. 1. Because the Amended Weapons Ban affects the rights of all Nebraskans, and is backed by criminal penalties, it encroaches on the legislative authority in violation of the separation of powers.

On several occasions the Nebraska Supreme Court has deemed actions, rules, and laws unconstitutional because they violated the separation of powers. Nebraska case law recognizes the separation of powers can be violated by either encroaching on the powers of another

branch or by improperly delegating that power.¹² Here, the Mayor for the City of Lincoln has encroached on the legislative powers by creating a law under the guise of an executive order.

The Nebraska Constitution, article II, section 1 provides “The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted.” “The Nebraska Constitution thus prohibits one branch of government from encroaching on the duties and prerogatives of the others or from improperly delegating its own duties and prerogatives.” *Clemens v. Harvey*, 247 Neb. 77, 82, 525 N.W.2d 185, 189 (Neb. 1994) (citation omitted). Thus, for example, in *Clemens*, a state agency violated the separation of powers when it

¹² See *In re Neb. Cmty. Corrs. Council*, 274 Neb. 225, 738 N.W.2d 850 (Neb. 2007) (Legislature violated separation of powers clause, Neb. Const. art. II, § 1, when it mandated the court promulgate substantive rules for sentencing felony drug offenses); *State ex rel. Shepher v. Nebraska Equal Opportunity Comm’n*, 251 Neb. 517, 557 N.W.2d 684 (Neb. 1997) (State law violated separation of powers clause, Neb. Const. art. II, § 1, because it mandated that the executive branch follow the findings and employment recommendation of a legislative investigation into an executive agency’s termination in retaliation).

promulgated rules that eliminated a class of people from medical assistance, when the underlying legislation did not make any such distinction. *Id.*, 247 Neb. at 83, 525 N.W.2d at 189.

For these reasons, Plaintiffs are likely to succeed on the merits of their claim that the Amended Weapons Ban violates the constitutional separation of powers.

C. Plaintiffs require an injunction to prevent irreparable harm.

Plaintiffs require a preliminary injunction to prevent irreparable harm.

The Nebraska Supreme Court has recognized that plaintiffs have no adequate remedy at law where the government engages in repeated, continual unlawful wrongful actions—even if those actions only cause “severe personal inconvenience.” *Hogelin*, 274 Neb. at 465, 741 N.W.2d at 627. Here, Plaintiff NFOA’s members and the individual Plaintiffs are suffering irreparable harm—more than “personal inconvenience”—from the City’s enactment and enforcement of the Amended Weapons Ban and the Park Weapons Ordinance, which prevent them from carrying a firearm for self-defense on public property, as state law allows.

And although Plaintiffs have not premised their claims on constitutional protections of the right to keep and bear arms (in Article I, Section 1), the Amended Weapons Ban and Park Weapons Ordinance impinge on those constitutional rights. Indeed, the Attorney General has concluded that the Amended Weapons Ban infringes on the Second Amendment right to bear arms, which the U.S. Supreme Court has held “naturally encompasses [the] public carry of firearms,” as well as Article I, Section 1 of the Nebraska Constitution. Attorney General Opinion at 10-13 (quoting *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 142 S. Ct. 2111, 2134 (2022)).

“[T]he denial of a constitutional right is . . . an irreparable harm.” *Ng v. Bd. of Regents*, 64 F.4th 992, 998 (8th Cir. 2023). That includes the denial of Second Amendment rights in particular. *See Koons v. Reynolds*, 649 F.Supp.3d 14, 42 (D.N.J. 2023) (“Because the Second Amendment protects the right to bear arms for self-defense in public, state restrictions that . . . render that right illusory must constitute irreparable injury.”); *Christian v. Nigrelli*, 642 F.Supp.3d 393, 408-409 (W.D.N.Y. 2022) (ban on possessing firearms on private property that “forced [law-abiding citizens] to give up their rights to armed self-defense outside their homes, being left to the mercy of opportunistic,

lawless individuals who might prey on them” caused irreparable harm), *aff’d sub nom. Atonyuk v. Chiumento*, __ F.4th __, 2023 U.S. App. LEXIS 32492 *232-41 (Dec. 8, 2023); *Rhode v. Becerra*, 445 F.Supp.3d 902, 953 (S.D. Cal. 2020) (loss of Second Amendment rights “even for minimal times constitutes irreparable injury”), *vacated and remanded on other grounds sub nom. Rhode v. Bonta*, 2022 U.S. App. LEXIS 32554 (9th Cir. Nov. 17, 2022). And even apart from the deprivation of a constitutional right, the loss of the ability to defend one’s own life—and the potential loss of one’s own life—inherently constitutes an irreparable harm.

Thus, the Amended Weapons Ban and the Park Weapons Ordinance have caused Plaintiff NFOA’s members and the individual Plaintiffs irreparable harm—and will continue to do so unless and until this court enjoins the order.

D. The balance of harms and the public interest favor an injunction.

The balance of harms and the public interest both favor an injunction. The City can suffer no cognizable harm from an injunction against enforcement of an unlawful executive order and an unlawful ordinance. On the other hand, Plaintiffs will suffer great, irreparable

harm in the absence of an injunction: the loss of their ability to bear arms for self-defense on city properties they are entitled to use and enjoy. Further, the State has determined in LB 77 that protecting the right to bear arms is in the public interest. So is enforcement of a valid State law and preservation of the separation of powers.

CONCLUSION

LB 77 plainly, expressly preempts any and all local laws regulating firearms, including the Amended Weapons Ban and the Park Weapons Ordinance. And the Nebraska Constitution's separation of powers clause prohibits the Mayor from creating laws, such as the Amended Weapons Ban, through executive orders. Plaintiffs are therefore likely to succeed on their claims. And they are certain to suffer immeasurable, irreparable harm unless this Court enjoins Defendants from enforcing the order and ordinances. This Court therefore should grant this motion for preliminary injunction to prevent the City from enforcing the Amended Weapons Ban and the Park Weapons Ordinance.

Respectfully submitted this 22nd day of February, 2024.

/s/ Seth Morris

Seth Morris (NE Bar No. 25803)

seth@libertylawnebraska.com

LIBERTY LAW GROUP

1201 "O" Street, Suite 304

Lincoln, Nebraska 68508

(402) 865-0501

Jacob Huebert* (TX Bar No.

24129465)

jhuebert@libertyjusticecenter.org

Loren A. Seehase* (HI Bar No.

10414)

lseehase@libertyjusticecenter.org

Noelle Daniel* (KS Bar No.29461)

ndaniel@libertyjusticecenter.org

LIBERTY JUSTICE CENTER

440 N. Wells Street, Suite 200

Chicago, Illinois 60654

(312) 637-2280

Attorneys for Plaintiffs

** Admitted Pro Hac Vice*

CERTIFICATE OF SERVICE

I, Seth Morris, hereby certify that on February 22, 2024, I served Plaintiffs' Amended Motion for Preliminary Injunction and Memorandum in Support on Defendants by electronic mail at the following addresses:

Yohance L. Christie
YChristie@lincoln.ne.gov
Tyler K. Spahn
TSpahn@lincoln.ne.gov
Lily L. Ealey
LEaley@lincoln.ne.gov
City of Lincoln Law Department
555 S. 10th Street, Suite 300
Lincoln, Nebraska 68508

/s/ Seth Morris
Attorney for Plaintiffs

Certificate of Service

I hereby certify that on Friday, February 23, 2024 I provided a true and correct copy of the Motion to the following:

Gaylord Baird, Mayor Leirion, represented by Tyler Spahn (Bar Number: 25308) service method: Electronic Service to tspahn@lincoln.ne.gov

City of Lincoln, Nebraska represented by Tyler Spahn (Bar Number: 25308) service method: Electronic Service to tspahn@lincoln.ne.gov

Signature: /s/ Seth William Morris (Bar Number: 25803)