

LANCASTER COUNTY
DISTRICT COURT

NEBRASKA FIREARMS OWNERS ASSOCIATION, et al., <i>Plaintiffs,</i> v. CITY OF LINCOLN, et al., <i>Defendants.</i>	Case No. CI 23-4254 Plaintiffs' Response to Defendants' Motion for Summary Judgment
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Plaintiffs, Terry Fitzgerald, Dave Kendle, Raymond Bretthauer, and D.J. Davis, by counsel, submit their Response to Defendants' Motion for Summary Judgment.

ARGUMENT

I. Defendants' park and sidewalk regulations are unlawful.

A. State law preempts Lincoln's executive order and city parks law.

Defendants claim their municipal restriction prohibiting the possession of a firearm on city property (Executive Order 97985) and ordinance prohibiting the possession of a firearm in parks and park facilities (Lincoln Municipal Code § 12.08.200) are valid despite 2023 Neb. Laws, L.B. 77 ("LB 77"), Plfs. Opp. Evid. Ind. 1, declaring them "null and void." Specifically, the government is claiming that its purported executive order is not a government regulation that can be preempted by state law and that it is merely acting as a property owner that wants to prohibit firearms from its property, which is permissible under Neb. Rev. Stat. §§ 13-330(2) and 28-1202.01(2). *See* Defs. Br. 5–10. However, the government's argument proves too much.

1. Executive Order 97985 is not merely a policy statement.

The government claims Executive Order 97985 “is not a regulation” that can be preempted by state law, but a “policy [that] merely sets parameters for access and use of [the] City’s property as any private person or corporation has the right to do” under Neb. Rev. Stat. §§ 13-330(2) and 28-1202.01(2). *Id.* at 6. Indeed, the government argues that it “exercise[es] its regulatory or governmental authority” when it “exercises its police powers to promote the public welfare.” *Id.* at 5 (quoting *Gates v. City of Dallas*, 704 S.W.2d 737 (Tex. 1986)). The government asserts that an exercise of its regulatory police powers occurs when it acts “to safeguard the health, comfort, and general welfare of [its] citizens.” Def. Br. at 5 (cleaned up). It claims, on the other hand, that Executive Order 97985 is an exercise of “proprietary functions,” and “placed on the same footing as [an act by] private corporations.” *Id.* at 5–6 (citing *Gates* and *Obitz v. Airport Authority of City of Red Cloud*, 181 Neb. 410, 417, 149 N.W.2d 105, 111 (Neb. 1967)) (internal quotation marks omitted).

The government insists that Executive Order 97985 “is not a regulation aimed at the public at large for the general welfare” but a “policy [that] merely sets parameters for access and use of City[] property as any private person or corporation has the right to do.” Defs. Br. at 6. It argues, “Neb. Rev. Stat. § 13-330 is limited to ‘regulation.’ [Executive Order 97985] is not a regulation aimed at the general public. It is an exercise of City’s propriety authority to establish parameters for accessing and using its property. As such, the policy is not preempted by § 13-330.” Def. Br. at 8.

However, the stated purpose of Executive Order 97985 is “to protect and promote the health, safety, and welfare of all community residents,” Plfs. Opp. Evid. Ind., Ex. 2, which meets defendants’ own definition of a regulation issued pursuant to its police powers. *See* Defs. Br. at 5. And the Nebraska Supreme Court has held that acts done for “public health or public welfare” are “regulations” by nature, issued pursuant to and within the bounds of a sovereign’s police powers. *Smiley v. MacDonald*, 42 Neb. 5, 13, 60 N.W. 355, 357 (Neb.

1894); *see also* *Chi., B. & Q. R. Co. v. State*, 47 Neb. 549, 574, 66 N.W. 624, 630 (Neb. 1896).

Therefore, by its own admission and Nebraska case law, Executive Order 97985 is an exercise of defendant's police powers, and, thus, a government regulation that is preempted by Neb. Rev. Stat. § 13-330.

The government's reliance on *Cherry v. Municipality of Metropolitan Seattle*, 808 P.2d 746 (Wash. 1991), underscores the fact that the defendants are regulating the general public. *Cherry* held that Washington's preemption law "did not intend to interfere with public employers in establishing workplace rules." *Id.* at 749. But it did preempt "laws [that] appli[ed] to the general public, not internal rules for employee conduct." *Id.* Executive Order 97985 is not a workplace rule forbidding city employees from carrying a firearm on the job. It is a firearm prohibition against everyone that steps foot in a park, or, in the language of LB 77, a regulation of the "possession . . . of firearms or other weapons." Plfs. Opp. Evid. Ind. 1.

2. LB 77 preempts Executive Order 97985 and Lincoln Municipal Code § 12.08.200.

Defendants argue that Executive Order 97985 and Lincoln Municipal Code § 12.08.200 is merely an exercise of their right, under Neb. Rev. Stat. §§ 13-330(2) and 28-1202.01(2), to "prohibit firearms and weapons from its own property." Defs. Br. at 8. *See generally* Defs. Br at 6–10, 15. Defendants argue it is their right to exclude firearms from government places of employment, government convention centers, government swimming pools, government recreation centers, and government buildings under Neb. Rev. Stat. § 28-1202.01(2). *Id.* at 7, 10, 14, 15. But plaintiffs want to take their firearms for self-defense to places defendants cannot regulate—parks. Indeed, their complaint is against the regulation of firearms at city parks and the playgrounds, lakes, hiking and biking trails located there. *See* Am. Compl. ¶¶ 12–15, 44, 46.

Neb. Rev. Stat. § 28-1202.01(2) allows defendants to regulate firearms on city property, but this exception applies only to buildings where government business is conducted, like those listed in Neb. Rev.

Stat. § 28-1202.01(3), government convention centers, and other government buildings—not to public parks and their playgrounds, lakes, hiking and biking trails or sidewalks (not just sidewalks that run parallel to public streets). Indeed, “when the government is acting in its proprietary capacity . . . rather than as a steward of public land, it may prohibit guns without offending [LB 77].” *Kipke v. Moore*, 165 F.4th 194, 209 (4th Cir. 2026). The issue is determining where the government is “operating a space in its propriety capacity.” *Id.*

Though the City of Lincoln may hold legal title to pieces of real property like parks, trails, and sidewalks or otherwise exercise control over them, these spaces are held in trust for public use and are presumptively open to and accessible by the public at large. *See Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939); *see also United States v. Kokinda*, 497 U.S. 720, 743-74 (1990) (Brennan, J., dissenting) (“Public access [to streets, sidewalks, parks, and other similar public spaces] is not a matter of grace by government officials but rather is inherent in the open nature of the locations.”).

Defendants seem to acknowledge the difference between property held and not held in public trust by distinguishing between locations that are and are not “quintessential public places.” Defs. Br. at 15. But they claim to still have the authority to regulate firearms in parks even if it is a quintessential public place because “[a] park is still a place or premises under [defendants’] control. *Id.* Defendants claim this is “[t]he only reasonable reading of” LB 77 and Neb. Rev. Stat. § 28-1202.01(2). *Id.* Not so.

“[T]here is a crucial difference . . . between the government exercising the power to regulate or license, as lawmaker, and the government acting as proprietor, to manage its internal operation[s].” *Engquist v. Or. Dep’t of Agric.*, 553 U.S. 591, 598 (2008) (internal quotation marks omitted). For example, in the First Amendment context, the government may regulate commercial advertising on its transit system but not speech in a traditional public forum like a “park, street corner, or other public thoroughfare.” *Kokinda*, 497 U.S. at 725 (discussing *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974) (plurality)) (internal quotation marks and citation omitted).

Likewise with firearms because “[t]he constitutional right to bear arms in public for self-defense is not a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.” *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 70 (2022) (quotation marks omitted).

A municipality that regulates behavior in places held in public trust must, with limited exception, exercise regulatory, not proprietary power, because these places are not the city’s private property. “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. “A park is for the benefit of and is held in trust by a city for the public.” *Abboud v. Lakeview, Inc.*, 237 Neb. 326, 335, 466 N.W.2d 442, 449 (Neb. 1991). And, indeed, acting on behalf of the public at large is the purpose of Executive Order 97985 (it is “intended to protect and promote the health, safety, and welfare of all community residents”). Accordingly, the true owner of the property is the public at large. And acts done for “public health or public welfare” are “regulations” by nature, issued pursuant to and within the bounds of a sovereign’s police powers. *Smiley*, 42 Neb. at 13, 60 N.W. at 357; *see also Chi., B. & Q. R. Co.*, 47 Neb. at 574, 66 N.W. at 630.

A city cannot manage land held in public trust as it pleases. The *Hague* Court rejected a municipality’s argument that because “the city’s ownership of streets and parks is as absolute as one’s ownership of his home” its ownership interest carried with it the “consequent power [to] altogether . . . exclude citizens from the use thereof.” 307 U.S. at 514. Exercising a proprietary “right to exclude,” is incompatible with the concept of a space that is “held in trust for the use of the public,” which necessarily makes such spaces open to the public at large. *Id.* at 515.

Likewise, “a municipality may not sell property held for public use without legislative authority.” *Abboud*, 237 Neb. at 335, 466 N.W.2d at 449. “Municipal corporations hold all property in which the public is interested, such as streets, wharves, parks, and public squares, in trust for the use of the public, and these properties may only be

disposed of by the municipality if it is authorized to do so by statute.” *Id.* “The statutory authorization functions as the terms of the trust.” *Id.*

“Any statutory construction restricting or abolishing common law rights should not be adopted, unless the plain words of the statute compel such result.” *Macku By and Through Macku v. Drackett Products Co.*, 216 Neb. 176, 180, 343 N.W.2d 58, 61 (Neb. 1984). The statutes at issue here do not compel the result against the plaintiffs’ rights that the defendants advocate.

At bottom, municipalities do not possess proprietary powers over the public streets, parks, trails, sidewalks, or the like. “They only possess regulatory powers.” *Am. Tel. & Tel. Co. v. Vill. of Arlington Heights*, 156 Ill. 2d 399, 409, 620 N.E.2d 1040, 1044 (Ill. 1993). Prohibiting the public from carrying firearms in these places has nothing to do with the government’s “internal operation[s].” *Engquist*, 553 U.S. at 598.

Therefore, because defendants are attempting to regulate the possession of “firearms and other weapons” on Lincoln parks and sidewalks—and do not fit under LB 77’s exceptions—Executive Order 97985 and Lincoln Municipal Code § 12.08.200 are “null and void.” Neb. Rev. Stat. § 13-330(3).

The Nebraska Attorney General agrees. *See* Plfs. Opp. Evid. Ind. Ex. 8 § I.

Also, defendants’ interpretation of LB 77 and Neb. Rev. Stat. § 28-1202.01(2) creates a constitutional question. The Nebraska Supreme Court commands that “when a statute is constitutionally suspect, [courts should] endeavor to interpret it in a manner consistent with the Constitution.” *In re Estate of Steppuhn*, 221 Neb. 329, 332, 377 N.W.2d 83, 85 (Neb. 1985). And the only way to interpret the interaction between LB 77 and Neb. Rev. Stat. § 28-1202.01(2) consistent with the “constitutional avoidance canon,” *Heiden v. Adelung (In re Estate of Adelung)*, 306 Neb. 646, 659, 947 N.W.2d 269, 282 (Neb. 2020), is to maintain the distinction between land held and not held in the public trust, as it has been done “from ancient times.” *Hague*, 307 U.S. at 515.

Additionally, defendants offer LB 77's legislative history to prove their case but correctly acknowledging that it is irrelevant "here due to the unambiguity and plain meaning of the statute. Defs. Br. at 10. *See also id.* at 10–11, 16 (LB 77's legislative debate).

Moreover, the legal doctrine for land held in public trust is unambiguous and another reason why the Court should not consider LB 77's legislative history

Nevertheless, the portions of LB 77's legislative debate that defendants present do not support their case. Indeed, the portions that defendants highlight concern "convention centers" and "arenas," *id.* at 10-11, which are not like properties held in public trust.

Defendants also misrepresent remarks from LB 77's sponsor, Senator Tom Brewer, regarding firearm regulation in city parks. *Id.* at 16-17. When asked whether LB 77's exception for entities to exclude firearms from the places or premises that they control includes "a public park," Senator Brewer stated, "I don't think it would" because of the lack of boundaries. *Id.* at 16. But he conceded that if boundaries could be established for a specific, temporary event like a parade or a concert in the park, then firearms could be excluded from entering the bounded area. *Id.* Based on this qualified answer, defendants disingenuously argue "a municipality can still prohibit the concealed carry of handguns from parks, as recognized by Senator Brewer." *Id.* at 17. But Senator Brewer did not concede that the government's proprietary authority stretches over every inch of a public park.

Regardless of LB 77's legislative history, however, the constitutional issues remain for land held in public trust. And the decisions of the United States and Nebraska Supreme Courts cited above regarding land held in public trust hold that municipalities cannot regulate streets, parks, and sidewalks in a proprietary manner. *See Hague*, 307 U.S. at 514-15; *Abboud*, 237 Neb. at 335, 466 N.W.2d at 449. Therefore, Executive Order 97985 and Lincoln Municipal Code § 12.08.200 are invalid under LB 77.

3. Defendants cannot prohibit the possession of firearms for self-defense in city parks.

Defendants claim their “ability to prohibit the *discharge* of firearms and weapons was not affected by L.B. 77 and Neb. Rev. Stat. § 13-330.” Defs. Br. at 14. Their argument is that because L.B. 77 and Neb. Rev. Stat. § 13-330 “concern [] the ‘ownership, possession, storage, transportation, sale, and transfer of firearms and other weapons’” they can regulate “the discharge of firearms and other weapons” because the Nebraska legislature left “discharge” off the preemption list and LB 77 expressly added the ability for cities to prevent “the discharge” of firearms, rockets, and fireworks to Neb. Rev. Stat. § 15-255(2). Defs. Br. at 14. *See also* Plfs. Opp. Evid. Ind. 1.

But Executive Order 97985 doesn’t simply prohibit the discharge of firearms, it prohibits the possession of firearms in public parks. Even if defendants can legally regulate the discharge of firearms in public parks, that does not mean that it can prohibit the possession of firearms in public parks.

Indeed, Plaintiffs want to carry their firearms for self-defense. *See* Am. Compl. ¶¶ 44, 46. Not only does the Second Amendment protect the fundamental right for all “ordinary, law-abiding citizens” to “possess a handgun” and “carry [it] publicly for their self-defense,” *Bruen*, 597 U.S. at 8-10, “[i]n Nebraska, self-defense is a statutorily defined affirmative defense.” *State v. Liech*, 320 Neb. 843, 852, 30 N.W.3d 847, 855 (Neb. 2026) (citing Neb. Rev. Stat. § 28-1409(1)). Thus, when a person is met with the threat of deadly force, the Second Amendment protects that individual’s right to discharge a firearm in self-defense. Thus, defendants cannot defend a possession ban in public parks by claiming it is only a restriction on discharge.

4. Neb. Rev. Stat. § 15-210(2) cannot give defendants *carte blanche* control of city parks.

Defendants assert that Neb. Rev. Stat. § 15-210(2) is an express delegation of authority that gives them complete control of city parks. *See* Def. Br. at 17–18. They argue that because the statute allows them to “[p]rovid[e] for the protection, preservation, and use of City’s [sic]

parks and park facilities,” it “necessarily entails the ability to set conditions on such use, *i.e.*, not bringing firearms and weapons.” *Id.* at 18. But this interpretation is only effective up to the point where it conflicts with decisions of the United States and Nebraska Supreme Courts and other Nebraska state statutes.

The Court should not accept defendants’ argument at face value. Recall the discussion of the United States and Nebraska Supreme Courts’ rulings that municipalities cannot control land held in public trust like it belongs to them. “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. “A park is for the benefit of and is held in trust by a city for the public.” *Abboud v. Lakeview, Inc.*, 237 Neb. 326, 335, 466 N.W.2d 442, 449 (Neb. 1991). *See also* section I(A)(2) *supra*.

Defendants’ argument also runs afoul of the constitutional avoidance doctrine. *See Hague*, 307 U.S. at 515; *In re Estate of Steppuhn*, 221 Neb. at 332, 377 N.W.2d at 85; *Heiden*, 306 Neb. at 659, 947 N.W.2d at 282; section I(A)(2) *supra*.

And plaintiffs’ right to self-defense with the use of a firearm in furtherance of that right. *See Bruen*, 597 U.S. at 8-10; *Liech*, 320 Neb. at 852, 30 N.W.3d at 855; section I(A)(3) *supra*.

Defendants’ interpretation Neb. Rev. Stat. § 15-210(2) is also inconsistent with the rules of statutory interpretation. The “*pari materia*” doctrine counsels that laws “should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.” *Wisner v. Vandelay Invs., L.L.C.*, 300 Neb. 825, 843, 916 N.W.2d 698, 715 (Neb. 2018). “Construction of a statute will not be adopted which has the effect of nullifying or repealing another statute. *Roger D. v. State*, 259 Neb. 463, 468, 610 N.W.2d 385, 390 (Neb. 2000). And “when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to

the particular litigant before the Court.” *Clark v. Suarez Martinez*, 543 U.S. 371, 380–81 (2005).

Taken together—the rulings, the statutes, and the rules of statutory construction—the best interpretation is that plaintiffs may carry their firearm in city parks for self-defense. This conclusion resolves any conflict between Neb. Rev. Stat. § 15-210(2) and the United States Supreme Court and Nebraska Supreme Court’s rulings on land held in public trust, *supra* section I(A)(2), conflict with the Second Amendment, *supra* sections I(A)(2) & (3), and Nebraska’s self-defense statute. *Supra* section I(A)(3).

Defendants’ interpretation also frustrates the Legislature’s evident purpose. “The fundamental objective of statutory interpretation is to ascertain and carry out the Legislature’s intent. *Sanitary & Improvement Dist. No. 596 v. THG Dev., L.L.C.*, 315 Neb. 926, 942, 2 N.W.3d 602, 616 (Neb. 2024). The Nebraska legislature enacted LB 77 to preempt municipal firearm regulations to establish statewide uniformity in firearm laws. *See* Neb. Rev. Stat. § 13-330; Plfs. Opp. Evid. Ind. 1. It is therefore implausible that the Legislature intended to create exceptions that would permit municipalities to accomplish indirectly what LB 77 forbids directly, thereby nullifying the statute’s central purpose. That interpretation leads to “absurd results.” *See Heist v. Neb. Dept. of Correctional Services*, 312 Neb. 480, 498, 979 N.W.2d 772, 786 (Neb. 2022).

Interpreting the statute to provide for an exception that applies only to buildings where government business is conducted, like those listed in Neb. Rev. Stat. § 28-1202.01(3), or property that is not held in public trust avoids statutory inconsistency, frustrating LB 77’s goals, and absurd results.

5. Defendants’ unclean hands argument is meritless.

Defendants’ unclean hands argument is essentially another attack on plaintiffs’ standing to challenge Lincoln Municipal Code § 12.08.200. Def. Br. at 19–20. They argue that because plaintiffs violated Lincoln Municipal Code § 12.08.200 for many years prior to LB 77’s enactment that they be barred from challenging the law now.

Id. But the Nebraska Supreme Court has already decided the standing issue in the plaintiffs' favor.

Indeed, plaintiffs have standing to challenge Lincoln Municipal Code § 12.08.200. *Neb. Firearms Owners Ass'n v. City of Lincoln*, 319 Neb. 723, 739, 24 N.W.3d 891, 903 (Neb. 2025). "[I]t matters not that the [plaintiffs] have before entered the parks and trails with their firearms (whether lawfully or unlawfully) and that neither [Executive Order 97985] nor § 12.08.200 was enforced against them for doing so." *Id.* at 319 Neb. at 738, 24 N.W.3d at 903. "[T]he threat is latent in the existence of [Executive Order 97985] and the ordinances." *Id.* at 319 Neb. at 739, 24 N.W.3d at 903 (quoting *St. Paul Area Chamber of Com. v. Gaertner*, 439 F.3d 481, 487 (8th Cir. 2006) (original brackets omitted)).

"The doctrine of unclean hands is an affirmative defense." *Melia v. Hansen*, 31 Neb. App. 517, 533, 985 N.W.2d 418, 430 (Neb. 2023). But it does not apply here. "[T]he doctrine is specifically predicated upon *equitable* rights, and is enforceable against a party seeking equitable relief. *Burns v. Nielsen*, 273 Neb. 724, 733-34, 732 N.W.2d 640, 649 (Neb. 2007). Defendants cite cases involving domestic disputes and a contract case from Michigan. *See* Def. Br. at 19–20. But plaintiffs' issues of statutory interpretation and whether municipal law is preempted by state law are far afield from pursuing equitable rights in a divorce, *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (Neb. 2002), in an adjust of child support, *Voichoskie v. Voichoskie*, 215 Neb. 775, 340 N.W.2d 442 (Neb. 1983), or a in contract dispute between property owners and their auctioneers, *Rose v. Nat'l Auction Grp.*, 466 Mich. 453, 646 N.W.2d 455 (Mich. 2002).

Otherwise, the government could enact all manner of unconstitutional laws that citizens refused to follow and Nebraska trial courts would be closed for them to seek a remedy under defendants' interpretation of the unclean hands doctrine. Surely, defendants do not believe that if they passed unconstitutional municipal ordinances—(1A) banning religious services, (1B) prohibiting criticism of the mayor in city parks, (2) mandating firearm confiscation, (3) requiring citizens to house active duty national guard

members, (4) allowing police to search random houses each day, (5) allowing compulsory confession of crimes in evidence, (6) requiring indigent accused criminals to pay for their lawyer, (7) banning trial by jury, or (8) reestablishing public hangings—and citizens willfully defied the laws that they could assert the unclean hands doctrine and get away with it.

Furthermore, plaintiffs' conduct was not willful. The clean hands doctrine only applies "to willful misconduct rather than merely negligent misconduct. The improper conduct which falls within the maxim must involve intention as opposed to an inadvertent act or a misapprehension of legal rights." *Voichoskie*, 215 Neb. at 777, 340 N.W.2d at 444 (internal quotation marks omitted).

Here, the record shows that plaintiffs did not willfully violate Lincoln Municipal Code § 12.08.200. Plaintiffs took firearms with them for self-defense in municipal parks. *See* Am. Compl. ¶¶ 12–15, 44, 46. But all of them stopped carrying a firearm in municipal parks once the mayor issued Executive Order 97985. *Id.* This proves that once plaintiffs were made aware of a purported law prohibiting their conduct, they complied as ordinary law-abiding citizens do. Indeed, defendants explain that some version of Lincoln Municipal Code § 12.08.200 has existed for very many years. *See* Defs. Br. at 20. But Executive Order 97985 was issued much more recently in September 2023. *See* Plfs. Opp. Evid. Ind. Ex. 2. The publicity of the mayor's action obviously caught plaintiffs' attention and they stopped carrying a firearm with them in municipal parks in an effort to comply with a purported law they had knowledge of, which also brought them into compliance with a law that they were negligently ignorant of, i.e. Lincoln Municipal Code § 12.08.200, and caused this lawsuit.

Regardless, "it matters not that the individual appellants have before entered the parks and trails with their firearms (whether lawfully or unlawfully)." *Neb. Firearms Owners Ass'n*, 319 Neb. at 738, 24 N.W.3d at 903. Plaintiffs can challenge Lincoln Municipal Code § 12.08.200. *Id.* at 319 Neb. at 739, 24 N.W.3d at 903.

B. The mayor has no power to issue executive orders.

Executive Order 97985 is an edict from the Mayor purportedly with the force and effect of law. It is not simply a policy for city officials and employees to follow. *See supra* section I(A)(i). Instead, it is an attempted exercise of the City's police powers. *Id.* Indeed, its stated purpose is "to protect and promote the health, safety, and welfare of all community residents." Plfs. Opp. Evid. Ind. 2. The order applies to everyone located in Lincoln whether that person is a resident or not. *Id.* Failure to comply results in criminal and civil penalties. *Id.* But the mayor does not have the authority to issue any edict with the force of law. Thus, Executive Order 97985 is invalid.

Defendants argue Executive Order 97985 "is a valid exercise of the City's propriety authority." Defs. Br. at 13. But plaintiffs refuted this argument in section I(A), *supra*.

Moreover, just as the Nebraska Constitution "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), the Lincoln City Charter does not allow the Mayor to encroach on City Council's legislative authority.

In Lincoln, the City Council has all lawmaking authority. The Lincoln City Charter states:

All 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 set forth in this charter. The council shall have the power to pass, amend, and repeal any and all ordinances and other enactments necessary or proper to execute or carry into effect any of the provisions of this charter or any of the powers herein granted, except as otherwise provided in this charter.

Lincoln City Charter Art. IV, § 8. (Plfs. Opp. Evid. Ind., Ex. 9) (emphasis added).

Conversely, the City Charter does not vest any lawmaking authority in Lincoln's mayor. It is a pure administrative role. The Lincoln City Charter states: "The executive and administrative power of the city shall be vested in and exercised by a mayor, who shall also be the ceremonial head of the city government." *Id.* at § 12. (Plfs. Opp. Evid. Ind., Ex. 10). The "power" and responsibilities vested in the mayor are: (1) supervise and coordinate all activities of the city's departments and agencies; (2) enforce municipal law; (3) appoint and remove "certain [city] officers, employees, and members of boards and commissions; (4) recommend city budgets to the city council; (5) supervise city purchases and contracts; (6) provide an annual report on the actions of city departments and agencies; (7) promote, develop, and encourage city government, Lincoln's economic growth, and the well-being of its residents; and (8) perform "such other duties" as directed by the City Charter. *Id.* The mayor also has the authority to appoint officers and employees to city departments and investigate the operation of city department and agencies. *Id.*

Additionally, she may "attend council meetings and to appear before the council for the purpose of expressing [her] views on matters pending before the council." Lincoln City Charter Art. IV, § 13. (Plfs. Opp. Evid. Ind., Ex. 11). She has "the power to present messages, reports, and other communications to the council" and "veto legislation." *Id.* But she may only "propose legislation" to the council. *Id.* Indeed, the Lincoln Charter does not give the mayor any authority to issue executive orders with the force of law, much less an edict like Executive Order 97985 that carries criminal or civil penalties.

And there is no state law that grants the Mayor the authority to issue edicts with the force of law. Executive Order 97985's "Authority" section cites the City's "inherent property rights to regulate the property owned and/or controlled by it," under Neb. Rev. Stat. § 28-1202.01. But as discussed above in section I(A), *supra*, this argument is invalid for property held in public trust, such as city parks.

But even if Lincoln had the right to ban firearms from land held in public trust, the City Council is the only lawmaking authority in the City. And any law that prohibits weapons from buildings where

government business is conducted, e.g., those listed in Neb. Rev. Stat. § 28-1202.01(3), the City Council must issue those laws—not the Mayor. Indeed, Executive Order 97985 is invalid use of legislative power.

II. State law preempts Lincoln’s firearm sale and registration law.

Defendants argue that plaintiffs’ claim against the city’s firearms sale and registration law (Lincoln Municipal Code § 9.36.030) is now moot because the law only applies to firearm dealers and because defendants posted on a government website that compliance with the law is now optional. Defs. Br. at 21. But the defendants are wrong.

“A moot case is one that seeks to determine a question that no longer rests upon existing facts or rights—i.e., a case in which the issues presented are no longer alive. The central question in a mootness analysis is whether changes in circumstances have forestalled any occasion for meaningful relief.” *Burbank v. Evnen*, 321 Neb. 65, 73, 32 N.W.3d 612, 620 (Neb. 2026).

The Nebraska Supreme Court ruled that plaintiffs have standing to challenge Lincoln Municipal Code § 9.36.030. *See Neb. Firearms Owners Ass’n v. City of Lincoln*, 319 Neb. 723, 739, 24 N.W.3d 891, 904 (Neb. 2025).

Plaintiffs’ injury in fact is the reporting to law enforcement the fact that they purchased a firearm in addition to the reporting of their personal information for a firearm registry. *Id.*; Am. Compl. ¶¶ 12–15, 49, 50, 69. Even under the new purportedly optional law, plaintiffs’ injury in fact still exists. Accordingly, “existing facts or rights” have not materially changed, and the plaintiffs can still obtain “meaningful relief” with a judgment in their favor. *Burbank*, 321 Neb. at 73, 32 N.W.3d at 620. Therefore, this claim is not moot.

Furthermore, because plaintiffs’ injury is the reporting of their personal information and their purchase of a firearm, whether plaintiffs are firearm dealers is irrelevant. Their injury is the result of

being the dealer's customer. These "existing facts or rights" have not materially changed, and the plaintiffs can still obtain "meaningful relief" with a judgment in their favor. *Id.* Therefore, this claim is not moot.

Moreover, plaintiffs do not concede that Lincoln Municipal Code § 9.36.030 was properly amended to allow for voluntary compliance. "All legislative powers of the city [are] exclusively vested in the council." Lincoln City Charter Art. IV, § 8. (Plfs. Opp. Evid. Ind., Ex. 9). *See also* section I(B) *supra* (explaining that the mayor has no legislative authority). Accordingly, it is the duty of the city council to amend Lincoln Municipal Code § 9.36.030. Defendants have not presented an ordinance that amends Lincoln Municipal Code § 9.36.030. Instead, they just put up a website. But posting a website does not change the law. Any decent attorney advising someone with an interest in Lincoln Municipal Code § 9.36.030 would counsel continued compliance with the law until it was properly amended. A website cannot change the language of duly enacted law.

There is also the issue of voluntary cessation. "[A] defendant cannot automatically moot a case simply by ending its unlawful conduct once sued. If voluntary cessation of that kind rendered a case moot, a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off." *Stewart v. Heineman*, 296 Neb. 262, 297, 892 N.W.2d 542, 565 (Neb. 2017) (internal quotations and citations omitted). "A defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur. This standard is stringent. *Id.* at 296 Neb. at 297-98, 892 N.W.2d at 565 (internal quotations and citations omitted). Here, "[t]he defendants made no attempt to meet this standard." *Id.* at 296 Neb. at 298, 892 N.W.2d at 565. Instead, they simply announced that a website now exists that says Lincoln Municipal Code § 9.36.030 is now optional without explanation or proof the law was amended by the city council.

Defendants claim to have “expressly disavowed any intent to enforce” Lincoln Municipal Code § 9.36.030. Defs. Br. at 22. But this assertion is unconvincing. Defendants were given the opportunity to disavow this law during oral argument at the Nebraska Supreme Court, but they refused to do so. *See Neb. Firearms Owners Ass’n*, 319 Neb. at 739, 24 N.W.3d at 904 (“As with [the park ordinance], the City has similarly refused to disavow the enforcement of these ordinances.”). Now for the first time, in their summary judgment briefing, they disclose to the Court and plaintiffs’ counsel that Lincoln Municipal Code § 9.36.030 is optional. Defendants’ website can be taken down as easily as it was put up.

III. State law preempts Lincoln’s multiburst trigger law.

Defendants cannot regulate multiburst trigger activators because that is the functional equivalent of regulating firearms.

Defendants argue that multiburst trigger activators can only be a firearm accessory just like “a scope.” Defs. Br. at 23. But some firearms are designed and manufactured with a multiburst trigger activator as a necessary component part so that the firearm cannot function without the multiburst trigger activator.

Plaintiffs’ expert, Mr. Matthew Larosiere, qualifies as a firearm design, function, and engineering expert due to his experience as a firearms manufacturer and designer. *See* Plfs. Opp. Evid. Ind., Ex. 12 at 6:19–8:10, 9:23–13:15, 14:3–22:19, 31:10–32:17, 97:7–100:17 & Ex.13-5, Ex. 13-6 § I.

The parties stipulated that Mr. Larosiere’s CV, reproduced as Exhibit 5 to his deposition (Plfs. Opp. Evid. Ind., Ex. 12), and his expert report, reproduced as Exhibit 6 to his deposition (Plfs. Opp. Evid. Ind., Ex. 12), are accurate copies of these documents, and meet the authenticity requirements of the Nebraska rules of evidence and should not be excluded from evidence as hearsay. *See* Plfs. Opp. Evid. Ind., Ex. 12 at 32:18–25, 78:19–81:24, 101:1–13.

Defendants argue “*most* any semi-automatic firearm can be modified so that only one shot is fired for each pull of the trigger.” Def.

Br. at 23 (emphasis added). But the key word in this assertion is “most.” *Id.*

That’s because, as Mr. Larosiére concluded in his report and deposition testimony, some firearms (*e.g.*, Tippmann revolving firearms, gatling guns, Arsenal Firearms AF2011-A1 double barrel pistols, Agar guns, and Gardner guns) cannot function without a multiburst trigger activator as it is defined by the Trigger Law. *See* Plfs. Opp. Evid. Ind. Ex. 12 at 85:18–87:4, 89:24–92:23; Ex. 13-6 at 3–5 & n.12. It is an essential component of these firearms.

There is a fundamental difference between firearm accessories and essential firearm components. Firearm accessories “are not an essential aspect of the functionality of a firearm.” *United States v. Alsenat*, 734 F. Supp. 3d 1295, 1309 (S.D. Fla. 2024). But “[t]he frame or receiver of a firearm for example, just as with ammunition, is a fundamental component part of a firearm’s basic functionality.” *Id.* Self-loading handguns need a slide to operate, and nearly all firearms cannot function without a fire control component, barrel, or firing pin. *See* Plfs. Opp. Evid. Ind., Ex. 12 at 83:12–85:17. If Lincoln attempted to ban these firearm components it would be the functional equivalent of banning firearms. Likewise, because a multiburst trigger activator is an essential component of some firearms, *id.* at 85:18–87:4, 89:24–92:23; Ex. 13-6 at 3–5 & n.12, it is the functional equivalent of banning these firearms. And because state law forbids Lincoln from regulating firearms, the Trigger Law is null and void. *See* Neb. Rev. Stat. § 13-330(3).

Defendants cite several other jurisdictions with more expansive “firearm” definitions to argue that Nebraska could have done the same and included multiburst trigger activators in its definition. Def. Br. at 24. Perhaps. But this does not negate the fact that Neb. Rev. Stat. § 13-330 prohibits defendants from regulating firearms. And by prohibiting multiburst trigger activators, defendants are banning several types of firearms that depend on this necessary component for their ability to function at all. Banning these firearms is regulating these firearms. And firearm regulation by municipalities is prohibited under Neb. Rev. Stat. § 13-330.

IV. State law preempts Lincoln's switchblade knife law.

Plaintiffs claim that Lincoln Municipal Code § 9.36.040 (the city's prohibition on the sale and possession of switchblade knives) is preempted by LB 77. Am. Compl. ¶¶ 40, 52, 73, 75, 79; Pfs. MSJ Mem. at § V.

Defendants failed to provide any argument in their brief on this claim. Plaintiffs will not have an opportunity to respond in writing to any future government argument on this claim. Therefore, any future attempt in the defendants' reply brief to offer argument on this claim should be stricken from the record and ignored.

CONCLUSION

Defendants' motion should be denied.

Dated: June 25, 2026

Respectfully submitted,

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Certificate of Service

I hereby certify that on Friday, June 26, 2026 I provided a true and correct copy of the Response to the following:

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

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

Signature: /s/ Seth William Morris (Bar Number: 25803)