

spaces (Executive order S-48-23), ordinance banning possession of gun parts (Ordinance 43579), and ordinance banning bump stocks and trigger cranks (Ordinance 43580) until the Court can rule on the merits of the complaint.

Respectfully submitted this 18th day of December, 2023.

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TABLE OF CONTENTS

TABLE OF CONTENTS2

TABLE OF AUTHORITIES4

INTRODUCTION7

FACTUAL BACKGROUND8

 I. Legislative Bill 77 repeals all permit requirements for concealed carry firearms.8

 II. The Mayor issues executive order banning firearms on City property.12

 III. The City Council bans gun parts.13

 IV. The City Council bans bump stocks.14

 V. The Firearms Order, the Gun Parts Ban, and the Bump Stock Ban injure Plaintiffs.15

 A. The Firearms Order, the Gun Parts Ban, and the Bump Stock Ban injure Plaintiff NFOA’s members.15

 B. The Firearms Order and the Gun Parts Ban injure Plaintiff Lonny Sund.16

 C. The Firearms Order and the Gun Parts Ban injure Plaintiff Justin Armsbury.17

 D. The Firearms Order and the Gun Parts Ban injure Plaintiff Michael O’Donnell.17

 E. The Firearms Order, the Gun Parts Ban, and the Bump Stock Ban injure Plaintiff Robert Robinson.18

 F. The Firearms Order, the Gun Parts Ban injure Plaintiff Alan Koziol.19

LEGAL STANDARD20

ARGUMENT21

 I. This Court should enjoin the City’s enforcement of the Firearms Order, the Gun Part Ban, and the Bump Stock Ban.21

 A. Plaintiffs are likely to succeed on the merits of their preemption and separation-of-powers claims.22

 1. Plaintiffs are likely to prevail on their preemption claim because LB 77 expressly preempts local firearms regulations. ..22

a. State law expressly preempts the City’s Firearms Order, Gun Parts Ban, and Bump Stock Ban.	22
b. The private property exception does not authorize political subdivisions’ exercise of regulatory authority over public spaces.....	26
c. A Home Rule Charter does not protect the City against state law preemption.	32
B. Plaintiffs require an injunction to prevent irreparable harm..	36
C. The balance of harms and the public interest favor an injunction.	39
CONCLUSION.....	39

TABLE OF AUTHORITIES

CASES

<i>Abboud v. Lakeview, Inc.</i> , 237 Neb. 326, 466 N.W.2d 442 (Neb. 1991)	17
<i>Am. Tel. & Tel. Co. v. Vill. of Arlington Heights</i> , 156 Ill.2d 399, 620 N.E.2d 1040 (Ill. 1993)	17
<i>Atonyuk v. Chiumento</i> , __ F.4th __, 2023 U.S. App. LEXIS 32492 *232-41 (Dec. 8, 2023)	25
<i>Bldg. & Constr. Trades Council of Metro. Dist. V. Assoc. Builders & Contractors of Mass./R.I., Inc.</i> , 507 U.S. 218 (1993)	17
<i>Burns v. City of Seattle</i> , 161 Wash. 2d 129 (Wash. 2007)	19
<i>Butler County Dairy, L.L.C. v. Butler County</i> , 285 Neb. 408, 827 N.W.2d 267 (Neb. 2013)	13
<i>Christian v. Nigrelli</i> , 642 F.Supp.3d 393 (W.D.N.Y. 2022)	24
<i>City of Buffalo v. State Bd. of Equalization & Assessment</i> , 260 N.Y.S.2d 710 (N.Y. Sup. Ct. 1965)	17
<i>Clemens v. Harvey</i> , 247 Neb. 77, 82, 525 N.W.2d 185 (Neb. 1994)	23
<i>County of Cedar v. Thelen</i> , 305 Neb. 351, 940 N.W.2d 521 (Neb. 2020)	11
<i>Friends of the Eel River v. N. Coast R.R. Auth.</i> , 3 Cal. 5th 677 (Cal. 2017)	20
<i>Gates v. City of Dallas</i> , 704 S.W.2d 737 (Tex. 1986)	17
<i>Hague v. Comm. For Indus. Org.</i> , 307 U.S. 496 (1939)	16, 17
<i>Heist v. Neb. Dep’t of Corr. Servs.</i> , 312 Neb. 480, 979 N.W.2d 772 (Neb. 2022)	18
<i>Henry v. City of Lincoln</i> , 93 Neb. 331, 140 N.W. 664 (Neb. 1913)	16
<i>Hogelin v. City of Columbus</i> , 274 Neb. 453, 741 N.W.2d 617 (Neb. 2007)	11, 23
<i>Home Builders Ass’n v. City of Lincoln</i> , 271 Neb. 353, 711 N.W.2d 871 (Neb. 2006)	20
<i>In re Neb. Cmty. Corrs. Council</i> , 274 Neb. 225, 738 N.W.2d 850 (Neb. 2007)	22
<i>Jacobberger v. Terry</i> , 211 Neb. 878, 320 N.W.2d 903 (Neb. 1982)	20
<i>Koons v. Reynolds</i> , 649 F.Supp.3d 14 (D.N.J. 2023)	24
<i>Malone v. City of Omaha</i> , 294 Neb. 516, 883 N.W.2d 320 (Neb. 2016)	13

<i>Midwest Employers Council, Inc. v. Omaha</i> , 177 Neb. 877, 131 N.W.2d 609 (Neb. 1964) -----	20
<i>N.Y. State Rifle & Pistol Ass’n v. Bruen</i> , 597 U.S. 1, 142 S. Ct. 2111 (2022)-----	24
<i>Ng v. Bd. of Regents</i> , 64 F.4th 992 (8th Cir. 2023) -----	24
<i>Rhode v. Becerra</i> , 445 F.Supp.3d 902 (S.D. Cal. 2020)-----	25
<i>Rhode v. Bonta</i> , 2022 U.S. App. LEXIS 32554 (9th Cir. Nov. 17, 2022) -----	25
<i>Rodgers v. Nebraska State Fair</i> , 288 Neb. 92, 846 N.W.2d 195 (Neb. 2014)-----	18
<i>Sebastian v. State</i> , 93 N.Y.2d 790 (N.Y. 1999)-----	17
<i>State ex rel. Shepher v. Nebraska Equal Opportunity Comm’n</i> , 251 Neb. 517, 557 N.W.2d 684 (Neb. 1997) -----	22
<i>State v. Albarenga</i> , 313 Neb. 72, 982 N.W.2d 799 (Neb. 2022) -----	13
<i>State v. Yzeta</i> , 313 Neb. 202, 983 N.W.2d 124 (Neb. 2023) -----	18
<i>United States v. Kokinda</i> , 497 U.S. 720 (1990) -----	16
<i>Wis. Dep’t of Indus., Lab. & Hum. Rels. v. Gould Inc.</i> , 475 U.S. 282 (1986)-----	19, 20
<i>Wren v. W. Corp.</i> , No. CI 18-7731, 2021 Neb. Trial Order LEXIS 1899 (May 20, 2021)-----	11

STATUTES

City of Omaha Ordinance No. 43508 -----	5
City of Omaha Ordinance No. 43510 -----	5
City of Omaha Ordinance No. 43579 -----	5, 6
City of Omaha Ordinance No. 43580 -----	6, 7
Neb. Rev. Stat. § 13-330 -----	2, 3, 15, 18
Neb. Rev. Stat. § 13-330(1)-----	13
Neb. Rev. Stat. § 13-330(2)-----	14
Neb. Rev. Stat. § 13-330(3)-----	14
Neb. Rev. Stat. § 14-102 -----	3, 18
Neb. Rev. Stat. § 15-255 -----	3, 18
Neb. Rev. Stat. § 16-227 -----	3, 19
Neb. Rev. Stat. § 17-556 -----	3, 19
Neb. Rev. Stat. § 25-1063-----	11
Neb. Rev. Stat. § 28-1202.01(2)-----	4, 18

Neb. Rev. Stat. § 28-1202.01(3)-----	4, 19
Neb. Rev. Stat. § 69-2441(1) (2022) -----	3
Omaha Municipal Code § 1-10-----	5, 6, 7
Omaha Municipal Code § 20-1-----	6, 7

OTHER AUTHORITIES

Legislative Bill 77-----	2, 3
Omaha City Charter Section 2.04 -----	21
Omaha City Charter Section 3.04 -----	21
Opinion of the Att’y Gen. of Nebraska No. 23-009 (Dec. 15, 2023) -----	passim

TREATISES

5 Eugene McQuillin, The Law of Municipal Corporations § 15:19 (3d ed. 2022)-----	13
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CONSTITUTIONAL PROVISIONS

Nebraska Constitution Article 1, Section 1-----	24
Nebraska Constitution Article II, Section 1 -----	22, 23
Nebraska Constitution Article XI, Section 2 -----	20

INTRODUCTION

This motion for preliminary injunction seeks to restore to Plaintiffs, and all Nebraskans, the right to bear arms free from government overreach. Plaintiffs Nebraska Firearms Owners Association (“NFOA”), Lonny Sund, Justin Armsbury, Michael O’Donnell, and Alan Koziol seek a preliminary injunction to prevent Defendants City of Omaha and the Omaha Mayor Jean L. Stothert (collectively the “City”) from continuing their illegal and unconstitutional deprivation of Nebraskans’ constitutional right to carry a weapon.

Earlier this year, the Nebraska Legislature enacted LB 77, which established “constitutional carry” statewide and nullified and prohibited any and all local regulations of firearms. After LB 77 took effect, the City immediately defied it by enacting new regulations of firearms. An executive order issued by the Mayor prohibits carrying a concealed firearm on all City parks, hiking trails, recreational facilities, including abutting sidewalks, driveways, and parking lots. And ordinances enacted by the City Council ban possessing firearm parts that lack a serial number, ghost gun kits, and accessory accelerators.

State law expressly preempts the order and ordinances, and the Mayor’s order additionally violates the separation of powers. Indeed, a recent Opinion of the Nebraska Attorney General analyzed the Firearms Order in detail and concluded that LB 77 preempts it. 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 executive order banning firearms on City property.

In response to LB 77’s nullification of all local firearms restrictions, the City of Omaha repealed its concealed carry laws on August 29, 2023, in Ordinance Nos. 43508⁴ and 43510⁵. The next day, however, the Mayor issued an Executive Order No. S-48-23, entitled “Prohibition of Firearms on City of Omaha Property”) (“Firearms Order”).⁶ It states:

1. **Firearms prohibited**: No person shall have in his or her possession any firearm on any City Property. City Property is defined as all City Managed buildings/facilities/Parks/public spaces and surrounding areas such as sidewalks, driveways, and parking lots under the City’s control. In determining whether something is City Property, it does not matter whether City owns or leases the property.

Firearms Order ¶ 1. The Order became effective September 2, 2023.

4

<https://mcclibraryfunctions.azurewebsites.us/api/ordinanceDownload/10945/1235099/pdf>.

5

<https://mcclibraryfunctions.azurewebsites.us/api/ordinanceDownload/10945/1235100/pdf>.

6

[https://hr.cityofomaha.org/images/stories/public_documents/executive_orders/Executive Order-Firearms on Cityof Omaha Property 8.31.23.pdf](https://hr.cityofomaha.org/images/stories/public_documents/executive_orders/Executive_Order-Firearms_on_Cityof_Omaha_Property_8.31.23.pdf), also attached as Exhibit 1.

The Order charges the Omaha Police Department with its enforcement. The penalty for a violation is a fine of up to \$500.00, up to six months in prison, or both. Omaha Municipal Code (“Omaha Code”) § 1-10 (imposing default penalties for violations of City law).

III. The City Council bans gun parts.

On October 31, 2023, the City restricted firearms further when the Omaha City Council passed Ordinance 43579 (“the “Gun Parts Ban”),⁷ which prohibits possession of unfinished firearm frames and firearm receivers, and the manufacturing or building of firearms from a ghost gun kit., “It shall be unlawful for a person who is not a licensed firearm importer or licensed manufacturer to knowingly possess an unfinished frame or receiver that does not contain a serial number placed by a licensed importer or licensed manufacturer.” *Id.* A “safe harbor” provision allows persons in possession of these banned gun parts to dispose of or destroy them before January 31, 2024, to avoid prosecution. *Id.* The Gun Parts Ban went into effect 15 days after passage, on November 15, 2023. The punishment for violating the Gun

⁷ <https://portal.laserfiche.com/Portal/DocView.aspx?id=213273&repo=r-898a06bf>, also attached as Exhibit 2.

Parts Ban is a fine of up to \$500, up to six months in prison, or both, under Omaha Code § 20-1, and § 1-10.

IV. The City Council bans bump stocks.

On November 14, 2023, the Omaha City Council passed yet another firearms restriction, Ordinance 43580 (the “Bump Stock Ban”),⁸ which prohibits the manufacturing, transfer, use, and possession of trigger activator devices. Specifically, “It shall be unlawful for any person to sell, manufacture, transfer, or possess a bump stock or trigger crank.” *Id.* The ordinance defines “bump stock” as “any manufactured device that allows a semi-automatic firearm to shoot more than one shot with a single pull of the trigger by harnessing the recoil energy of the semi-automatic firearm so that the firearm mimics the rate of fire of an automatic firearm.” *Id.* The ordinance defines “trigger crank” as “any manufactured device that, when installed in or attached to a semiautomatic firearm, repeatedly activates the trigger of the firearm through the use of a crank, a lever, or any other part that is turned in a circular motion so that the firearm mimics the rate of fire of an automatic firearm.” *Id.*

⁸ <https://portal.laserfiche.com/Portal/DocView.aspx?id=282110&repo=r-898a06bf>, also attached as Exhibit 3.

The Bump Stock Ban went into effect 15 days after passage, on November 29, 2023. The punishment violating the Bump Stock Ban is a fine of up to \$500 and/or up to six months in prison, under Omaha Code § 20-1, and § 1-10.

V. The Firearms Order, the Gun Parts Ban, and the Bump Stock Ban injure Plaintiffs.

A. The Firearms Order, the Gun Parts Ban, and the Bump Stock Ban injure Plaintiff NFOA's members.

The Firearms Order, the Gun Parts Ban, and the Bump Stock Ban injure the members of Plaintiff Nebraska Firearms Owners Association (“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 4, 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 Omaha's public parks. *Id.* ¶ 11. The Firearms Order, however, has prevented those members from carrying a firearm in the City's public parks, and has thus injured them.

Further, many NFOA members construct their own firearms from scratch or from parts, modify their firearms by adding or substituting parts, and possess accessory accelerators. *Id.* ¶ 10. Those NFOA members are injured by the Gun Parts Ban and the Bump Stock ban, which prevent them from creating their own firearms or possessing accessory accelerators.

B. The Firearms Order and the Gun Parts Ban injure Plaintiff Lonny Sund.

Plaintiff Lonny Sund is injured by the Firearms Order. Before the Firearms Order, Mr. Sund would visit City properties several times a month—for example, frequently using the walking trails a few blocks from his house, together with his wife. Exhibit 5, Declaration of Lonny Sund ¶ 5. When going for walks on City property, Mr. Sund would carry a concealed weapon. *Id.* Now, he visits the City parks less frequently because the Firearms Order prohibits him from carrying a concealed weapon there. *Id.*

Plaintiff Sund is also injured by the Gun Parts Ban. Before the Ban, he would purchase gun parts to assemble and create his own unique firearms. *Id.* ¶ 6. He would like to continue that hobby, but the Gun Parts Ban prevents him from doing so. *Id.*

C. The Firearms Order and the Gun Parts Ban injure Plaintiff Justin Armsbury.

Plaintiff Justin Armsbury is likewise injured by the Firearms Order. Before the Firearms Order, he carried his concealed firearm at all times and visited City properties a few times a week to use the hiking trails. Exhibit 6, Declaration of Justin Armsbury ¶¶ 4, 5. He and his wife would also go for walks around their neighborhood, including on sidewalks abutting City-owned green space. *Id.* ¶ 5. During these walks, Mr. Armsbury would carry a firearm. *Id.* ¶¶ 4-5. Now, however, he can no longer go on these hikes and walks because the Firearms Order prevents him from carrying his firearm. *Id.* ¶ 5. Also, Mr. Armsbury has coached little league baseball in the parks and had planned to do so again, but he will not now that he must forgo his right to bear arms. *Id.* ¶ 6.

Plaintiff Armsbury is also injured by the Gun Parts Ban. He has built firearms from parts or kits as a hobby but has halted plans to do so because of the Ban. *Id.* ¶ 8.

D. The Firearms Order and the Gun Parts Ban injure Plaintiff Michael O'Donnell.

Plaintiff Michael O'Donnell is also injured by the Firearms Order. Before the Firearms Order, Mr. O'Donnell carried a concealed firearm for self-defense more than 75 percent of the time, and he still carries a firearm for self-defense. Exhibit 7, Declaration of Michael O'Donnell ¶ 3. Before the Order, he and his family would regularly visit City parks, lakes, and trails. *Id.* ¶ 11. His inability to carry a concealed firearm in the parks has caused his family to adjust the types of activities they engage in there, the timing of their visits, and the trails they choose to explore. *Id.* ¶ 12. It also prevents him even from keeping his firearm stored in his vehicle in a City parking lot when he takes his children to sports practices and games. *Id.*

Plaintiff O'Donnell is also injured by the Gun Parts Ban. Before the Ban, he would regularly purchase firearms parts to upgrade and customize weapons. *Id.* ¶ 13. Now the Ban prevents him from doing this. *Id.*

E. The Firearms Order, the Gun Parts Ban, and the Bump Stock Ban injure Plaintiff Robert Robinson.

Plaintiff Robert Robinson is also injured by the Firearms Order. Before the Order, he would visit City properties a few times a week with his family, sometimes carrying a concealed weapon, depending on

where he went. Exhibit 8, Declaration of Robert Robinson ¶ 4. Now, however, he can no longer carry a firearm to protect himself and his family when going for walks on City property. *Id.* ¶ 5.

Plaintiff Robinson is also injured by the Gun Parts Ban. Before the ban, he would legally purchase unfinished gun parts to build and customize guns, and he had planned to build rifles for his son and daughter, to give to them when they are of legal age to possess a firearm. *Id.* ¶ 6. Now the Ban prevents him from doing this. *Id.*

Plaintiff Robinson is also injured by the Bump Stock Ban. Before the Ban, he legally purchased accessory accelerators, but the Ban now prevents him from using them. *Id.*

F. The Firearms Order, the Gun Parts Ban injure Plaintiff Alan Koziol.

Plaintiff Alan Koziol is injured by the Firearms Order. He lives in Omaha with his wife and two young children. Exhibit 9, Declaration of Alan Koziol ¶ 2. He carries a firearm more than 50 percent of the time, and usually open carries a firearm outside of Omaha. *Id.* ¶ 3. Before the Order, he would go to parks frequently with his children. *Id.* ¶ 5. Since the Order, he goes less often because he feels less safe without the ability to use a firearm to protect his family. *Id.*

Plaintiff Koziol is also injured by the Gun Parts Ban. He has built guns in the past, and would like to do so in the future for his children (when they are of legal age), but the Ban now prevents this. *Id.* ¶ 6.

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). This 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 (Neb. 2007).

ARGUMENT

I. This Court should enjoin the City’s enforcement of the Firearms Order, the Gun Part Ban, and the Bump Stock Ban.

Plaintiffs are entitled to a preliminary injunction against the Firearms Order, the Gun Part Ban, and the Bump Stock Ban. They are likely to succeed on the merits of their preemption claim because the State has prohibited local governments from enacting *any* firearms regulations not expressly authorized by state law, and the order and 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 Firearms Order 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 Firearms Order, Gun Parts Ban, and Bump Stock Ban.

Plaintiffs are likely to prevail on their preemption claim because LB 77 expressly preempts local firearm regulations, including the Firearms Order, the Gun Parts Ban, and the Bump Stock Ban.

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 Omaha*, 294 Neb. 516, 883 N.W.2d 320 (Neb. 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 (Neb. 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 Omaha’s Firearms Order, Gun Parts Ban, and Bump Stock Ban. LB 77 states that “counties, cities, and villages 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). 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 establishes express preemption under 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 *Albarenga* standard.

All three local laws conflict with the state law because they regulate the possession of firearms, firearm parts, and firearm accessories. The Firearms Order prohibits the “*possession* [of] any *firearm*” on City property. Ex. 1. The Gun Parts Ban likewise prohibits the *possession* of unfinished *firearm* frames and receivers. Ex. 2. And the Bump Stock Ban prohibits the *possession* of a *firearm* accessory.

Ex. 3. Therefore, the Firearms Order, the Gun Parts Ban, and the Bump Stock Ban conflict with and are preempted by, LB 77.

The Attorney General of Nebraska recently issued an opinion on whether LB 77 preempts the Firearms Order—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.⁹ Opinion of the Att’y Gen. of Nebraska No. 23-009 (Dec. 15, 2023) (“Attorney General Opinion”).¹⁰ 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 Firearms Order because it “concern[s] the possession of firearms or

⁹ The Attorney General was not asked to opine on the Gun Parts Ban and the Bump Stock ban on this occasion, so his opinion does not address those ordinances.

¹⁰

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

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 Firearms Order “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 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 Firearms Order because the order is an exercise 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 Firearms Order 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 (Neb. 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 (Neb. 1991) (“A park is for the benefit of and is 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)). Exercise 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 Firearms Order is, on its face, “aimed at society as a whole” and the “interests of the public at large.” It states that it is the City’s “obligation to provide a safe place for [its] citizens” and the “members of the public” who have access to and are “able to use” City property. Ex. 1. Thus, the Firearms Order is an exercise of the City’s regulatory authority, not its proprietary authority.

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.¹¹ 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

¹¹ 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).

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 political subdivisions.¹² Further, the Legislature 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.¹³ See Neb. Rev. Stat. § 28-1202.01(3). Reading all of these provisions together, it is clear that that the Legislature did not want any political subdivisions to regulate, punish, or prevent *any* aspect of firearms: use, carrying, ownership, possession, storage, sale, transportation, or transfer.

¹² 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 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.

¹³ 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).

As the Attorney General has explained (Attorney General Opinion at 9 n.5), this means that the Firearms Order 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.* (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.

Omaha'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). Nebraska appellate courts have not hesitated to strike down local laws, enacted under home rule charters, that conflict with state law.¹⁴

¹⁴ *Jacobberger v. Terry*, 211 Neb. 878, 320 N.W.2d 903 (Neb. 1982) (A 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

Here, the City of Omaha'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 it. The City of Omaha 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 Defendants cannot use the City Charter to avoid preemption of the Firearms Order, the Gun Part Ban, and the Bump Stock Ban by the Constitutional Carry bill.

2. Plaintiffs are likely to succeed on their separation-of-powers claim against the Firearms Order because the Mayor lacks any authority to create law.

In addition, the Firearms Order is unconstitutional because the Mayor lacks any authority to legislate through an executive order.

Section 3.04 of the Omaha City Charter grants the Mayor the authority to: (1) supervise executive activities; (2) enforce the City charter and ordinances; (3) exercise the power of appointment and

were matters of statewide concern, not purely local or municipal concern).

removal; (4) submit an annual budget to the City Council; and (5) “[e]xercise such other powers and performing such other duties as may be prescribed by the charter, by ordinance or resolution, or by applicable laws of the State of Nebraska.” 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 hereinafter set forth.” Omaha Charter, § 2.04.

The Firearms Order 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 4-9. Now they cannot. The order does not just apply to city workers; it applies to all Nebraskans who want to use Omaha city parks, recreational facilities, and hiking trails. It even applies to any Nebraskan who is simply walking on a sidewalk that happens to abut any city property. Indeed, the Firearms Order even prevents a Nebraskan from leaving their handgun in their parked vehicle while they access the city property, because it makes it unlawful to store a firearm in a parked vehicle that is in a city parking lot. Violation of the Firearms Order is enforceable by the Omaha City Police Department, and violators could receive up to a \$500 fine, up to

six months in prison, or both. Because the Firearms Order affects the rights of all Nebraskans, and is backed by criminal penalties, it encroaches on 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.¹⁵ Here, the Mayor for the City of Omaha 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

¹⁵ 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).

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 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 Firearms Order violates the constitutional separation of powers.

B. 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 Firearms Order, which prevents them from carrying a firearm for self-defense on public property, as state law allows.

Although Plaintiffs have not premised their claims on constitutional protections of the right to keep and bear arms (in Article 1, Section 1), the Firearms Order, the Gun Parts Ban, and the Bump Stock Ban all impinge on those constitutional rights. Indeed, the Attorney General has concluded that the Firearms Order violates 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 Firearms Order, the Gun Parts Ban, and the Bump Stock ban 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 and ordinances.

C. 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 unlawful ordinances. 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, which the City holds in trust for them as members of the public, and which 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 Firearms Order, the Gun Part Ban, and the Bump Stock Ban. And the Nebraska Constitution's separation of powers clause prohibits the Mayor from creating laws, such as the Firearms Order, 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 Firearms Order, the Gun Part Ban, and the Bump Stock Ban.

Respectfully submitted this 18th day of December, 2023.

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** Pro Hac Vice application
forthcoming*

CERTIFICATE OF SERVICE

I, Seth Morris, hereby certify that on December 18, 2023, I served Plaintiffs' Motion for Preliminary Injunction and Memorandum in Support on Defendants by placing it with the Summons and Complaint in this case for service by the Douglas County Sheriff on the Defendants at the following addresses:

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/s/ Seth Morris
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