

No. A-24-0503

IN THE NEBRASKA SUPREME COURT

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

Petitioner-Appellants,

v.

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

Respondent-Appellees.

**APPEAL FROM THE DISTRICT COURT OF
LANCASTER COUNTY, NEBRASKA**

The Honorable Andrew R. Jacobsen, District Judge

PETITION TO BYPASS

**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@ljc.org
LIBERTY JUSTICE CENTER
7500 Rialto Blvd., Suite 1-250
Austin, Texas 78735
(512) 481-4400**

Attorneys for Petitioner-Appellants, **Pro Hac Vice pending*

Petitioners-Appellants Nebraska Firearms Owners Association (“NFOA”), Terry Fitzgerald, Dave Kendle, Raymond Bretthauer, and D.J. Davis respectfully petition this Court under Nebraska Supreme Court Rule 2-102(B) to bypass review by the Court of Appeals in this case. Bypass is warranted under Nev. Rev. Stat. § 134-1106(2) because this case involves a question of first impression in this state and because the case is one of significant public interest.

BACKGROUND

Legislative Bill 77 (“LB 77”)—which the Governor of Nebraska signed into law on April 24, 2023, and which became effective on September 1, 2023—declares that local governments shall not have the power to “[r]egulate 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)(a). The statute further declares “[a]ny county, city, or village ordinance, permit, or regulation” that imposes such regulation in violation of the statute “to be null and void.” Neb. Rev. Stat. § 13-330(3).

Nonetheless, on the date LB 77 took effect, Lincoln Mayor Leirion Gaylor Baird issued an executive order, No. 97692, prohibiting “the possession of weapons in all vehicles, buildings, and facilities owned, leased, controlled, or maintained by the City of Lincoln.” (E10, p. 2-4) On September 12, 2023, the Mayor issued another executive order, No. 97985 (the “Amended Weapons Ban”), which rescinded the previous order but likewise banned weapons on City property and provided that violators would be subject to prosecution for criminal trespass. (E1, p. 61-63)

Also, notwithstanding LB 77, the City of Lincoln has not repealed its ordinances regulating firearms. These include, among others, a ban on weapons in public parks, Lincoln Code § 12.08.200; a requirement that firearms sales be reported to police, Lincoln Code § 9.36.030; bans on multiburst trigger activators and switchblade knives, Lincoln Code

§§ 9.36.036, 9.35.040; and an ordinance regulating the storage of firearms in vehicles, Lincoln Code § 9.36.110(1).

In December 2023, Petitioners brought suit against the City and the Mayor in the District Court of Lancaster County to challenge the Amended Weapons Ban and the ordinances on the ground that LB 77 preempts them. (T44-72.) They also sought a preliminary injunction against enforcement of the Amended Weapons Ban. (T73-166.) Petitioners alleged that they carry a concealed firearm, that they previously did so in Lincoln’s city parks, and that they no longer visit the parks to avoid prosecution for violating the Amended Weapons Ban. (T90-93; E3-7, p. 7-29.)

In an order entered June 4, 2024, the district court dismissed Petitioners’ claims, holding that Petitioners lacked standing to challenge the order and ordinances and that the court therefore lacked subject-matter jurisdiction over their claims. (T174-184) The district court concluded that the Petitioners lacked standing because they faced no actual or threatened enforcement of the Amended Weapons Ban and ordinances, and because their “confusion” over the conflicting state and local laws on vehicle firearm storage was not a sufficient injury. (T174-184.) This appeal is from that dismissal.

ARGUMENT

The Court should grant this petition to bypass the Court of Appeals because this case satisfies two factors warranting such a bypass set forth in Nebraska Revised Statutes § 24-1106(2). First, it presents an issue of first impression: namely, the criteria for standing to bring a pre-enforcement challenge to a statute or ordinance. Second, it involves an issue of significant public interest: citizens’ ability to challenge an executive order that prohibits them from carrying firearms in city parks and other city restrictions on weapons on the basis that state law preempts them.

I. This Court should grant this petition because this case presents an issue of first impression: the criteria for standing to bring a pre-enforcement challenge.

This case presents a question of first impression because Nebraska law does not address when plaintiffs have standing to bring a “pre-enforcement” challenge to a statute or ordinance. The district court correctly “[r]ecogniz[ed] that no Nebraska case law has addressed threatened prosecution and pre-enforcement standing.” (T178.) Thus, the district court stated that it took “guidance from federal jurisprudence.” (*Id.*)

It is well-established in federal courts that the chilling of a constitutional right constitutes an injury-in-fact for the purposes of pre-enforcement review. The Supreme Court has held that a plaintiff has standing to bring a pre-enforcement challenge when he shows “an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by statute, and there exists a credible threat of prosecution thereunder.” *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014), “[W]here threatened action by government is concerned, [federal courts] do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat.” *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-129 (2007). And federal 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 exists.” *Hedges v. Obama*, 724 F.3d 170, 197 (2d Cir. 2013).

The district court purported to apply the federal *Driehaus* standard but nonetheless dismissed Petitioners’ claims for lack of standing because they had not faced actual or threatened enforcement of the orders and ordinances they challenged—effectively adopting a different standard under which a credible threat of prosecution is *not* presumed and Plaintiffs must show that the law has been, or will be, enforced against them. (T179-183.)

Many other states have case law establishing the criteria for standing to bring a pre-enforcement challenge. Most have accepted and applied the federal standard for pre-enforcement challenges. *See, e.g., Hulse v. Indiana State Fair Bd.*, 94 N.E.3d 726, 731 (Ind. Ct. App. 2018); *Kligler v. Att'y Gen.*, 491 Mass. 38, 46, (2022); *Minn. Democratic-Farmer-Lab. Party by Martin v. Simon*, 970 N.W.2d 689, 697 (Minn. Ct. App. 2022); *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 280, (2019); *Prigmore v. City of Redding*, 211 Cal. App. 4th 1322, 1349 (2012); *McIver v. Kirscher*, No. CL-96-1504-AF, 1997 WL 225878, at *5 (Fla. Cir. Ct. Jan. 31, 1997); *State v. Sluyter*, 763 N.W.2d 575, 580 (Iowa 2009); *Alpert v. State*, 543 S.W.3d 589, 595 (Mo. 2018); *Sullivan v. New York State Joint Comm'n on Pub. Ethics*, 207 A.D.3d 117, 130 (2022) (N.Y. Ct. App.); *League of Women Voters of Kansas v. Schwab*, 539 P.3d 1022, 1024 (Kan. 2023); *Munza v. Ivey*, 334 So. 3d 211, 218-19 (Ala. 2021); *Jegley v. Picado*, 349 Ark. 600, 615 (2002); *Anonymous v. State*, No. CIV.A. 17453, 2000 WL 739252, at *5 (Del. Ch. June 1, 2000).

Nebraska should clarify its own law on this question, and this case presents an opportunity for this Court to do so.

II. The Court should grant this petition because this is a case of significant public interest.

The Court should grant this petition for the additional reason that the case is of significant public interest. Both Petitioners and the public would benefit from an expedited resolution of this appeal so that, if Petitioners prevail, their claims can be heard on the merits sooner.

In enacting LB 77, the state deemed “the regulation of the ownership, possession, storage, transportation, sale, and transfer of firearms and other weapons” to be “a matter of statewide concern.” Neb. Rev. Stat. § 18-1703. It therefore established statewide “constitutional carry” and uniformity of laws governing weapons. *See* Neb. Rev. Stat. § 13-330. Petitioners allege that enforcement of the

local firearms restrictions they challenge is contrary to that policy and the law. (T44-72; T73-166.)

Petitioners sought preliminary injunctive relief against the Amended Weapons Ban in the district court (T73-166) but were unable to obtain it because of the court's dismissal based on standing. Meanwhile, before the Douglas County District Court, Petitioner NFOA and other individuals have succeeded in obtaining a preliminary injunction against a substantially similar executive order issued by Omaha's mayor. (E8, p. 31-47.) That court concluded not only that the plaintiffs suffered sufficient injury to have standing but also that they would suffer irreparable harm from the continued enforcement of a (likely) preempted restriction on carrying firearms on city property. (E8, p. 46.) A prompt resolution of the standing question would give Petitioners an opportunity to seek and potentially obtain the same relief, which they have alleged that they urgently require to exercise their rights.

Indeed, prompt relief is also important because the Amended Weapons Ban implicates Petitioners' right to bear arms under the Second Amendment and Article 1, Section 1, of the Nebraska Constitution. Although Plaintiffs do not challenge the Amended Weapons Ban based on those constitutional protections—believing that their preemption claim will suffice—Nebraska's Attorney General has issued an opinion stating that the Amended Weapons Ban does violate Nebraskans' Second Amendment rights. (E14, p.73-85.) And the violation of Second Amendment rights for any length of time constitutes an irreparable harm. *See, e.g., Ng v. Bd. of Regents*, 64 F.4th 992, 998 (8th Cir. 2023) (“[T]he denial of a constitutional rights is . . . an irreparable harm.”); *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.”); *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).

Of course this Court need not and cannot, at this stage, address the merits or the propriety of preliminary injunctive relief. But regardless of who will ultimately prevail on those questions, the public indisputably would benefit from having them answered—and obtaining clarity on the extent of their rights—as soon as possible.

CONCLUSION

Petitioners respectfully request that this Court grant this Petition to Bypass and hear their case.

Respectfully submitted this 3rd day of October, 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

Attorney for Petitioner-Appellants

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface and word-count requirements of Neb. Ct. R. App. P. § 2-103 because it contains 1,797 words excluding this certificate. This brief was prepared using Microsoft Word 365.

/s/ Seth Morris

Seth Morris

Certificate of Service

I hereby certify that on Thursday, October 03, 2024 I provided a true and correct copy of this *Pet Appt to Bypass Court of Appeals* 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)