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Bernalillo County
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STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

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

Plaintiffs,

D-202-CV-2020-01048

v.

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

Defendant.

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

COMES NOW, Plaintiffs New Mexico Patriots Advocacy Coalition, Lisa Brenner, and Pro-Gun Women, by and through undersigned counsel Western Agriculture, Resource and Business Advocates, LLP (A. Blair Dunn, Esq.) and Barnett Law Firm, P.A. (Colin L. Hunter, Esq.) with Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss Complaint for Declaratory Judgment and Verified Petition for Injunctive Relief, and for their reasons state as follows:

RESPONSE TO PRELIMINARY STATEMENT OF DEFENDANTS

First, an argument that a new order which by its very language explains that it is interpreting state law to enforce a law that had never previously been enforced in such a fashion does not pass the laugh test. Defendants ask this Court to grant them a power specifically reserved to the legislature and explicitly prohibited from them. It is stunning to acknowledge, in one breath, that the New Mexico Supreme Court has clearly articulated what the intent of the Legislature was

regarding school premises stating “the 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 (e*mphasis added*). And then, in the next breath, state that interpreting the statute to include non-school property contrary to the plain language of the statute is also the intent of the Legislature, with a straight face. Neither are the community centers school property, nor are the health centers university property. Plain and simple, Defendants are attempting to regulate through interpreting the statutes to fit their whim, ignoring the plain language of the New Mexico Constitution and the statutes themselves.

But the bending of plain meanings and splitting hairs tactic does not stop with statutory re-interpretation of Defendants, they use the same tactic to attack the standing of Plaintiffs in a blatant attempt sever the Plaintiffs’ First Amendment attempt to petition the Courts for redress of their grievances. Such a transparent attempt to avoid culpability for unconstitutional actions should give this Court pause. For instance, Ms. Brenner’s Declaration made under threat of perjury attached to the Complaint as Exhibit 2 plainly states:

> I **now no longer feel safe attending** Albuquerque's community centers because I cannot bring a fire arm to exercise my right to self-defense nor do I feel safe knowing that other law abiding citizens that will likely face the threat of a 4th Degree Felony if they carry their firearms will now no longer visit these facilities either. **I can no[] longer exercise my right** to carry my firearm for self-defense at [a] community center in Albuquerque.

(*emphasis added*). The emphasis language in the above statement clearly indicates that Ms. Brenner previously attended the Community Centers and has now suffered the very real injury of no longer attending these facilities because she does not feel safe to do so. Without severe distortion, Defendants cannot read this plain statement any other way as they ask this Court to do, in order to avoid having this Court review the grievance brought forward by Plaintiffs.

ARGUMENT

I. Plaintiffs have Established Standing.

Defendants correctly point out that 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 II"), 2008-NMSC-045, ¶ 7, but their application of that standard is completely wrong. Ms. Brenner and Ms. West both make declarations under penalty of perjury that they have been injured by being prohibited for concerns of safety from future lawful attendance or future attendance to a community center without their constitutionally protected right to bear arms in self-defense. This injury directly results from the Defendants actions. In this regard, Defendants ask the Court to apply the wrong *ACLU* precedent. This case is on all fours with *ACLU v. City of Albuquerque ("ACLU I"*), 1999-NMSC-044, just as teenagers had standing to address a curfew ordinance that "curtail[ed] their previously legitimate late-night activities," *id.* at ¶9, so too do Ms. Brenner and Ms. West have standing here to address not only of injury of no longer attending public facilities because of fears for safety directly resulting of the AI, but their previously lawful bearing of firearms at these facilities has been curtailed.

To state that Plaintiffs did not previously have the right to bear arms at the community centers and therefore lack standing to address the injury of the depravation of that right gets to the very heart of this matter. Interpreting or reinterpreting statutes is not the province of the executive of the City of Albuquerque, it is the province of the Courts, "[I]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803). Plaintiffs have sufficiently alleged that they previously possessed the

right to bear arms at the community centers and health centers, which this Court must treat as true for the purposes of this Motion. For the Court to follow the assumptions of Defendants to their logical conclusion would imply that they are the ultimate say and a citizen is left with no opportunity to challenge the constitutionality of an action of the government.

This Court, sitting as the arbiter of what the law means and as the branch of our republican form of government in New Mexico that is responsible to be the bastion that protects the fundamental liberties of the individual against infringement by the government, should be very alarmed by the instant motion. It is the responsibility of this Court to protect the public from all usurpations by a government, including the usurpation of the powers of the judiciary in this state to interpret what the Legislature means when it says what a "school premises" is, and to protect the public from a municipality or county that wishes to interpret laws in a new way in order to regulate an incident of the fundamental liberty to keep and bear arms. Indeed, this Court should be so alarmed by the instant motion, which represents nothing short of an effort of tyranny to suppress not only the fundamental liberty protected by the Second Amendment; but also the liberty protected by the First Amendment, that any hesitation or delay by this Court would have the troubling appearance of condoning the fascism that this Motion undeniably represents. More importantly, for this Court to entertain the notion that the deprivation or infringement of fundamental liberties by the Mayor and the public employees under his control through this instant motion would be tantamount to conceding the despotic notion that depriving citizens of their constitutional freedoms was not an injury, much less an injury that confers upon the citizens the standing necessary to petition their government through the courts for redress of their grievances. In short, for this Court to give any weight to the idea that a citizen or group of citizens that suffer an infringement on their fundamental liberty to lack standing because they have not alleged that

they previously exercised that liberty would be the equivalent of this Court aiding in the deprivation of the liberty protected by the First Amendment.

II. Defendants' Actions Violate the New Mexico and the United States Constitutions

The First Amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press." U.S. Const. amend. I. That is the functional equivalent of the New Mexico Constitution's prohibition of local governments regulating in any way the carrying of firearms by stating "[n]o municipality or county shall regulate, in any way, an incident of the right to keep and bear arms." N.M. Const. art. II, § 6. If Congress can make no law abridging the freedoms protected by the First Amendment, how can this Court find it permissible for a municipality acting through the authority of its mayor to regulate by re-interpreting state law the bearing of firearms protected by the Second Amendment and Section 6 of the New Mexico Bill of Rights without causing an injury sufficient to confer standing. Thus, the instant Motion by the Mayor, having ceded his voice to a radical special interest group largely funded by a fascist former candidate for President, seeks not only to violate the New Mexico Constitution's prohibition against a municipality regulating where firearms may be carried in any way, but seeks explicitly by this Motion to have this Court deny the very standing protected by the First Amendment to women wishing to address injury they have suffered, depriving them of their fundamental liberty of self-defense protected by the Second Amendment.

For this Court to agree with the Mayor that *Am. Fed'n, of State v. Bd. of County Com'rs of Bernalillo County,* 2016-NMSC-017 stands for the proposition that a loss of a constitutionally guaranteed freedom is not a real injury such that Plaintiffs in the matter lack standing is contrary to the great weight of jurisprudence regarding the deprivation of or infringement upon fundamental

liberties which are recognized to be not only an injury but an irreparable injury based upon the constitutional tenets discussed above. Here in the Tenth Circuit, that Court has stated that "the loss of [constitutional] freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Heideman v. S. Salt Lake City,* 348 F.3d 1182, 1190 (10th Cir.2003) (internal quotation marks omitted). And the Tenth Circuit is in good company. In the Third Circuit, the Federal District Court of New Jersey has previously explained that "an alleged constitutional infringement will often alone constitute irreparable harm." *Ass'n for Fairness in Bus., Inc. v. New Jersey,* 82 F. Supp. 2d 353, 363 (D.N.J. 2000). "When an alleged deprivation of a constitutional right is involved, … most courts hold that no further showing of irreparable injury is necessary." 11A Wright & Miller, Federal Practice & Procedure §2948.1 (West 3d ed. 2017). The Ninth Circuit, for example, reiterated the point very recently, concluding that "the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Washington v. Trump,* 847 F.3d 1151, 1169 (9th Cir. 2017). And other courts have reached similar conclusions. *See, e.g., Gordon v. Holder,* 721 F.3d 638, 653 (D.C. Cir. 2013) ("'[A] prospective violation of a constitutional right constitutes irreparable injury.'"); *Lynch v. City of New York*, 589 F.3d 94, 99 (2d Cir. 2009) ("The parties do not dispute that, assuming the breathalyzer program violates the Fourth Amendment, plaintiffs have demonstrated 'irreparable harm.'"). Nor should there be any relaxation of this principle when it comes to the right to keep and bear arms—a constitutional guarantee that protects the liberty of self-defense and self-governance. In fact, James Madison writing in Federalist Paper No. 46, made it clear that this fundamental liberty of the individual was critical to preserving our form of government stating:

> Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any

> which a simple government of any form can admit of. Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms. And it is not certain, that with this aid alone they would not be able to shake off their yokes.

Id. Indeed, denial of the "right of a citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes" is even more expressly considered and prohibited by the New Mexico Constitution than the federal Constitution. N.M. Const. art. II, § 6 And is, thus, a recognition that improper denial of the right to keep and bear arms creates irreparable injury. In effect, what the instant Motion tries to convince this Court would be proper is an executive order or an administrative instruction by the Mayor's Chief Administrative Officer[1] at the Mayor's direction that because a state law prohibits the obstruction of traffic on a street that the Mayor can ban peaceful protest by members of the LGBTQ community in a pride parade if they don't allege that they have purchased the materials to make a sign for the parade. Such a notion is offensive and should strike this Court not just as unconstitutional on its face, but should "strike [this Court] as wrong with the force of a five-week-old, unrefrigerated dead fish." *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.,* 866 F.2d 228, 233 (7th Cir.1988), *cert. denied,* 493 U.S. 847, 110 S.Ct. 141, 107 L.Ed.2d 100 (1989).

If there were any doubt about the gravity of the harm at issue, the loss of Plaintiffs' right to carry arms at issue on certain city property illustrates the "intangible" and "unquantifiable" injuries that result when individuals are later harmed as result of being denied constitutionally protected arms resulting from being defenseless against the criminal element that does not abide by a prohibition against arms in certain locations. *Ezell v. City of Chicago*, 651 F.3d 684, 699 (7th

[1] The Mayor tries in his Motion to hide his actions behind the authority of his CAO when in reality he is on record as having directed her actions and taking credit for them. *See* *https://www.krqe.com/news/albuquerque-metro/mayor-signs-action-banning-firearms-from-community-centers/*

Cir. 2011). There is no way to quantify the harm done by preventing Plaintiffs from defending themselves in these community places from those that do not abide by the prohibition that the Mayor's new regulation imposes upon law-abiding citizens. To argue that the Defendants' actions do not infringe upon the Second Amendment rights of Albuquerque's citizenry is farcical at best; to argue that that they have lawfully taken an action that is narrowly tailored to meet a compelling government interest when they are prohibited from in any way legislating or regulating any incident of the right to keep arms is tragically wrong. As the Supreme Court noted in *Rowell,* these laws were passed by the Legislature to meet a compelling government interest of firearm dangers on *school property,* not the public zoo that school children regularly attend on school sanctioned field trips, the Legislature by the plain language of the statute did not intend to extend the law to every public property that school children might from time to time attend for school activities.

III. The Statutes Passed by the Legislature are Clear

Plaintiffs are likely to prevail on the merits because the Mayor's attempt to back door regulate the bearing of firearms contradicts the plain language of the statute. Statutes are interpreted to give meaning to the plain language unless there is ambiguity:

> Our primary goal in interpreting statutory language is to "give effect to the intent of the Legislature." *State v. Smith*, 2004-NMSC-032, ¶ 8, 136 N.M. 372, 98 P.3d 1022 (internal quotation marks and citation omitted). "We look first to the plain meaning of the statute's words, and we construe the provisions of the Act together to produce a harmonious whole." *Dewitt v. Rent-A-Center, Inc.*, 2009-NMSC-032, ¶ 14, 146 N.M. 453, 212 P.3d 341 (internal quotation marks and citation omitted). When we interpret the plain language of a statute, we read all sections of the statute together so that all parts are given effect. *Diamond v. Diamond*, 2012-NMSC-022, ¶ 25, 283 P.3d 260. "[I]f the language is doubtful, ambiguous, or an adherence to the literal use of the words would lead to injustice, absurdity or contradiction, we will reject the plain meaning in favor of an interpretation driven by the statute's obvious spirit or reason." *State v. Trujillo*, 2009-NMSC-012, ¶ 21, 146 N.M. 14, 206 P.3d 125 (internal quotation marks and citations omitted).

Cordova v. Cline, 2017-NMSC-020, ¶ 13, 396 P.3d 159, 164. When no contrary intent or ambiguity exist, "no other means of interpretation should be resorted to and there is no room for construction." *State v. Lujan*, 1985–NMCA–111, ¶ 12, 103 N.M. 667, 712 P.2d 13.

Here, the New Mexico Legislature unambiguously stated that school premises means, "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." NMSA 1978 § 30-7-2.1 (*emphasis added*). The legislature clearly did not state "where school activities have or may be performed," they said, "are being performed", *id*. thus, city centers are only school premises when school related and sanctioned activity is currently occurring; not all the time as the Mayor would like to be the case in his executive order. Likewise, a health center is only a university premise if a university sanctioned activity is performed there. There is no demonstration by the Mayor that his executive order meets the plain language requirements of the law and he is prohibited by the New Mexico Constitution from enacting new regulation.

CONCLUSION

James Madison once said *"*[j]ustice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit.*"* It would be grave injustice for this Court to entertain favorably this Motion to Dismiss.

The Court should deny the Motion.

Respectfully Submitted,

WESTERN AGRICULTURE, RESOURCE
AND BUSINESS ADVOCATES, LLP

/s/ A. Blair Dunn
A. Blair Dunn, Esq.
400 Gold Ave. SW, Suite 1000
Albuquerque, NM 87102
(505) 750-3060

BARNETT LAW FIRM, P.A.

/s/ Colin L. Hunter
Colin L. Hunter, Esq.
1905 Wyoming Blvd NE
Albuquerque, NM 87112-2865
(505) 275-3200

CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2020 I filed the foregoing via the New Mexico E-filing System causing all parties of record to be served via electronic means.

/s/ A. Blair Dunn
A. Blair Dunn, Esq.