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 AMENDED COMPLAINT

COMES NOW, Defendants 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 Amended 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 third iteration of their Complaint, to fundamentally misread the statutes applicable to Administrative Instructions 5-19 and 5-20 (the "AIs"). Plaintiffs argue that it "does not pass the smell test" that the City "interpret[s] the statute to include non-school property contrary to the plain language of the statute…" Response at 2 (emphasis added). However, the statute defining "school premises," NMSA 1978 § 30-7-2.1 (the "School Premises

Statute") 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.

Despite this fallacious argument, near the end of their Response, Plaintiffs concede that the School Premises Statute prohibits firearms in "city centers,"[1] 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, and is contrary to judicial interpretations of similarly-worded statutes across the country.

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 locations covered by the AIs. *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

[1] AI 5-20 provided notice that additional locations beyond City community and health centers (collectively with the new locations, the "City Locations") fall within the ambit of the School Premises Statute, which is why Plaintiffs filed an Amended Complaint. However, Plaintiffs do not address the new locations in their Response, likely because the Response is in large part duplicative of their original Response to the Motion to Dismiss the Complaint. Except where otherwise stated, Defendants' legal arguments apply to all of the locations covered by both AIs.

complaint's well-pleaded allegations as true but disregard conclusions of law and unwarranted factual deductions"). Finally, Plaintiffs' Response with respect to their First Amendment claim fails to counter the fact that (a) Plaintiffs do not have standing to bring this claim because no Plaintiff alleges that they have ever been to or intend to go to Civic Plaza, let alone with a firearm, and (b) in any event, possession of a firearm alone, without any expressive content, does not constitute protected speech. *See* MTD at 11. The Amended Complaint should be dismissed.

LEGAL ARGUMENT

Plaintiffs have 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 because, by issuing the AIs, the City simply provided notice that *State* law applies to certain school and university-related locations. *See* Motion at 6-7. Plaintiffs not only agree that the State has the right to regulate firearms on school and university premises (Compl., ¶ 14), but also (after wrongly stating that the statutes do not apply to non-school property) concede that the State prohibits firearms in the locations themselves. Response at 5. But, Plaintiffs argue, "city centers are only school premises when school related and sanctioned activity is *currently occurring*." Response at 9 (emphasis added). Thus, this case presents a narrow question: do the School Premises 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 First and Second Amendment claims.

A. The Plain Language of the School Premises Statute Supports the AIs

"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" itself 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. This subsection addresses 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, the phrase "are being operated" – written in the exact same present continuous tense as the "are being performed" provision at issue – means 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 of course 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 out of hand.

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 that interference was only prohibited 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

If the Court need look any further, "[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 AIs, thousands of students attend the City Locations on a regular 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

Furthermore, 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.

Plaintiffs erroneously make a slippery slope argument that "[u]nder the logic presented by the Defendants, regulation of firearms could be enforced on private property where a class of school children takes a field trip merely under the premise that the property has been sanctioned for school use." Response at 2. However, the School Premises Statutes are restricted to public buildings and grounds, and are not applicable to private property. *See* § 30-7-2.1(B). Furthermore, as addressed above, the statutes apply to locations where school properties regularly occur; Plaintiffs nowhere contest that school activities regularly occur at the locations covered by the AIs.

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 are performed." There is no colorable argument – and Plaintiffs do not attempt one – that this statute limits the prohibition solely while activities are performed. 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 Premises Statutes should be read in the same light, prohibiting deadly weapons wherever school- or university-related programming regularly occurs.

* * *

In sum, because the AIs merely provide notice for officials and visitors that the State law prohibition on deadly weapons applies to the Centers, they do not run afoul of the prohibition on municipal regulation of firearms.[2]

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 locations covered by the AIs are almost all government buildings, and therefore, like the post offices in *Bonidy*, are

[2] With respect to Defendants' alternative argument that the City may set conditions for entry onto its own property pursuant to the state trespass statute, *see* Motion at 7-8, Plaintiffs respond only that it "lacks such merit that it barely deserves a response." Response at 5. As Plaintiffs do not respond, Defendants rest on the argument in the Motion.

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. Similarly, with respect to the remaining locations, Plaintiffs cite to no case that has found the Second Amendment applies to public spaces such as the specific parks, pools and Civic Plaza described in AI 5-20. To the contrary, public parks are also "sensitive places" not subject to the Second Amendment. *See People v. Bell*, 107 N.E.3d 1047, 1054 (Ill. App. 2018) (finding "compelling" the argument that public parks are "sensitive places" not subject to the Second Amendment), citing *United States v. Masiciandaro*, 638 F.3d 458 (4th Cir. 2011).

Furthermore, as set forth in the Motion, even if the Court were to find that the Second Amendment applies to such spaces, the restriction on firearms easily passes intermediate scrutiny. *See* Motion at 10. These are locations populated by students and other young children, have food programming, playground equipment, and other child-focused activities, and are contained within "limited spatial area[s]." *Bonidy v. U.S. Postal Service*, 790 F.3d 1121, 1127 (10th Cir. 2015); *Bell*, 107 N.E.3d at 1055 (even if Second Amendment does apply, prohibition on firearms in public parks passes intermediate scrutiny). Plaintiffs fail to state a Second Amendment claim.

F. Plaintiffs Have Failed to State a First Amendment Claim

Plaintiffs fail entirely to respond to the fundamental defect in their First Amendment claim that no Plaintiff alleges that they have gone or intend to go to Civic Plaza, with or without a firearm, and therefore lack standing to bring a claim that their First Amendment rights are violated by a prohibition on firearms at that location. *See ACLU of New Mexico v. City of Albuquerque*, 2008-NMSC-045, ¶ 7.

On the merits, Plaintiffs argue that "[t]he law is far from clear or settled that displaying firearms and chanting about support for firearm ownership in a traditional forum like civic plaza

would not be expressive protected conduct." Response at 5. However, that is not the question presented here, because no Plaintiff alleges that they "chant[] about support for firearm ownership." Instead, Plaintiffs merely allege that they do not feel safe going to community centers because they cannot bring firearms. *See* Decl. of Lisa Brenner, ¶ 4; Decl. of Debra West, ¶ 4. And as stated in the Motion, the only courts to address the issue have found that possession of a firearm alone, without any expressive content, does not constitute protected speech. *See Northern Indiana Gun & Outdoor Shows, Inc. v Hedman*, 104 F. Supp. 2d 1009, 1013 (N.D. Ind. 2000) (ordinance banning gun possession at a city center did not implicate the First Amendment because plaintiffs failed to show their conduct "contains an expressive component"); *Chesney v. City of Jackson*, 171 F. Supp. 3d 605, 617 (E.D. Mich. 2016) (collecting cases) ("[G]un possession alone is unlikely to convey a particular message that would be understood by those who witnessed it."). Thus Plaintiffs fail to state a First 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,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed on and submitted for service on the 20th day of January, 2021, through the Odyssey System and emailed and mailed via U.S. Mail to:

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