

STATE OF NEW MEXICO  
COUNTY OF BERNALILLO  
SECOND JUDICIAL DISTRICT COURT

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

Plaintiffs,

v.

D-202-CV-2020-01048

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

Defendants.

**ORDER (1) GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION  
TO DISMISS AMENDED COMPLAINT AND (2) GRANTING PLAINTIFFS' ORAL  
MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT**

This matter comes before the Court upon Defendants' Motion to Dismiss Amended Complaint for Declaratory Judgment and Verified Petition for Injunctive Relief, which was filed on December 3, 2020 (the "Motion"). The Court has read the Motion, Plaintiffs' response in opposition, and Defendants' reply brief. The Court also heard from the parties at a hearing on the Motion on October 6, 2021.<sup>1</sup>

Being fully advised, the Court finds that the Motion should be granted in part such that Plaintiffs' claims for violations of the First Amendment to the United States Constitution and of Article II, Section 17 of the New Mexico Constitution should be dismissed for lack of standing.<sup>2</sup> The Court further finds that the remainder of the Motion should be denied.

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<sup>1</sup> Although the Motion was fully briefed on January 20, 2021, the parties did not request a hearing on the Motion in accordance with LR2-119 NMRA until July 30, 2021.

<sup>2</sup> The Amended Complaint references Article II, Section 16 of the New Mexico Constitution, presumably in error.

Lastly, the Court finds that Plaintiffs' oral motion at the hearing for leave to file an a further amended complaint should be granted. Specifically, Plaintiffs should be granted leave to file a further amended complaint with whatever allegations they may that they have standing to bring their First Amendment and Article II, Section 17 claims.

Broadly speaking, Plaintiffs have alleged three separate constitutional claims, each concerning the City of Albuquerque's Administrative Instructions 5-19 and 5-20 (the "AIs"). Those constitutional claims are that: (1) the AIs impermissibly infringe upon Plaintiffs' rights to bear arms under the Second Amendment of the United States Constitution and Article II, Section 6 of the New Mexico Constitution; (2) the AIs are impermissible attempts by the City of Albuquerque *to regulate* the right to keep and bear arms in violation of Article II, Section 6 of the New Mexico Constitution; and (3) AI 5-20 infringes upon Plaintiffs' rights of free speech and free expression secured by the First Amendment to the United States Constitution and Article II, Section 17 of the New Mexico Constitution.

Defendants argue that the Amended Complaint does not set out any set of facts that would support a claim for any constitutional violation, whether Federal or State. However, in support of their arguments, Defendants ask this Court to accept as true the factual underpinnings that they say justify the issuance of the AIs. For example, Defendants contend that the findings made in the AIs should be taken as conclusive evidence that the locations where firearms are prohibited are "school premises" and "university premises" as defined in NMSA 1978, Sections 30-7-2.1 and 30-7-2.4 (the "Deadly Weapons Statutes"). And, more broadly, they point to those same facts to show that those locations are "sensitive places" for purposes of the Second Amendment analysis.

In contrast, Plaintiffs allege in their Amended Complaint that the properties and locations identified in the AIs where firearms are no longer permitted are not "school premises" or

“university premises” as those terms are defined in the Deadly Weapons Statutes. *See* Amended Complaint at ¶¶ 8 – 11 (alleging that the properties identified in the AIs do not meet those statutory definitions).

To rebut Plaintiffs’ arguments, Defendants further assert that Plaintiffs are putting only a legal question before the Court and not a factual one about the uses of the properties and locations at issue in the AIs. Plaintiffs disagree and argue that their Amended Complaint puts the actual uses of the identified properties squarely at issue. The Court agrees with Plaintiffs.

In considering Defendants’ Motion to Dismiss, the Court must accept as true all well-pled factual allegations. In order for the Court to accept Defendants’ position as set out in the Motion, the Court must find that the properties identified in the AIs are in fact “school premises” and “university premises” under the Deadly Weapons Statutes. The Court is precluded from undertaking that factual investigation with a motion to dismiss, and Plaintiffs made clear at the hearing on the Motion that the actual uses of those properties are what they intend to explore to show that those properties are not “school premises” or “university premises” as set out in the Deadly Weapons Statutes. Thus, the Court denies the Motion with respect to its request to dismiss the Amended Complaint in its entirety.

Turning next to standing, the Court finds that Plaintiffs have alleged that their previously legitimate activities have been curtailed such that their Second Amendment and Article II, Section 6 claims may go forward. *See American Civil Liberties Union of New Mexico*, 1999-NMSC-044, ¶ 9, 128 N.M. 315, 992 P.2d 866.

However, Plaintiffs’ Amended Complaint does not allege that any Plaintiff “is faced with a real risk of future injury” to Plaintiff’s First Amendment and Article II, Section 17 rights as a result of the issuance of either of the AIs. For example, the Amended Complaint does not allege

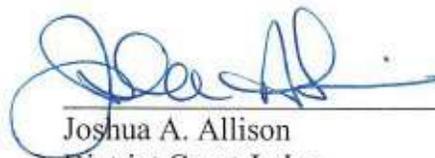
that any Plaintiff has previously carried a firearm in a traditional public forum such as Civic Plaza as a matter of protected speech. Thus, Plaintiffs' First Amendment and Article II, Section 17 claims must be dismissed for lack of standing.

However, Plaintiffs' counsel represented to the Court at the hearing on the Motion that Plaintiffs have a basis to allege their standing to make their First Amendment and Article II, Section 17 claims and would do so if the Court granted them leave to file a further amended complaint. Given these representations, the Court finds that Plaintiffs should be granted leave to file a second amended complaint.

It is therefore ORDERED as follows:

1. Defendants' Motion to Dismiss is granted in part. Plaintiffs First Amendment and Article II, Section 17 claims are hereby dismissed without prejudice.
2. The remainder of Defendants' Motion to Dismiss is denied.
3. Plaintiffs are hereby granted leave to file a further amended complaint, which shall be considered timely if filed no later than October 28, 2021.

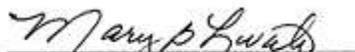
IT IS SO ORDERED.



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Joshua A. Allison  
District Court Judge

Counsel for the parties were served a copy of this order on the date of filing through Odyssey.



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Mary B. Lovato  
TCAA to Division XXIII