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

REPLY BRIEF FOR APPELLANTS

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 Appellants, *_Pro Hac Vice pending_

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

City Ordinances

I. Appellants have standing to challenge the Amended Weapons Ban.

A. Appellants have standing based on the threat of prosecution.

Appellants have standing to challenge the Amended Weapons Ban (Lincoln Executive Order No. 97985) for the reason explained in their opening brief: they wish to carry firearms on city property, but the Ban prohibits them from doing so, forcing them to choose between obeying the Mayor's order and risking prosecution. *See* Appellants' Br. 17-19.

The City suggests that Appellants lack a sufficient injury to support standing because they "do not allege they have carried firearms onto City parks or trails, been asked to leave, refused, and cited for trespassing." Appellees' Br. 19. In the City's view, Appellants face no imminent threat because they could only face criminal prosecution if they carried firearms onto City property, City authorities asked them to leave, and they refused. *See id.* at 19-21.

But, as Appellants have explained in their opening brief, Appellants wish to carry firearms on City property *and remain there*, notwithstanding any requests to leave, without facing criminal prosecution. Appellants' Br. 19. The Ban—backed by a threat of prosecution for criminal trespass—prevents them from doing so.

Under the City's view, Appellants apparently would only have standing to bring a pre-enforcement challenge to the Ban in the moment between when they are asked to leave City property and when would be arrested for trespassing, which is impossible. A lawsuit brought before they violate the Ban and are asked to leave (now) is proper because it is the only way they can avoid the choice between forfeiting their asserted right and risking arrest. *See Susan B. Anthony List v. Dreihaus*, 573 U.S. 149, 158 (2014). Moreover, expulsion from City property would itself be an enforcement action that Plaintiffs may seek to avoid through a pre-enforcement challenge. *See id.* ("When an individual is subject to such a threat [of enforcement], an actual arrest,

prosecution, *or other enforcement action* is not a prerequisite to challenging the law.") (emphasis added).

The City's suggestion that the Nebraska Supreme Court has rejected a threat of prosecution as a basis for standing is incorrect. *See* Appellees' Br. 20. The primary case on which the City relies, *In Re Application A-18503*, 286 Neb. 611, 838 N.W.2d 242 (2013), did *not* consider a plaintiff's standing to challenge a law based on a threat of prosecution. Rather, the Court held that political subdivisions charged with managing ground water lacked standing to object to an application for an appropriation of river water based on "speculation" that the "application *might* be granted, which then *might* lead to a fully appropriated designation," which would require the plaintiffs to expend public funds. *Id.*, 286 Neb. at 617-18, 838 N.W.2d at 248. The Court simply applied the usual rule that, to be "concrete" and give rise to standing, an alleged injury must not be speculative—and, in doing so, the Court deemed federal case law on threatened prosecutions off-point. *See id.*, 286 Neb. at 618, 838 N.W.2d at 248. The decision does not conflict with federal case law on standing, which has held that the threat of prosecution for breaking a law—which was absent in the case the City relies on—*is* concrete and is *not* too speculative to support standing under the rigorous demands of Article III of the U.S. Constitution. *See Dreihaus*, 573 U.S. at 156-57 (reversing lower court rulings that threatened prosecution was "insufficiently concrete" and "speculative").

The other cases on which the City relies for this idea (Appellees' Br. 20) had nothing to do with threatened prosecutions for constitutionally protected activity, but instead simply presented situations in which plaintiffs sought to challenge government decisions from which they could show no harm to themselves. *See Pres. The Sandhills, LLC v. Cherry County*, 313 Neb. 590, 601-02, 985 N.W.2d 599, 609 (2023) ("[P]roperty owners do not show injury-in-fact standing just because they are concerned that approval of a project many miles from their property today might lead to the future approval of similar projects nearby."); *Cent. Neb. Pub. Power & Irrigation Dist. V. N. Platte NRD*,

280 Neb. 533, 544, 788 N.W.2d 252, 261 (2010) (availability of "marginally less" water, by itself, did not constitute a "particularized harm" to a party that owned and managed certain bodies of water).

Finally, the New Jersey federal district court case on which the City relies, *Siegel v. Platkin*, 635 F. Supp. 3d 136 (D.N.J. 2023), *supports* Plaintiffs' standing here. The court there rightly held that plaintiffs with concealed-carry licenses *did* have standing to seek an injunction against statutory provisions that prohibited them from carrying firearms in places they regularly went: public libraries, museums, bars and restaurants where alcohol is served, entertainment facilities, private property, vehicles, and certain "sensitive places." *Siegel*, 635 F. Supp. 3d at 148, 150. The court did hold that plaintiffs lacked standing to challenge other provisions restricting firearms in places where the plaintiffs did not allege that they would carry a firearm or did not allege that they regularly go. *Id.* at 148-49. But Plaintiffs here, by contrast, have alleged that they regularly would carry on City property—particularly parks and trails—but for the Ban. And, unlike New Jersey's statute, the Ban does not have discrete provisions regarding different types of property—it is a blanket ban on weapons on *all* City property with parks noted as one example.

For these reasons, Appellants do not seek an "advisory opinion" on the Ban, as Appellees assert (Appellees' Br. 21). Rather, they challenge an order that currently, specifically prohibits them from exercising a right protected by (at least) state law in places where they heretofore had done so, from which they can only obtain relief through an injunction. The Ban is causing them an injury is concrete, ongoing, and redressable, and they therefore have standing to challenge it.

B. The City's "proprietary authority" argument is irrelevant to standing.

The City argues that Appellants lack standing because the Amended Weapons Ban is a lawful exercise of the City's property rights permitted under LB 77. Appellees' Br. 22-23. But that is an argument about the merits—and 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." *Pres. the Sandhills, LLC*, 313 Neb. at 596, 985 N.W.2d at 606-07. Because the City's argument is framed entirely in terms of standing—and fails on as an argument on standing—it is not necessary or appropriate to address the merits, which the City has not raised independently here or in the district court, and which were not a basis of the district court's decision. Appellants note, however, that the Nebraska Attorney General has considered and rejected the City's argument, concluding that the Amended Weapons Ban is *not* an exercise of the City's proprietary authority that would allow it to avoid LB 77's preemption. (E14, pp.73-85.)

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

Appellants have standing to challenge the Park Weapons Ordinance, Lincoln Code § 12.08.200, for the same reasons that they have standing to challenge the Amended Weapons Ban: it prohibits them from, and subjects them to prosecution for, carrying weapons in City parks, which they have done in the past and would do again but for the ordinance.

It is irrelevant that Plaintiffs "do not allege they have ever been charged with a misdemeanor" for violating the ordinance or otherwise allege "actual enforcement" in the past. *See* Appellees' Br. 24. As Appellants have explained in their opening brief, the lack of any past prosecutions does not negate Appellants' standing because (1) a lack of past prosecutions is not conclusive evidence that the City does not or will not enforce the statute; (2) there is no evidence that Appellants engaged in violations that would have subjected them to prosecutions because, before the enactment of LB 77 and the Amended Weapons Ban, the law protected their concealed carry in City parks, notwithstanding the ordinance; and (3) the City has not disavowed any intention to enforce the ordinance. *See* Appellants' Br. 19-21. A

reference to these arguments in Appellants' opening brief suffices here because Appellees' brief does not even attempt to refute them.

III. Appellants have standing to challenge the other weapons ordinance provisions.

Appellants also have standing to challenge the City's ordinances requiring reporting of firearm purchases to the police and banning trigger crank activators and switchblade knives (Lincoln Code §§ 9.36.030, 9.36.035, 9.36.040) (E11, pp. 3-4). That is because, as explained in their opening brief, they have refrained from purchasing firearms in Lincoln to avoid the reporting requirement and have refrained from possessing trigger crank activators and switchblade knives to avoid prosecution. *See* Appellants' Br. 21-22. Appellees have presented nothing to refute Appellants' arguments on these points. *See* Appellees' Br. 26-27. As with the Park Weapons Ordinance, a lack of allegations of past enforcement against the Appellants is irrelevant.

Finally, Appellants have standing to challenge the City's ordinance regulating the storage of firearms in vehicles, Lincoln Code § 9.36.110(1) (E11, p.6). The City says that the "confusion" Appellants allege, arising from being subject to both state and city laws on storing weapons in vehicles, cannot give rise to standing. Appellees' Br. 27. But Appellants have anticipated and addressed that argument in their opening brief, and the City's brief does not contend with, let alone refute, Appellants' argument on this issue. *See* Appellants' Br. 22-23. In sum, the City's ordinance on storage on vehicles injures Appellants because they must comply with it when they store weapons in their vehicles—even though, Appellants allege, LB 77 entitles them to look to state law alone. *See id.*

IV. Appellants do not have "unclean hands."

Contrary to the City's argument, which the district court did not rely on in dismissing Appellants' claims, Appellants do not have

"unclean hands," and that doctrine cannot bar their claims. *See* Appellees' Br. 27-28.

According to the City, the Appellants' allegations that they carried firearms in City parks in the past is an admission of lawbreaking—that is, admission of violating the Park Weapons Ordinance. *Id.* at 28. But, as Appellants explained in their opening brief, before LB 77 was enacted, their concealed carry licenses entitled them to carry firearms in City parks notwithstanding any local prohibition. *See* Appellants' Br. 20. Thus, their carrying of firearms at that time was *lawful* and could not give them unclean hands.

Besides, that doctrine has no application in this context. The City has cited no authority for the proposition that citizens forfeit any right to challenge a law's validity once they have violated it. And the City's argument on this point contradicts the arguments elsewhere in its brief that Appellants lack standing because they have *not* violated the provisions they challenge. *See* Appellees' Br. 19, 26.

CONCLUSION

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

Respectfully submitted this 16th day of December, 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@ljc.org
LIBERTY JUSTICE CENTER
7500 Rialto Blvd., Suite 1-250
Austin, Texas 78735
(512) 481-4400

Attorneys for 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 2,171 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 December 16, 2024, I served the foregoing Reply Brief of Appellants by electronic mail to the following addresses:

Yohance L. Christie
YChristie@lincoln.ne.gov
Jocelyn W. Golden
JGolden@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 Monday, December 16, 2024 I provided a true and correct copy of this *Reply Brief* to the following:

City of Lincoln, Nebraska represented by Jocelyn Golden (23039) service method: Electronic Service to **jgolden@lincoln.ne.gov**
City of Lincoln, Nebraska represented by Lily Lorean Ealey (27210) service method: Electronic Service to **lealey@lincoln.ne.gov**
City of Lincoln, Nebraska represented by Tyler Kent Spahn (25308) service method: Electronic Service to **tspahn@lincoln.ne.gov**
City of Lincoln, Nebraska represented by Yohance Lateef Christie (24271) service method: Electronic Service to **ychristie@lincoln.ne.gov**

Mayor Leirion Gaylord Baird represented by Jocelyn Golden (23039) service method: Electronic Service to **jgolden@lincoln.ne.gov**
Mayor Leirion Gaylord Baird represented by Lily Lorean Ealey (27210) service method: Electronic Service to **lealey@lincoln.ne.gov**
Mayor Leirion Gaylord Baird represented by Tyler Kent Spahn (25308) service method: Electronic Service to **tspahn@lincoln.ne.gov**
Mayor Leirion Gaylord Baird represented by Yohance Lateef Christie (24271) service method: Electronic Service to **ychristie@lincoln.ne.gov**

Signature: /s/ Seth William Morris (25803)