

**STATE OF NEW MEXICO  
COUNTY OF BERNALILLO  
SECOND JUDICIAL DISTRICT COURT**

**NEW MEXICO PATRIOTS  
ADVOCACY COALITION,  
LISA BRENNER,**

**Plaintiffs,**

**v.**

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

**TIM KELLER, Mayor,  
City of Albuquerque,**

**Defendants.**

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

COMES NOW, Defendant Tim Keller, Mayor of the City of Albuquerque, by and through his undersigned counsel of record, and files the forgoing 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, the Chief Administrative Officer (“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 contracts 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

---

<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).

country 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.*

More than a month after the AI was issued, 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 and "Emergency" Petition for a Temporary Restraining Order and Preliminary Injunction (the "Petition") against Defendant Mayor Tim Keller, requesting that the Court enjoin the City from enforcing the AI. Plaintiffs allege 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., ¶ 5. Though they plead only this single "Count," Plaintiffs also allege that the AI "violates the Second Amendment of the United States Constitution." Compl., ¶ 12.

As addressed herein, the Court can dispense with the Complaint without even reaching Plaintiffs' meritless claims because the Plaintiffs have not pled anything to establish standing to bring this action, a jurisdictional requirement for a complaint brought pursuant to the Declaratory Judgment Act. *Am. Fed'n. of State v. Board of County Comm'rs of Bernalillo County*, 2016-NMSC-017, ¶ 31 (dismissing declaratory judgment action for lack of standing). Plaintiffs' Complaint fails to allege any injury or "imminent threat" of injury – a prerequisite for standing – because it does not allege that Ms. Brenner or any member of NMPAC owns a firearm, much less

---

<sup>3</sup> As pointed out by the AI, mass shooters have targeted municipal centers across the country, including the killing of 12 people earlier this 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, a shooting occurred at the Alamosa Community Center. *Id.*

that they have carried or have reason to carry such a firearm into any of the Centers. *Id.* at ¶ 31. Additionally, Plaintiffs' Complaint fails to identify a proper party Defendant in this case. The Complaint should thus be dismissed pursuant to Rules 1-012(B)(1) and 1-012(B)(7).

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., ¶ 11, 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 City's 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.<sup>4</sup> 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 Service 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,

---

<sup>4</sup> Defendant is concurrently filing a separate opposition to the Petition for a TRO and Preliminary Injunction, in the event the Court decides not to dismiss the Complaint.

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). As Plaintiffs fail to establish standing, dismissal here is warranted pursuant to Rule 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*, 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.

#### A. Plaintiffs Fail To Allege Any Injury-In-Fact.

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. In *ACLU*, the organization and one of its members challenged a City ordinance that provides for civil forfeiture of vehicles upon an arrest for driving while intoxicated. *ACLU*, at ¶ 4. The court rejected

the individual plaintiff's argument that he suffered an injury sufficient to confer standing because he drives a vehicle and the ordinance purportedly "place[d] everyone who drives within the city limits of Albuquerque... in imminent harm because it punishes based on arrest, not upon a finding of guilt," finding that argument "simply too speculative" and presenting only a "hypothetical possibility" of injury. *Id.* at ¶¶ 23-29. The court concluded, "at the very least a plaintiff must be able to demonstrate a high probability of arrest for his own actions." *Id.* at ¶ 25. The organization also lacked standing because it failed to show any of its individual members had suffered an injury-in-fact. *Id.* at ¶ 30-32.

Here, Plaintiffs are even further afield than plaintiffs in *ACLU* from establishing any injury-in-fact. Unlike the individual plaintiff in *ACLU*, who at least alleged he drove a vehicle, neither Ms. Brenner nor any of the purported members of NMPAC have alleged they own a firearm, let alone that they intend to carry the firearm into a Center and are at imminent risk of prosecution thereafter. Indeed, Plaintiffs do not even allege that they have ever been to or intend to go to any of the Centers. Plaintiffs have thus failed to meet the basic requirement to plead an injury in fact, and the Complaint must be dismissed for lack of standing. *ACLU*, at ¶ 29; *see also Am. Fed'n. of State*, at ¶¶ 31-33.

**B. Plaintiffs Sued the Wrong Defendant and Fail to Show A Causal Connection Between any Injury and any Action by the Mayor.**

Here, to the extent Plaintiffs allege they have suffered any harm caused by the AI, the injury was not traceable to the Mayor, when it was the Chief Administrative Officer ("CAO") who issued the AI, and who is not before the Court. Complaint ¶ 5 and Exhibit 1 (acknowledging CAO issued AI); Albuquerque Code of Ordinances, § 3-1-2(A)(4) (granting CAO sole authority to issue AIs). Because Ms. Nair was not joined, and Mayor Keller is the sole Defendant, the case must be dismissed. *See* Rule 1-012(B)(7); *Perez v. Gallegos*, 1974-NMSC-102, ¶ 7. (affirming dismissal

of action because “trial court lacked jurisdiction to adjudicate these claims because of the absence from the suit of an indispensable party, the county commissioners”). Furthermore, Plaintiffs cannot obtain the relief they seek – an order that the AI is unconstitutional – by suing the Mayor, who has no authority to issue an AI and whom Plaintiffs admit has not done so here.

### **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 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 is merely confirming 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 “reinterpret[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. ¶¶ 6-7; Petition at 2, 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 State law, any Second Amendment claim regarding the scope of the prohibition must be brought against the State. Plaintiffs’ single claim against the Mayor fails to state a Second Amendment claim.

## CONCLUSION

For the foregoing reasons, Defendant Keller respectfully requests that the Court enter an order dismissing Plaintiffs' Complaint.

Respectfully submitted,

/s/ Esteban A. Aguilar, Jr.  
Esteban A. Aguilar, Jr.  
City Attorney  
City of Albuquerque  
P.O. Box 2248  
Albuquerque, NM 87102  
(505) 768-4500  
*Attorney for Defendants*

and

Eric Tirschwell\*  
Mark Weiner\*  
Everytown Law  
450 Lexington Avenue  
P.O. Box 4148  
New York, NY 10017  
(646) 324-8222  
*\*Requesting Admission Pro Hac Vice  
Attorneys for Defendant*

## **CERTIFICATE OF SERVICE**

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

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

/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-2019-07344

V.

TIM KELLER, Mayor,  
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: October 14, 2019.

Eric Tirschwell  
Affiant

SUBSCRIBED AND SWORN TO before me this 14 day of October, 2019.

My commission expires:

October 1, 2022

James Edward Miller  
NOTARY PUBLIC

JAMES EDWARD MILLER  
Notary Public, State of New York  
Registration #02MI6381318  
Qualified In New York County  
Commission Expires Oct. 1, 2022