**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.**

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

**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 file the forgoing Motion to Dismiss Plaintiffs' Amended Complaint for Declaratory Judgment and Verified Petition for Injunctive Relief pursuant to Rules 1-012(B)(1) and 12(B)(6), 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).[1] 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").[2] 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. The firearm bans are not discretionary, but having broadly defined school and university premises, the Legislature left it to localities to provide notice as to the particular locations where the statutes apply.

On August 16, 2019, Defendant Nair, the City's CAO, issued Administrative Instruction No. 5-19 ("AI 5-19"), which provided that notice by confirming that the State's definition of school and university premises applies to City locations in which school and university programs regularly 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

[1] "Deadly weapon" is defined by statute as including "any firearm, whether loaded or unloaded." N.M.S.A. 1978, § 30-1-12 (1964).

[2] Unlike the School Premises Statute, violation of the University Premises Statute is a misdemeanor. N.M.S.A. 1978 § 30-7-2.4(D).

"university premises" as defined in the University Premises Statute. *See* Compl., Ex. 1, AI 5-19 at 1-3. Thereafter, on August 31, 2020, Defendant Nair issued Administrative Instruction 5-20 ("AI 5-20") (collectively with AI 5-19, the "AIs"), which provided notice that the Deadly Weapons Statutes apply to additional City property where school and university programs occur, including parks that are used as playing areas for schools (reflecting the School Premises Statute's inclusion of "playing fields" as a type of "school premise"), as well as the Albuquerque Convention Center and Civic Plaza, where playground equipment is located and public school activities such as physical education and graduations regularly occur. *See* AI 5-20 at 2. The issuance of the AIs followed an increase in gun violence across the country and in the City.[3]

On November 18, 2020, Plaintiffs filed an Amended Complaint requesting that the Court enjoin the City from enforcing the AIs.[4] Plaintiffs alleged that the AIs involve a municipality

[3] As pointed out by the AIs, mass shooters have targeted municipal centers across the country, including the killing of 12 people in 2019 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. AI 5-19 at 3. Tragically, on May 31, 2013, an eight-year old girl was shot and at the City's own Alamosa Community Center, and on April 4, 2019, a shooting occurred at the Alamosa Community Center. *Id.* Additionally, on June 15, 2020, armed counter-demonstrates confronted protestors near Tiguex Park in Old Town, and a protestor was shot four times. AI 5-20 at 4.

[4] As the Court is aware of the procedural history of this case, we will not repeat it at length here. In short, Plaintiffs' original complaint (filed in September 2019) was dismissed by the Honorable Nancy J. Franchini on January 7, 2020, because the Plaintiffs failed to establish that they had standing to bring their claims. Plaintiffs then amended their complaint with additional plaintiffs and allegations, and Defendants again moved to dismiss on both standing and substantive grounds. (*See* Motion to Dismiss, filed March 12, 2020). Meanwhile, on June 20, 2020, Defendant Nair issued the first version of AI 5-20. Oral argument was held on Defendants' Motion to Dismiss on July 7, 2020, at the conclusion of which Plaintiffs requested that they be allowed to move to amend their complaint to include allegations regarding AI 5-20, which the Court granted. On August 31, 2020, Defendant Nair issued an updated version of AI 5-20. On November 18, 2020, as noted, Plaintiffs filed their Amended Complaint.

"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"). Amend. Compl., ¶ 7. Though they plead only this single "Count," Plaintiffs also allege that the AIs violate the First and Second Amendments of the United States Constitution. Amend. Compl., ¶¶ 15, 16.[5]

The Court can dispense with the Amended Complaint for the simple reason that the AIs do not "regulate" anything at all, and therefore do not fall within the scope of the Preemption Provision. Rather, they simply provide the requisite notice as to where *State* law applies. Plaintiffs do not challenge the right of the State to regulate firearms, *see* Amended Compl., ¶ 14, nor the State's authority to prohibit firearms on school and university premises. The AIs do not "reinterpret state criminal law," as Plaintiffs claim, Amended Compl., ¶¶ 8-9; to the contrary, they provide requisite notice that the City will *enforce* that existing State law prohibition as the law applies to City locations. Plaintiffs nowhere explain how the Deadly Weapons Statutes could constitutionally be applied if localities like the City did not provide notice as to where school and university programming regularly occurs. Additionally, the City has the authority to establish reasonable conditions before consenting to entry on its own property pursuant to state trespass laws, including certain firearm prohibitions. Finally, as explained herein, the AIs do not come close to violating the First or Second Amendments of the Federal Constitution. Plaintiffs fail to state a claim upon which relief may granted, and therefore the Amended Complaint should be dismissed pursuant to Rule 1-012(B)(6).

[5] Defendants maintain that Plaintiffs do not have standing to bring their claims, because, as described at length in the March 12, 2020 Motion to Dismiss, Plaintiffs fail to allege that any Plaintiff, or member thereof, has ever been to a Center, much less have carried a firearm into a Center; an assertion of "modification" of behavior without alleging any relevant initial behavior is insufficient to establish injury under New Mexico caselaw. *See, e.g., ACLU v. City of Albuquerque*, 1999-NMSC-044 (plaintiffs had standing only because they "curtailed their previously legitimate activities.").

## FACTUAL BACKGROUND

The City owns, maintains and/or operates property throughout the city on which school and university programming occurs. This includes 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 AI 5-19, 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, 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. In addition, all four of the Health Centers are used for the University of New Mexico Maternity & Family Planning clinic, serving approximately 144,000 clients annually.

The City also owns and/or maintains several public spaces on which school and university programming occurs. As described in AI 5-20, this includes certain city neighborhood parks, "which are used as playing areas for public schools and other public school programming, including those used for the Food Services Program for Children in partnership with [APS]"; City sports fields and pools; the Albuquerque Convention Center (used for public school graduations and other school activities); as well as Civic Plaza, which "educators and students from Amy Biehl Charter High School regularly use for physical education activities and in which playground equipment is located." AI 5-20 at 2. The AIs specifically except from their scope areas where the School and University Premises statures are inapplicable, including "Shooting Range Park, the Esperanza Bike Shop, the BMX Complex, Open Space or other Parks and Recreation Department

maintenance yards or administrative business offices." AI 5-20 at 3.

## ARGUMENTS AND AUTHORITY

### A. The City Has Not Violated the New Mexico Constitution

#### 1. The AIs Simply Provide Requisite Notice Under State Law

As the AIs merely provide notice and confirmation that State law applies to certain school and university-related locations, they in no way violate 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, including playing fields and parking areas that are *not* school property, in or on which public school-related and sanctioned activities are being performed.") (emphasis added); § 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 concede that the State has the authority to regulate firearms. Amend. Comp. ¶ 14.

In issuing the AIs, the City provided notice – as it must – as to 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," Amend. Compl. ¶ 8-9, let alone a "regulation" *Id.*; it is requisite notice as to the precise places the State law applies. As such, the State Constitution's Preemption Provision is not violated or even implicated by the AIs. 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 reflecting such notice concerns, the AIs require that written notice be posted at each property or facility in which the AIs apply. *See* AI 5-20 at 4.

Further, while Plaintiffs cursorily allege that the locations do not "actually meet the definition in the statute," (Amend. Compl. ¶¶ 8-9), 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 AIs set forth in unrebutted detail the nature of the school and university programming occurring at the locations described therein. 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 at the Centers. *See* AI 5-19 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. Finally, AI 5-20 describes in detail particular school programming that takes place at the various parks, pools, and other City locations described therein. *See* AI 5-20.

In sum, because the AIs provide requisite notice as to the application of State law, they do not violate the Preemption Provision's prohibition on municipal regulation.

**2. The City May Set Conditions for Entry Onto Its Own Property**

Additionally, and in the alternative, New Mexico's criminal trespass statute regarding

government property – also passed by the State legislature – provides the authority for municipalities to set reasonable conditions for entry onto its *own* property, including prohibitions on firearms. Under NMSA 1978, § 30-14-1(C), "[c]riminal trespass also consists of knowingly entering or remaining upon lands owned, operated or controlled by the state or any of its political subdivisions knowing that consent to enter or remain is denied or withdrawn by the custodian thereof." In 2011, in reviewing whether a District Attorney's office could permissibly ban firearms on its office premises, the Attorney General issued an advisory letter concluding that, "[t]he authority and ability of the state or a political subdivision to consent to entry by others, and to establish reasonable conditions to consenting to enter, upon lands that the state or political subdivisions own is necessarily implied by the trespass statute, and the exercise of that authority may lawfully be enforced by the trespass statute." AG Advisory Letter, issued Sept. 8, 2011[6], citing *State v. McCormick*, 100 N.M. 657, 674 (1984). This sound reasoning applies equally well to the Centers and other properties described in the AIs, all of which are owned and maintained by the City. Instituting safety protocols to consent to entry are inherent and implied to the City's authority promulgated by the *State* legislature under the trespass statute, and therefore do not fall within the prohibition on *municipal* regulation of firearms under the Preemption Provision.

### B. The City Has Not Violated the United States Constitution

#### 1. The AIs Do Not Violate the Second Amendment

Contrary to Plaintiffs' allegation that the AIs "violate[] the Second Amendment," (Amend. Compl., ¶¶ 15, 16), the U.S. Supreme Court has made clear that regulations prohibiting firearms in sensitive places, such as schools and government buildings, are presumptively constitutional.

[6] Available at https://docs.google.com/viewer?a=v&pid=sites&srcid=bm1hZy5nb3Z8cHVibGljLXJlY29yZHMtcHJvamVjdHxneDo2N2UzZTg3MmRjZWExNWQ2.

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 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. *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. *See also 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). Pursuant to the "sensitive places" doctrine, therefore, the Second Amendment simply does not apply to the locations covered by the AIs, and the Court need not reach the second stage of the analysis.

But even if the Court does go further, the AIs easily satisfy intermediate scrutiny, as they advance 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." *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, parks, pools, and other listed locations, in all of which school- and university- related programming takes place. *See, e.g., Bell*, 107 N.E.3d at 1055 (even if Second Amendment does apply, prohibition on firearms in public parks passes intermediate scrutiny). As noted above, 200,000 City youth visited the Centers 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.

**2. AI 5-20 Does Not Violate Free Speech Principles**

Plaintiffs cursorily allege that AI 5-20 "also no [sic] infringes upon the Free Expression of Speech in a traditional forum on the basis of the content of the speech by restricting the carrying of firearms in a traditional forum such as Civic Plaza in violation of the First Amendment to the United States Constitution and Article II Section 16 of the New Mexico Bill of Rights." Amend.

Compl. ¶ 4.[7] The Court can dispense with this allegation without even reaching its merits because 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 the claim. *See ACLU of New Mexico v. City of Albuquerque*, 2008-NMSC-045, ¶ 7 (with respect to a constitutional challenge to a criminal ordinance, while a plaintiff need not subject himself to arrest, she "must be able to demonstrate a high probability of arrest for his own actions.").

Even if the Court were to reach its merits, to Defendants' knowledge, no Court has ever ruled in favor of a plaintiff who brought a First Amendment claim alleging a right to carry a firearm. Rather, the only courts to address it found the opposite, 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."). The First Amendment does not reach behavior described by Plaintiffs in the Amended Complaint.

## CONCLUSION

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

[7] Article II, Section 16 of the New Mexico Constitution addresses treason. Presumably Plaintiffs intended to cite Section 17, which addresses freedom of speech. In any event, with respect to the speech clause, courts have treated the protections afforded by the State and Federal constitutions as the same, and thus the same analysis should apply. *See, e.g., State v. Ongley*, 1994-NMCA-073, ¶ 6, *modified on other grounds by State v. Gomez*, 1997-NMSC-006, ¶ 19; *Coll. v. First American Title Ins. Co.*, 642 F.3d 876, 895 (10th Cir. 2011).

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing was filed and submitted for service on December 3, 2020, through the Odyssey System to:

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