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.

REPLY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS COMPLAINT

COMES NOW, Defendant Tim Keller, Mayor of the City of Albuquerque, by and through his undersigned counsel of record, and files the following Reply in Support of his Motion to Dismiss Complaint for Declaratory Judgment and Verified Petition for Injunctive Relief (the "Motion" or "MTD"):

PRELIMINARY STATEMENT

After filing a Complaint, a Petition for an injunction, and now two legal briefs, Plaintiffs still fail to allege that they even own firearms, let alone have been or intend to go armed to Albuquerque's community or health centers (the "Centers"). It is black letter law that they therefore do not have standing, a dispositive and jurisdictional issue, and this case must be dismissed. *See ACLU of New Mexico v. City of Albuquerque*, 2008-NMSC-045.

While Plaintiffs stridently argue that a litigant alleging a deprivation of constitutional rights need not show any likelihood of actual injury – to Plaintiffs, the claim of a constitutional violation is enough – the New Mexico Supreme Court has made clear that it disagrees. *See ACLU* at ¶ 11 (dismissing pre-enforcement constitutional challenge to city ordinance due to litigant's failure to

establish that he was "imminently threatened with injury"). In fact, the plaintiffs in *ACLU* tried to persuade the Court to abandon the same injury-in-fact requirement Plaintiffs take issue with here, but the Court rejected the attempt. *Id.* at ¶¶ 19-20. Additionally, every case cited by Plaintiffs in their Response, rather than supporting their argument, involved litigants who *did* establish an injury-in-fact. (*See* Response at 4-5, discussed *infra* at 4-5).

Moreover, even if an allegation of a constitutional violation were sufficient to establish standing in New Mexico – and it is not – Plaintiffs have not alleged any such violation. As set forth in the Motion, there is no Second Amendment right to carry firearms in community centers. MTD at 9-10, citing *Bonidy v. U.S. Postal Service*, 790 F.3d 1121, 1124-25 (10th Cir. 2015). Plaintiffs fail altogether to respond to this argument, or to the case law supporting it. Simply declaring one has a constitutional right to something does not make it so. *See 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").

Finally, even if Plaintiffs had standing to bring this case, the gravamen of their Complaint – that the Mayor "reinterpreted" State law by issuing the Administrative Instruction (the "AI" or "AI 5-19") – is based on a fundamental misreading of the State statutes at issue. In their Reply in support of their Emergency Verified Petition for Temporary Restraining Order and Preliminary Injunction (the "TRO Reply"), incorporated by reference in the MTD Response here, Plaintiffs argue that "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 [sic]." (TRO Reply at 2). First, this is a concession by Plaintiffs that State law does, in fact, prohibit firearms in Albuquerque's health and community centers (the "Centers") under existing State law. However, the statute defining "school premises," NMSA 1978, § 30-7-2.1 (the "School

Premises Statute"), is not so limited in time; it covers any location "in or on which" there are ongoing school activities. Plaintiffs improperly attempt to insert a limiting word – "while" or "when" activities "are being performed" – that does not exist in the statute. As explained herein, the plain language of the statutes and tools of statutory construction make clear that the state statutes encompass the Centers. Thus, the Complaint fails on the merits, though the Court need not reach them here. The Complaint should be dismissed.

LEGAL ARGUMENT

I. PLAINTIFFS FAILED TO ESTABLISH STANDING

A. Plaintiffs Have Not Established Any Injury-in-Fact

As set forth in the Motion, the New Mexico Supreme Court requires that a plaintiff must establish an injury-in-fact to bring suit. *ACLU* at ¶¶ 11, 20-22 (litigants must show that they are "faced with a real risk of future injury, as a result of the challenged action or statute"). The purpose is to avoid a court deciding a constitutional question with only "a general, undifferentiated threat of a hypothetical harm to some unidentifiable person." *ACLU* at ¶ 18. In the context of a pre-enforcement challenge, as in *ACLU*, an injury-in-fact means that "at the very least a plaintiff must be able to demonstrate a high probability of arrest for his own actions." *ACLU* at ¶ 25. In *ACLU*, the allegation that the plaintiff drove a vehicle and was therefore subject to the challenged ordinance regarding vehicle forfeiture was *insufficient* to show a high probability of arrest; here, Plaintiffs do not even allege that they own firearms, let alone that they likely face arrest for bringing them into community centers. *ACLU* therefore mandates dismissal.

Plaintiffs do not confront this controlling case law. Instead, Plaintiffs level frivolous and inflammatory charges of "tyranny" and "despot[ism]," claiming that if the Court does not act swiftly it will "have the troubling appearance of condoning the fascism that this Motion undeniably

represents." (MTD Response at 2). Plaintiffs then cite to a number of federal cases that discuss the necessary showing of irreparable harm for the purposes of equitable relief. (*See* MTD Response at 3-4). Yet all of those cases involve plaintiffs who had suffered an injury-in-fact, supporting *Defendant's* position on standing; the inapposite portions Plaintiffs rely on discuss whether that injury is *irreparable*. *See Heideman v. South Salt Lake City*, 348 F.3d 1182, 1190 (10th Cir. 2003) (challenge to ordinance prohibiting nude dancing brought by female erotic dancers whose livelihood was threatened by ordinance); *Ass'n for Fairness in Business, Inc. v. New Jersey*, 82 F.Supp.2d 353, 355 (D.N.J. 2000) (challenge to New Jersey law requiring casinos contract a portion of their business to minority-owned businesses brought by association whose members lost business due to law); *Washington v. Trump*, 847 F.3d 1151, 1169 (9th Cir. 2017) (challenge to executive order affecting immigration brought by states whose universities were deprived of foreign nationals by order); *Lynch v. City of New York*, 589 F.3d 94, 99 (2d Cir. 2009) (challenge to breathalyzer policy for police who cause injury or death brought by labor union representing police officers who are affected by policy). None of these cases stand for the proposition that any person need only allege a constitutional violation to have standing to challenge a government act, because all of those plaintiffs had expressly established an injury.

The sole Second Amendment case cited by Plaintiff is illustrative. *See* Response at 6, citing *Ezell v. City of Chicago*, 651 F3d 684, 699 (7th Cir. 2011). In *Ezell*, the Seventh Circuit granted the plaintiffs' motion to enjoin a Chicago ordinance that required firearms training before a person could own a handgun, but also prohibited firearm ranges in the city. The panel addressed the plaintiffs' standing at length:

> We note first that the district court did not address the individual plaintiffs' standing, probably because it is not in serious doubt. Ezell, Hespen, and Brown are Chicago residents who own firearms and want to maintain proficiency in their use via target practice at a firing range. Ezell is the victim of three attempted burglaries and applied

> for a Chicago Firearm Permit to keep a handgun in her home for protection. Hespen is a retired Chicago police detective who maintains a collection of handguns, shotguns, and rifles. Brown is a U.S. Army veteran who was honorably discharged after service in World War II; he is currently chairman of the Marksmanship Committee of the Illinois unit of the American Legion and teaches a junior firearms course at an American Legion post outside the city. Ezell and Hespen left the city to complete the range training necessary to apply for a Permit to legalize their firearm possession in the city. Brown owns a firearm that he keeps outside the city's limits because he does not have a Permit…

Id. at 695. If Plaintiffs' conception of the law of standing were correct, the Seventh Circuit would not have engaged in any of this analysis, but rather relied solely on the allegation of a constitutional violation. Plaintiffs' conception of federal and New Mexico law, however, is incorrect. The failure to establish injury-in-fact is fatal to their standing to bring this suit.

B. Plaintiffs Fail to Allege A Constitutional Violation

Even if it were the case that the mere allegation of a constitutional violation, rather than an injury-in-fact, were sufficient to establish standing, the government act at issue would have to actually violate the state or federal Constitutions. Yet the ability to bring firearms into community centers – the purported "right" Plaintiffs argue is infringed – is not protected by either Constitution.[1] Rather, as set forth in the Motion, the Second Amendment does not apply to "sensitive places such as schools and government buildings." *See* Motion at 9-10, citing *Bonidy*, 790 F.3d at 1124. The Centers at issue here are all government buildings, and therefore, like the post offices in *Bonidy*, are encompassed within the "sensitive places" doctrine. Plaintiffs cite to no case – and Defendant has not located any – holding that the Second Amendment applies to public community or health centers.

Plaintiffs fail to address this fundamental defect in their claim. Plaintiffs simply assert,

[1] Despite Plaintiffs assertion (Response at 4), Plaintiffs do not cite, and Defendant has not located, any caselaw that suggests New Mexico's "right of the citizen to keep and bear arms," NM. Const. art. II, § 6, is more expansive than the U.S. Constitution's "right to keep and bear arms."

without any analysis or case law that they have a "right to carry arms at issue on certain city property." Response at 5. This bald assertion does not a right make. *See Tarin's, Inc.*, 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."). Thus even under Plaintiffs' erroneous conception of the law of standing, they still fail to establish it. And without standing, the Court does not have jurisdiction to hear this case; it must be dismissed.

II. PLAINTIFFS FAIL TO STATE A CLAIM

Though the Court need not reach the merits here, Plaintiffs have also failed to state a claim. As set forth in the Motion, the City has not violated the New Mexico Constitution's prohibition on municipal regulation of firearms (Art. II, Section 6) because, by issuing AI 5-19, the City merely confirmed the applicability of *State* law to certain school and university-related locations, i.e., the Centers. (MTD at 7-8). Plaintiffs not only agree that the State has the right to regulate firearms on school and university premises (Compl., ¶ 11), but also concede that the State prohibits firearms in the *Centers themselves*, stating that "city centers are only school premises when school related and sanctioned activity is currently occurring." (TRO Reply at 2). Thus, even if Plaintiffs had standing, their case would present a narrow question: do the State statutes prohibit firearms only during the exact times while school or university activities are "currently occurring," as Plaintiffs allege, or rather during all hours, so long as some school- or university- related activities regularly occur? The plain language of the Statutes, as well as their underlying policy and the necessary avoidance of absurd results, firmly establish that the legislature meant the latter. We address the School Premises Statute first.

A. The Plain Language of the School Premises Statute Supports AI 5-19

"The principal command of statutory construction is that the court should determine and effectuate the intent of the legislature, using the plain language of the statute as the primary indicator of legislative intent." *State v. Ogden*, 1994-NMSC-029, ¶ 24. The School Premises Statute broadly prohibits firearms on "school premises," defined as:

> (1) the buildings and grounds, including playgrounds, playing fields and parking areas and any school bus of any public elementary, secondary, junior high or high school in or on which school or school-related activities are being operated under the supervision of a local school board; or
>
> (2) 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.

§ 30-7-2.1(B) (emphasis added).

The phrase "are being performed" is a tense known as the passive voice of the present continuous, and can reference activities limited in time, or activities that occur regularly. However, when used to indicate activities occurring "now" or limited in time, as Plaintiffs argue, the phrase is limited by the word "while" or "when." For example, one may ask, "When are the plays being performed?" with a response that, "They are being performed at 3 p.m." This is a temporal use of the phrase. However, one may also ask, "Where are the plays being performed?" with a response that, "They are being performed at the KiMo Theatre." This evinces an ongoing activity, not that the plays are being performed this very second.

It is in this sense that the School Premises Statute is written. First, the word "premises" suggests a location, not a time. *See Ogden*, at ¶ 24 (words "should be given their ordinary meaning absent clear and express legislative intention to the contrary…"). Second, the statute references "buildings or grounds… in or on which pubic school-related and sanctioned activities are being performed." § 30-7-2.1(B). These are descriptions of a location, at which an activity regularly occurs.

Plaintiffs, however, attempt to insert the word "when" into the statute – even though the legislature chose not to. They argue that "city centers are only school premises when school related and sanctioned activity is currently occurring." (TRO Reply at 2). To Plaintiffs, the statute reads:

> (2) any other public buildings or grounds, including playing fields and parking areas that are not public school property, ~~in or on which~~ [when] public school-related and sanctioned activities are being performed.

However, it is black letter law that, "[t]he court will not read into a statue or ordinance language which is not there, particularly if it makes sense as written." *Mira Consulting, Inc. v. Board of Education, Albuquerque Public Schools*, 2017-NMCA-009, ¶ 5. The word "when" nowhere appears in the statute, and therefore the statute is plainly not limited to "when" school activities are being performed.

If there were any doubt, the Court need only look at the first portion of the "school premises" definition. § 30-7-2.1(B)(1). It encompasses schools themselves, prohibiting firearms on "buildings and grounds… of any public elementary, secondary, junior high or high school in or on which school or school-related activities are being operated under the supervision of a local school board." *Id.* (emphasis added). In Plaintiffs' reading, this phrase – written in the same present continuous tense as the "are being performed" provision at issue – would mean that firearms are allowed in *schools themselves* and on school grounds when school activities are not "currently ongoing." (TRO Response at 2). This is, of course, not the law, and would be an absurd reading. When courts analyze convictions for carrying firearms on school grounds, they do not consider whether school activities were occurring *at that moment*. *See, e.g., State v. Salazar*, 1997-NMCA-043, ¶ 2 (upholding conviction under School Premises Statute where defendant possessed gun in school parking lot while "waiting for night classes to begin."). Were the Court to accept Plaintiffs' interpretation, firearms would be allowed in schools, on school parking lots, and any

other school premises afterhours or while non-"school board-supervised" activities occur. This is obviously not what the State legislature intended, and must be rejected.

B. The Purpose of the Statute Supports the City's Interpretation

Furthermore, "[a] criminal statute must be interpreted in light of the harm or evil it seeks to prevent." *State v. Ogden*, 1994-NMSC-029, ¶ 34 (death penalty enhancement for killing "peace officers" includes community service officers since the purpose of the statute is "to deter the killing of law enforcement officers"). Here, the "evil" the statute seeks to prevent is gun violence around students and children. As the New Mexico Supreme Court has stated, "[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. In light of this clear purpose it makes sense to construe the state statutes broadly, not narrowly, to effectuate the goal of protecting the state's students from gun violence. Thus the purpose and intent of the statute supports the City's interpretation.

C. Plaintiffs' Interpretation Leads to Unreasonable and Absurd Results

The "primary purpose of statutory construction is to give effect to the intent of the legislature while not rendering an absurd, unreasonable, or unjust application of the statute." *State v. Contreras*, 2002-NMCA-031, ¶ 12 (statute criminalizing harboring a "felon" included harboring juveniles, who cannot commit felonies under NM law; opposite result would be "absurd") (citation omitted). Here, Plaintiffs' reading would lead to a number of unreasonable and absurd results.

First, under Plaintiffs' reading of the School Premises Statute, there would be periods of time throughout the day where firearms would be permitted, essentially creating "gun hours" in community centers populated by children. In some centers, there are school-related and sanctioned activities interspersed during the day, including before-school and after-school programming, school-sanctioned transport to and from APS, therapeutic recreation programs with APS, job

mentorship programs, and child and family development programs. *See* AI 5-19 at 3 (attached as Exhibit 1 to the Complaint). In Plaintiffs' reading, between such programming, despite the fact that children are still present, adults could come in carrying firearms. This is an unreasonable, impractical and unenforceable reading of what the legislature intended.

Second, such a reading would put law-abiding gun owners at risk of becoming felons. Under Plaintiffs' conception, a person carrying a firearm in a community center could be doing so lawfully, but the moment a school activity began, he would be committing a fourth degree felony, face up to a year and a half in prison, and, ironically, lose his gun rights for life as a felon. If an armed person missed a sign that a school activity was to begin, or was simply late in leaving, he or she would become a felon. This is an absurd, and unworkable, result.

D. Reading the Statutes In Pari Materia Makes the Intent Clear

Finally, the doctrine of "in pari materia" provides that "[s]tatutes on the same general subject should be construed by reference to each other, the theory being that the court can discern legislative intent behind an unclear statute by reference to similar statutes where legislative intent is more clear." *State v. Ogden*, 118 N.M. 234, ¶ 28 (N.M. 1994).

The University Premises statute, § 30-7-2.4(C), passed after the School Premises Statute, defines "university premises" as "buildings or grounds… that are not university property, in or won which university-related and sanctioned activities <u>are performed</u>." There is no colorable argument – and Plaintiffs do not attempt one – that this statute limits the prohibition to solely <u>while</u> activities are performed.[2] It is unreasonable to believe that the legislature intended to protect university students – adults – from gun violence more than children. Rather, the University and

[2] The Plaintiffs concede that the State prohibits firearms on university premises "if a university sanctioned activity is performed there." (TRO Reply at 2). As described in AI 5-19, university-sanctioned activities – namely UNM Maternity & Family Planning clinics – occur at the health centers. (AI at 3).

School Premises Statutes should be read in the same light, prohibiting deadly weapons wherever school- or university-related programming regularly occurs.

In sum, because the Administrative Instruction merely clarifies for officials and visitors that the State law prohibition on deadly weapons applies to the Centers, it does not run afoul of the prohibition on municipal regulation of firearms. Plaintiffs have failed to state a claim.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Motion, Defendant Keller respectfully requests that the Court enter an order dismissing Plaintiffs' Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed on and submitted for service on the 16th day of December, 2019, through the Odyssey System and emailed and mailed via U.S. Mail to:

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