STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

STATE OF NEW MEXICO, ex. rel.,
MARCO WHITE, MARK MITCHELL,
and LESLIE LAKIND,

Plaintiffs,

vs. Case No. D-101-CV-2022-00473

COUY GRIFFIN,

Defendant.

**PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO QUASH AND DISMISS**

Plaintiffs respectfully respond in opposition to Defendant's Motion to Quash and Dismiss (Motion). Defendant's Motion fails both for its procedural deficit and its lack of merit. Filed more than two weeks past Defendant's deadline for demurrer, the Motion is in violation of both this Court's scheduling order and lacks merit as a matter of law. It should be denied.

## I. Background

On March 21, 2022, Plaintiffs commenced this action under New Mexico's *quo warranto* statute, NMSA 1978, Section 44-3-4 (1919). *See* Compl. at 1. Plaintiffs are three New Mexico residents, and Defendant is an Otero County Commissioner. *Id.* ¶¶ 1-5. Plaintiffs' complaint seeks Defendant's removal from county office and disqualification from any future public office pursuant to NMSA 1978, Section 44-3-4 and Section Three to the Fourteenth Amendment to the United States Constitution, based on Defendant's participation in the insurrection resulting in the January 6, 2021 attack at the United States Capitol. Compl. at 1. Plaintiffs' standing to sue in state court is statutory and based on their status as residents of New Mexico. *See id.* ¶ 6; NMSA 1978, § 44-3-4; *State ex rel. Martinez v. Padilla*, 1980-NMSC-064, ¶ 8, 94 N.M. 431 (a "private person" may bring a *quo warranto* action "when the office usurped pertains to a county.").

On March 26, 2022, Plaintiffs served Defendant with the Complaint and summons. *See* Return of Service of Summons, *State ex rel. White v. Griffin*, D-101-CV-2022-00473 (N.M. 1st Jud. Dist. Ct., Mar. 29, 2022). Defendant filed a Notice of Removal pursuant to 28 U.S.C. § 1441. The federal court remanded the case to this Court on May 27, 2022. On June 14, 2022, the Court issued a scheduling order that set this matter for trial on August 15, 2022. *See* Scheduling Order (Jun. 14, 2022). The Court issued other deadlines, including Defendant's deadline to file any Demurrer by July 5, 2022. *Id.* Defendant did not file any Demurrer by July 5, 2022 and has proceeded *pro se* since the withdrawal of his counsel after the Court permitted the withdrawal of his Counsel on June 14.[1] *See* Order Granting Motion for Withdrawal as Counsel for Couy Griffin (Jun. 14, 2022); *see also* Email from Diego Esquibel (Ex. A) (Jun. 20, 2022) (confirming that he made his client aware of the scheduling order). To date, Defendant has not provided any requested written discovery response and did not attend this Court's pretrial conference on July 22, 2022.[2] Defendant filed the present Motion on July 25, 2022.

## II. Argument

### A. Defendant's Motion is in Violation of the Scheduling Order.

As a threshold matter, Defendant's Motion must fail because it was filed more than two

[1] Defendant views when and how to participate in these proceedings as a matter of choice. Mr. Griffin picks and chooses when he is represented by counsel. After the complaint was served, Diego Esquibel, Esq. filed on behalf of Defendant Griffin a notice of removal of these proceedings to federal court and thereby informally entered an appearance on behalf of Mr. Griffin. *See* Notice of Removal (Apr. 19, 2022). In federal court, Mr. Griffin was represented by Nicholas Smith, Esq. Mr. Griffin paid both Mr. Esquibel and Mr. Smith. *See* Deposition of Couy Griffin at 15:6-12; 24:3-6 (Jul. 20, 2022) (Ex. B). After remand, Mr. Griffin has chosen to proceed *pro se*. Similarly, Mr. Griffin picks and chooses when to comply with this Court's orders. Mr. Griffin has failed to meet any deadline set in the Court's pretrial scheduling order. He attended the first status conference and failed to appear at the second status conference. He appeared for his deposition and has failed to respond per the Court's scheduling order to any written discovery.

[2] Counsel for Plaintiffs have been in regular contact with Defendant and advised him both of his discovery obligations and of the pretrial conference.

weeks after the deadline for such dispositive motions. Pursuant to this Court's June 14 Scheduling Order, Defendant's deadline for Demurrer was July 5. The Motion, which seeks to "Quash and Dismiss" Plaintiffs' Complaint, constitutes just such a demurrer. *Carroll v. Bunt*, 1946-NMSC-021, ¶ 11, 50 N.M. 127 (the motion to dismiss is the "modern substitute" of the challenge by demurrer to test the legal sufficiency of a complaint). "Adherence to such scheduling orders is critical in maintaining the integrity of judicial proceedings." *Buke, LLC v. Cross Country Auto Sales*, 2014-NMCA-078, ¶ 63. It is for this reason that they may not be "modified except by order of the court upon showing of good cause." Rule 1-016(B) NMRA.

In this case, the necessity of making a showing of good cause for extension of time carries particular weight as the *quo warranto* statute prescribes tight timelines. *See generally* Section 44-3-8. Defendant has already frustrated the Legislature's guarantee at expedited processes in *quo warranto* actions through his earlier unsuccessful attempt to remove this matter to federal court. Moreover, Commissioners Griffin's arguments arise solely from the complaint, filed four months ago and of which he has had considerable notice. Defendant has neither filed any motion to modify the scheduling order nor attempted to show the requisite good cause. His Motion should be summarily denied.

**B. New Mexico's *quo warranto* statute remains in full force and effect and has not been abrogated by NMSA 1978, Section 10-4-29.**

Underpinning Defendant's Motion is the incorrect assumption that New Mexico's *quo warranto* statute has been "superseded" by NMSA 1978, Sections 10-4-1 to -29 (*hereinafter* "the Removal of Local Officers Act"**)** and that a local public official may be removed from office *only* pursuant to that section. This argument fails for two independent reasons: (1) New Mexico courts have repeatedly reaffirmed the availability of both the Removal of Local Officers Act and *quo warranto* as distinct methods by which an elected official may be removed from office, and (2) to the extent that any conflict exists between the two statutes, the *quo warranto* statute governs.

**1. Sections 10-4-1 to -29 do not prohibit or exclude *quo warranto* proceedings to challenge qualifications for office.**

Defendant's argument fails for the simple reason that Sections 10-4-29 and 44-4-1 are not in conflict. Rather they provide two distinct mechanisms to remove an officer, each applicable in different contexts. Defendant's cited authority recognizes as much, with the New Mexico Supreme Court explaining that "New Mexico law affords *at least two* statutory alternatives for removal of an elected official from office. See NMSA 1978, §§ 10-4-1 to -29 (1909) (providing for removal of local officers); NMSA 1978, §§ 44-3-1 to -16 (1919) (outlining *quo warranto* procedure)." *Lopez v. Kase*, 1999-NMSC-011, ¶ 6, 126 N.M. 733 (emphasis added); Motion ¶ 3.

These remedies do not conflict because Section 10-4-29 addresses as the "exclusive" means to remove a county officer only for misconduct provided for in Section 10-4-4, not the exclusive means to remove a county officer at all. Specifically, the Removal of Local Officers Act "do[es] not address … the removal of officers who have *lost* their qualifications [,]" N.M. Att'y Gen., No. 87-3 (Feb. 9, 1987) (emphasis added), as Defendant has done and which is the subject of these proceedings. As in this case, "[q]uo warranto is available" because "no other adequate remedy at law exists." *Id.*; *see also Olson v. Grilly*, 1960-NMSC-116, ¶ 6, 67 N.M. 432 ("[I]f plaintiff is correct in his contention that his opponent is not qualified [to be county sheriff], and if plaintiff's opponent should be successful in the election, and if plaintiff's opponent qualifies after his possible election, then and at that time there is an adequate remedy at law in the nature of *quo warranto.*"). Indeed, "[o]ne of the primary purposes of quo warranto is to ascertain whether one is constitutionally authorized to hold the office he claims, whether by election or appointment, and [courts] must liberally interpret the quo warranto statutes to effectuate that purpose." *Clark v. Mitchell*, 2016-NMSC-005, ¶ 8.

In his Motion, Defendant acknowledges that Sections 10-4-1 to -29 do not provide the sole means to remove officers. He recognizes that officers may be removed by recall election.

Motion ¶ 9; *see also* N.M. Const. art. X, § 9. This is regardless of the fact that Section 10-4-29 contains no carve out for recall elections. New Mexico's Attorney General (NMAG) has similarly recognized the multiple means by which New Mexico law provides for the removal of a county officer. In one opinion, the NMAG recognized that county commissioners "are subject to removal" for reasons stated in 10-4-2, in proceedings provided in 10-4-1 to -29, and "*also* may be removed pursuant to 10-2-12" for failing to file a bond. N.M. Att'y Gen., No. 87-18 (Apr. 29, 1987).

The coexistence of these remedies is crucial to the integrity and continued functioning of our democratic processes, as each addresses distinct scenarios. In this case, the *only* adequate remedy is that provided by *quo warranto*. The Removal of Local Officers Act is not an adequate remedy because, as stated *supra*, it does not address removal of officers who have lost their qualification for office, by, for example, engaging in insurrection in violation of Section Three of the Fourteenth Amendment. N.M. Att'y Gen., No. 87-3 (Feb. 9, 1987). If Defendant's position were correct, then there would be *no* legal remedy at all for removing constitutionally-disqualified local officials. This result would be incompatible with this Court's duty to "liberally interpret the quo warranto statutes" to provide an effective legal remedy for "ascertain[ing] whether one is constitutionally authorized to hold the office he claims, whether by election or appointment." *Clark*, 2016-NMSC-005, ¶ 8.

Nor do plaintiffs challenge Defendant's election–his disqualifying activity occurred after he was elected to office. Plaintiffs challenge does not arise from an election irregularity or act of misconduct subject to Section 10-4-1. Rather, it arises from his post-election and post-oath participation in an insurrection against the United States in violation of Section Three of the Fourteenth Amendment, the sole provision of the U.S. Constitution delineating when local officials can "los[e] their qualification" for office. *Cf.* N.M. Att'y Gen., No. 87-3 (Feb. 9, 1987).

**2. Sections 10-4-1 to -29 did not abrogate Sections 44-3-1 to -16.**

Even if there were a conflict between the two provisions, as a matter of both law and logic, an earlier statutory provision cannot supersede or abrogate a later enactment. *See* § 12-2A-10; *State ex rel. State Eng'r v. United States*, 2018-NMCA-053, ¶ 16 ("Specific and later-enacted statutes control over general, earlier-enacted laws."). Contrary to this principle, Defendant argues that the Removal of Local Officers Act, which was passed ten years *before* the *quo warranto* statute, abrogates the same. *See* § 12-2A-10; *Cf.* § 10-4-29 (1909) and § 44-3-4 (1919). The contention that the *quo warranto* statute was abrogated fails. Instead, to the extent that the two Acts conflict, it is the later-enacted *quo warranto* statute that must control over the earlier law. *See* § 12-2A-10.

**C. Plaintiffs' *quo warranto* claim does not require any action or inaction of the Attorney General or the district attorney.**

Defendant posits that Plaintiffs' action is improper and must be dismissed because they "fai[l] to state that the Attorney General is even aware of this case." Motion ¶¶ 1, 4. This allegation presumes–wrongly–that Plaintiffs are required to seek the collaboration or permission of the Attorney General in order to maintain their Complaint under Section 44-3-4.

The *quo warranto* statute expressly excludes challenges to the qualifications of county level officials from the need to first seek action by the Attorney General or a district attorney. *See* § 44-3-4 ("When the attorney general or district attorney refuses to act, *or when the office usurped pertains to a county*, incorporated village, town or city, or school district, such action may be brought in the name of the state by a private person on his own complaint." (emphasis added)). Accordingly, courts do not require plaintiffs challenging local officials to present claims to the attorney general before bringing suit. *See Martinez*, 1980-NMSC-064, ¶ 7 (considering private parties' *quo warranto* challenge to member of school board without discussion of refusal by attorney general or district attorney, rejecting argument that private persons were "wrong parties to bring an action"); *see also State ex rel. Besse v. Dist. Court of*

*Fourth Judicial Dist.*, 1925-NMSC-025, ¶ 4, 31 N.M. 82 (rejecting interpretation of statute that would have imposed attorney general and district attorney refusal as condition for suits against local officials and provided no means for *quo warranto* suits against other officials).

**D. Plaintiffs have standing under the *quo warranto* statute, which permits a suit by "a private person."**

Plaintiffs' standing here is express, as provided by Section 44-3-4, and carries no requirement that they have suffered any direct injury as a result of Defendant's disqualifying conduct. *See, e.g.*, *Martinez*, 1980-NMSC-064, ¶ 8 (permitting *quo warranto* suit by two private persons without addressing any injury to them of the defendants 'hold on office); *Clark*, 2016-NMSC-005, ¶ 8 (stating private persons may bring *quo warranto* action against state official upon refusal of district attorney with no further discussion of standing). The statutory basis for Plaintiffs' standing reflects the nature of the *quo warranto* remedy, which embodies the principle that "disputes over title to public office are […] a public question of governmental legitimacy and not merely a private quarrel among rival claimants." 65 Am. Jur. 2d *Quo Warranto* § 15. It also reflects the breadth of standing doctrine in New Mexico courts, where standing "is not derived from the state constitution," is "not jurisdictional," and can be freely conferred by statute. *Gandydancer, LLC v. Rock House CGM, LLC*, 2019-NMSC-021, ¶ 7. A particularized controversy, such as that required by Article III of the U.S. Constitution in federal court, is thus unnecessary. Defendant's argument that Plaintiffs lack standing fails as a matter of law. [3]

[3] Just as the Legislature can freely confer standing via statute, as it has done here, New Mexico courts "can 'confer' standing and reach the merits of a case regardless of whether a plaintiff meets the traditional standing requirements based on a conclusion that the questions raised involve matters of great public importance." *ACLU of N.M. v. City of Albuquerque*, 2008-NMSC-045, ¶ 33, 144 N.M. 471. "Those cases deemed by this Court to raise issues of great public importance typically have involved 'clear threats to the essential nature of state government guaranteed to New Mexico citizens under their Constitution.'" *Id.* The New Mexico Supreme Court has repeatedly invoked the doctrine in constitutional cases of substantial public interest, often with cursory analysis. *Pirtle v. Legislative Council Comm. of*

### E. The First Amendment does not preclude Defendant's disqualification, and the *quo warranto* proceedings satisfy due process.

Defendant also seeks dismissal on the basis that Plaintiffs seek his removal from office "for acts done which are entirely protected by the First Amendment," so as to violate his right to due process. Motion ¶ 18. Defendant does not point to which of the allegations in Plaintiffs ' complaint he purports to constitute protected speech. Regardless, Defendant's contention is rooted in a fundamental misunderstanding of both his substantive and procedural rights.

As an initial matter, Defendant's rights under the First Amendment stand on equal footing with the provision directing his disqualification under Section Three of the Fourteenth Amendment, and the two provisions must "be read together and harmonized in their application." *State v. Sandoval*, 1980-NMSC-139, ¶ 8, 95 N.M. 254. Defendant cannot, therefore, hide behind the First Amendment to immunize his insurrectionary conduct in violation of the Fourteenth Amendment.

Moreover, Defendant has forfeited his public office not by any protected speech, but rather through his conduct, which at times was evidenced or accompanied by his speech. *See Rumsfeld v. Forum for Acad.& Institutional Rights, Inc*., 547 U.S. 47, 65-66 (2006). Defendant was present during, participated in, and took action supporting an attack on the U.S. Capitol as

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*the N.M. Legislature*, 2021-NMSC-026 (constitutionality of closing legislative council sessions due to COVID-19); *New Energy Econ., Inc. v. Martinez*, 2011-NMSC-006, ¶ 13, 149 N.M. 207 (constitutionality of Governor temporarily suspending publication of regulations); *State ex rel. League of Women Voters v. Herrera*, 2009-NMSC-003, ¶ 11, 145 N.M. 563 (constitutionality of statute governing the counting of hand-tallied ballots); *Baca v. N.M. Dep't of Pub. Safety*, 2002-NMSC-017, ¶ 2, 132 N.M. 282 (constitutionality of Concealed Handgun Carry Act). A case like this one—that involves a public official's qualifications for office and forfeiture thereof for engaging in insurrection—presents just such an issue of great public importance sufficient to confer standing on Plaintiffs. *See New Mexico ex rel. Village of Los Lunas v. County of Valencia*, No. 33,903, ¶ 7 (N.M. Ct. App. Sept. 23, 2015) (nonprecedential) (invoking the "great public importance exception" in *quo warranto* action challenging constitutional qualifications of county official, reasoning that "[n]othing less than the integrity of the democratic process itself is at stake, and the alleged conduct constitutes a clear threat to 'the essential nature of state government guaranteed to New Mexico citizens under their Constitution.'") (quoting *Piedra, Inc. v. State Transp. Comm'n*, 2008-NMCA-089, ¶ 44, 144 N.M. 382).

part of an insurrection against the United States Constitution. That he spoke or expressed sincerely held opinions or beliefs during the course of his participation in such an insurrection does not shield him from the consequences therefrom.

"[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language[.]" *Giboney v. Emp. Storage & Ice Co.*, 336 U.S. 490, 502 (1949). Rather, to the extent that Defendant's speech is relevant, it is so because it evidences his knowledge of the nature of the event in which he took part and his intent in doing so. *See id*. Additionally, it was in part through Defendant's speech that he engaged in insurrection through incitement and solicitation to unlawful acts. *Id.* "The First Amendment does not protect speech which 'is directed to inciting or producing imminent lawless actions and [which] is likely to incite or produce such action.'" *United States v. Allen*, 139 F.3d 913, at *2 (10th Cir. 1998) (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

Finally, Defendant's argument that this action violates his procedural due process rights fails. Defendant cannot assert a due process violation because these proceedings give him the process to which he is due. *See Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (due process simply requires "a meaningful opportunity to be heard"); *Doe v. DiStefano*, 2018 WL 2096347, at *7 (D. Colo. May 7, 2018) ("the trappings of civil litigation, including discovery, application of rules of evidence, and a formal adversarial hearing… satisf[y] procedural due process requirements."); *Reid v. N.M. Bd. of Examiners of Optometry*, 1979-NMSC-005, ¶ 6, 92 N.M. 414 ("Procedural due process […] may be described as follows: one whom it is sought to deprive of such rights must be informed of this fact […]; he must be given an opportunity to defend himself […]; [a]nd the proceedings looking toward the deprivation must be essentially fair."); *see also* § 44-3-1 (*quo warranto* proceedings follow process available in "other civil actions"). It is through this process, as prescribed by the Fourteenth Amendment and Sections

44-4-1 to -29, that this Court will finally assess the merits of Plaintiffs' contentions: that the events of January 6 were part of an insurrection and that Defendant, despite having previously taken an oath of public office, was a participant in that insurrection.

**III. Conclusion**

Defendant's Motion is both in violation of this Court's Scheduling Order and lacking in merit. It rests on a fundamental misunderstanding of both the substantive and procedural law that governs when and by what means a public official forfeits his office by violation of Section Three of the Fourteenth Amendment. Defendant's dilatory tactics have already caused significant delay, in frustration of the NMSA 1978, Section 44-4-1. This Court should prevent additional delay, deny Defendant's Motion, and address the merits of Plaintiffs' claims in the trial scheduled for August 15, 2022.

Date: July 29, 2022

Respectfully Submitted,

FREEDMAN BOYD HOLLANDER
& GOLDBERG, P.A.

*/s/ Joseph Goldberg*
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**CERTIFICATE OF SERVICE**

I hereby certify that on July 29, 2022, I filed the foregoing Plaintiffs' Opposition to Defendant's Motion to Quash and Dismiss through the New Mexico Odyssey File & Serve system, which caused all counsel of record to be served by electronic means.

Defendant Griffin was served the foregoing via e-mail and 2 identical packages of the foregoing as indicated below:

1) by U.S. Postal First Class Mail and 2) by Federal Express, two-day delivery available to Tularosa, NM to the following address:

Couy Griffin
[redacted]

*/s/ Joseph Goldberg*
Joseph Goldberg

*Counsel for Plaintiffs*

**From:** Diego Esquibel <diego@theblf.com>
**Sent:** Monday, June 20, 2022 3:04 PM
**To:** sfeddiv1proposedtxt@nmcourts.gov
**Cc:** Lori Baca; Joe Goldberg; Christopher Dodd; Amber Fayerberg; Donald Sherman; Nikhel Sus; Stuart McPhail; Noah Bookbinder; Eden Tadesse; Daniel A. Small; Debbie Tope; Couy Griffin
**Subject:** D-101-cv-2022-00473 - White et al. v. Griffin - June 20, 2022 deadline

[EXTERNAL SENDER]

Dear Judge Mathew and Counsel:

As I informed the Court and Counsel I would assist Mr. Griffin in meeting the June 20, 2022 deadline to inform the court of intention to proceed. Mr. Griffin has not yet secured counsel. He has been provided the scheduling order and dates to continue if he cannot find counsel to come in within the set times. I have also provided him with the Order allowing me to withdraw and the certificate of service of discovery filed on June 15. I will consider this email as my conclusions of duties in this case.

Sincerely,
Diego Esquibel

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STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT

STATE OF NEW MEXICO, ex rel,
MARCO WHITE, MARK MITCHELL,
and LESLIE LAKIND,

Plaintiff,

v No. D-101-CV-2022-00473

COUY GRIFFIN,

Respondent.

Deposition of Couy Griffin
July 20, 2022, 11:00 a.m.
500 4th St. NW, STE. 105
Albuquerque, NM 87102

PURSUANT TO THE NEW MEXICO RULE OF CIVIL PROCEDURE, this Deposition was:

TAKEN BY: JOSEPH GOLDBERG
ATTORNEY FOR THE PLAINTIFF

REPORTED BY: KRISTINE KACZOR, RPR
NEW MEXICO CCR #545
PAUL BACA COURT REPORTING
500 4TH ST. NW STE. 105
Albuquerque, NM 87102

of his good will because he knows who I am and he knows the maliciousness of what's going on right now legally. So I never remember signing any, kind of, an official agreement with Nicholas to represent me in this case right here.

**Q Did you ever pay Mr. Smith or his law firm to represent you in this case?**

A I sent Nicholas Smith a $5,000 retainer check. How he spent it, how he used it, what he did with it, I don't know. But I did send him a $5,000 retainer. He may still have it in an account. I don't know.

**Q And when you sent him that $5,000 retainer, what was your understanding as to what that money was going to be used for?**

A For representation.

**Q In this case?**

A I didn't know. I guess, yeah. Yeah, or in any future proceedings.

**Q In the criminal case at all?**

A No. I don't guess. I don't know if the criminal case. Again, I don't know of the timeline I don't know if the criminal case was already finished. I think it was.

**Q When were you sentenced in this case?**

group for President Trump, and his America First Agenda.

**Q Have you paid the Barnett Law Firm any additional money besides that $5,000 to represent in that proceeding or any other?**

A Yes, I have.

**Q How much more have you paid them?**

A I can't recall, but it's significant.

**Q Did any of that money come from the $49,000 or so, that was raised by Mr. Bergquam in the gofundme -- givesendgo?**

A I'm not fully aware. Possibly.

**Q Did you get all -- is all of that $49,989 been expended?**

A Yeah, all but about probably six or $700.

**Q Can you tell me today how much of that was expended on lawyers?**

A No, I don't know.

**Q Was there any amount of that money expended on lawyers besides the $5,000 to the Smith Law Firm and the $5,000 to the Barnett Law Firm?**

A It was more than $5,000 to the Barnett Law Firm. I'm not -- not that I can recall. I'm not sure.

**Q Did you use any of the $49,989 for your own**