STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT

STATE OF NEW MEXICO ex rel. RAÚL TORREZ, District Attorney, Second Judicial District,

Plaintiff,

v. D-202-CV-2020-04051

NEW MEXICO CIVIL GUARD, BRYCE L. SPANGLER (a/k/a Bryce Provance, a/k/a Jason Bjorn), JOHN C. BURKS, ORYAN MIKALE PETTY, JONATHAN MICHAEL VERA, MICHAEL LYN HARRIS, THOMAS W. GILLESPIE, DAVID BERNIE ROSE, CRAIG PORTER FITZGERALD, NICOLAS LOMAS, DAVID S. RICE, DEVON MICHAEL BAY, WESSLEY AVIS RODGERS, WALTER EUGENE RODRIGUEZ, and DANIEL MATTHEW ESPINOSA,

Defendants.

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR JUDGMENT ON THE PLEADINGS AND DENYING MOTION TO STAY

THIS MATTER comes before the Court on Defendants, New Mexico Civil Guard (NMCG), Bryce Spangler, John Burks, Oryan Petty, Jonathan Vera, Michael Harris, Craig Fitzgerald, Nicolas Lomas, David Rice, Devon Bay, Wes Rodgers, Walter Rodriguez, and Daniel Espinosa ("Defendants"), Motion for Judgment on the Pleadings, filed on February 1, 2021 ("Motion") and Motion to Stay, filed on January 29, 2021. The Court, having reviewed the briefing, having determined that a hearing is not necessary, *see* LR2-119(D) NMRA (providing that a judge can "make a decision based on the papers filed"), and being otherwise well-informed,

DENIES the Motion in part and **GRANTS** the Motion in part. As a result, Defendants' Motion to Stay is hereby moot and **DENIED**.

I. BACKGROUND

On July 13, 2020, Plaintiff State of New Mexico *ex rel.* Raúl Torrez, the District Attorney for the Second Judicial District, filed a Verified Complaint for Injunctive and Declaratory Relief ("Complaint"). The Complaint alleges, among other things, that Defendants are operating as a military unit in violation of state law. Plaintiff asserts three causes of action. Count I asserts a cause of action for operating a military unit in violation of the New Mexico Constitution. Count II asserts a cause of action pursuant to NMSA 1978, Section 30-8-8(B) (1963), for abatement of a public nuisance. Count III asserts a cause of action pursuant to the Declaratory Judgment Act, NMSA 1978, Section 44-6-1 through 44-6- (1975). Plaintiff seeks a declaration that Defendants are in violation of the New Mexico Constitution and state law. It also seeks an injunction, enjoining Defendants from organizing and operating in public as a military unit independent of New Mexico's civil authority and without having been activated by the Governor, and from assuming law enforcement functions.

II. STANDARD OF REVIEW

Defendant's motion is governed by Rule 1-012(C) NMRA which states in part: "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Rule 1-012(C) NMRA. Motions for judgment on the pleadings are reviewed according to the same standards that apply to motions to dismiss for failure to state a claim under Rule 1-012(B)(6) NMRA. *Conocophillips Co. v. Lyons*, 2013-NMSC-009, ¶ 58, 299 P.3d 844. A motion to dismiss for failure to state a claim under Rule 1-012(B)(6) tests the legal sufficiency of the complaint, not the facts that support it. *Wallis v. Smith*, 2001-NMCA-017, ¶ 6, 130 N.M. 214,

22 P.3d 682. For purposes of the motion, the well-pleaded material allegations are taken as true and all doubts are resolved in favor of the sufficiency of the complaint. *Id.*

III. DISCUSSION

Defendants ask the Court to grant judgment in their favor and to dismiss Plaintiff's Complaint with prejudice. They argue that Plaintiff cannot meet its burden for the issuance of a permanent injunction; that the alleged bases for injunctive relief – including Article II, Section 9 of the New Mexico Constitution, impersonation of a peace office, and public nuisance – are all insufficient as a matter of law; and that the injunctive relief Plaintiff seeks violates the Constitution. Defendants arguments are addressed below.

A. Injunctive Relief

Defendants make several arguments with respect to Plaintiff's request for injunctive relief. Their arguments concerning the validity of the underlying legal theories and whether an injunction can withstand constitutional scrutiny are more specifically addressed below. Defendants also argue more generally that Plaintiff cannot meet its burden of proof for injunctive relief, emphasizing "that injunctions are harsh and drastic remedies . . . [and] that an injunction should issue only in extreme cases of pressing necessity and only where there is a showing of irreparable injury for which there is no adequate and complete remedy at law." *Scott v. Jordan*, 1983-NMCA-022, ¶ 26, 99 N.M. 567, 661 P.2d 59. Defendants complain that Plaintiff, in its briefing, fails to analyze and argue its burden in seeking injunctive relief including "balanc[ing] the equities and hardships," or acknowledging other available remedies. *See Insure New Mexico, LLC v. McGonigle*, 2000-NMCA-018, ¶¶ 6-7, 128 N.M. 611, 995 P.2d 1053 ("In determining whether to grant injunctive relief, a trial court must consider a number of factors and balance the equities and hardships.") (internal quotation marks and citation omitted).

This type of analysis, however, is premature. At this stage in the proceeding, the Court is only to consider whether the law supports a claim under the alleged facts, resolving all doubts in favor of sufficiency of the complaint. *Morales v. Reynolds*, 2004-NMCA-098, ¶ 25, 136 N.M. 280, 97 P.3d 612. Defendants appear to be arguing that Plaintiff fails to meet its burden of *persuasion* and asks the Court to weigh factors related to an injunction, rather than persuasively arguing whether Plaintiff adequately states a claim for injunctive relief. In any event, the Court is not convinced that injunctive relief is unavailable to Plaintiff, as a matter of law, or that Plaintiff's allegations, taken as true, are insufficient to warrant injunctive relief.

B. **The Subordination Clause**

Article II, Section 9 of the New Mexico Constitution, the "Subordination Clause," provides, in relevant part, that "[t]he military shall always be in strict subordination to the civil power." Our constitution also provides that the governor is the commander in chief of the military forces of the state and is vested with the power to "call out the militia to preserve the public peace . . . ." N.M. Const., art. V, § 4; *see also* art. XVIII, § 1 ("The organized militia shall be called the "national guard of New Mexico," of which the governor shall be the commander in chief."). Plaintiff alleges in Count I that "the "NMCG has attempted to organize itself as a 'military' unit and exercise peacekeeping functions without having been called to military service by the Governor, without the Governor calling for the militia to keep the public peace, and without accountability to the people in derogation of civil authority." [Complaint, ¶ 75] It also alleges that Defendants intend to continue operating as supposed military units, or as members and commanders thereof, in New Mexico." [*Id.* ¶ 76]

The threshold legal issue with respect to Plaintiff's cause of action under the Subordination Clause is whether the clause is self-executing. "A constitutional provision may be said to be self-

executing when it takes immediate effect and ancillary legislation is not necessary to the enjoyment of the right given, or the enforcement of the duty imposed. In short, if a constitutional provision is complete in itself, it executes itself." *Bounds v. State*, 2011-NMCA-011, ¶ 37, 149 N.M. 484, 252 P.3d 708 (quoting *Lanigan v. Town of Gallup*, 1913-NMSC-024, ¶ 10, 17 N.M. 627, 131 P. 997). A constitutional provision is not self-executing "if it merely indicates a principle without laying down rules having the force of law." *State ex rel. Noble v. Fiorina*, 1960-NMSC-107, ¶ 4, 67 N.M. 366, 355 P.2d 497.

Defendants argue that the Subordination Clause is not self-executing, because it is implemented by the New Mexico Military Code, which they argue has an express hierarchical structure for subordination, *see* NMSA 1978, Section 20-3-2 (setting forth the structure of the department of military affairs) and a finite list of offenses, *see* NMSA 1978, Sections 20-11-1 through 20-11-7 (setting forth "offenses"). Indeed, the Military Code itself expressly "consists of" Article II, Section 9 of the New Mexico Constitution, among other federal and state constitutional provisions. NMSA 1978, § 20-1-1 (1987). Defendants contend that Plaintiff is limited to the methods of enforcement in the statutory scheme implementing the Subordination Clause, the New Mexico Military Code. Thus, because Plaintiff has not alleged that Defendants violated any provision of the Military Code, Defendants contend that Plaintiff cannot maintain a "freestanding" constitutional claim under the Subordination Clause.

The Court recognizes that the Military Code implements the Subordination Clause by regulating the state's military forces and by placing the state's military in subordination to the "civil power." The question remains, however, whether the clause is self-executing with respect to military forces that operate entirely outside of the framework, organization, and thus strict regulation of the state's legitimate and lawful military forces. The provision at issue, providing

that "[t]he military *shall* always be in *strict subordination* to the civil power," (emphasis added) clearly prohibits a military that is not in strict subordination to the civil power. In other words, the clause prohibits a military from operating outside of the bounds of the New Mexico Military Code and other relevant authority; this clear prohibition is complete in itself and does not require legislation to make it effective. *See State ex rel. Delgado v. Romero*, 1912-NMSC-010, ¶ 10, 17 N.M. 81, 124 P. 649 ("[T]he general rule is that negative and prohibitory provisions of a Constitution are self-executing.").

C. **Impersonation of a Peace Officer Pursuant to Section 30-27-2.1(A)(1)**

Count II of Complaint, seeking to abate a public nuisance pursuant to NMSA 1978, Section 30-8-8(B) (1963) and Count III, seeking a declaratory judgment, are both based, in part, on Defendants allegedly impersonating a peace officer. "'[P]eace officer' means any public official or public officer vested by law with a duty to maintain public order or to make arrests for crime, whether that duty extends to all crimes or is limited to specific crimes." NMSA 1978, § 30-27-2.1(C) (1999). It is a crime to impersonate a peace office which, relevant to this litigation, consists of "without due authority exercising or attempting to exercise the functions of a peace officer[.]" § 30-27-2.1(A)(1).

Defendants seek to narrowly limit the scope of the functions of a peace officer to specific duties assigned to peace officers in other areas of our statutes, which they refer to as the "statutory scheme for peace officers," like the duty to investigate violations of criminal laws of the state, *see* NMSA 1978, Section 29-1-1 (1921, as amended through 1979). They argue that Plaintiff fails to allege that Defendants attempted to exercise such specific duties. However, the entirety of Section 30-27-2.1 is clear in its prohibition – it prohibits, without due authority, attempting to exercise the functions of a peace officer, whose duty it is to maintain public order or make arrests for crimes.

Even the "statutory scheme for peace officers," relied on by Defendants, recognizes the overarching duty of peace officers to "to preserve the public peace and to prevent and quell public disturbances." NMSA 1978, § 29-1-9 (1891, as amended through 2006). Defendants contend that reading the statute to include anyone who exercises or attempts to exercise the function of maintaining public order would "make anyone who broke up a fight" criminally liable. If the allegations here were that Defendants merely attempted to break up a fight, the Court may determine that, as a matter of law, such facts do not constitute impersonating a peace officer. The allegations here, however, are not merely that someone attempted to break up a fight.

Defendants also argue that Plaintiff's allegations do not reflect the "principle objective" of Section 30-27-2.1, which our Court of Appeals provides "is to protect the public from being harmed or deceived into believing a person is a peace officer and has the authority to act in an official capacity, when in fact, there is no such authority to do so." *State v. Ramos-Arenas*, 2012-NMCA-117, ¶ 13, 290 P.3d 733. However, in *Ramos-Arenas*, our Court of Appeals specifically addressed Section 30-27-2.1(A)(2), which criminalizes "pretending to be a peace officer with the intent to deceive another person," and whether the provision applies to federal officers. *See id.* ¶¶ 6-13. In the context of Section 30-27-2.1(A)(2), the Court of Appeals identification of the "principle objective" of the statute makes sense, but with respect to the provision at issue, Section 30-27-2.1(A)(1), the principle objective may encompass more than just protecting the public from *believing* a person is a peace officer when in fact they are not. The Court is also not convinced that Plaintiff's allegations are inconsistent with the principle objective of the statute as articulated by our Court of Appeals or that *Ramos-Arena* has any implication in determining whether Plaintiff has adequately alleged that Defendants impersonated a peace officer in violation of Section 30-27-2.1(A)(1).

Mindful that our rules of civil procedure require only notice pleading, *see Zamora v. St. Vincent Hospital*, 2014-NMSC-035, ¶¶ 10-12, 335 P.3d 1243, Plaintiff appropriately alleges a violation of Section 30-27-2.1(A)(1). For example, Plaintiff alleges that the New Mexico Civil Guard's mission is to respond to emergency and dangerous situations, that it intends to usurp law enforcement by "patrolling [the] community to make sure infiltrators of [] peaceful protests do not attack and loot businesses," by "defend[ing] [their] neighbors," by keeping protestors separated because "that's what the police do," and by getting "riot shields" and "batons." [Complaint, ¶¶ 49-50] While merely articulating a mission is insufficient to declare that Defendants impersonated a peace officer or to issue an injunction, Plaintiff also alleges that Defendants guarded the Oñate statue at the June 15 protest; circled the statue dressed in camouflage fatigues, helmets, and other military-style gear, and carrying assault rifles; and also physically restrained protestors. [Complaint, ¶¶ 63-64]

Defendants compartmentalize Plaintiff's allegations, arguing for example, that it is not a violation of the statute to carry guns or to wear camouflage, but at this stage of the litigation, "[t]he only question is whether the plaintiff might prevail *under any state of facts* provable under the claim." *Valles v. Silverman*, 2004-NMCA-019, ¶ 6, 135 N.M. 91, 84 P.3d 1056 (emphasis added). The Court is to accept as true all well-plead factual allegations and resolve all doubts in favor of the sufficiency of the Complaint. *See id.* Under this standard, Plaintiff's allegations, in total, with respect to Defendants' actions at the June 15 protest, and in light of the New Mexico Civil Guard's alleged mission, can support a claim that Defendants exercised or attempted to exercise the functions of a peace officer.

However, as to Defendants Petty, Vera, Harris, Gillespie, Rose, Lomas, Rodgers, and Rodriguez, Plaintiff does not allege that these individual Defendants were present at the June 15

protest or specifically allege that they have exercised or attempted to exercise the functions of a peace officer. The allegations against these specific Defendants thus amount to the following: they are members of or associate with the NMCG, an organization whose alleged mission and intention may be viewed as having its members impersonate peace officers. Again, merely articulating a mission to impersonate a peace officer is insufficient to declare a violation of Section 30-27-2.1(A)(1) or to issue a related injunction. While Plaintiff argues that it can be inferred that these Defendants exercise the functions of a peace officer, such an inference would not be reasonable. *See Derringer v. State*, 2003-NMCA-073, ¶ 5, 133 N.M. 721, 68 P.3d 961 (providing that all that is required is that "the essential elements prerequisite to the granting of the relief sought can be found or *reasonably* inferred") (emphasis added). The Court thus grants Defendants Motion to the extent is seeks to dismiss claims against Defendants Petty, Vera, Harris, Gillespie, Rose, Lomas, Rodgers, and Rodriguez, that are based on impersonating a peace officer.

D. **Abatement of a Public Nuisance**

Our public nuisance statute provides that "[a] public nuisance consists of knowingly creating, performing or maintaining anything affecting any number of citizens without lawful authority which is either: A. injurious to public health, safety, morals or welfare; or B. interferes with the exercise and enjoyment of public rights, including the right to use public property." NMSA 1978, § 30-8-1 (1963).

> New Mexico common law more specifically defines public nuisance as either nuisances per se or nuisances in fact. A nuisance per se is an activity, or an act, structure, instrument, or occupation which is a nuisance at all times and under any circumstances, regardless of location or surroundings. A nuisance in fact is described as an activity or structure which is not a nuisance by nature, but which becomes so because of such factors as surroundings, locality, and the manner in which it is conducted or managed.

City of Sunland Park v. Harris News, Inc., 2005-NMCA-128, ¶ 40, 138 N.M. 588, 124 P.3d 566 (internal quotation marks and citations omitted).

In its Complaint, Plaintiff alleges that Defendants' violation of the New Mexico Constitution by their "ongoing" paramilitary activity and their violation of and intent to continue violating Section 30-27-2.1, constitute per se public nuisances. [Complaint, ¶ 81] Defendants argue generally that Plaintiff's allegations do not amount to a nuisance per se, because, for example, Defendants' alleged conduct is sporadic rather than constant and because the type of harm is tied to a specific circumstance, location, or surrounding. However, if the acts of impersonating a peace officer contrary to statute and engaging in paramilitary activity contrary to the constitution, constitute a public nuisance, those acts are "always a nuisance." Impersonating a peace officer and engaging in paramilitary activity, contrary to law, to the extent they create a nuisance, is a nuisance irrespective of circumstance, location, or surrounding.

That is not to say that the act of violating Section 30-27-2.1 and the act of violating the constitution are automatically per se public nuisances. *See State v. Davis*, 1958-NMSC-138, ¶ 7, 65 N.M. 128, 333 P.2d 613 ("the state cannot obtain an injunction simply because certain conduct is a crime"). Plaintiff makes a convincing argument that violating the constitution by engaging in unsanctioned paramilitary activity and violating Section 30-27-2.1 by impersonating a peace officer, inherently endanger public safety. However, notwithstanding Plaintiff's cogent argument, Plaintiff also adequately alleges a threat to the public. [*See* Complaint ¶ 57]

Overall, and again mindful of our notice pleading standard, Plaintiff has adequately pled abatement of a public nuisance. The Court also rejects Defendants argument that Plaintiff lacks standing to bring a public nuisance claim against Defendants Petty, Vera, Harris, Lomas, Rose, or Gillespie, because the allegations against them relate to conduct outside of Bernalillo County. As

Plaintiff points out, "[a] civil action to abate a public nuisance may be brought, by verified complaint in the name of the state . . . by any public officer . . . in the district court of the county *where the public nuisance exists*, against any person, corporation or *association of persons* who shall create, perform or maintain a public nuisance. NSMA 1978, § 30-8-8(B) (emphasis added). Plaintiff has adequately alleged a public nuisance in Bernalillo County [*see* Complaint, ¶¶ 2, 14] and because it alleges that all Defendants are members of the NMCG, it can reasonably be inferred that they are an association of persons [*see* Complaint, ¶¶ 17-19, 20-21, 23].

E. **Constitutional Considerations**

Defendants argue that the injunctive relief Plaintiff seeks violates their First and Second Amendment rights. Specifically, Defendants argue that enjoining them from "organizing" and "operating" together in public infringes on their First Amendment right of association and expression. *See National Socialist Party of America v. Village of Skokie*, 432 U.S. 43, 43-44 (1977) (providing that an injunction prohibiting the petitioners, the Nationalist Social Party of America, from marching or parading in its uniform or displaying the swastika, among other things, would deprive the petitioners "of rights protected by the First Amendment during the period of appellate review," and thus staying the injunction pending appellate review). Defendants also argue that the proposed injunction would violate their right to bear arms. However, Plaintiff does not merely seek to enjoin Defendants from "organizing" and "operating" together or from simply bearing arms but rather seeks to enjoin Defendants from "organizing and operating in public *as a military unit independent of New Mexico's civil authority and without having been activated by the Governor* . . . " and from "assuming law-enforcement functions[.]" [Complaint, at 30 (emphasis added)].

Plaintiff additionally alleges that Defendant Burks admitted that NMCG members were not present at the Oñate protest to express a particular point of view. [Complaint, ¶ 63] Given that First Amendment protection extends "only to conduct that is inherently expressive," *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47, 66 (2006), Plaintiff has alleged facts, that taken as true, could place Defendants' conduct outside of First Amendment protection. And, to the extent Plaintiff's proposed injunctive relief may still impact Defendants' constitutional rights, the Court cannot say that Plaintiff could not still prevail in obtaining the injunction it seeks. This is because, as pled, the proposed injunction could potentially still withstand the applicable standard of scrutiny. *See State v. Murillo*, 2015-NMCA-046, ¶¶ 5-11, 347 P.3d 284 (applying intermediate scrutiny to a challenge to a state statute on the basis that it violated the right to bear arms under the state constitution); *Marrujo v. New Mexico State Highway Transp. Dept.*, 1994-NMSC-116, ¶ 10, 118 N.M. 753, 887 P.2d 747 ("Strict scrutiny applies when the violated interest is a fundamental personal right or civil liberty – such as first amendment rights[.]"). Indeed, Defendants make no argument with respect to scrutiny and instead asks the Court to rule that the relief the State seeks cannot withstand constitutional muster under any state of facts provable under the claim. The Court remains unpersuaded.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motion is **GRANTED** to the extent it seeks to dismiss claims against Defendants Petty, Vera, Harris, Gillespie, Rose, Lomas, Rodgers, and Rodriguez, that are premised on them impersonating a peace officer. Defendants' Motion is **DENIED** in all other respects. Defendants' Motion to Stay, now being moot, is also hereby **DENIED**.

IT IS SO ORDERED.

ELAINE P. LUJAN
DISTRICT COURT JUDGE

Endorsed copies delivered by email or through the e-filing system on date of filing.

Charlene Montoya
TCAA to Judge Elaine Lujan