

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' PRE-TRIAL BRIEF

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PRELIMINARY STATEMENT

Couy Griffin swore an oath to support the Constitution of the United States when he became an Otero County Commissioner. He violated that oath on January 6, 2021, when he knowingly joined a violent insurrection at the United States Capitol to stop the constitutionally-mandated certification of the 2020 election and the transfer of presidential power. In the days preceding the attack, Commissioner Griffin, who took his gun with him to Washington D.C., was a featured speaker on a cross-country road tour mobilizing the “Stop the Steal” movement. He stoked crowds with calls for a “fight” and “war” over the election results and exhorted them to join him and the assembling mob in Washington D.C. to “stop the steal” on January 6. At the Capitol on January 6, Griffin illegally breached multiple security barriers, helped others do the same, and incited rioters and normalized violence with inflammatory rhetoric. He then entered a door leading to the inaugural stage that the mob had broken open and walked up an enclosed staircase joining the mob on the Capitol’s Lower West Terrace. There, amid wafting fumes of tear gas and pepper spray, Griffin gave a speech for social media. As rioters a short distance from him brutally attacked police officers defending the Capitol, Commissioner Griffin threatened into the camera, “This is what you’re gonna get. ... We’re not going anywhere ... We’re not gonna take no for an answer ... Anything to get our country back.”

These horrific events—which Griffin says he wears as a “badge of honor”—marked the first ever U.S. presidential transition marred by violence. The mob Griffin helped mobilize, joined, and inflamed successfully halted Congress’s counting of electoral votes as required by the Twelfth Amendment and the Electoral Count Act. Members of Congress and the Vice President were forced to evacuate to secure locations and remain in hiding until the Capitol was

cleared of all rioters, including Griffin. As a result, the election-certification process could not resume for several hours.

Law enforcement were overwhelmed not just by the rioters savagely attacking them, but also by non-violent members of the mob, like Griffin, illegally occupying Capitol grounds. To remove the mob from the restricted area, the Capitol Police called in more than 2,000 officers as reinforcements from 19 federal, state, and local agencies. The attack led to seven deaths, injuries to more than one hundred police officers, and millions of dollars in damages to the Capitol complex. During and even after the violence that unfolded on January 6, Griffin falsely claimed the attack was “peaceful” and vowed to return to the Capitol with firearms for the presidential inauguration on January 20, 2021, when he threatened there would be “blood running out of that building.” He was later criminally convicted for his actions on January 6.

Section Three of the Fourteenth Amendment, known as the Disqualification Clause, bars from federal or state office any person who took an “oath ... to support the Constitution of the United States” as an “officer of any State” and then “engaged in insurrection” against the Constitution, unless “such disability” is “remove[d]” by a two-thirds vote of Congress. U.S. Const. amend. XIV, § 3. Adopted in the wake of the Civil War, Section Three is unique in that it is the only qualification the U.S. Constitution places on state-level officeholders. It reflects the post-war judgment of the Fourteenth Amendment’s framers that officials at *any* level of government who betray their constitutional oaths by joining an insurrection should be barred for life from public office. As a leading Reconstruction-era case explained, “[t]he oath to support the Constitution is the test. The idea being that one who had taken an oath to support the Constitution and violated it, ought to be excluded from taking it again, until relieved by

Congress.” *Worthy v. Barrett*, 63 N.C. 199, 204, *appeal dismissed sub nom. Worthy v. Comm’rs*, 76 U.S. 611 (1869) (emphasis in original).

This *quo warranto* suit, brought by three New Mexico residents, seeks to enforce the Fourteenth Amendment’s Disqualification Clause against Commissioner Griffin. Plaintiffs will present evidence at trial establishing each element for disqualification: (1) Griffin took “an oath . . . to support the Constitution of the United States” as an “officer of [a] State,” (2) the January 6, 2021 attack on the Capitol and surrounding events were an “insurrection,” and (3) Griffin “engaged in” that insurrection. Plaintiffs will further show that none of Commissioner Griffin’s anticipated defenses have merit. As relief, Plaintiffs will request that the Court enter judgment declaring the January 6 attack and surrounding events an insurrection, removing Commissioner Griffin from office, and barring Griffin from holding any future public office pursuant to NMSA 1978, Sections 44-3-4 and 44-3-14, and Section Three of the Fourteenth Amendment.

LEGAL FRAMEWORK

I. New Mexico’s *Quo Warranto* Statute

A *quo warranto* action may be brought against a person who “unlawfully hold[s] . . . any public office” in the State, NMSA 1978, § 44-3-4(A), or “any public officer, civil or military, [who] shall have done or suffered an act which, by the provisions of law, shall work a forfeiture of his office,” *id.* § 44-3-4(B). “[W]hen the office usurped pertains to a county,” any “private person” has standing to bring a *quo warranto* action “on his own complaint.” *Id.* § 44-3-4; *State ex rel. Martinez v. Padilla*, 1980-NMSC-064, ¶ 8, 94 N.M. 431, 434. If the defendant is “adjudged guilty of usurping or intruding into or unlawfully holding or exercising any office, franchise or privilege, judgment shall be rendered that such defendant be excluded from such

office, franchise or privilege.” NMSA 1978, § 44-3-14.

“[*Q*]uo warranto has long been recognized under New Mexico law as an appropriate vehicle to ‘ascertain whether one is constitutionally authorized to hold the office he claims, whether by election or appointment.’” *State v. Oliver*, 2020-NMSC-002, ¶ 9, 456 P.3d 1065, 1070. Courts “must liberally interpret the *quo warranto* statutes to effectuate that purpose.” *Clark v. Mitchell*, 2016-NMSC-005, ¶ 8, 363 P.3d 1213, 1216.

The *quo warranto* statute authorizes courts to make a “judicial finding” that an official has engaged in conduct resulting in their “forfeiture” of office due to constitutional disqualification. *Martinez*, 1980-NMSC-064, ¶ 5. No prior criminal conviction is necessary if the constitutional qualification at issue does not require one. *See id.* The “effective date” of the disqualified official’s removal from office is the date on which the disqualifying condition occurred. *See State ex rel. King v. Sloan*, 2011-NMSC-020, ¶¶ 13–14, 149 N.M. 620, 623–24.

II. Section Three of the Fourteenth Amendment

Section Three of the Fourteenth Amendment provides:

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

U.S. Const. amend. XIV, § 3.

State courts have adjudicated Section Three challenges through *quo warranto* or similar proceedings. *See, e.g., Louisiana ex rel. Sandlin v. Watkins*, 21 La. Ann. 631 (La. 1869) (*quo warranto*); *Worthy*, 63 N.C. at 199 (mandamus); *In re Tate*, 63 N.C. 308, 309 (1869) (same).

Section Three imposes a qualification for public office, much like an age or residency requirement. It is not a criminal penalty or punishment, nor does it require a prior criminal conviction. *See infra* Part II.D. It is thus akin to New Mexico constitutional disqualifications that do not require a prior criminal conviction. *See Martinez*, 1980-NMSC-064, ¶ 5.

Although the defendant in a *quo warranto* action typically carries the burden of proof, it is unsettled how this rule applies in a Section Three disqualification suit. *See Griffin v. White*, 2022 WL 2315980, at *9 (D.N.M. June 28, 2022) (noting this is a question of “first impression in New Mexico” on which this Court “must break new ground”). Regardless of how the Court resolves this question, Plaintiffs are fully prepared to prove by a preponderance of the evidence that Commissioner Griffin is disqualified under Section Three, as outlined *infra*.

EXPECTED TRIAL EVIDENCE AND ARGUMENT

I. Commissioner Griffin is Disqualified from Public Office Under Section Three of the Fourteenth Amendment.

A. Commissioner Griffin Took an Oath as a State Officer to Support the Constitution of the United States.

As an elected member of the County Commission, New Mexico law required Griffin to take an oath to support the Constitution of the United States before assuming office. N.M. Const. art. 20, § 1; NMSA 1978, 10-1-13(B). Griffin took that oath on December 28, 2018. *See* Plaintiffs’ Exhibit (“PX”) 1; Griffin Dep. at 39:19–40:17.

Because state law required Griffin to take an oath to support the Constitution and he did so, he is subject to disqualification under Section Three. *See Worthy*, 63 N.C. at 202–04 (county official was subject to disqualification because state law required him to take the oath), *In re Tate*, 63 N.C. at 309 (disqualifying county official); *United States v. Powell*, 27 F. Cas. 605, 607

(C.C.D.N.C. 1871) (county official who took the oath was subject to disqualification); *Op. of Att’y Gen. Stanbery under the Reconstruction Laws*, at 16 (Wash. Gov’t Print. Off., June 12, 1867), <https://perma.cc/U4C3-4T8D> (“county officers” who are “required to take ... the oath to support the Constitution of the United States” are “subject to disqualification”). Consistent with these authorities, Plaintiffs’ expert of constitutional history, Professor Mark Graber, will testify that Section Three’s drafters understood it would apply broadly to every officer of a state who took an oath to support the Constitution, including officers like Griffin.

Moreover, Commissioner Griffin’s own testimony establishes that the Otero County Commission performs “executive functions” and is the “ultimate executive of Otero County.” Griffin Dep. at 54:24–55:5, 53:18–21; 56:8–20; PX2–11. A “county is but a political subdivision of the [s]tate,” with powers derived *solely* from the State. *El Dorado at Santa Fe, Inc. v. Bd. of Cnty. Comm’rs*, 1976-NMSC-029, ¶ 6, 89 N.M. 313, 317. It follows that Griffin is necessarily an “executive ... officer of [a] State” within the meaning of Section Three who took an oath of office to support the Constitution of the United States.

B. The January 6 Attack on the U.S. Capitol and Surrounding Events Were an “Insurrection” Against the Constitution of the United States.

During the period of the Fourteenth Amendment’s ratification, “insurrection” was defined as a (1) “rising ... in opposition to the execution of the laws of the United States” by a “number of persons” that is (2) “so formidable as for the time being to defy the authority of the United States” such that a “considerable” law enforcement and military response is needed to “to put them down.” *In re Charge to Grand Jury*, 62 F. 828, 830 (N.D. Ill. 1894). *accord* “Insurrection,” *Webster’s Dictionary* (1828), <https://perma.cc/9YPA-XN8J>; “Insurrection,” *Bouvier’s Law Dictionary*, Vol. 1 (1897). While many insurrections are violent, it “is not

necessary that there should be bloodshed,” nor is it “necessary that its dimensions should be so portentous as to insure probable success.” *In re Charge to Grand Jury*, 62 F. at 830.

Professor Graber will testify that the foregoing definition of insurrection is consistent with how Section Three’s framers and nineteenth-century Americans understood the term, and that they did not understand an insurrection to require actual violence; intimidation by numbers would suffice. He will also describe historical events involving violent efforts to resist the government’s authority to execute laws that nineteenth-century Americans considered insurrections, including the Whiskey Insurrection and Fries Insurrection. Professor Graber will further testify that the violent assault on the U.S. Capitol on January 6, 2021 and surrounding events (“January 6 Attack”), attempting to stop certification of the election of the President of the United States, was just the type of activity the Fourteenth Amendment’s framers and nineteenth-century Americans would have considered an “insurrection.”

- 1. The January 6 Attack Was a Violent “Rising ... in Opposition to the Execution of the Laws of the United States” by a “Number of Persons.”**
 - i. The “Stop the Steal” Movement to Block the Lawful Transfer of Presidential Power Ahead of January 6.**

The transfer of presidential power is governed by the Twelfth and Twentieth Amendments and the Electoral Count Act, among other laws. The Twelfth Amendment requires electors to meet after the election in their respective states to cast their votes, which are then transmitted to Congress to be “open[ed]” by the Vice President (in his capacity as the President of the Senate) and “counted” in a joint congressional session. U.S. Const. amend. XII. The Electoral Count Act establishes procedures for electoral votes to be opened and counted on the sixth day of January following any presidential election in a joint session of Congress, in which

the Vice President “shall be the[] presiding officer.” 3 U.S.C. § 15. The Twentieth Amendment provides that a President’s term “shall end at noon on the 20th day of January” and “the term[] of [his or her] successor[] shall then begin.” U.S. Const. amend. XX, § 1.

The January 6 Attack followed a months-long campaign by former President Trump and his allies to stop—through extra-legal means—certification of the 2020 presidential election and the prevent the transfer of power as mandated by federal law. They called their movement “Stop the Steal,” based on the false premise that the 2020 election would be and then had been “stolen” and that the lawful transfer of power needed to be “stopped.” *See Eastman v. Thompson*, 2022 WL 894256, at *1–*7 (C.D. Cal. Mar. 28, 2022); Initial Decision at 4, *Rowan v. Greene*, No. 2222582-OSAH-SECSTATE-CE-57-Beaudrot (Ga. Off. Admin. Hr’gs May 6, 2022), <https://perma.cc/M93H-LA7X> (“May 2022 *Greene* Decision”). President Trump’s team ultimately devised and carried out a plan to pressure Vice President Pence, both privately and publicly, to take the unconstitutional action of refusing to count electoral votes from several states during the January 6 proceedings. *Eastman*, 2022 WL 894256, at *3–*4. A federal judge has held it is “more likely than not” these efforts amounted to criminal obstruction of the Joint Session of Congress on January 6, 2021 in violation of 18 U.S.C. § 1512(c)(2). *Id.* at *20–*23.

As Plaintiffs’ expert on political violence, Dr. Rachel Kleinfeld, will explain and contextualize, a key component of the Stop the Steal effort involved mobilizing Trump supporters across the country to come to Washington, D.C. on January 6 to pressure Vice President Pence and Congress to not certify the election. *See Griffin Dep.* at 146:14–16 (Griffin came to Washington, D.C. partly “because the president called [him] to go”); *id.* at 168:20–22 (opining the “right thing” for Vice President Pence to do “was to not certify the election”). Pro-

Trump groups held Stop the Steal rallies in various states—including in New Mexico and other states where Commissioner Griffin was a featured speaker—to gin up support for the movement leading up to the January 6 Attack. *See* Griffin Dep. at 136:10–137:19. President Trump later announced his own Stop the Steal rally at the White House Ellipse on January 6. PX12 at 22.

Dr. Kleinfeld will testify that her investigation revealed that calls for violence to stop certification of the election were widespread on social media and reported in the press. Federal agencies generated “26 threat products” identifying threats of violence tied to planned “Stop the Steal” and other demonstrations in Washington, D.C. on January 6, with some predicting a “potentially violent uprising could take place at the U.S. Capitol.” PX13 at 21, 24, 39, 40.

ii. Rioters Attack the Capitol to Stop Certification of the 2020 Presidential Election and the Transfer of Power.

On January 6, 2021, the joint session of Congress convened to certify the presidential election. Just before noon, President Trump took the stage at his Stop the Steal rally at the White House Ellipse, where he repeated his false claims that the election was “rigged” and “stolen,” and urged Vice President Pence to “do[] the right thing” by unconstitutionally refusing to certify the election. PX12 at B-2. He then told the crowd to march to the Capitol to “demand that Congress do the right thing and only count the electors who have been lawfully slated,” insisting “we must stop the steal.” *Id.* at B-5, B-20. He pushed them to “fight like hell,” warning that, “if you don’t fight like hell, you’re not going to have a country anymore.” *Id.* at B-22.

Before the speech ended, thousands of Trump supporters began marching to the Capitol, some armed with weapons and wearing full tactical gear. *Id.* at 22–23, 27–29. At 12:53 p.m., the mob illegally breached security barriers surrounding the Capitol complex including on the Capitol’s West Front grounds. *Id.* at 23. The mob then quickly and violently breached other

barricades around the Capitol perimeter, overwhelmed law enforcement, and scaled walls. *Id.* at 24–25. By 2:11 p.m., they breached the Capitol building, where they confronted law enforcement, wreaked further havoc, and called for the murder of Vice President Pence. *Id.*; see PX15 at 14 (timeline of attack). The attack led to seven deaths, injuries to more than one hundred police officers, and millions of dollars in damage to the Capitol complex. PX12 at 1, 26.

At trial, Plaintiffs will present testimony and video evidence showing that the mob was a brutally violent “rising” by “a number of persons.” *In re Charge to Grand Jury*, 62 F. at 830. Officer Daniel Hodges of the D.C. Metropolitan Police Department (“MPD”) will testify that he was called to the Capitol on January 6 to reinforce Capitol Police, and that, upon his arrival, rioters engaged him and his fellow officers in hand-to-hand combat and attacked the officers with a variety of weapons. *See also* PX43 at 148–49 (Erickson Crim. Trial Testimony) (describing weapons rioters used). Rioters personally attacked Officer Hodges by trying to gouge his eye out, crushing him in a metal doorframe, ripping off his gas mask, and bashing in his face with his own baton, injuring his skull and lip.

Nate Gowdy, a professional photographer who took thousands of pictures of the mob on January 6 (including of Commissioner Griffin), will testify that militia members and others assaulted him without provocation, and were markedly more aggressive compared to his prior experiences photographing Stop the Steal and other demonstrations.

The evidence will show that the mob was unified by the common purpose of “oppos[ing] ... the execution of the laws of the United States,” *In re Charge to Grand Jury*, 62 F. at 830, namely, the Twelfth and Twentieth Amendments and the Electoral Count Act. Officer Hodges will testify that the rioters made it clear—through their chants, flags, banners, and clothing—that

they were there to stop the constitutionally-mandated process of certifying the election and the transfer of presidential power. Officer Hodges will also testify that the attackers' preparations to use violence to achieve their shared objective differentiated them from protesters he had previously encountered as an MPD officer.

Plaintiffs' proof will also include a compilation of Capitol Police surveillance video admitted at Commissioner Griffin's criminal trial through the testimony of Capitol Police Inspector John Erickson, PX53; PX43 at 150; Officer Hodges' body camera footage; Mr. Gowdy's photographs; and footage compiled by the January 6 Select Committee. PX136, all of which depict the violent activities at the Capitol on January 6.

Professor Graber will testify that the shared purpose of the mob on January 6 and their activities are similar to historical events Section Three's drafters and nineteenth-century Americans regarded as insurrections. Dr. Kleinfeld will testify that the January 6 Attack was a coordinated and violent attack to prevent the transfer of presidential power, not a mere protest turned violent.

2. The January 6 Attack Was "So Formidable As For the Time Being to Defy the Authority of the United States" and Putting it Down Required A "Considerable" Law Enforcement and Military Response.

The January 6 Attackers achieved what even the Confederates never did during the Civil War: they breached the Capitol building and seized the Capitol grounds, forcing the Vice President and Congress to halt their constitutional duties and flee to more secure locations. PX12 at 25. The rioters succeeded in delaying the constitutionally-mandated counting of electoral votes by several hours and for the first time in our Nation's history disrupted the peaceful transfer of presidential power. Both houses went into recess by 2:18 p.m., and the Senate did not reconvene

until 8:00 p.m., with the House reconvening approximately an hour later. *Id.* at 25-26. It was not until 3:42 a.m. on January 7 that Congress completed its business and certified the election. *Id.* at 26. To clear the mob and regain control of the Capitol, the Capitol Police called in approximately 2,075 reinforcements from 19 agencies, including the MPD and Officer Hodges. PX14 at 20. Officers used chemical spray and munitions, flash bangs, tactical teams with firearms, riot shields, and batons to fight back the mob. PX15 at 26–33; PX14 at 21. Even with this significant show of force, the Capitol grounds were not deemed secure until 8:00 p.m. PX12 at 26.

Plaintiffs will present the prior testimony of U.S. Secret Service Inspector Lanelle Hawa, who was part of Vice President Pence’s security detail on January 6. She testified at Griffin’s criminal trial that the Secret Service evacuated the Vice President to a secure loading dock after rioters breached the building at 2:11 p.m. and kept him there for several hours until the Capital grounds were deemed secure. PX44 at 222–23, 258. Once the “Capitol went into lockdown,” that meant “everything ha[d] to stop,” including the election-certification proceedings over which Vice President Pence was the presiding officer. *Id.* at 224. The Vice President could not return to the Senate chamber and the constitutionally-mandated proceedings could not resume until all rioters in the restricted area (including Commissioner Griffin) were removed. *See id.* at 258.

Officer Hodges, who was deployed to the Capitol at 1:30 p.m. on January 6, will testify that the sheer size of the mob was the most important factor in the attack’s success and that, but for the actions of Griffin and others who illegally occupied the restricted area, the attack likely would not have succeeded as it did. Plaintiffs’ proof will also include a compilation video admitted at Commissioner Griffin’s criminal trial detailing how the attack disrupted the election-certification proceedings, relevant portions of the Congressional Record, PX60–61, and a

compilation video prepared by the January 6 Select Committee, PX136.

3. The Events of January 6 Are Widely Regarded as an Insurrection.

Reinforcing what the evidence at trial will show, each branch of the Federal Government has referred to the January 6 Attack as an “insurrection” and the participants as “insurrectionists,” including bipartisan majorities of both chambers of Congress,¹ more than a dozen federal courts,² President Biden,³ and the Department of Justice under former President Trump.⁴ Former President Trump’s own impeachment defense lawyers admitted “everyone agrees” there was “a violent insurrection of the Capitol” on January 6. 167 Cong. Rec. 5717, 5733 (Feb. 13, 2021).

C. Commissioner Griffin “Engaged in” the January 6 Insurrection.

Case law from the Reconstruction era holds that a person “engage[s]” in an insurrection within the meaning of Section Three by “[v]oluntarily aiding the [insurrection], by personal service, or by contributions, other than charitable, of anything that was useful or necessary” to the insurrectionists’ cause. *Worthy*, 63 N.C. at 203; *see also Powell*, 27 F. Cas. at 607 (defining “engage” as a “a voluntary effort to assist the Insurrection ... and to bring it to a successful

¹ *E.g.*, 167 Cong. Rec. H191 (daily ed. Jan. 13, 2021); 167 Cong. Rec. S733 (daily ed. Feb. 13, 2021); H. Res. 503, 117th Cong., 1st Sess. (2021); S. 35, 117th Cong. (2021); H.R. 3325, 117th Cong. (2021).

² *E.g.*, *United States v. Munchel*, 991 F.3d 1273, 1281 (D.C. Cir. 2021); *United States v. DeGrave*, 539 F. Supp. 3d 184 (D.D.C. 2021); *Noem v. Haaland*, 542 F. Supp. 3d 898, 906 (D.S.D. 2021); *Alsaada v. City of Columbus*, 536 F. Supp. 3d 216, 274 (S.D. Ohio 2021); *United States v. Brogan*, 2021 WL 2313008, at *2 (E.D.N.Y. June 7, 2021); *United States v. Brockhoff*, 2022 WL 715223, at *1 (D.D.C. Mar. 10, 2022); *United States v. Hunt*, 573 F. Supp. 3d 779, 807 (E.D.N.Y. 2021); *United States v. Puma*, 2022 WL 823079, at *2 (D.D.C. Mar. 19, 2022); *O'Rourke v. Dominion Voting Sys. Inc.*, 552 F. Supp. 3d 1168, 1199 (D. Colo. 2021); *United States v. Randolph*, 536 F. Supp. 3d 128, 132 (E.D. Ky. 2021); *United States v. Little*, 2022 WL 768685, at *2 (D.D.C. Mar. 14, 2022); *O'Handley v. Padilla*, 2022 WL 93625, at *5 (N.D. Cal. Jan. 10, 2022); *Amalgamated Transit Union Local 85 v. Port Auth.*, 2021 WL 719671, at *2 (W.D. Pa. Feb. 24, 2021).

³ *E.g.*, Statement By President Joe Biden On the Six-month Anniversary of the January 6th Insurrection On the Capitol (July 6, 2021), <https://perma.cc/VS89-CC3B>.

⁴ Gov’t Br. in Supp. of Det. at 1, *United States v. Chansley*, No. 21-cr-00003, ECF No. 5 (D. Ariz. Jan. 14, 2021).

termination” from the insurrectionists’ perspective). One need not personally commit acts of violence to “engag[e]” in insurrection. *See Powell*, 27 F. Cas. at 607 (defendant “engaged” in insurrection if he voluntarily provided a substitute to avoid serving in Confederate Army); *Worthy*, 63 N.C. at 203 (individual “engaged” in rebellion by holding office of county sheriff under the Confederacy); May 2022 *Greene* Decision at 14 (“[E]ngage’ includes overt actions and, in certain limited contexts, words used in furtherance of the insurrections and associated actions.”).

Applying these principles, Plaintiffs’ trial evidence will establish that Commissioner Griffin engaged in insurrection within the meaning of the Disqualification Clause. The evidence will include videos captured by Griffin’s videographer, Matthew Struck, and others documenting Griffin’s actions; social media posts by Griffin and his organization, “Cowboys for Trump,” *see* Griffin Dep. at 66:7–9; and Mr. Gowdy’s testimony and photographs of Griffin at the Capitol.

Ahead of the January 6 Attack, Griffin advocated for political violence and helped mobilize the Stop the Steal movement. He spoke at various Stop the Steal rallies where he spread lies about the 2020 election being stolen. *See* Griffin Dep. at 119:14–120:10. On social media, Griffin and Cowboys for Trump spent months normalizing that violence may be necessary to keep President Trump in office, PX68–70, and urged their followers to come to Washington, D.C. on January 6 to answer President Trump’s call, PX73.⁵

In the days preceding the attack, Griffin was a featured speaker on a cross-country road tour where he mobilized the Stop the Steal movement with increasing fervor. *See* Griffin Dep. at

⁵ These efforts had the desired effect, with replies to Cowboys for Trump’s tweets including explicit calls to “Occupy The Capitol” and “Grab Our Rifles and Defend America.” PX113–117. One reply called for “PATRIOTS [to] MEET AT THE US CAPITOL BUILDING AT 1PM ON JAN 6 2021” and provided detailed information on the Capitol’s layout and location, as well as the schedule for Congress’s election-certification proceedings. PX113.

136:10–137:19. At a January 1 speech in West Monroe, Louisiana, he urged the crowd to “meet us” on “the streets of Washington, D.C. on January 6.” At a January 3 speech in Bowling Green, Kentucky, he said, “If we allow this election to be stolen from us, we will become a third world country overnight... The elitist, gross, wicked vile people that are in place will continue to wage war on America. Because there is a war, mind you, I promise you that.” PX65. He added, “we got to get our country back. There’s no other way, there’s no other option.” The next day, he told another crowd, “We want to win it through our democratic process, but losing is not an option. We’ll win it...in the ballot box or we’ll win it in the street.” PX67.

Early in the morning of January 6 in Washington, D.C., Griffin worked up crowds of Trump supporters by telling them that Vice President Pence is “gonna have to find a real deep hole to crawl into” and that “we’ll all be lining up at his house if he doesn’t come through.” PX38. He also asked one man, “where’s your gun at?” *Id.* Video shows Griffin loading his car with a gun for his trip to Washington, D.C. When asked at his deposition whether he brought guns to these events, Griffin invoked the Fifth Amendment. *See* Griffin Dep. at 176:23–178:1.

Videos from later on January 6 show Commissioner Griffin illegally breaching multiple security barriers and occupying restricted Capitol grounds from at least 2:31 p.m. to 4:48 p.m.—actions for which he was later criminally convicted. PX45 at 326:22–327:23; PX47. Around 2:31 p.m., just twenty minutes after rioters breached the Capitol building, Griffin climbed over the Olmstead Wall on the Capitol grounds. PX42. Around 2:41 p.m., Griffin approached the Capitol building amid chants of “storm the Capitol” and “this is civil f*cking war.” PX25. He used a metal security fence rioters had repurposed into a ladder to scale another wall. *Id.* He proceeded to fist bump other rioters and declare “this is our house!” and “we could all be armed.” *Id.* He

then helped a rioter climb up a makeshift ramp to breach another security barrier and ran over the ramp himself. *Id.* He made his way to just below the inaugural stage, where he said he would wait until the mob got “this door broke down” to enter an enclosed staircase.

By 2:56 p.m., the mob had broken the door and Griffin walked up to the inaugural stage on the Lower West Terrace, where he covered his mouth presumably from the acrid smell of tear gas and pepper spray, but stated gleefully “I love the smell of napalm in the air.” PX26. Once he reached the inaugural stage, Griffin filmed a speech for social media promoting the insurrection. PX27. He exhorted, “It’s a great day for America! The people [are] showing that they’ve had enough. People are ready for fair and legal elections, or this is what you’re going to get, and you’re going to get more of it.” *Id.* As rioters brutally attacked Officer Hodges and other officers in a tunnel a short distance away from him, Griffin threatened into the camera, “We’re not going anywhere. We’re not gonna take ‘no’ for an answer ... Anything to get our country back.” *Id.*

Griffin remained on the inaugural platform until sometime after 4:00 p.m. During this time, rioters in the same area were beating police officers, stealing their riot shields, forming a human battering ram to collectively force their way into the building, and breaking a window. *E.g.*, PX31, 34. Griffin remained within restricted Capitol grounds until at least 4:48 p.m.

The next day, Griffin glorified his role in the insurrection. In a video posted to Facebook that he recorded in Roanoke, Virginia, he gloated that he “climbed up on top of the Capitol building” and “saw a little bit of that action on ... the inside.” PX37. He characterized the mob as “unleashing [the] whirlwinds” and a “shot over the bow.” *Id.* He explained the purpose of the attack was to stop the transfer of presidential power and threatened further action to achieve that goal, stating, “[y]ou saw America rise up. ... You saw a people that had had enough ... because

we will not lose. And Joe Biden will never be President ... you thought yesterday was a big day? It'll be nothing like -- compared to like the next one." *Id.* Griffin previewed a more brutal attack to prevent Biden from taking office, stating "You want to say that was violence? ... No, we could have a Second Amendment rally on those same steps that we had that rally yesterday, you know, and if we do, then it's going to be a sad day because there's going to be blood running out of that building." *Id.* Later, at an Otero County Commission meeting on January 14, 2021, Griffin conveyed his continued support for the insurrection and his plans to return to the Capitol with firearms on January 20 for the presidential inauguration. PX40. Even after his criminal conviction, Griffin showed no remorse for his conduct on January 6, instead stating in a March 22, 2022 interview that he "wear[s] January 6 as a badge of honor." PX66.

Mr. Gowdy, who photographed Griffin at the Capitol on January 6, will testify that Griffin's actions contributed to the chaos he witnessed that day. Officer Hodges' and Inspector Hawa's testimony will show that behavior like Griffin's was critical to the success of the January 6 Attack, even though he did not personally engage in violence. *See supra* Part I.B.2. Dr. Kleinfeld will contextualize Griffin's actions by explaining his role as a mobilizer and inciter of an insurrectionist mob and a normalizer of violence. She will explain how Commissioner Griffin's conduct before, during, and after January 6 supported the insurrection in significant ways, consistent with how political violence often plays out.

II. Commissioner Griffin's Anticipated Defenses Are Meritless.

Although he is now proceeding *pro se*, Griffin was represented by counsel in these *quo warranto* proceedings in federal court and a parallel federal suit under 42 U.S.C. § 1983 in which he unsuccessfully sought to enjoin this action. *See Griffin*, 2022 WL 2315980. In those federal

proceedings, Griffin raised a host of legal defenses that he might assert at trial. None have merit.⁶

A. Commissioner Griffin’s Various First Amendment Defenses Fail.

First, contrary to Griffin’s recent claim that the First Amendment bars consideration of his social media posts, *e.g.*, Griffin Dep. at 65:1–3, 66:2–4, “[t]he First Amendment ... does not prohibit the evidentiary use of speech...” *Wisc. v. Mitchell*, 508 U.S. 476, 489 (1993).

Second, Section Three of the Fourteenth Amendment cannot violate any First Amendment right Griffin could claim to run for office. *See Griffin*, 2022 WL 2315980, at *12 (“Section Three ... narrows the First Amendment right to run for office ...”). There is no fundamental right to run for office. *See Thournir v. Meyer*, 909 F.2d 408, 412 (10th Cir. 1990). And Section Three serves compelling interests in “protecting the integrity and practical functioning of the political process” by excluding “candidates who are constitutionally prohibited from assuming office” due to their disloyalty to the Constitution. *Hassan v. Colorado*, 495 F. App’x 947, 948 (10th Cir. 2012) (Gorsuch, J.); *see Sandlin*, 21 La. Ann. at 632 (“[T]he State has obviously a great interest” in enforcing Section Three “and a clear right to do” so).

Third, Commissioner Griffin’s free speech and free exercise rights do not immunize him from disqualification, even if his insurrectionary activities are entangled with speech and prayer. “[F]reedom of speech and of religion do not extend so far as to bar prosecution of one who uses a public speech or a religious ministry to commit crimes” or other illegal conduct. *United States v. Rahman*, 189 F.3d 88, 116–17 (2d Cir. 1999). Rather, Commissioner Griffin could be held to violate even a statute pursuant to traditional First Amendment exceptions, such as speech integral to illegal conduct, *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949); *Rumsfeld v.*

⁶ Griffin repeated some of these defenses in an untimely “Motion to Quash and Dismiss” filed on July 25, 2022, for which Plaintiffs are filing their opposition today. Plaintiffs incorporate their opposition arguments by reference here.

FAIR, Inc., 547 U.S. 47, 62 (2006), true threats, *Virginia v. Black*, 538 U.S. 343, 359–60 (2003), and incitement, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Here, Griffin is accused of violating the Fourteenth Amendment, which must be “be read together and harmonized” with the First Amendment, *State v. Sandoval*, 1980-NMSC-139, ¶ 8, 95 N.M. 254, 257, to ensure Section Three is not rendered “without effect,” *Marbury v. Madison*, 5 U.S. 137, 174 (1803).⁷

B. The Amnesty Act of 1872 Did Not Effectively Repeal Section Three of the Fourteenth Amendment.

Judge Gonzalez rejected Griffin’s argument that the Amnesty Act of 1872 granted amnesty prospectively to all future insurrectionists who might be disqualified under Section Three. *See Griffin v. White*, 2022 WL 2132042, at *2 (D.N.M. June 14, 2022) (citing *Cawthorn v. Amalfi*, 35 F.4th 245, 258 (4th Cir. 2022)). This Court should as well.

C. Under the Supremacy Clause, the New Mexico Constitution Cannot Preclude Application of the U.S. Constitution to Griffin.

Griffin also argued in federal court that New Mexico’s Constitution sets out the exclusive conditions for which a state official may be disqualified and does not permit disqualification under Section Three. But the “Supremacy Clause provides a clear rule that federal law ‘shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.’” *Arizona v. United States*, 567 U.S. 387, 399 (2012) (quoting U.S. Const. art. VI, cl. 2).

D. Griffin Can Be Disqualified Under Section Three Regardless of Whether He Has Been Convicted of Any Crime.

Commissioner Griffin has argued he cannot be disqualified under Section Three because

⁷ Griffin’s First Amendment defenses will also be addressed in a forthcoming amicus brief by First Amendment scholars and faith leaders.

he was acquitted of disorderly conduct under 18 U.S.C. § 1752(a)(2) and has not been charged with the crime of insurrection under 18 U.S.C. § 2483. But, as Professor Graber’s trial testimony will confirm, Section Three imposes a qualification for public office, much like an age or residency requirement; it is not a criminal penalty. *See Sandlin*, 21 La. Ann. at 632–33 (Section Three suit was brought “not to inflict punishment or to impose penalties or disabilities,” but “to inquire legally into [defendant’s] right to hold ... office”); Cong. Globe, 39th Cong., 1st Sess. 2918 (1865-66) (Section Three is “not... penal in its character, it is precautionary.”). Nor is a criminal conviction a prerequisite for disqualification under Section Three. *See, e.g., Sandlin*, 21 La. Ann. 631; *Worthy*, 63 N.C. 199; *In re Tate*, 63 N.C. 309; May 2022 *Greene* Decision at 13.⁸

CONCLUSION

The evidence at trial will show that Commission Griffin is disqualified from public office under Section Three of the Fourteenth Amendment. In their post-trial brief, Plaintiffs will respectfully request that the Court enter judgment declaring the January 6 attack and surrounding events an insurrection, removing Commissioner Griffin from office, and barring Griffin from holding any future public office pursuant to NMSA 1978, Sections 44-3-4 and 44-3-14, and Section Three of the Fourteenth Amendment.

⁸ Nor is Griffin’s acquittal for disorderly conduct relevant here. Unlike 18 U.S.C. § 1752(a)(2), Section Three does not require proof that Griffin had the specific “intent to impede or disrupt the orderly conduct of Government business or official functions.” Nor does Section Three require proof that Griffin engaged in “disorderly or disruptive conduct” or that he “in fact impede[d] or disrupt[ed] the orderly conduct of Government business or official functions.” 18 U.S.C. § 1752(a)(2). Instead, Griffin is disqualified under Section Three if he “[v]oluntarily aid[ed] the [insurrection], by personal service, or by contributions, other than charitable, of anything that was useful or necessary” to the insurrectionist cause. *Worthy*, 63 N.C. at 203. The judge in Griffin’s criminal case had no occasion to apply this standard. The quantum of proof also differs significantly: to secure a § 1752 conviction, the United States had to prove each element beyond a reasonable doubt. In this civil action, the standard of proof is, at most, preponderance of the evidence.

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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2022, I filed the foregoing Plaintiffs' Pre-Trial Brief 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



/s/ Joseph Goldberg
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