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.

RESPONSE IN OPPOSITION TO EMERGENCY VERIFIED PETITION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION WITH BRIEF IN SUPPORT

COMES NOW, Defendant Tim Keller, Mayor of the City of Albuquerque, by and through his undersigned counsel of record, and files the following response opposing Plaintiffs' *Emergency Verified Petition for Temporary Restraining Order and Preliminary Injunction with Brief in Support* as follows:

PRELIMINARY STATEMENT

As set forth in the concurrently filed Motion to Dismiss the Complaint (the "Motion"), the New Mexico State Legislature has prohibited the possession of firearms not only on public school property, but also on broadly-defined "school premises," NMSA 1978, § 30-7-2.1 (the "School Premises Statute") and "university premises." NMSA 1978, § 30-7-2.4(C)(2)(b) (the "University Premises Statute") (together, the "Deadly Weapons Statutes").

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 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 (the AI) at 1-3).

Over a month after the AI was issued, on September 20, 2019, Plaintiffs 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 because, Plaintiffs allege, 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.

Even were the Complaint to survive the fatal defects described in the Motion, the Petition should be denied because Plaintiffs have failed to meet their burden of proving *any* of the four requirements for preliminary injunctive relief. Plaintiffs are (1) unlikely to succeed on the merits of their claim because, as set forth in the Motion, the AI is a straightforward application of *State* law, and thus the Preemption Provision is wholly inapplicable. Nor can Plaintiffs (2) demonstrate irreparable injury because, by failing to even allege they own guns or visit the Centers, they have failed to show that they face any injury at all. Finally, (3) the balance of hardships and (4) public interest tip decidedly in favor of rejecting the Petition. On May 31, 2013, an eight-year old girl was shot to death in one of the Centers, and since August 1, 2015, there have been 27 gun offenses in the Centers, including a shooting on April 4, 2019. (*See* AI at 2). As the Court of Appeals has remarked, "[t]he occurrence of any violent crime by a child on school grounds is obviously

extremely disturbing and completely unacceptable." *State v. Tywayne H.*, 1997-NMCA-015, ¶ 14. The same holds true here. The Petition should be denied.

LEGAL STANDARD

"Injunctions are harsh and drastic remedies [that] should issue only in extreme cases of pressing necessity and only where there is no adequate...remedy at law.'" *Insure New Mexico, LLC v. McGonigle*, 2000-NMCA-018, ¶ 7 (internal authority and citations omitted). "The object of the preliminary injunction is to preserve the status quo pending the litigation of the merits." *Penn v. San Juan Hosp. Inc.*, 528 F.2d 1181, 1185 (10th Cir. 1975). The burden, "is, of course on the movant to establish his right to such relief." *Id.*

In order to obtain a preliminary injunction, a plaintiff must show that

> (1) the plaintiff will suffer irreparable injury unless the injunction is granted; (2) the threatened injury outweighs any damage the injunction might cause the defendant; (3) issuance of the injunction will not be adverse to the public's interest; and (4) there is a substantial likelihood plaintiff will prevail on the merits.

Nat'l Tr. for Historic Pres. v. City of Albuquerque, 1994-NMCA-057, ¶ 21. "If a plaintiff fail[s] to establish one of the required factors," the request should be denied. *LaBalbo v. Hymes*, 1993-NMCA-010, ¶ 11. The standard for issuance of a temporary restraining order is the same. *See Montoya v. Albuquerque Public Schools*, 2001 WL 37125104, at *1 (D.N.M. Apr. 26, 2001). It is well settled that a preliminary injunction "is an extraordinary remedy, and that it should not be issued unless the movant's right to relief is clear and unequivocal." *Haldeman v. South Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003) (citation omitted).[1]

[1] Due to "the absence of New Mexico authority concerning the factors a trial court must considering in ruling on a motion for a preliminary injunction," New Mexico courts rely on federal cases interpreting Federal Rule of Civil Procedure 65, the Rule regarding preliminary injunctions. *LaBalbo*, at ¶ 11.

ARGUMENT

I. PLAINTIFFS FAIL TO ESTABLISH ANY OF THE FOUR REQUIREMENTS FOR PRELIMINARY INJUNCTIVE RELIEF

A. Plaintiffs Are Unlikely to Succeed On the Merits.

Though they charge only a single "Count," Plaintiffs allege violations of both the New Mexico and United States Constitutions. Both of these arguments are addressed in full in the Motion to Dismiss; in the interest of economy and avoiding repetition, Defendant briefly summarizes his arguments here and incorporates by reference, as if fully set forth herein, the more detailed responsive portions of the Motion. (*See* Motion at 8-10).

1. The AI Does Not Violate 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. Here, it is undisputed that the State Legislature validly passed the Deadly Weapons Statutes criminalizing deadly weapons on school and university premises pursuant to its Constitutional authority. The City, in issuing the AI, simply informed and confirmed that the Deadly Weapons Statutes applies to the Centers. Thus, the Preemption Provision of the New Mexico Constitution has no applicability here.

While Plaintiffs cursorily allege that the Centers do not "actually meet the definition in the statute" (Compl. ¶¶ 6-7; Petition at 2), presumably meaning that the Centers are not school or university premises as defined in the Deadly Weapons Statutes, they provide no further explanation or supporting allegations as to how or why they do not, despite the fact that the movant for a preliminary injunction must show "by clear proof that he will probably prevail when the merits are tried." *Penn*, 528 F.2d at 1185. The AI, on the other hand, describes in detail the nature

of school- and university-related and sanctioned programming that occurs in the Centers, including descriptions of contracts with Albuquerque Public Schools and University of New Mexico. (*See* AI at 2-3; Motion *passim*). Without even a shred of explanation, let alone support, for its claim the Centers do not meet the State statutory definition, Plaintiffs fail to show that they are likely to succeed on the merits of this claim.

2. The AI Does Not Violate the Second Amendment

Plaintiffs' claim of a violation of the Second Amendment similarly has no chance of success on the merits, because there is no Second Amendment right to carry firearms in the Centers. (*See* Motion at 9-10). In *Bonidy v. U.S. Postal Service*, 790 F.3d 1121, 1124-25 (10th Cir. 2015), the Tenth Circuit applied to post offices the Supreme Court's statement in *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008), approving of firearm prohibitions in "sensitive places such as schools and government buildings." The Tenth Circuit held that the "Second Amendment right to carry firearms *does not apply* to federal buildings, such as post offices." 790 F.3d at 1124 (emphasis added). The same holds true here, where the buildings at issue are not only government property, but under state law are classified as school and university premises frequented by students.

Even if the Court were to determine that the Second Amendment applies to the Centers, Plaintiffs still would not succeed on the merits because the AI easily satisfies "intermediate scrutiny," as it advances a comparable government interest to the one in *Bonidy*, i.e., the government's "important interest in employee and customer safety." *Id.* at 1127. The Centers are attended by tens of thousands of City youth receiving school programming, and the City has a substantial interest in providing them with a safe, weapons-free environment. *See Heller*, 554 U.S.

at 635; *Pena v. Lindley*, 898 F.3d 969, 981-2 (9th Cir. 2018) ("countless cases" support that "public safety and crime prevention are substantial government interests") (citations omitted).

In sum, even if the Complaint could survive the Motion to Dismiss, Plaintiffs have not, and cannot, show a likelihood of success on their claims.

B. Plaintiffs Fail To Show *Any* Harm Absent an Injunction, Let Alone Irreparable Harm.

"To constitute irreparable harm, an injury must be certain, great, actual and not theoretical." *Schrier v. University of Co.*, 427 F.3d 1253, 1266-67 (10th Cir. 2005). The party seeking injunctive relief "must show that the injury complained of is of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Id.* Plaintiffs fail to show that they will suffer irreparable harm in the absence of an injunction for the simple reason that they fail to show they have suffered or will suffer any harm whatsoever.

Here, as described above and in the Motion (at pp. 4-6), Plaintiffs do not allege that they even own guns, let alone that they have possessed or intend to possess a firearm in the Centers and are therefore at imminent risk of prosecution. For this reason alone, the Petition must be denied. *See, e.g., Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1261 (10th Cir. 2004) (reversing grant of preliminary injunction where petitioner failed to show irreparable harm).

Plaintiffs argue that they need not show any actual harm by relying on a Tenth Circuit freedom of speech case that *denied* a preliminary injunction, but stated that, "the loss of First Amendment 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). Plaintiffs argue that similarly, "New Mexicans will be deprived of their due and owing constitutionally protected uninfringed Second Amendment right." (Petition at 3).

However, as described *supra*, the AI does not violate the Second Amendment. Rather, because school premises are unquestionably sensitive places, possessing firearms at the Centers is not a Second Amendment right. Thus, Plaintiffs cannot rely on the doctrine that impinging a constitutional right itself constitutes irreparable harm, because no constitutional right is violated.

Even *if* the AI implicated constitutional rights (which it does not), it would not rise to the level of "certain, great, [and] actual" harm required for the extraordinary relief sought here. *Schrier*, 427 F.3d at 1266-67. "When a state bans guns merely in particular places, such as public schools, a person can preserve an undiminished right of self-defense by not entering those places." *Moore v. Madigan*, 702 F.3d 933, 940 (7th Cir. 2012). The D.C. Circuit, in recently upholding a ban on firearms on Capitol grounds (including public areas up to 1,000 feet from the Capitol), similarly held that such a ban does not have more than a "de minimis effect upon" the petitioner's right to bear arms. *United States v. Class*, 930 F.3d 460, 465 (D.C. Cir. 2019). The same logic applies with even greater force here, where Plaintiffs can simply choose not to enter the Centers.

Additionally, bound up in the inquiry of whether there exists irreparable harm in the absence of an injunction is whether the injunction seeks to preserve the status quo, which is "the object of a preliminary injunction." *Penn*, 528 F.2d at 1185. Here, the status quo *is* that no firearms are allowed in the Centers, as it has been since the moment school and university programming began taking place in the Centers, pursuant to the Deadly Weapons Statutes. As described above, the AI simply clarifies for the public, the operating agencies, and law enforcement that the Statutes apply in these spaces and will be enforced. Thus, flipping the analysis on its head, it is the Plaintiffs that seek to alter the status quo by permitting firearms where they are not allowed, providing a further reason the Petition should be denied. *See O Centro Espirita Beneficiente Uniao Do Vegetal*

v. Ashcroft, 389 F.3d 973, 975 (10th Cir. 2004) (preliminary injunctions "that disturb the status quo" are "disfavored"), *aff'd sub nom*, 546 U.S. 418 (2006).

C. The Balance of Hardships and Public Interest Weighs Heavily In Defendant's Favor.

The balance of the equities and the public interest "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). Here, these factors tip decidedly against granting the Petition. Keeping firearms out of buildings where school and university programming occurs and schoolchildren congregate is clearly in the public interest. As the New Mexico Supreme Court has emphasized, "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; *see also State v. Tywayne H.*, 1997-NMCA-015, ¶ 11 ("[T]he nature and immediacy of the government's concern in ridding the school grounds of weapons, is indisputably of great importance. The occurrence of any violent crime by a child on school grounds is obviously extremely disturbing and completely unacceptable."). The same logic holds true in "school premises" generally, including in the Centers, where after school and recreation programs occur, and thousands of students, including young schoolchildren, congregate and receive services. As described in the AI, in Fiscal Year 2019, 200,000 City youth visited the Centers. Meanwhile, since 2015, there have been 27 gun offenses reported to the APD, including a shooting on April 4, 2019 at the Alamosa Community Center. (*See* AI at 3). It is well within the public interest to provide a safe, firearm-free environment in the Centers, as mandated by State law.

Additionally, with respect to a balance of the hardships, the City faces potential liability under the Tort Claims Act for negligence in the operation of its facilities. (*Id.* at 1). Enjoining the prohibition on firearms could expose the City to this potential liability.

On the other hand, the Plaintiffs have made no showing of hardship because, again, they

do not allege that they even use the Centers or own firearms. With respect to the requisite showing of a public interest, Plaintiffs again rely solely on the Second Amendment, arguing that it is "in the public interest to prevent the violation of a party's constitutional rights." (Petition at 4 (citing *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1132 (10th Cir. 2013)). As described *supra* and in the Motion (at pp. 9-10), however, the AI does not implicate any Second Amendment rights, and thus this argument fails. Even if it did, however, courts have rejected requests for preliminary injunctions even where they assume that Second Amendment rights are infringed, on the grounds that the public interest "is also furthered by preventing and minimizing the harm of gun violence." *Wiese v. Becerra*, 263 F. Supp. 3d 986, 994–95 (E.D. Cal. 2017). The same holds true here.

In sum, Plaintiffs have failed to meet their burden on a single one, let alone all four, of the requirements for preliminary injunctive relief.

II. IF THE COURT GRANTS INJUNCTIVE RELIEF, PLAINTIFFS MUST PROVIDE SECURITY

Rule 1-066(C) NMRA, governing applications for preliminary injunctive relief, requires the giving of security by an applicant such relief, absent a showing of good cause otherwise, "for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." Plaintiffs argue that they should not be required to post bond because Defendant "would not be entitled to any monetary relief." (Petition at 6).

While Plaintiffs' inartful pleading makes it difficult to discern if their suit is brought against the Mayor in his individual or official capacity, in either event bond is required. If Plaintiffs have (improperly) sued the Mayor in his individual capacity, and if he is required at any point to outlay attorneys' fees or costs, he would be entitled to recover. *See Guame v. New Mexico Interstate Stream Commission*, 2019 WL 3492219, at *3 (N.M. Ct. App. July 31, 2019) (discussing posting of bond for defendant's attorney's fees). Additionally, an injunction may expose the City to tort

liability for any incidents that arise in the Centers stemming from violations of the State law prohibition on firearms on school and university premises, and Plaintiff would be liable for reimbursement of those costs if the injunction is found to have been improvidently granted. *See* Rule1-066(C). Thus, if the Court grants an injunction, Plaintiffs should be required to post security in a reasonable amount to be determined by the Court.

CONCLUSION

Defendant respectfully requests that the Court deny Plaintiffs' Petition for a Temporary Restraining Order and Preliminary Injunction. If the Court grants Plaintiffs' Petition, Plaintiffs should be required to post security.

Respectfully submitted,

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