

STATE OF NEW MEXICO  
COUNTY OF BERNALILLO  
SECOND JUDICIAL DISTRICT COURT

NEW MEXICO PATRIOTS  
ADVOCACY COALITION,  
LISA BRENNER, PRO-GUN WOMEN,

**Plaintiffs,**

v.

Case No. D-202-CV-2020-01048

TIM KELLER, Mayor,  
City of Albuquerque, SARITA NAIR,  
Chief Administrative Officer,  
City of Albuquerque,

**Defendants.**

**MOTION TO DISMISS COMPLAINT FOR DECLARATORY JUDGMENT AND  
VERIFIED PETITION FOR INJUNCTIVE RELIEF**

COMES NOW, Defendants Tim Keller, Mayor, and Sarita Nair, Chief Administrative Officer (“CAO”), of the City of Albuquerque (the “City”), by and through their undersigned counsel of record, and file this Motion to Dismiss Plaintiffs’ Complaint for Declaratory Judgment and Verified Petition for Injunctive Relief pursuant to Rules 1-012(B)(1), 12(B)(6), and 1-012(B)(7) NMRA, and as grounds therefore state as follows:

**PRELIMINARY STATEMENT**

In 1994, the New Mexico State Legislature (“Legislature”) made it a felony to carry a deadly weapon on “school premises.” *See* NMSA 1978, § 30-7-2.1 (“School Premises Statute”). Rather than cabin the deadly weapon prohibition to school property, the Legislature broadly defined “school premises” to additionally include “any other public buildings or grounds, including playing fields and parking areas that are *not* public school property, in or on which public school-related and sanctioned activities are being performed.” *Id.*, § 30-7.2-1(B)(2) (emphasis

added).<sup>1</sup> In 2003, the Legislature prohibited deadly weapons on similarly broadly-defined “university premises.” NMSA 1978, § 30-7-2.4(C)(2)(b) (prohibiting deadly weapons in “the buildings or grounds... that are not university property, in or on which university-related and sanctioned activities are performed”) (“University Premises Statute”) (together, with the School Premises Statute, the “Deadly Weapons Statutes”).<sup>2</sup> The New Mexico Supreme Court has long recognized that the reason for such prohibitions is “obvious”: “Bringing a shotgun or other deadly weapon onto school grounds poses such a high risk of danger that the Legislature specifically has made it a felony offense... [T]he presence of dangerous weapons on school property is an intolerable threat to the safety of students and teachers.” *State v. Rowell*, 2008-NMSC-041, ¶ 33.

On August 16, 2019, Defendant Nair, the City’s CAO, issued Administrative Instruction No. 5-19 (the “AI” or “AI 5-19”), which provides notification and confirmation that the State’s broad definition of school and university premises applies to City locations in which school and university programs occur. Citing the City’s agreements with the Albuquerque Public Schools and other student and university programming, AI 5-19 “confirm[ed] that the City’s Community Centers, Multigenerational Centers and Senior Centers” fall within the definition of “school premises” set forth in the School Premises Statute; and further confirmed that the City’s Health and Social Service Centers (the “Health Centers”) (collectively, the “Centers”) fall within the definition of “university premises” as defined in the University Premises Statute. *See* Compl., Ex. 1, AI 5-19 at 1-3. The issuance of AI 5-19 followed an increase in gun violence across the country

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<sup>1</sup> “Deadly weapon” is defined by statute as including “any firearm, whether loaded or unloaded.” N.M.S.A. 1978, § 30-1-12 (1964).

<sup>2</sup> Unlike the School Premises Statute, violation of the University Premises Statute is a misdemeanor. N.M.S.A. 1978 § 30-7-2.4(D).

and in the City,<sup>3</sup> and is rooted in the City’s obligations pursuant to State law and its potential liability under the New Mexico Tort Claims Act for negligence in the operation of its facilities.

*Id.*

On September 20, 2019, Plaintiffs New Mexico Patriot Advocacy Coalition (“NMPAC”), a “political advocacy group,” and Lisa Brenner, a “resident of the City of Albuquerque,” filed a Complaint (the “Original Complaint”) against Defendant Mayor Tim Keller, requesting that the Court enjoin the City from enforcing the AI. Plaintiffs alleged that the AI involves a municipality “regulat[ing] an incident of the right to bear arms” in violation of the Article II, Section 6 of New Mexico Constitution (the “Preemption Provision”). Compl., ¶ 7. Though they plead only this single “Count,” Plaintiffs also alleged that the AI “violates the Second Amendment of the United States Constitution.” Compl., ¶ 14. Then, as now, Plaintiffs failed to allege that they had ever been, or intended to ever go, to the Centers.

On January 7, 2020, the Honorable Nancy J. Franchini granted Defendants’ Motion to Dismiss the Original Complaint, without prejudice, because Plaintiffs NMPAC and Brenner failed to establish they had standing to bring their claim. Thereafter, on February 10, 2020, Plaintiffs (now with additional organizational Plaintiff “Pro-Gun Women”) filed a new Complaint (the “Second Complaint” or “Complaint”), which is identical to the Original Complaint, except for the additional allegations and affidavits meant to bolster standing, namely adding that Plaintiffs have “modified their behavior and refrained from the exercise of their rights to purchase, keep and bear

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<sup>3</sup> As pointed out by the AI, mass shooters have targeted municipal centers across the country, including the killing of 12 people last year at a Virginia Beach municipal center. Meanwhile, between August 1, 2015 and July 31, 2019, 27 gun offenses have been reported to the Albuquerque Police Department (“APD”) at the Centers, and 510 gun offenses have been reported to the APD within a two-block radius of the Centers. *Id.* at 3. Tragically, on May 31, 2013, an eight-year old girl was shot and killed at the City’s own Alamosa Community Center, and on April 4, 2019, another shooting occurred at the Alamosa Community Center. *Id.*

arms as a direct result of the laws passed by the New Mexico Legislature at issue in this lawsuit” and are “fearful of going unarmed” to the Centers. Compl., ¶¶ 1,3.

As addressed herein, the Court can dispense with the Second Complaint without even reaching Plaintiffs’ meritless claims because Plaintiffs have again failed to establish standing to bring this action, a jurisdictional requirement for a complaint brought pursuant to the Declaratory Judgment Act. *See Am. Fed’n. of State v. Board of County Comm’rs of Bernalillo County*, 2016-NMSC-017, ¶ 31. Plaintiffs have *again* failed to allege any injury or “imminent threat” of injury – a prerequisite for standing – because they again fail to allege that any Plaintiff, or member thereof, has ever been to a Center, much less has carried or ever intended to carry a firearm into any of the Centers. An assertion of “modification” of behavior without alleging any relevant initial behavior is wholly insufficient to establish injury under New Mexico caselaw. *Compare ACLU v. City of Albuquerque*, 1999-NMSC-044 (plaintiffs had standing only because they “curtailed their previously legitimate” activities).

Further, even if their lack of standing were not fatal to their claim – and it is – Plaintiffs fail to state a claim upon which relief may be granted. Rule 1-012(B)(6). Even accepting all of Plaintiffs’ factual allegations as true, the New Mexico Constitution’s prohibition on *municipal* regulation of “an incident of the right to keep and bear arms” has no application here: AI 5-19 simply provides notice and confirmation as to where the City will enforce *State* law – the Deadly Weapons Statutes – it already applies. Plaintiffs do not challenge the right of the State to regulate firearms, *see* Compl., ¶ 13, nor the State’s authority to prohibit firearms on school and university premises. The AI does not “reinterpret state criminal law,” as Plaintiffs claim, Compl., ¶¶ 5-6; it merely clarifies for visitors to the Centers that the City will *enforce* the existing State law

prohibition of firearms as the law applies to the City’s Centers, as any political subdivision of the State must. For all of these reasons, the Complaint should be dismissed.

**FACTUAL BACKGROUND**

The City operates several dozen Community Centers, Multigenerational Centers, Senior Centers, and Health Centers that provide services to the City’s residents. *See* AI at 3. As set forth in detail in the AI, the Centers provide a number of school-related and sanctioned programming activities to students, and even themselves serve as schools by providing various education classes. *Id.* The City is party to several contracts and agreements with Albuquerque Public Schools (“APS”), reflecting joint use of the Centers. *Id.* In the Fiscal Year 2019 alone, 200,000 City youth and nearly 325,000 City adults visited City Community Centers. The City Playground Recreation Program served almost 270,000 children, and the City Therapeutic Recreation Program served almost 48,000 youth. The City Job Mentorship Program had an enrollment of over 1,500. In addition, all four of the Health Centers are used for the University of New Mexico (“UNM”) Maternity & Family Planning clinic, serving approximately 144,000 clients annually. Plaintiffs challenge none of these facts.

**ARGUMENTS AND AUTHORITY**

**I. DISMISSAL IS REQUIRED DUE TO A LACK OF STANDING**

Plaintiffs bring this suit pursuant to New Mexico’s Declaratory Judgment Act, N.M.S.A. § 44-6-1 *et. seq.* Compl, p. 1. “Under New Mexico’s Declaratory Judgment Act, standing . . . is a jurisdictional prerequisite.” *Am. Fed’n. of State v. Bd. of County Com’rs of Bernalillo County*, 2016-NMSC-017, ¶ 31 (dismissing declaratory judgment action for lack of standing).<sup>4</sup> As Plaintiffs fail to establish standing, dismissal here is warranted pursuant to Rule

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<sup>4</sup> At oral argument, Judge Franchini stated that she was dismissing Plaintiff’s Complaint without prejudice because she did not have jurisdiction to reach the merits.

1-012(B)(1).

To maintain standing to assert a claim for declaratory judgment, plaintiffs must show “(1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision.” *ACLU of New Mexico v. City of Albuquerque* (“*ACLU I*”), 2008-NMSC-045, ¶ 7. Organizational standing requires a showing that “its members would otherwise have standing to sue in their own right.” *Id.* at ¶ 30.

To have standing, litigants must allege an injury-in-fact by showing that the plaintiff “is imminently threatened with injury, or, put another way, that [the plaintiff] is faced with a real risk of future injury, as a result of the challenged action or statute.” *Am. Fed’n. of State*, at ¶ 32. With respect to a constitutional challenge to a criminal ordinance, while a plaintiff need not subject himself to arrest, he “must be able to demonstrate a high probability of arrest for his own actions.” *ACLU II*, at ¶ 25 (dismissing complaint for lack of standing where plaintiff’s assertion that he drove in Albuquerque and was therefore subject to DWI vehicle forfeiture ordinance was “simply too speculative.”). This showing may involve an allegation of changed behavior; for example, in *ACLU v. City of Albuquerque* (“*ACLU I*”), 1999-NMSC-044, the Court held that teenagers had standing to challenge a City curfew ordinance because the plaintiffs alleged that, due to the ordinance, they “curtail[ed] their previously legitimate late-night activities.” *Id.* at ¶ 9.

Here, however, Plaintiffs have not alleged they have ever been to any Center, nor that they intended to go to the Centers but for the AI. While Plaintiffs cursorily aver that they “no longer feel safe attending Albuquerque’s community centers” (Decls. of Lisa Brenner and D. West, ¶ 4), and “can now longer [sic] exercise my right to carry my firearm for self-defense at community center [sic],” they do not allege that they have ever actually been to a Center, with or without a

firearm, in the first place.<sup>5</sup> No New Mexico court has held that an ephemeral, newfound fear, without any allegation of altering a “previously legitimate” activity, establishes standing. Allowing so would eviscerate the purpose of standing, namely, that a plaintiff have a personal stake in the outcome of a case. *See ACLU II*, 2008-NMSC-045, ¶ 19 (noting that by requiring an injury-in-fact, “our state court justiciability policies serve the values of avoiding unnecessary constitutional determinations.... [an] approach [that] is deeply ingrained in New Mexico jurisprudence.”) (citations omitted).

Additionally, unlike the curfew ordinance in *ACLU I*, entering a Center with a firearm was not “previously legitimate” before the AI; rather, it was already illegal under the State Deadly Weapons Statutes. The Complaint therefore additionally suffers the same flaw as the challenge to the DWI forfeiture ordinance in *ACLU II*, namely, the underlying behavior was already unlawful. *See id.*, ¶ 26 (plaintiffs had no injury because the ordinance “does not make illegal any particular course of conduct that was previously permitted.”).<sup>6</sup>

### **III. DISMISSAL IS REQUIRED FOR FAILURE TO STATE A CLAIM**

Even if Plaintiffs had sufficiently pled facts to support standing, and accepting all of Plaintiffs’ allegations as true, Plaintiffs fail to state a claim that Defendant violated the New

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<sup>5</sup> Debra West, a member of “Pro-Gun Women,” alleges that “[i]f it wasn’t for the threat of prosecution of a 4<sup>th</sup> degree felony or the fear of being defenseless I would continue to attend meetings and community events.” (Decl. of D. West, ¶ 5). However, Ms. West never actually alleges that she has visited a Center in the first place, with or without a firearm. Indeed, in this sentence, she also does not mention any Center at all. Whether or not this is an attempt at wordplay to avoid standing requirements, it fails to establish engagement in a previously legitimate activity. To the extent the Court has any doubts, Defendants alternatively request an opportunity to examine the affiants in order to determine if this Court has jurisdiction over Plaintiffs’ claims.

<sup>6</sup> Because Ms. Brenner and Ms. West do not have standing, the organizational Plaintiffs lack standing as well. *ACLU II*, at ¶ 30-32 (organizational standing requires that “its members would otherwise have standing to sue in their own right”; dismissing organizational plaintiff).

Mexico or United States Constitutions, and thus the Complaint must be dismissed on the merits.

**A. The City Has Not Violated the New Mexico Constitution.**

As the AI merely confirms the applicability of State law to certain school and university-related locations, it in no way violates the New Mexico Constitution provision that “no municipality or county shall regulate, in any manner, an incident of the right to keep and bear arms.” Art. II, § 6. In passing the Deadly Weapons Statutes, the State Legislature prohibited firearms not only in places that are traditionally understood to be “schools” and “universities,” but also explicitly included separate and distinct provisions that capture areas where school-related or university-related activities occur. *See* § 30-7-2.1(B)(2) (school premises include “any other public buildings or grounds. . . in or on which public school-related and sanctioned activities are being performed.”); § 30-7-2.4(C)(2)(b) (university premises include “any other public buildings or grounds. . . . in or on which university-related and sanctioned activities are performed.”). Plaintiffs do not challenge the State’s right to prohibit firearms in such locations.

In issuing the AI, the City simply clarified where, in fact, (1) “school related and sanctioned activities are being performed” in the City of Albuquerque, as well as where (2) “university-related and sanctioned activities are performed.” § 30-7-2.4(C)(2)(b). This is not a “reinterpet[ation] of state criminal law,” Compl. ¶ 6-7, let alone a “regulation,” *Id.*; it is a straightforward *application* of State law to the precise places the State Legislature *requires* that law to be enforced. As a simple application of state law, the State Constitution’s Preemption Provision is not violated or even implicated by the AI. One wonders how Plaintiffs would have local agencies apply the State prohibition on firearms in locations with school-related activities without issuing guidance as to where that prohibition applies.



Further, while Plaintiffs cursorily allege that the Centers do not “actually meet the definition in the statute,” (Compl. ¶¶ 8-9), they provide no further explanation or allegations as to how or why they do not. This unsupported legal conclusion cannot be accepted as true on a Motion to Dismiss. *Tarin’s, Inc. v. Tinley*, 2000-NMCA-048, ¶ 11 (on motion to dismiss, “[w]e treat all of complaint’s well-pleaded allegations as true but disregard conclusions of law and unwarranted factual deductions.”). In any event, the AI sets forth in detail the nature of the school and university programming occurring at the Centers. The City is party to several contracts and agreements with APS, and they work jointly in providing a vast array of programs and services to tens of thousands of students. *See* AI at 3. This includes, *inter alia*, APS Transitional Services provided to students with disabilities who need transition into employment and post-secondary education/training; the City Therapeutic Recreation Program, which served almost 48,000 students in Fiscal Year 2019; as well as APS-sanctioned or APS-related before and after school programming. *Id.* Additionally, all four Health Centers are used for the UNM Maternity & Family Planning clinic and serve approximately 144,000 clients annually.

In sum, because the AI simply applies and enforces existing *State* law, it does not violate the Preemption Provision’s prohibition on *municipal* regulation.

**B. The City Has Not Violated the Second Amendment.**

Contrary to Plaintiffs’ allegation that the AI “violates the Second Amendment,” (Compl., ¶ 12), the U.S. Supreme Court has made clear that regulations prohibiting firearms in sensitive places, such as schools and government buildings, are presumptively constitutional. The Supreme Court emphasized in *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008), that “[n]othing in our opinion should be taken to cast doubt on... laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.” *Id.* at 626-7 (noting that these measures are

“presumptively lawful” under the Second Amendment). The Tenth Circuit has written that this sentence is “an important emphasis upon the narrowness of the holding” of *Heller*. *Bonidy v. U.S. Postal Service*, 790 F.3d 1121, 1124-25 (10th Cir. 2015) (upholding prohibitions on firearms in post offices and adjacent parking lots).

Courts have widely adopted a “two-pronged approach” to Second Amendment claims. *See, e.g., United States v. Reese*, 627 F.3d 792 (10th Cir.2010). First, the court will “ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee.” *Id.* at 800. If the law does not burden conduct protected by the Second Amendment, it is constitutional. If it does, then the court evaluates the law under intermediate means-end scrutiny. *Id.* at 801; *see also State v. Murillo*, 2015-NMCA-046, ¶ 9, (applying intermediate scrutiny to Second Amendment claim). Here, the AI does not reach activity protected by the Second Amendment, and even if the court were to find that it does, it easily survives intermediate scrutiny.

Applying the first prong of the *Heller* analysis, the Tenth Circuit upheld a prohibition on firearms in post offices and adjacent parking lots, pursuant to *Heller*'s instruction that firearm prohibitions in federal buildings do not touch activity protected by the Second Amendment. *Bonidy*, 790 F.3d at 1124 (the “Second Amendment right to carry firearms *does not apply* to federal buildings, such as post offices”) (emphasis added). *Bonidy*'s application of the sensitive places doctrine is equally persuasive here, where the State law prohibition of firearms on school premises is as presumptively lawful as the prohibition on federal buildings and parking lots. Pursuant to the “sensitive places” doctrine, therefore, the Second Amendment simply does not apply to the AI, and the Court need not reach the second stage of the analysis.

But even if the Court does go further, the AI easily satisfies intermediate scrutiny, as it advances the same government interest in *Bonidy*, the government’s “important interest in employee and customer safety.” *Id.* at 1127. In *Bonidy*, the Court noted that the prohibition was substantially related to the government’s interest, as it applied to a “limited spatial area” and “affects private citizens only insofar as they are doing business with” the US Postal Service. *Id.* The Court further noted that as property owner, the government was “acting as a proprietor rather than as a sovereign,” and thus had “broad discretion to govern its business operations according to rules it deems appropriate.” *Id.* Here, as in *Bonidy*, the City’s strong interest in protecting the sensitive populations served by schools and universities is substantially related to the AI, especially as it only affects citizens who wish to visit the Centers, in all of which school- and university- related programming takes place. As noted above, 200,000 City youth visited in Fiscal Year 2019. Meanwhile, since August 1, 2015, 27 gun offenses have been reported at the Centers, including a shooting on April 4, 2019, and 510 gun offenses have been reported within a two-block radius of the Centers. (AI at 2-3). The City has a substantial interest in protecting its students.

Finally, as the AI merely enforces existing State law, any Second Amendment claim regarding the scope of the prohibition must be brought against the State. Plaintiffs’ single claim against the Mayor and CAO of Albuquerque fails to state a Second Amendment claim.

### **CONCLUSION**

For the foregoing reasons, Defendants Keller and Nair respectfully request that the Court enter an order dismissing Plaintiffs’ Complaint.

March 12, 2020

Respectfully submitted,

/s/ Esteban A. Aguilar, Jr.

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### **CERTIFICATE OF SERVICE**

I hereby certify that the foregoing was filed on and submitted for service through the Odyssey System to:

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Colin Hunter, Esq.  
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Albuquerque, New Mexico 87104

    /s/ Esteban A. Aguilar, Jr.

STATE OF NEW MEXICO  
BERNALILLO COUNTY  
SECOND JUDICIAL DISTRICT

NEW MEXCO PATRIOTS ADVOCACY  
COALITION, ET AL.

No. D-202-CV-2020-01048

V.

TIM KELLER, Mayor, and SARITA NAIR,  
Chief Administrative Officer, City of Albuquerque

**AFFIDAVIT OF NON-ADMITTED LAYWER**

STATE OF NEW YORK            )  
  )  
COUNTY OF NEW YORK        )

Mark Weiner, (Non-admitted Lawyer) the affiant herein, having been duly sworn, states upon oath:

1. Affiant is admitted to practice law and is in good standing to practice law in New York, NY, United States.
2. Affiant has complied with rule 24-106 NMRA.
3. Affiant has associated with Esteban A. Aguilar Jr., counsel licensed to practice law in good standing in New Mexico.

Mark Weiner, Affiant, being first duly sworn, states upon oath, that all of the representations in this affidavit are true as far as affiant knows or is informed, and that such affidavit is true, accurate and complete to the best of affiant's knowledge and belief.

DATED: March 11, 2020.



Affiant

SUBSCRIBED AND SWORN TO before me this 11<sup>th</sup> day of March, 2020.

My commission expires:

10/01/2020

  
NOTARY PUBLIC

MELISSA PAQUETTE  
NOTARY PUBLIC-STATE OF NEW YORK  
No. 02PA6269636  
Qualified In Kings County  
My Commission Expires 10-01-2020

STATE OF NEW MEXICO  
BERNALILLO COUNTY  
SECOND JUDICIAL DISTRICT

NEW MEXCO PATRIOTS ADVOCACY  
COALITION, ET AL.

No. D-202-CV-2020-01048

V.

TIM KELLER, Mayor, and SARITA NAIR,  
Chief Administrative Officer, City of Albuquerque

**AFFIDAVIT OF NON-ADMITTED LAYWER**

STATE OF NEW YORK            )  
  )  
COUNTY OF NEW YORK        )

Eric Tirschwell, (Non-admitted Lawyer) the affiant herein, having been duly sworn, states upon oath:

1. Affiant is admitted to practice law and is in good standing to practice law in New York, NY, United States.
2. Affiant has complied with rule 24-106 NMRA.
3. Affiant has associated with Esteban A. Aguilar Jr., counsel licensed to practice law in good standing in New Mexico.

Eric Tirschwell, Affiant, being first duly sworn, states upon oath, that all of the representations in this affidavit are true as far as affiant knows or is informed, and that such affidavit is true, accurate and complete to the best of affiant's knowledge and belief.

DATED: March 11, 2020.

  
\_\_\_\_\_  
Affiant

SUBSCRIBED AND SWORN TO before me this 11<sup>th</sup> day of March, 2020.

My commission expires:

10/01/2020

  
\_\_\_\_\_  
NOTARY PUBLIC

MELISSA PAQUETTE  
NOTARY PUBLIC-STATE OF NEW YORK  
No. 02PA6269636  
Qualified In Kings County  
My Commission Expires 10-01-2020