

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

NEBRASKA FIREARMS OWNERS)	Case No. CI 23-4254
ASSOCIATION, a Nebraska non-profit)	
corporation; TERRY FITZGERALD;)	
DAVE KENDLE; RAYMOND)	
BRETTTHAUER; and D.J. DAVIS,)	
)	
Plaintiffs,)	
)	
v.)	ORDER OF DISMISSAL
)	
CITY OF LINCOLN, NEBRASKA, a)	
municipal corporation; and LEIRION)	
GAYLOR BAIRD, in her official capacity)	
as the Mayor of the City of Lincoln,)	
)	
Defendants.)	

This case came before the Court on February 27, 2024, for a hearing on Defendants’ Partial Motion to Dismiss Plaintiffs’ Amended Complaint (Filing No. 11) and on Plaintiffs’ Amended Motion for Preliminary Injunction (Filing No. 10). Seth Morris and Jacob Huebert appeared on behalf of Plaintiffs. Yohance L. Christie, Tyler K. Spahn, and Lily L. Ealey appeared on behalf of Defendants. Exhibit 1 was received for the purpose of Filing No. 11. Exhibits 1-14 were received for the purpose of Filing No. 10. The Court heard arguments of counsel and took the matters under advisement. Now being duly advised, the Court dismisses this case in its entirety for lack of subject matter jurisdiction.

BACKGROUND

This litigation is premised on Legislative Bill 77 (“L.B. 77”), which was passed by the Nebraska Legislature on April 19, 2023, and was approved by the Governor on April 25, 2023. L.B. 77 legalizes permitless concealed carry in Nebraska, subject to some limitations, and preempts regulation on the ownership, possession, storage, transportation, sale, transfer, or registration requirements of firearms or other weapons by political subdivisions unless expressly

authorized by state law. *See* Neb. Rev. Stat. §§ 13-330 and 28-1202.01 (Supp. 2023) (effective September 2, 2023). After L.B. 77 became effective, the Mayor of the City of Lincoln issued Executive Order No. 97985 (“Weapons Policy”), prohibiting the possession of weapons in all vehicles, buildings, and facilities owned, leased, controlled, or maintained by the City.

Plaintiffs in this case consist of Nebraska Firearms Owners Association (“NFOA”), a Nebraska non-profit corporation, and four individual residents of Nebraska: Terry Fitzgerald, Dave Kendle, Raymond Bretthauer, and D.J. Davis. Plaintiffs bring this case against Defendant City of Lincoln, Nebraska (“City”) and Defendant Leirion Gaylor Baird, in her official capacity as the Mayor of the City of Lincoln (“Mayor Gaylor Baird”).

On December 18, 2023, Plaintiffs filed their initial Complaint for Declaratory and Injunctive Relief, alleging the Weapons Policy and the City’s regulations on weapons in chapter 9.36 of Lincoln Municipal Code (“LMC”) were preempted by L.B. 77 and that the Weapons Policy violated the separation of powers under Neb. Const., art. II, § 1. Plaintiffs also filed a Motion for Preliminary Injunction (Filing No. 1), seeking to block enforcement of the Weapons Policy during the pendency of this litigation. In a pre-answer motion (Filing No. 8), Defendants moved to dismiss Plaintiffs’ Complaint under Neb. Ct. R. Pldg. § 6-1112(b)(1) & (6).

On February 22, 2024, Plaintiffs filed the operative Amended Complaint for Declaratory and Injunctive Relief (“Amended Complaint” or “Am. Compl.”), rendering Defendants’ motion to dismiss in Filing No. 8 moot. The Amended Complaint adds a challenge to LMC § 12.08.200 (“Park Weapons Ordinance”), which prohibits the possession of firearms and other weapons in City parks and park facilities. The Amended Complaint also narrows the challenged provisions of LMC chapter 9.36 to LMC §§ 9.36.030, 9.36.035, 9.36.040, and 9.36.110(1). All challenged provisions of LMC were adopted by the City before L.B. 77 and have not been repealed.

On February 22, 2024, Plaintiffs also filed the pending Amended Motion for Preliminary Injunction (Filing No. 10), seeking to block enforcement of both the Weapons Policy and LMC § 12.08.200 while this litigation is pending. The amended motion supersedes Filing No. 1.

On February 26, 2024, Defendants filed the pending, pre-answer Partial Motion to Dismiss Plaintiffs' Amended Complaint (Filing No. 11) under Neb. Ct. R. Pldg. § 6-1112(b)(1) & (6). Defendants move the Court to dismiss Plaintiffs' claims regarding the Weapons Policy, arguing that Plaintiffs do not have standing to bring a declaratory judgment action regarding the Weapons Policy and that Plaintiffs have failed to state a claim for declaratory judgment.

STANDARD OF REVIEW

“Standing is a jurisdictional component of a party’s case, and courts must address it as a threshold matter.” *Millard Gutter Co. v. Farm Bureau Prop. & Cas. Ins. Co.*, 312 Neb. 629, 640, 980 N.W.2d 437, 446 (2022) (citations omitted). A party invoking a court’s jurisdiction bears the burden of establishing the elements of standing. *Wisner v. Vandelay Invs.*, 300 Neb. 825, 837, 916 N.W.2d 698, 712 (2018) (citation omitted). A defect in standing is a defect in subject matter jurisdiction. *Jacobs Eng’g Grp. Inc. v. ConAgra Foods, Inc.*, 301 Neb. 38, 54, 917 N.W.2d 435, 451 (2018) (citation omitted). Lack of standing may be raised at any time by any party or by the court sua sponte. *Id.* A challenge to standing is treated as a motion to dismiss for lack of subject matter jurisdiction brought under Neb. Ct. R. Pldg. § 6-1112(b)(1). *Id.*

“When standing is challenged at the pleadings stage, before an evidentiary hearing and before any evidence outside of the pleadings is admitted, it is deemed a facial challenge.” *Millard Gutter Co.*, 312 Neb at 640, 980 N.W.2d at 447 (quotation omitted). “When considering a facial challenge to standing, the trial court will typically review only the pleadings to determine whether the plaintiff has alleged sufficient facts to establish standing.” *Id.* Materials that are not

physically attached to the pleadings but alleged in a complaint and whose authenticity no party questions are documents embraced by the pleadings, not evidence outside the pleadings. *Lindsay v. Fitt*, 293 Neb. 677, 682, 879 N.W.2d 385, 390 (2016) (citations omitted).

ANALYSIS

In Filing No. 11, Defendants move the Court to partially dismiss Plaintiffs' declaratory and injunctive action regarding the Weapons Policy for, inter alia, lack of standing. Defendants offer a copy of the Weapons Policy as Exhibit 1 to support their motion. The Weapons Policy was referenced and challenged by the Amended Complaint. No party questions the authenticity of Exhibit 1. Therefore, Exhibit 1 is a document embraced by the pleadings. The Court considers Defendants' standing challenge regarding the Weapons Policy to be a facial one. In addition, the Court, on its own motion, examines Plaintiffs' standing to challenge LMC §§ 9.36.030, 9.36.035, 9.36.040, 9.36.110(1), and 12.08.200 on the pleadings.

I. Standing Principles

The Court first sets out the general common-law standing jurisprudence in Nebraska. Only a party who has standing may invoke the jurisdiction of a court. *Pres. the Sandhills, LLC v. Cherry County*, 313 Neb. 590, 596, 985 N.W.2d 599, 606 (2023) (citation omitted). "Standing refers to whether a party had, at the commencement of the litigation, 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.* "Standing relates to a court's power to address the issues presented and serves to identify those disputes which are appropriately through the judicial process." *Id.* "The focus of the standing inquiry is not on whether the claim the plaintiff advances has merit; it is on whether the plaintiff is the proper party to assert the claim." *Id.* at 596, 985 N.W.2d at 606-67.

Generally, a party has standing only if they have suffered or will suffer an injury in fact. *Id.* at 597, 985 N.W.2d at 607. “Such injury must be concrete in both a qualitative and temporal sense, and it must be distinct and palpable, as opposed to merely abstract, and the alleged harm from such injury must be actual or imminent, not conjectural or hypothetical.” *Id.* (quotations omitted). “[T]o show standing, it is generally insufficient for a plaintiff to have merely a general interest common to all members of the public.” *Id.* (quotations omitted).

The Nebraska Supreme Court has explicitly refused to hold that a threatened injury can satisfy standing requirements. See *In re Application A-18503, Water Div. 2-D*, 286 Neb. 611, 618, 838 N.W.2d 242, 248 (2013). However, Nebraska case law has not discussed whether or how a plaintiff can allege an injury in fact to establish standing to challenge a law before the law is enforced against them.

The United States Supreme Court acknowledges pre-enforcement standing and holds that an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging a law when an individual is subject to a threat of enforcement. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (citation omitted). Federal judicial precedent permits pre-enforcement review under certain circumstances that render the threatened enforcement sufficiently imminent. *Id.* at 159. Specifically, a plaintiff satisfies the injury-in-fact requirement where they allege “an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.” *Id.* (citation omitted). Admittedly, standing in Nebraska courts is different from Article III standing in federal courts. *Thompson v. Heineman*, 289 Neb. 798, 822, 857 N.W.2d 731, 751 (2015) (quotations omitted). Recognizing that no Nebraska case law has addressed threatened prosecution and pre-enforcement standing, the Court takes guidance from federal jurisprudence on this issue.

II. Standing to Challenge the Weapons Policy

The Weapons Policy issued by Mayor Gaylor Baird provides that subject to exceptions, no person “shall possess or cause to be present a weapon in or on any City property” regardless of whether a person possesses a valid concealed carry permit or license. (Ex. 1.) The Weapons Policy further provides that noncompliance with the policy will be considered trespassing and that any person violating the policy will be subject to criminal and civil penalties, including being banned from the premises. (*Id.*) “If any person in violation of this policy refuses to leave, they will be considered trespassing and law enforcement will be called.” (*Id.*)

All individual Plaintiffs allege that they are law-abiding citizens and routinely carried their concealed firearms with a valid concealed carry permit to the City parks and trails before the Weapons Policy. (*See Am. Compl.*) Plaintiffs assert that the recently issued Weapons Policy subjects violators to criminal prosecution for trespassing and that they can no longer enjoy the City parks, hiking trails, recreational facilities, and their freedom to move about the City in order to avoid criminal prosecution. (*Am. Compl.* ¶¶ 33, 43-44.)

For Plaintiffs to allege standing to challenge the Weapons Policy, they must allege that they have suffered or will suffer an injury in fact because of the Weapons Policy. *See Pres. the Sandhills, LLC, supra.* Plaintiffs allege that because of the Weapons Policy, they have to refrain from visiting City parks and trails that they frequented in the past to avoid criminal prosecution. (*Am. Compl.* ¶ 43.) However, mere allegations that Plaintiffs visited the parks and trails in the past but no longer do so are not sufficient to show an injury in fact. Plaintiffs do not allege any enforcement action against them when they carried their concealed firearms to City parks or trails. Nor do they allege that others have been asked to leave and face prosecution for carrying concealed firearms to City parks or trails. With the Weapons Policy in place, if Plaintiffs carry a

concealed firearm to a City park, the City might ask them to leave the premises if it becomes aware of the presence of a concealed weapon. If Plaintiffs refuse to leave upon request and if the City further decides to involve law enforcement, Plaintiffs might be charged with criminal trespassing. The Amended Complaint contains no allegation of actual enforcement or credible threat of prosecution against Plaintiffs under the Weapons Policy. See *Driehaus, supra*. The injury alleged by Plaintiffs is conjectural, hypothetical, not sufficiently imminent, not concrete in a temporal sense, and therefore insufficient to show an injury in fact. See *Pres. the Sandhills, LLC, supra*. Under Nebraska's standing jurisprudence and the guidance of federal cases on pre-enforcement standing, this Court cannot conclude that Plaintiffs have alleged sufficient facts to demonstrate their standing to challenge the Weapons Policy. Therefore, Plaintiffs' claims as to the Weapons Policy must be dismissed for lack of standing.

III. Standing to Challenge LMC § 12.08.200 (the Park Weapons Ordinance)

LMC § 12.08.200 was adopted long before the passage of L.B. 77, and Plaintiffs assert that the City has failed to repeal it. Plaintiffs request a judgment declaring that the Park Weapons Ordinance is preempted by L.B. 77, as codified in Neb. Rev. Stat. § 13-330, and a permanent injunction prohibiting Defendants from enforcing the Park Weapons Ordinance.

LMC § 12.08.200 prohibits the possession of firearms and various other weapons in City parks and park facilities, and a violation thereof is a misdemeanor. (Am. Compl. ¶¶ 35-36.) Plaintiffs are gun owners who routinely possessed their concealed firearms in City parks for years despite LMC § 12.08.200. Plaintiffs do not allege they have ever been charged with a misdemeanor for violating the ordinance. There is no allegation of any actual enforcement of the challenged ordinance against Plaintiffs. Nor is there any factual allegation to support a credible threat of enforcement of the ordinance against Plaintiffs. To the contrary, the factual allegations

in the Amended Complaint indicate that LMC § 12.08.200 has never been enforced against Plaintiffs, notwithstanding Plaintiffs' continuous violation of the ordinance over the years, which supports an inference that Plaintiffs lack a credible threat of enforcement. Therefore, the Court concludes that Plaintiffs have not alleged an injury in fact for them to have standing to challenge LMC § 12.08.200. Plaintiffs' claims regarding the Park Weapons Ordinance must be dismissed for lack of standing.

IV. Standing to Challenge LMC §§ 9.36.030, 9.36.035, 9.36.040, 9.36.110(1)

LMC §§ 9.36.030, 9.36.035, 9.36.040, and 9.36.110(1) were adopted before L.B. 77 and remain in the Lincoln Municipal Code. Plaintiffs request a judgment declaring these ordinances are preempted by L.B. 77 and a permanent injunction prohibiting Defendants from enforcing them.

LMC § 9.36.030 requires any person or entity selling a firearm to report the sale to the Police Department. (Am. Compl. ¶ 38.) All individual Plaintiffs allege that they do not purchase firearms in Lincoln because of this reporting requirement and would purchase firearms in Lincoln if this requirement were repealed or if its enforcement were enjoined. (Am. Compl. ¶¶ 12-15.) LMC § 9.36.035 makes it unlawful for any person to have in their possession, custody, or control any device defined as a multiburst trigger activator within the corporate city limits of the City of Lincoln. (Am. Compl. ¶ 39.) LMC § 9.36.040 makes it unlawful for any person to have any switch-blade knife in their possession, custody, or control. (Am. Compl. ¶ 40.) Plaintiffs allege they are interested in owning a multiburst trigger and/or a switch-blade knife and that they would purchase those items but for the challenged ordinances. (Am. Compl. ¶¶ 51-52.) Plaintiffs do not allege actual enforcement against them under the challenged ordinances. Nor do they allege the challenged ordinances were enforced in the past and are still enforced. Plaintiffs

merely allege they would do certain things but for the prohibition or barrier imposed by the challenged ordinances. However, a mere intention to engage in a proscribed act is insufficient to satisfy the pre-enforcement standing requirements. *Driehaus, supra*. Plaintiffs' desired conduct is arguably affected with a constitutional interest and is proscribed by the challenged ordinances, but Plaintiffs have failed to allege any facts to show they face a credible threat of prosecution. Absent actual enforcement and without alleging the threatened enforcement is sufficiently imminent, Plaintiffs' alleged injury is neither concrete nor particularized, neither actual nor imminent, and therefore insufficient to demonstrate standing. Therefore, Plaintiffs' claims as to LMC §§ 9.36.030, 9.36.035, 9.36.040 must be dismissed.

LMC § 9.36.110(1) makes 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 vehicle is locked and the firearm is not visible from outside the vehicle. (Am. Compl. ¶ 41.) Plaintiffs regularly store their firearms in vehicles. (Am. Compl. ¶ 53.) There is no allegation that LMC § 9.36.110(1) has ever been enforced against them. Instead, Plaintiffs allege that the unattended vehicle storage requirements under this ordinance are similar but not identical to those provided by Nebraska state law, which creates confusion, and that they would have just one set of laws, with clear expectations, to adhere to but for this challenged ordinance. (Am. Compl. ¶ 53.) However, Plaintiffs' alleged confusion about what actions they must take under the laws does not show any concrete harm to support an injury in fact. This Court joins federal courts in concluding that the state of confusion is not itself an injury in fact to support standing. See *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2213 (2021); *Ojogwu v. Rodenburg Law Firm*, 26 F.4th 457, 463 (8th Cir. 2022); *Garland v. Orleans, PC*, 999 F.3d 432, 437 (6th Cir. 2021); *Brunett v. Convergent Outsourcing, Inc.*, 982 F.3d 1067, 1068 (7th Cir. 2020). Without

any factual allegation that Plaintiffs have suffered or will suffer an injury in fact due to this challenged ordinance, Plaintiffs are without standing to challenge an ordinance merely because they find it confusing. Therefore, Plaintiffs' claims as to LMC § 9.36.110(1) must be dismissed for lack of standing.

CONCLUSIONS

Without deciding whether the claims advanced by Plaintiffs have merit, because none of the Plaintiffs alleges sufficient facts to implicate an injury in fact under the challenged Weapons Policy or ordinances, the Court concludes that Plaintiffs lack standing to bring their claims in this Court. Defendants' Partial Motion to Dismiss Plaintiffs' Amended Complaint (Filing No. 11) is sustained. Plaintiffs' Amended Motion for Preliminary Injunction (Filing No. 10) is overruled. This case is dismissed in its entirety without prejudice.

IT IS SO ORDERED.

DATED this 4 day of June, 2024.

BY THE COURT:



Andrew R. Jacobsen
District Court Judge