STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

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

Plaintiffs,

v. **Case No. D-202-CV-2020-01048**

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

Defendants.

REPLY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS COMPLAINT

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

PRELIMINARY STATEMENT

Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss (the "Response") reveals that Plaintiffs continue, on this second iteration of their case, to fundamentally misread the statutes applicable to Administrative Instruction 5-19 (the "AI"). Plaintiffs argue that it "does not pass the laugh test" that the City "interpret[s] the statute to include non-school property contrary to the plain language of the statute… with a straight face." Response at 1-2 (emphasis added). However, the statute defining "school premises," NMSA 1978 § 30-7-2.1 (the "School Premises Statute"), defines such premises as including school property in subsection (B)(1), and – in

subsection (B)(2) – explicitly includes "any other public buildings or grounds, including playing fields and parking areas that are not school property, in or on which public school-related and sanctioned activities are being performed." *Id.*, § 30-7-2.1(b) (emphasis added). Plaintiffs ask the Court to simply ignore subsection (B)(2) of the School Premises Statute.

Bizarrely, despite this argument, at the tail end of their Response, Plaintiffs concede that the School Premises Statute prohibits firearms in the City's community and health centers (the "Centers"), but argue that the prohibition only exists "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." Response at 9. This too is a fundamental misreading of the statute. As explained herein, not only does this interpretation insert a word that does not exist in the statute – limiting the definition of school premises to "while" or "when" activities "are being performed" – this (mis)reading would lead to dangerous and absurd results, including allowing firearms in elementary and high schools themselves.

With respect to their cursory allegation that the AI violates the Second Amendment, Plaintiffs do not even attempt to respond to the case law set forth in the Motion that clearly demonstrates that there is no Second Amendment right to carry firearms in the Centers. *See* Motion at 9-10, citing *Bonidy v. U.S. Postal Service*, 790 F.3d 1121, 1125-25 (10th Cir. 2015). 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").

The Court need not reach the merits of Plaintiffs' case, however, because they have not established standing to bring this case in the first place. Plaintiffs concede that under New Mexico jurisprudence they do not have standing if they have not alleged they have ever been to the Centers

with a firearm – which is the clear holding of *ACLU v. City of Albuquerque ("ACLU I")*, 1999-NMSA-044 – but ask the Court to simply infer that Plaintiffs "previously attended the Community Centers and ha[ve] now suffered the very real injury of no longer attending these facilities…". Response at 2-3. Yet, even were the Court to grant that inference, the question is not whether Plaintiffs have previously attended the Centers, but whether they did so carrying firearms and can say they expect or would do so again in the future. *ACLU v. City of* Albuquerque ("*ACLU II"*), 2008-NMSC-045, ¶ 19. Failure to allege as much deprives this court of jurisdiction, and mandates dismissal. *See Am. Fed'n. of State v. Board of County Comm'rs of Bernalillo County*, 2016-NMSC-017, ¶ 3.

LEGAL ARGUMENT

I. PLAINTIFFS FAILED TO ESTABLISH STANDING

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 II,* 2008-NMSC-045, ¶¶ 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 II* at ¶ 18.

In *ACLU I*, the New Mexico Supreme Court held that teenagers had standing to challenge a City curfew ordinance because the plaintiffs alleged that, due to the ordinance, they "curtail[ed] their previously legitimate late-night activities." *Id.* at ¶ 9. Thus, to establish standing to challenge governmental action, New Mexico courts look to whether the Plaintiff's previous activity would have been affected by the challenged governmental action. *See also Protection and Advocacy System v. City of Albuquerque*, 2008-NMCA-149, ¶ 26 (plaintiff had standing to challenge ordinance providing for mandatory treatment of certain mentally ill persons where "she had been

hospitalized four times in the last thirty-six months").

Here, as Plaintiffs appear to concede, this requires that Plaintiffs allege that they have, at some point in the past, attended a Center while carrying a firearm, and therefore engaged in activities that are "curtailed" by the AI. *See* Response at 2. However, no Plaintiff has alleged as much. Instead, they cryptically allege that they "now no longer feel safe attending Albuquerque's community centers because I cannot bring a firearm to exercise my right to self-defense… I can now [sic] longer exercise my right to carry my firearm for self-defense at community center [sic] in Albuquerque." Decl. of L. Brenner, ¶ 4. Plaintiffs argue that this "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." Response at 2. However, even were the Court to grant Plaintiffs this inference, the question is not whether Plaintiffs previously attended the Centers, but whether they did so *carrying a firearm* and would do so in the future but for the AI. *See ACLU I,* at ¶ 9; *ACLU II*, at ¶ 19. Plaintiffs do not even argue that this is "clearly indicated" by their affidavits, let alone actually allege that they have carried firearms into Centers populated by small children and seniors.

This is insufficient to establish standing, particularly in a declaratory judgment action, where standing is a matter of jurisdiction. *See Am. Fed'n. of State*, 2016-NMSC-017, ¶ 3. Plaintiffs' failure to articulate previous activity that is "curtailed" by the AI deprives the Court of jurisdiction, and for that reason alone, the Complaint should be dismissed.

To the extent the Court entertains Plaintiffs' request that it draw numerous inferences not contained in the affidavits, "it is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of the plaintiff's standing. If, after this opportunity, the plaintiff's standing does

not adequately appear from all materials of record, the complaint must be dismissed." *Protection and Advocacy System*, 2008-NMCA-149, ¶ 17, quoting *Warth v. Seldin*, 422 U.S. 490, 501-02 (1975). The Court should require as much here, or, as requested in the Motion, provide Defendants with the opportunity to examine the affiants in order to determine if this Court has jurisdiction over their claims. *See* Motion at 7, fn. 5.

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 simply confirmed the applicability of *State* law to certain school and university-related locations, i.e., the Centers. *See* Motion at 7-8. Plaintiffs not only agree that the State has the right to regulate firearms on school and university premises (Compl., ¶ 13), but also (after wrongly stating that the statutes do not apply to non-school property) concede that the State prohibits firearms in the *Centers themselves*. Response at 9. But, Plaintiffs argue, "city centers are only school premises when school related and sanctioned activity is currently occurring." Response at 9. 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" though that language is not in the statute, 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, case law, as well as their underlying policy and the necessary avoidance of absurd results, firmly establish that the latter is the correct reading of the law. We address the School Premises Statute first, then the University Premises Statute, and, finally, address Plaintiffs' erroneous Second Amendment claim.

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 phrases "are being operated" and "are being performed" are in a tense known as the passive voice of the present progressive, which can reference activities occurring contemporaneously, or activities that occur regularly. *See, e.g.*, *United States v. Balint*, 201 F.3d 928, 933 (7th Cir. 2000) (present progressive phrase "is providing" can mean at that moment or on a continuing basis; Congress meant the latter when banning interference with any clinic that "is providing" abortions), citing Robert Perrin, The Beacon Handbook 146-47 (4th ed. 1997). When used to indicate activities occurring "now" or limited in time, as Plaintiffs argue, such phrases are typically 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 a regularly occurring 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 phrase "school 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." Response at 9. 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 subsection (B)(1) of the "school premises" definition, repeated above. 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, in Plaintiffs'

words, "currently ongoing." Response at 9. This is, of course, not the law, and would be an absurd and dangerous 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.

Indeed, federal and state courts across the country have repeatedly rejected Plaintiffs' narrow interpretation of the present progressive tense in similar statutory contexts. For example, in *Balint*, as noted above, the Seventh Circuit rejected the defendant's argument that a federal statute's prohibition on interference with a clinic that "is providing" abortions meant only at the moment abortions were being provided; rather, "when Congress barred protester interference because a clinic '*is providing*' health services, the most natural reading is that it meant to prohibit not just interference prompted by abortions *in process* but also interference prompted by abortions provided on a recurring or continuing basis." 201 F.3d at 933 (emphasis in original); *see also Al Otro Lado v. Wolf*, 952 F.3d 999, 1011-12 (9th Cir. 2020) (phrase "is arriving" in asylum statute included people not yet in the United States; "the use of the present progressive… denotes an ongoing process."); *Currence v. Harrogate Energy, LLC*, 2015 WL 2257229, at *6 (Tenn. Ct. App. May 11, 2015) (reviewing present progressive tense; "The requirements that the rentals 'are being paid' generally indicates that these payments must be ongoing or continuous"). The same reasoning applies to locations at which school activities "are being performed" or "are being operated"; these are clear references to ongoing, recurring activities.

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. And as set forth in the AI, thousands of students attend the Centers on a daily basis, including young and disabled students. *See* AI 5-19 at 3 (attached as Exhibit 1 to the Complaint). 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. 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 and the spirit of the law.

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, she would be committing a fourth degree felony, face up to a year and a half in prison, and, ironically, lose her 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 on 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 solely <u>while</u> activities are performed.[1] It is unreasonable to believe that the legislature intended to protect university students – adults – from gun violence more than children. Rather, the University and School

[1] The Plaintiffs concede that the State prohibits firearms on university premises "if a university sanctioned activity is performed there." Response at 9. As described in AI 5-19, university-sanctioned activities – namely UNM Maternity & Family Planning clinics – occur at the health centers. *See* AI 5-19 at 3.

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.

E. Plaintiffs Have Failed To State A Second Amendment Violation

As set forth in the Motion, the Second Amendment does not apply to "sensitive places such as schools and government buildings." *Bonidy*, 790 F.3d at 1124. The Centers 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 Defendants have 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, and as such have failed to state a viable Second Amendment claim.

CONCLUSION

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

Respectfully submitted,

/s/_____
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed on and submitted for service on the 4th day of May, 2020, through the Odyssey System and emailed and mailed via U.S. Mail to:

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