No. A-24-0503

IN THE NEBRASKA COURT OF APPEALS

NEBRASKA FIREARMS OWNERS ASSOCIATION, a Nebraska non-profit corporation, TERRY FITZGERALD, DAVE KENDLE, RAYMOND BRETTHAUER, D.J. DAVIS,

Appellants,

v.

CITY OF LINCOLN, NEBRASKA, a municipal corporation, LEIRION GAYLOR BAIRD, in her official capacity as the Mayor of the City of Lincoln,

Appellees.

APPEAL FROM THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

The Honorable Andrew R. Jacobsen, District Judge

BRIEF FOR APPELLANTS

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STATEMENT OF JURISDICTION

The district court entered an order on June 4, 2024 dismissing Plaintiffs-Appellants' claims based on its conclusion that it lacked subject-matter jurisdiction over them. (T183). Plaintiffs filed a notice of appeal on July 2, 2024 and deposited the docket fee on July 18, 2024. This Court has jurisdiction over Plaintiffs' appeal under Neb. Rev. Stat. § 24-1106(1).

STATEMENT OF THE CASE

I. Nature of the Case

This case is an appeal from an order of dismissal issued by the Lancaster County District Court against Plaintiffs-Appellants.

Plaintiffs' amended complaint alleges that state law preempts an Executive Order issued by Lincoln Mayor Leirion Gaylor Baird, No. 97985, which prohibits weapons on City-owned property, as well as Lincoln ordinances that, respectively, prohibit weapons in parks, require firearms sales to be reported to police, prohibit multiburst trigger activators, prohibit switchblade knives, and regulate the storage of firearms in vehicles.

Defendants moved for partial dismissal of the case (T167-173), and the district court then dismissed the case in its entirety based on its conclusiond that Plaintiffs lack standing and that the court therefore lacked subject-matter jurisdiction (T174-184).

Plaintiffs ask this Court to reverse that dismissal.

II. Issues Decided in the Court Below

The district court considered whether Plaintiffs have standing to bring preemption challenges to various restrictions on weapons enacted by the City of Lincoln. Those preemption claims challenge:

- Lincoln Executive Order No. 97985, which prohibits weapons on City property;

- Lincoln Municipal Code § 12.08.200, which prohibits weapons in City parks;
- Lincoln Municipal Code § 9.36.030, which requires that firearms sales be reported to the police;
- Lincoln Municipal Code § 9.36.035, which prohibits multiburst trigger activators;
- Lincoln Municipal Code § 9.36.040, which prohibits switchblade knives; and
- Lincoln Municipal Code § 9.36.110(1), which regulates the storage of firearms in vehicles.

(T177).

III. Resolution of the Issues Decided Below

The district court held that Plaintiffs lacked standing to challenge the prohibitions of the executive order and the ordinances because it concluded that they had not alleged that they faced actual or threatened enforcement of the order and ordinances. (T180-184.) It also held that their challenge to the ordinance regulating the storage of firearms and vehicles did not allege a sufficient injury to support standing. (T182-183).

IV. Scope of Review

Aside from findings of fact, "the trial court's ruling on subject matter jurisdiction is reviewed de novo, because it presents a question of law." *Pres. the Sandhills, LLC v. Cherry Cnty.*, 313 Neb. 590, 595 (2023). Standing concerns whether plaintiffs have "a personal stake in the outcome of the litigation that would warrant a court's exercise of its subject matter jurisdiction and remedial powers on that party's behalf." *Id.* The question of standing asks only whether the plaintiffs are the proper parties to assert the claims; it makes no determination on their merit. *Id.*

ASSIGNMENTS OF ERROR

1. The district court erred in concluding that Plaintiffs lack standing to challenge Lincoln Executive Order No. 97985, which prohibits them from carrying firearms on City property as they did before the order was issued.

2. The district court erred in concluding that Plaintiffs lack standing to challenge Lincoln Municipal Code § 12.08.200, which prohibits them from carrying firearms in City parks.

3. The district court erred in concluding that Plaintiffs lack standing to challenge Lincoln Municipal Code § 9.36.030, which requires that firearms sales be reported to police, and which has caused them to refrain from purchasing firearms in Lincoln.

4. The district court err in concluding the Plaintiffs lack standing to challenge Lincoln Municipal Code § 9.36.035, which prohibits multiburst trigger activators, even though at least one of the Plaintiffs would possess such an item but for the ban.

5. The district court erred in concluding that Plaintiffs lack standing to challenge Lincoln Municipal Code § 9.36.040, which prohibits switchblade knives, even though at least one of the Plaintiffs would possess such an item but for the ban.

6. The district court erred in concluding that Plaintiffs lack standing to challenge Lincoln Municipal Code § 9.36.110(1), which regulates the storage of firearms in vehicles, even though Plaintiffs store weapons in vehicles and allege that a conflicting state law preempts the local rule.

PROPOSITIONS OF LAW

The propositions of law are:

1. Individuals may bring a "pre-enforcement" challenge to a statute or ordinance that they allege to be unlawful where they allege "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by [the challenged law], and there exists a credible threat of prosecution thereuder." *Susan B. Anthony List v. Dreihaus*, 573 U.S. 149, 158 (2014); *see also MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-129 (2007); *Steffel v. Thompson*, 415 U.S. 452, 459 (1974).

2. To have standing to bring a "pre-enforcement" challenge to a statute or ordinance, plaintiffs need not subject themselves to arrest, prosecution, or other enforcement. *Susan B. Anthony List v. Dreihaus*, 573 U.S. 149, 158 (2014).

3. A plaintiff "suffers [a justiciable] injury when [he] must either make significant changes" to "obey [a] regulation" or "risk a criminal enforcement by disobeying the regulation"; the "threat is latent in the existence of the statute." *St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 487 (8th Cir. 2006).

4. Courts assume that governments will enforce the law "as long as the relevant statute is 'recent and not moribund,'" and assume a credible threat of enforcement absent "a disavowal by the government or another reason to conclude that no such intent existed." *Hedges v. Obama*, 724 F.3d 170, 197 (2d Cir. 2013) (quoting *Doe v. Bolton*, 410 U.S. 179, 188 (1973)).

5. A disavowal of enforcement cannot be casual or inferred; it will not suffice for officials to make a non-binding statement that they have "no present plan" to enforce it. *281 Care Comm. v. Arneson*, 638 F.3d 621, 628 (8th Cir. 2011).

STATEMENT OF FACTS

I. Legislative Bill 77 establishes statewide constitutional carry and abolishes local firearms regulations not expressly authorized by state law.

Legislative Bill 77 ("LB 77")—which the Governor of Nebraska 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 statewide. (E9, pp. 1-13). The stated 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. LB 77; Neb. Rev. Stat. § 13-330; (E9, p. 1). 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 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); (E9, p. 1).

LB 77 amended state law to, among other things, deprive local governments of any authority to enact or enforce any regulations of firearms and other weapons not expressly authorized by state law. It states:

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; (E9, p. 1). 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). (E9, pp. 1, 4-5).

II. Lincoln's mayor issues executive orders banning weapons on City property.

On the same day that LB 77 took effect, Lincoln Mayor Leirion Gaylor Baird issued Executive Order number 97962, entitled "Weapons Policy" ("Weapons Ban"). (E10, p. 1). The stated purpose of the order was to prohibit "the possession of weapons in all vehicles, buildings, and facilities owned, leased, controlled, or maintained by the City of Lincoln." (E10, pp. 1-2). The order states that "[n]o individual shall possess or cause to 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." (E10, p. 2). The Weapons Ban only exempted weapons in a locked vehicle and weapons possessed by law enforcement, security personnel, and individuals who have received approval from the Mayor. *Id.* The Weapons Ban subjected violators to prosecution for criminal trespassing and to civil liability. (E10, p. 3).

On September 12, 2023 the Mayor issued Executive Order No. 97985 (the "Amended Weapons Ban"), which rescinded and superseded the previous order. The Amended Weapons Ban added an assertion

that the Ban is permissible under Neb. Rev. Stat. § 28-1202.01 as an exercise of the City's "property rights." (E1, p. 3). It also added an exception to the prohibition of weapons on City property for City shooting and archery facilities. (E1, p. 4). The Amended Weapons Ban also stated that the public sidewalks to which it applies include only approach sidewalks, not any public street or public sidewalk that runs parallel to a public street. (E1, p. 3). The Amended Weapons Ban subjects violators to prosecution for criminal trespassing. (E1, p. 4).

III. The City failed to repeal its weapons ordinances.

Since the passage of LB 77, the City of Lincoln has not repealed any of its ordinances regulating weapons.

For example, it has not repealed Lincoln Code § 12.08.200 (the "Park Weapons Ordinance"), which prohibits the possession of "any firearm" and various other weapons in City parks and park facilities. 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.

The City also regulates firearms and other weapons in Lincoln code chapter 9.36 (the "Weapons Ordinances"). The Weapons Ordinances:

- Require than any person or entity selling a firearm "shall, on the same day of the sale of any firearm, except a shotgun or rifle of a type commonly used for hunting, report the sale to the Police Department," Lincoln Code § 9.36.030; (E11, p. 3);
- Make it unlawful unlawful "for any person to sell, give away, or furnish to another person any device meeting the definition of multiburst trigger activator and it shall be unlawful for any person to have in his or her possession, custody, or control any device defined as a multiburst trigger activator within the corporate city limits of the City of Lincoln." Lincoln Code § 9.36.035; (E11, p. 3);
- Make it unlawful to sell, give away, furnish to another person, or possess a switchblade knife, Lincoln Code § 9.36.040; (E11, pp. 3-4); and

- Make it unlawful "for any person to keep a firearm in a motor vehicle which is not occupied and/or is outside the immediate control of the person responsible for the vehicle unless the motor vehicles is locked and the firearm is not visible from outside the vehicle," Lincoln Code § 9.36.110(1); (E11, p. 6).

IV. Plaintiffs refrain from certain activities to avoid prosecution for violating the Amended Weapons Ban and the Park Weapons Ordinance.

To avoid prosecution for violating the Amended Weapons Ban and the Park Weapons ordinance, members of Plaintiff Nebraska Firearms Owners Association ("NFOA") and the individual Plaintiffs refrain from carrying firearms in City parks and on other City property.

Plaintiff 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. (E3, pp. 3-5). NFOA's members carry a firearm for self-defense, and many carry them for self-defense in the City of Lincoln's public parks—or would do so if the Amended Weapons Ban and Park Weapons Ordinance did not prohibit it. (E3, pp. 4-5).

Plaintiff Terry Fitzgerald is a Lincoln resident with a valid concealed carry permit, who carries his concealed firearm for self-defense 100% of the time. (E4, pp. 2-3.) Before the Mayor's orders, he would regularly go for walks through his neighborhood, and hike through City parks, around lakes, and on trails, always carrying his concealed weapon. (E4, p. 3). Since the executive order, he has stopped using the City parks and trails because firearms are prohibited. (E4, p. 3).

Plaintiff Dave Kendle, a resident of Seward County, likewise has a concealed carry permit and carries his concealed firearm 100% of the time. (E5, pp. 2-3). Until the Mayor's executive order, he would take his wife and grandchildren to the City of Lincoln parks and playgrounds, always carrying his concealed firearm. *Id.* Since the executive order, he has done so because firearms are prohibited. *Id.*

Plaintiff Raymond Bretthauer is a Lincoln resident with a concealed carry permit who carries his concealed firearm for defense of himself and his family more than half of the time. (E6, pp. 2-3). Before the executive order, he would usually carry his concealed firearm as he and his wife would regularly use the City parks for the walking paths, hiking trails, biking trails, and dog parks. *Id.* Since the executive order he has not done so because firearms are prohibited. *Id.*

Finally, Plaintiff D.J. Davis is a Lincoln resident with a valid concealed carry permit who carries his concealed firearm for self-defense and the defense of his family 100% of the time. (E7, pp. 2-3). He carries his firearm for self-protection and defense of his family. *Id.* Before the executive order he would visit the City parks and lakes, together with his wife and two children, about once a week, always carrying his concealed firearm. *Id.* Since the executive order, he and his family have not visited the parks and lakes because firearms are prohibited. *Id.*

V. The individual Plaintiffs refrain from certain conduct because it is prohibited by the Weapons Ordinances.

In addition, the Weapons Ordinances affect the individual Plaintiffs' activities.

All of the individual Plaintiffs have refrained from purchasing firearms in Lincoln because they do not wish to comply with the reporting requirement of Lincoln Municipal Code § 9.36.030 (E4, p. 3; E5, p. 3; E6, p. 3; E7, p. 4). If the reporting requirement were repealed, or its enforcement were enjoined, Plaintiffs Kendle, Bretthauer, and Davis would purchase firearms in Lincoln, and Plaintiff Fitzgerald likely would do so. (E4, p. 3; E5, p. 3; E6, pp. 3-4; E7, p. 4).

Plaintiff Kendle would possess a multiburst trigger activator in the future if the ordinance prohibiting it were repealed or its enforcement were enjoined. (E5, p.5.) Plaintiff Davis would purchase a switchblade knife if the ordinance prohibiting it were repealed or its enforcement were enjoned, and Plaintiff Kendle would likely own one. (E5, p. 5; E7, p. 4).

All of the individual Plaintiffs regularly store their firearm in their vehicle when visiting a site where carrying the firearm is not allowed, subjecting them to the requirements of Lincoln Municipal Code § 9.36.110(1). (E4, p. 3; E5, p. 3; E6, p. 3; E7, p. 3).

SUMMARY OF ARGUMENT

The district court erred in dismissing Plaintiffs' claims challenging the City of Lincoln's restrictions on weapons for lack of subject-matter jurisdiction based on Plaintiffs' supposed lack of standing.

Individuals have standing to challenge statutes or ordinances as unconstitutional without first subjecting themselves to arrest and prosecution for violating them. They need only allege an intent to engage in the prohibited activity and a credible threat of enforcement against them if they do engage in it. *See Susan B. Anthony List v. Dreihaus*, 573 U.S. 149, 158 (2014).

Plaintiffs have alleged exactly what they must to establish standing to bring each of their preemption claims.

They have established their standing to challenge the Amended Weapons Ban by alleging that they previously carried concealed firearms on City property, particularly City parks, but now refrain from doing so to avoid prosecution for violating the Ban. Contrary to the district court's analysis, it does not matter that Plaintiffs have not faced enforcement or identified others who have. Courts presume that a credible threat of enforcement exists unless the government disavows the law or otherwise shows that it will not be enforced, and the City has not done so here.

Plaintiffs have established their standing to challenge the Park Weapons Ban for the same reason: they avoid carrying firearms in parks to avoid prosecution. It does not matter that they might have carried firearms in the parks in the past when the ordinance was in effect; their standing turns on whether they face a credible threat of prosecution *now*, and the City has not established that they do not.

Plaintiffs have also established their standing to challenge the reporting requirement for firearms sales and the ordinances banning multiburst trigger activators and switchblade knives. Plaintiffs have alleged that they refrain from buying firearms in Lincoln because of the reporting requirement, and otherwise would buy firearms in Lincoln. At least one Plaintiff has alleged that he would possess a multiburst trigger activator, and at least one Plaintiff has alleged that he would possess a switchblade, but for the bans. Here again, that is enough; the lack of any past or threatened enforcement against Plaintiffs is irrelevant, because there is no reason to believe that the City would not enforce these laws if Plaintiffs were caught violating them.

Finally, Plaintiffs have established their standing to challenge Lincoln's ordinance regulating the storage of firearms in vehicles because they have alleged that they *do* store firearms in their vehicles and are thus subject to the inconsistent requirements of local and state law.

ARGUMENT

The district court erred in dismissing Plaintiffs' claims for lack of standing. Plaintiffs have standing to challenge the City of Lincoln's Amended Weapons Ban and Park Weapons Ordinance because they have refrained from carrying weapons on City property, particularly parks, to avoid prosecution. They have standing to challenge the City's reporting requirement for firearms sales because they have all refrained from purchasing firearms in Lincoln to avoid complying with it, but would purchase firearms in Lincoln but for the requirement. Similarly, Plaintiff Kendle has standing to challenge the City's ban on multiburst trigger activators, but for which he would possess the prohibited item. And Plaintiff Davis has standing to challenge the City's switchblade ban, but for which he would possess a switchblade knife.

I. Plaintiffs have standing to challenge the Amended Weapons Ban because it has caused them to refrain from carrying firearms on City property.

Plaintiffs all allege that they (or, in NFAO's case, its members) previously carried firearms on City property, particularly City parks, but have stopped doing so to avoid prosecution for violating the Amended Weapons Ban. That establishes their standing to challenge the Ban. Contrary to the district court's analysis, they need not show that the Ban has been enforced against them, or that they have been specifically threatened with enforcement.

Nebraska lacks case law addressing standing to bring a pre-enforcement challenge to a statute or ordinance alleged to be unlawful. The district court therefore relied on federal case law (T178)—but applied that case law incorrectly.

As the district court recognized, (T178), individuals may bring a "pre-enforcement" challenge to a statute or ordinance they allege to be unlawful where they allege "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by [the challenged law], and there exists a credible threat of prosecution thereunder." *Susan B. Anthony List v. Dreihaus*, 573 U.S. 149, 158 (2014). They need not subject themselves to actual arrest, prosecution, or other enforcement. *Id.*; *see also MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-129 (2007) ("Where threatened action by government is concerned, [courts] do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat."); *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) ("[I]t is not necessary that [an individual] first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional right.").

Also, the Eighth Circuit has held that a plaintiff "suffers [a justiciable] injury when [he] must either make significant changes" to "obey [a] regulation" or "risk a criminal enforcement by disobeying the

regulation." *St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 487 (8th Cir. 2006). The "threat is latent in the existence of the statute." *Id.*

Plaintiffs have thus alleged exactly what they must to establish their standing: that they want to carry firearms—and, before the Ban's enactment, did carry firearms—but have refrained from doing so to avoid prosecution. (E3, pp. 4-5; E4, p. 3; E5, pp. 2-3; E6, pp. 2-3; E7, pp. 2-3).

The district court acknowledged that Plaintiffs allege this (T179), but nonetheless concluded that they lack standing because they "do not allege any enforcement action against them when they carried their concealed firearms to City parks or trails," or "that others have been asked to leave and face[d] prosecution for carrying concealed firearms to City parks or trails." (T179).

But Plaintiffs had no need to allege enforcement against them "when they carried their concealed firearms to City parks or trails." Again, individuals do not have to subject themselves to arrest to have standing to challenge an ordinance's lawfulness. *See Dreihaus*, 573 U.S. at 158-59. The basis of the Plaintiffs' standing is that they have *not* carried their firearms to City parks or trails to *avoid* prosecution.

Nor does it matter that the Plaintiffs have not alleged actual enforcement of the Ban against others. Of course others could also be refraining from carrying firearms on City property to avoid prosecution, making enforcement unnecessary. And courts presume that governments will enforce the law "as long as the relevant statute is 'recent and not moribund,'" absent a "disavowal by the government or another reason to conclude that no such intent exist[s]." *Hedges v. Obama*, 724 F.3d 170, 197 (2d Cir. 2013) (quoting *Doe v. Bolton*, 410 U.S. 179, 188 (1973)). Indeed, the Supreme Court has found standing to challenge a "criminal penalty provision" even though it had "not yet been applied and may never be applied," in part because the state "ha[d] not disavowed any intention of invoking" it. *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 302 (1979). And a disavowal of enforcement cannot be casual or inferred; for example, the Eighth Circuit has held

that it will not suffice for officials to make a non-binding statement they have "no present plan" to enforce it. *281 Care Cmte. v. Arneson*, 638 F.3d 621, 628 (8th Cir. 2011).

Here, Defendants have not disavowed the Ban or presented any reason to believe that they would not enforce it against Plaintiffs. Indeed, it would make no sense for Defendants to disavow a Ban that the City only recently imposed and which it now defends.

It does not matter that Plaintiffs, as the district court said (T180), might face criminal prosecution only if they carried firearms onto City property and then refused to leave when asked. In that situation, they would still be criminally prosecuted for doing what they seek to do through this lawsuit: *remain* on City property while carrying a firearm.

Thus, Plaintiffs have alleged a credible threat of prosecution sufficient to give them standing to challenge the Amended Weapons Ban.

II. Plaintiffs have standing to challenge the Park Weapons Ordinance.

Plaintiffs have standing to challenge the Park Weapons Ordinance, which also prohibits them from carrying firearms in City parks, for the same reason that they have standing to challenge the Amended Weapons Ban: because it causes them to avoid carrying firearms in City parks to avoid prosecution for violating it.

The district court found no "credible threat of enforcement" of the Park Weapons Ordinance because Plaintiffs "do not allege that they have ever been charged with a misdemeanor for violating the ordinance," or that it has otherwise been enforced against them, even though they have carried firearms in the parks in the past.

That reasoning has three fatal flaws.

First, even if Plaintiffs violated the ordinance in the past, their lack of prosecution for any past violations proves nothing about whether they face a credible threat of prosecution for future violations. The

district court identified no reason to believe that the City would not have prosecuted Plaintiffs for violating the ordinance *if they had been caught violating it*, or that the City would not prosecute them in the future.

Second, there is no evidence that Plaintiffs engaged in "continuous violation of the ordinance over the years" that could have subjected them to enforcement, as the district court asserted. (T181). Plaintiffs have all alleged that they have long held concealed carry permits and that they carried firearms in City parks before the Amended Weapons Ban was issued. (E4, p. 3; E5, p. 3; E6, p. 3; E7, p. 3). Under the law as it stood before LB77, local governments were forbidden from regulating the concealed carry of firearms, and any local regulation purporting to do so was "null and void as against any permitholder possessing a valid permit under the act." Neb. Rev. Stat. § 18-1703 (2022). Thus, Plaintiffs' permits entitled them to carry their firearms in the parks notwithstanding the Parks Weapons Ordinance—an additional reason why the lack of any enforcement actions against them in the past proves nothing.

Third, the City has not disavowed any intention to enforce the Park Weapons Ordinance. To the contrary, the City has effectively conceded that a credible threat of prosecution *does* exist. In their initial complaint, Plaintiffs challenged the Amended Weapons Ban but did not challenge the Park Weapons Ordinance. (T15). The City then argued in a motion to dismiss that the challenge to the Amended Weapons Ban had to fail because it could not provide the Plaintiffs with relief: even if the Ban were struck down, Defendants argued, the Park Weapons Ordinance, which Plaintiffs' initial complaint did not challenge, would still prohibit Plaintiffs from carrying firearms in City parks. (T5, T15). Plaintiffs then mooted that argument by amending their complaint to challenge the Park Weapons Ordinance. (T63-64).

The City cannot have it both ways. If the Park Weapons Ordinance prevents a standalone challenge to the Amended Weapons Ban's restriction on carrying in City parks, that can only be because the Plaintiffs would *still face prosecution* for carrying firearms under the

Park Weapons Ordinance if the Ban were struck down. And if the Parks Weapons Ordinance is toothless, as the district court assumed, then it cannot be a reason to reject a challenge to the Amended Weapons Ban. The City cannot benefit from the assumption of the Park Weapons Ordinance's enforcement in one context and benefit from the assumption of its non-enforcement of the other.

Thus, Plaintiffs have established their standing to challenge the Park Weapons Ordinance.

III. Plaintiffs have standing to challenge the reporting requirement for firearms purchases and the bans on trigger crank activators and switchblade knives.

Plaintiffs also have standing to challenge Lincoln's ordinance that requires that firearm purchases (with some exceptions) be reported to the police, Lincoln Code § 9.36.030; (E11, p. 3); its ordinance that bans trigger crank activators, Lincoln Code § 9.36.035; (E11, p. 3); and its ordinance banning switchblade knives, Lincoln Code § 9.36.040; (E11, pp. 3-4).

Each of the Plaintiffs has alleged that he has refrained from purchasing firearms in Lincoln to avoid having to comply with this requirement and would purchase firearms in Lincoln but for the requirement. Plaintiff Kendle has alleged that he would possess a trigger crank activator for the ban. (E4, p. 3; E5, p. 3; E6, p. 3; E7, p. 4). And Plaintiff Davis has alleged that he would possess a switchblade knife but for the ban. (E7, p. 4).

That is enough: Plaintiffs need not conduct a firearms purchase without reporting it, possess a trigger crank activator, or possess a switchblade knife—let alone be prosecuted for doing so—to challenge the ordinances. Here again, the district court's analysis ignores the presumption that governments *will* enforce their criminal laws unless they present a sufficient reason to believe otherwise. And, here again, the City has presented nothing to suggest that it does not or would not enforce these restrictions.

Thus, Plaintiffs have established their standing to challenge all three of these ordinances.

IV. Plaintiffs have standing to challenge Lincoln's ordinance regulating the storage of firearms in motor vehicles.

Finally, Plaintiffs have established their standing to challenge Lincoln's ordinance regulating the storage of firearms in motor vehicles, Lincoln Code § 9.36.110(1). All of the Plaintiffs allege that they sometimes store a firearm in a vehicle and are thus subject to the ordinance—as well as the state law that regulates the storage of firearms in vehicles, (E4, p. 3; E5, p. 3; E6, p. 3; E7, p. 3).

Plaintiffs challenge this ordinance because its requirements are similar—but not identical—to those of state law, and under LB 77's preemption they should be entitled to rely on the state law without concern for running afoul of, and potentially facing criminal prosecution under, the local ordinance. (E11; E9).

The district court concluded Plaintiffs lack standing because their "alleged confusion about what actions they must take under the laws does not show any concrete harm to support an injury in fact." (T182). But cases the district court cited for that conclusion do not support it. All of those cases addressed confusion from language used in debt collection, which could not, by itself, constitute injury. None of them involved a conflict between the obligations of a state law and a local ordinance that it allegedly preempts. *See TransUnion LLC v. Ramirez*, 594 U.S. 413, 440 (2021) (no standing where there was no evidence that credit-agency mailings "confused" plaintiffs); *Ojogwu v. Rodenburg Law Firm*, 26 F.4th 457, 463 (8th Cir. 2022) (plaintiff's alleged anxiety from debt-collection letter was "not itself an injury"); *Garland v. Orlans*, 999 F.3d 432, 436 (6th Cir. 2021) (no injury from receipt of letters that "led to confusion and increased anxiety"); *Brunett v. Convergent Outsourcing, Inc.*, 982 F.3d 1067, 1068 (7th Cir. 2020) (no injury from confusion from debt collector's language).

An individual does suffer an injury from facing the inconsistent demands of a state law and a local law that the state law is supposed to preempt. The injury is not merely the feeling of "confusion" in the person's mind—the injury arises from the requirement to *comply* with a local law that, because of state law preemption, should not exist. This deprives the individual of the ability to look to state law alone to be aware of his legal obligations and the consequences of failing to meet them—a benefit that LB 77 was specifically intended to provide. Plaintiffs allege that compliance with local law is a cost that they should not have to bear, and the fact that they are forced to bear it—unless and until it is repealed or a court enjoins its enforcement—constitutes a redressable injury that supports their standing.

CONCLUSION

Plaintiffs respectfully ask the Court to reverse the district court's dismissal.

Respectfully submitted this 3rd day of October, 2024.

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface and word-count requirements of Neb. Ct. R. App. P. § 2-103 because it contains 6,051 words excluding this certificate. This brief was prepared using Microsoft Word 365.

/s/ Seth Morris
Seth Morris

CERTIFICATE OF SERVICE

I, Seth Morris, hereby certify that on October 3, 2024, I served Plaintiffs' Petition to Bypass on Defendants by electronic mail at the following addresses:

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/s/ Seth Morris
Attorney for Plaintiffs

Certificate of Service

I hereby certify that on Thursday, October 03, 2024 I provided a true and correct copy of this *Brief of Appt NE Firearms Owners Assoc* to the following:

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

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

Signature: /s/ Seth William Morris (25803)