

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

NEW MEXICO PATRIOTS
ADVOCACY COALITION,
LISA BRENNER,

Plaintiffs,

Case No. D-202-CV-2019-07344

v.

TIM KELLER, Mayor,
City of Albuquerque,

Defendant.

**EMERGENCY VERIFIED PETITION FOR TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION WITH BRIEF IN SUPPORT**

COME NOW, Plaintiffs, by and through undersigned counsel Western Agriculture, Resource and Business Advocates, LLP (A. Blair Dunn, Esq.) and pursuant to Rule 1-066 NMRA, move this Court for a temporary restraining order and preliminary injunction and state the following:

BACKGROUND

Before this Court is the very important issue of whether the Defendant's Administrative Instruction No 5-19 unconstitutionally regulates the constitutional right to keep and bear arms at certain city facilities.

Both the United States Constitution and the New Mexico Constitution protect the pre-existing fundamental liberty of the individual to keep and bear arms, directing that the government shall not infringe upon that right. It is understood that the right to keep and bear arms is "not unlimited," *D.C. v. Heller*, 554 U.S. 570, 595, 128 S. Ct. 2783, 2799, 171 L. Ed. 2d 637 (2008), but may only be limited by regulation that is narrowly tailored to serve a compelling government

interest and that such infringement is subject to strict scrutiny by judicial review. *See Abrams v. Johnson*, 521 U.S. 74, 82, 117 S.Ct. 1925, 138 L.Ed.2d 285 (1997). Further, in New Mexico Law such regulation is limited by Article II Section 6 of the New Mexico Bill of Rights in the New Mexico Constitution to prohibit counties and municipalities from regulating **in any way** an incident of the right to keep and bear arms. Thus, even an action to reinterpret state law would be **the way** in which the City of Albuquerque seeks to regulate the incident of carrying of firearms on certain city property, which would be expressly prohibited by the New Mexico Constitution, putting aside that the reinterpretation is legally incorrect.

Because of the drastic and potentially unconstitutional deprivation of a constitutionally protected liberty, Plaintiff respectfully requests that this Court issue a TRO and set this matter for a preliminary hearing as soon as possible. Counsel for Defendants was notified and served a copy of this action and the instant motion.

DISCUSSION

I. Plaintiff is Entitled to Preliminary Injunctive Relief.

A preliminary injunction is appropriate if “(1) the plaintiff will suffer irreparable injury unless the injunction is granted; (2) the threatened injury outweighs any damages the injunction might cause the defendant; (3) issuance of the injunction will not be adverse to the public’s interest and (4) there is substantial likelihood plaintiff will prevail on the merits.” *Key v. Chrysler Motors Corp.*, 119 N.M. 267, 274, 889 P. 2d 875, 882 (Ct. App. 1995) (quoting *LaBalbo v. Hymes*, 115 N.M. 314, 318, 850 P.2d 1017, 1021 (Ct. App. 1993)). Plaintiffs can establish each of these elements.

1. Irreparable Harm.

If the Court does not enter the requested injunction, Plaintiffs and New Mexicans will

suffer irreparable injury. New Mexicans will be deprived of their due and owing constitutionally protected unfringed Second Amendment right. It is well understood 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). Here, the Administrative Instruction No. 5-19 will impermissibly infringe upon the rights of citizens to keep and bear arms.

The preliminary injunction relief is intended to restrict the parties from altering the status quo until the merits of their disputes may be resolved. *Beltronics USA, Inc. v. Midwest Inventory Distrib., LLC*, 562 F.3d 1067, 1070–71 (10th Cir.2009)

2. Balance of Hardship.

The Court's grant of a temporary restraining order and preliminary injunction will impose no hardship on Defendant. In balancing the hardship, the courts typically look at whether the requested injunction preserves or alters the status quo and whether it seeks the full relief the plaintiff requested in his complaint. *See Phillips v. Fairfield University*, 118 F.3d 131, 133 (2nd Cir. 1997); *Dorfmann v. Boozer*, 414 F.2d 1168, n.13 (U.S. App. D.C. 1969). The balance of hardships will usually weigh in favor of the plaintiff if the status quo is preserved and if she is not seeking the full relief requested in her complaint. *See id.*

The balance of hardship in this case weighs heavily in Plaintiffs' favor. There is no hardship in requiring the Mayor to refrain from implementing a new and novel interpretation of state law that has never occurred before. Further, “when [a] law ... is likely unconstitutional, the [] interests [of those the government represents, such as voters] do not outweigh [a plaintiff's interest] in having [its] constitutional rights protected.” *Awad v. Ziriatax*, 670 F.3d 1111, 1131–32 (10th Cir.2012).

3. Public Interest.

The Court's entry of a temporary restraining order and preliminary injunction in this case is certainly not adverse to the public interest; indeed it is in the public interest. In fact, it "is always in the public interest to prevent the violation of a party's constitutional rights," *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1132 (10th Cir. 2013), *aff'd sub nom.*

4. Likelihood of Success.

In a case involving constitutional rights, "the likelihood of success on the merits will often be the determinative factor." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013), *aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014); *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 589 (7th Cir. 2012), *cert. denied*, — U.S. —, 133 S.Ct. 651, 184 L.Ed.2d 459 (2012). Plaintiff is likely to succeed on the merits in this matter. In the present case, the Mayor's executive order violates a constitutional right of New Mexicans.

However, even if the Court finds a less likely chance that Plaintiffs will succeed on the merits, the other three factors discussed above are established, thereby providing strong grounds for the Court to issue the temporary restraining order and preliminary injunction. While the Court must normally be satisfied that the movant has a substantial likelihood of success on the merits, when the movant can establish the other three factors, this last factor is "relaxed to require only that the movant raise 'questions, substantial, difficult, and doubtful as to make them a fair grounds for litigation and this for more deliberate inquiry.'" *Longstreth v. Maryland*, 961 F.2d 895, 903 (10th Cir. 1992). Here, Plaintiffs are likely to succeed on the merits, and at the very least raise issues as to due process, to require more "deliberate inquiry" and the need for the court to grant the preliminary injunction.

In assessing this crucial factor, courts "do not require that the right to a final decision

after trial be wholly without doubt.” *Issa v. Sch. Dist. of Lancaster*, 847 F.3d 121, 131 (3d Cir. 2017). Rather, a movant “need only show a reasonable probability of success” on the merits. *Id.* If the Court agrees that one significant outcome is the likely deprivation of the constitutional right to petition, the fundamental liberty of the right to keep and bear arms and the fundamental liberty of due process, then the most significant prong reviewed the likelihood of the movant’s success on the merits. *Am. Ass’n of People with Disabilities v. Herrera*, 690 F. Supp. 2d 1183, 1192–93 (D.N.M. 2010), *on reconsideration in part*, No. CIV 08-0702 JB/WDS, 2010 WL 3834049 (D.N.M. July 28, 2010).

“[A]ll fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States.” *Planned Parenthood v. Casey*, 505 U.S. 833, 846–47, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (quotation omitted). The doctrine of substantive due process extends protections to fundamental rights “in addition to the specific freedoms protected by the Bill of Rights.” *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997); *see also Casey*, 505 U.S. at 848, 112 S.Ct. 2791 (“Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects.”). To qualify as “fundamental,” a right must be “objectively, deeply rooted in this Nation’s history and tradition ... and implicit in the*1209 concept of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed.” *Glucksberg*, 521 U.S. at 720–21, 117 S.Ct. 2258 (quotations omitted). *Kitchen v. Herbert*, 755 F.3d 1193, 1208–09 (10th Cir. 2014).

II. The Court Should Not Require Bond.

Rule 1-066 (C) NMRA makes clear that a court need not impose a bond when granting

preliminary injunction relief. The rule provides “that for good cause shown and to be recited in the order made, the court or judge may waive the furnishing security.” *See e.g., Doctor's Association, v. Stuart*, 85 F.3d 975 (2nd Cir. 1996) (affirming district court's not to require a bond). A bond is particularly inappropriate when, like Defendant, the person sought to be enjoined will suffer no harm. *See 6001, Inc. v. City of Albuquerque*, No. 02-CV-97 MCA/DJS (D.N.M. 2002), at 17-18.

In the present case, even if the Mayor were to prevail, the Mayor would not be entitled to any monetary relief.

CONCLUSION

For the forgoing reasons, this Court should grant Plaintiffs a temporary restraining order and preliminary injunction and thereby preserve the status quo by prohibiting the Mayor and the City of Albuquerque under his direction from taking an action to enforce or implement Administrative Instruction No. 5-19 during the pendency of this dispute.

Respectfully submitted:

WESTERN AGRICULTURE, RESOURCE
AND BUSINESS ADVOCATES, LLP

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of September 2019, I filed the foregoing via the New Mexico E-filing system and caused a copy to be served with the Summons and Complaint.

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

**VERIFICATION OF EMERGENCY APPLICATION FOR TEMPORARY
RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND BRIEF IN
SUPPORT**

State of New Mexico)
)ss
County of Bernalillo)

I, Lisa Brenner, being first duly sworn on oath attest and state:

(1) I have read the both the Complaint and this Petition. I am familiar with the facts alleged herein, and hereby verify that the factual allegations contained in the above-mentioned are true and correct to the best of my knowledge, information, understanding and belief.



Lisa Brenner

Subscribed and sworn to before me on September 20, 2019



NOTARY PUBLIC

My Commission Expires:

