

ARGUMENT

I. Plaintiffs fail to establish standing on three out of four of the challenged University policies

Plaintiffs lack standing on all but one of the four challenged University policies; nothing in Plaintiffs' opposition changes that. Again, this case is about Plaintiffs' facial challenge to OSU's four firearms policies:

1. Code of Student Conduct §3335-23-04(E), prohibiting student possession or storage of firearms without university permission;
2. Workplace and Family Relationship Violence Policy §7.05, prohibiting "possession of deadly weapons on university property" and prohibiting storage of these weapons in "personal vehicles parked on state-owned and/or leased property";
3. Department of Recreational Sports Standard of Conduct § 4.1.1, prohibiting "[c]oncealed weapons" on campus "except by a licensed person in a locked vehicle"; and
4. Residence Hall Handbook Standard of Conduct § 7.2, providing that "[p]ossession and/or use of any type of firearm or other weapon is not permitted in or around University Housing," including "persons in possession of a concealed firearms permit."

Plaintiffs can establish standing to challenge only one of these provisions—the Code of Student Conduct—through plaintiff, Ryan Guenther, who alleges to be an OSU student and member of both Students for Concealed Carry Foundation, Inc. ("SCCF") and Ohioans for Concealed Carry ("OFCC"). No plaintiff establishes standing on the three remaining provisions.

A. Plaintiffs lack standing to challenge the Residence Hall Handbook Community Standard of Conduct § 7.2 and the Department of Recreational Sports Standard of Conduct § 4.1.1.

The Residence Hall Handbook Standard of Conduct §7.2 applies only to "residents" of Ohio State housing: "Community Standards of Conduct" is "a guide to help define acceptable behavior on issues related to university and resident property or resident behavior." Am. Compl. Exh. 4, Residence Hall Handbook at 1. Similarly, the Department of Recreational Sports Standard of Conduct § 4.1.1 is applicable only to "recreational sports member[s]." Am. Compl. Exh. 3, Recreational Sports Standard of Conduct.

As explained in OSU's opening motion, Guenther has *not* alleged that he lives in Ohio State housing or is otherwise subject to a housing agreement with OSU, or that he uses Ohio State recreational facilities. And neither OFCC nor SCCF allege facts showing that their members are bound by either the residence-hall or recreational-sports provisions. As a result, Guenther fails to allege a "direct, personal stake" in the enforcement of these provisions, and therefore lacks standing to challenge them. *ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St.3d 520, 2014-Ohio-2382 ¶ 1. And OFCC and SCCF fail to establish associational standing to challenge these provisions. *See Ohio Contractors Assn. v. Bicking*, 1994-Ohio-183.

B. Plaintiffs lack standing to challenge the Workplace and Family Relationship Violence Policy §7.05

No Plaintiff has alleged facts establishing standing to challenge OSU's Workplace and Family Relationship Violence Policy §7.05. The policy applies to OSU *employees*. Guenther did not allege to be an employee and the Amended Complaint does not allege that any member of SCCF or OFCC were employees of OSU. So Plaintiffs lack standing to challenge this provision.

In response to OSU's motion, Plaintiffs attached the affidavit of Patsy LaRosa. But they still cannot establish standing. As a preliminary matter, the affidavit is evidence outside of the complaint, which may not be considered on a motion to dismiss. LaRosa is not a party to the suit; she is not referenced in the Amended Complaint; and the Court is not permitted to take judicial notice of the type of information in her affidavit. Plaintiffs have therefore failed to establish standing to challenge the Workplace and Family Relationship Violence Policy and cannot overcome that failure by smuggling in an outside-the-pleadings affidavit of a nonparty.

Second, even if the Court were to consider the affidavit, its contents only accentuate the disconnect between this suit and the mission of OFCC and SCCF, the two associational plaintiffs. For these groups to have standing, *Bicking* requires that they be seeking to protect

interests that are “germane to the organization’s purpose.” 71 Ohio St.3d at 320. LaRosa asserts employment with OSU, membership in OFCC, and inability to carry at work which might establish her own standing if she were a party. But the relevant standing inquiry here is whether the basis of standing for an association member is germane to the purpose of the association. *See United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 555–56 (1996). Importantly, LaRosa is a concealed handgun licensee who joined OFCC. Yet she does not now assert a desire to conceal carry—that is not a claim of any plaintiff in this suit, since the law clearly prohibits concealed carry on university campuses. Rather, her sole claims are that she should be able to *open carry* a handgun in her workplace. As previously explained, *open carry* is not germane to the purpose of any associational plaintiff.¹

C. *Plaintiffs Still Fail to Establish Standing on the Locked Car Challenge and the Records Expungement Count*

Even after amending their complaint and filing a response to OSU’s motion, Plaintiffs still fail to allege personal or membership use of a vehicle on campus, a wish to store a firearm in a locked vehicle, or an expression that they *would* store a firearm in a vehicle but for OSU’s policies. Accordingly, it is quite clear that no plaintiff has established the injury-in-fact required for standing to challenge OSU’s prohibition on storing firearms in personal vehicles.

Moreover, no plaintiff has alleged to have been disciplined under any challenged provision. So no party has standing to demand that the Court “immediately expunge and destroy all disciplinary records.” Am. Compl. Prayer for Relief ¶ c.

¹ Despite Plaintiffs’ argument to the contrary, in drawing the Court’s attention to the OFCC website, OSU did not rely on impermissible extrinsic evidence. The Tenth District has previously taken judicial notice of website information. *See Malone v. Berry*, 2007-Ohio-6501 (taking judicial notice of a website) (*citing O’Toole v. Northrop Grumman Corp.*, 499 F.3d 1218, 1225. (10th Cir. 2007) (“It is not uncommon for courts to take judicial notice of factual information found on the world wide web”); *Coremetrics, Inc. v. Atomic Park.com*, 370 F.Supp.2d 1013, 1021(N.D.Cal. 2005) (taking judicial notice of defendant’s website); *Monroe Emps. Retirement Sys. v. Bridgestone Corp.*, 399 F.3d 651, fn. 1 (6th Cir. 2005) (taking judicial notice of website in considering Civ.R. 12(B)(6) motion)). Plaintiffs do not and could not dispute the accuracy of information itself.

II. Plaintiffs fail to state a claim upon which relief could be granted

Even if the Court considered Plaintiffs’ arguments on the merits, they fail to state a claim upon which relief could be granted for the following reasons:

First: R.C. 9.68(A) does not diminish state entities’ authority to control firearms on state property. R.C. 9.68 displaces regulation of firearms by *local* governments, not *state* entities. The statute provides for state regulation—“[e]xcept as specifically provided by . . . state law,” *id.*, preempting local-government regulation with the exception of specified zoning ordinances. And as explained in OSU’s opening motion, numerous state entities—including the Departments of Agriculture, Commerce, Job and Family Services, Natural Resources, and a number of others—have continued to adopt and enforce firearm restrictions after the statute’s enactment. Plaintiffs offer no counter to this argument.

Second: The student-code provisions—the only ones for which standing may exist—are “state law” within the meaning of R.C. 9.68. As state law, they are exempt from R.C. 9.68’s restrictions. Meaning, the statute allows restrictions on an individual’s right to carry a firearm “as specifically provided by . . . state law.” R.C. 9.68(A). And for the reasons explained in OSU’s opening motion, the other challenged University provisions—though not in play, because no plaintiff has standing as to them—are also “specifically provided by . . . state law” within the meaning of R.C. 9.68(A). Motion to Dismiss p. 14.

Third: Plaintiffs fail to state a claim relating to OSU’s prohibition on storing firearms in personal vehicles. Again, Plaintiffs make a pre-enforcement facial challenge to this prohibition, for which they must show that that there is “no set of circumstances under which” the challenged prohibition could be enforced. *See Harrold v. Collier*, 2005-Ohio-5334 ¶ 37. OSU’s opening motion identified at least three settings where the prohibition may be enforced even when Plaintiffs’ arguments are considered at face value: the prohibition could be enforced against

individuals without concealed carry licenses, individuals who do not have their license and personal identifications in their possession, and individuals carrying other types of firearms. Plaintiffs offer no rebuttal.

Fourth: To the extent Plaintiffs attempt to rebut OSU’s arguments, they miss the point entirely as to why they have failed to state a claim upon which relief may be granted. The essence of Plaintiffs’ statutory argument is that R.C. 9.68 prohibits all restrictions on firearms that do not come directly from the Legislature.

But that simply is not the law. While R.C. 9.68 displaces local-government firearms regulation, exceptions for state entities are baked into the law: “*Except as specifically provided by the United States Constitution, Ohio Constitution, state law, or federal law, a person, without further license, permission, restriction, delay, or process, may own, possess, purchase, sell, transfer, transport, store, or keep any firearm, part of a firearm, its components, and its ammunition.*” *Id.* OSU maintains that R.C. 9.68 displaces only local-government level firearms regulation and that even if R.C. 9.68 applied to OSU, OSU’s Code of Student Conduct (the only challenged provision as to which there is standing) still fits within the statutory exception because it *is* state law (as are the other provisions, though no Plaintiff has standing to challenge those).

Ohio State is not alone in its view that it can continue to regulate firearms in this way. Multiple state agencies do the same. Plaintiffs do not engage in this discussion *at all*. Their claims should be denied.

Plaintiffs’ constitutional arguments suffer the same affliction: they presume that the right to bear arms is absolute and can in no way be restricted. As the U.S. Supreme Court has recognized, that simply is not true of any constitutional right, let alone the right to bear arms. “Like most rights, the right secured by the Second Amendment is not unlimited.” *D.C. v. Heller*,

554 U.S. 570, 626, 128 S. Ct. 2783, 2816, 171 L. Ed. 2d 637 (2008). Accordingly, “nothing in [United State Supreme Court’s] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or *laws forbidding the carrying of firearms in sensitive places such as schools and government buildings*, or laws imposing conditions and qualifications on the commercial sale of arms.” *D.C. v. Heller*, 554 U.S. 570, 626-27 (2008) (emphasis added).

The test of whether restrictions impermissibly burden a constitutional right is reasonableness. *Arnold v. Cleveland*, 67 Ohio St.3d 35, 47 (1993). And here, the challenged provisions are a reasonable condition on receiving higher education and employment in higher education. As explained in OSU’s opening motion, the provision is not coercive and it does not place a severe burden on anyone’s right to possess a firearm or seek higher education. Motion to Dismiss p. 13. Furthermore, it only limits firearms on university property and in university activities, and there is a reasonable relationship between the provisions and a safe and productive educational environment. Thus, it is a reasonable restriction.

CONCLUSION

For the foregoing reasons, OSU respectfully requests that this case be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Defendant's Reply to Plaintiffs' Memorandum in Opposition* was served through the Court's electronic filing system this 7th day of November, 2014, upon the following counsel:

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