UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

COUY GRIFFIN, Plaintiff, v. MARCO WHITE, MARK MITCHELL, and LESLIE LAKIND, *acting under color of New Mexico law*, Defendants.	Civ. No. 2:22-cv-362-KG-GJF **Oral Argument Requested**

PLAINTIFF GRIFFIN'S REPLY TO DEFENDANTS' OPPOSITION TO HIS MOTION FOR PRELIMINARY INJUNCTION

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Preliminary statement[1]

Acting in the name of New Mexico, Defendants aim to remove and permanently ban Plaintiff Griffin from elected office. They say the Constitution compels courts to overturn the will of New Mexico voters and compels this Court to let it happen. After walking on the U.S. Capitol steps during the January 6 riot, Griffin may have been acquitted of a disorderly conduct misdemeanor. Yet he simultaneously committed the crime of insurrection. Thus, under Section Three of the Fourteenth Amendment, a provision created for and unused since the Civil War, the courts must reverse a local election, held 160 years later, in which Griffin prevailed.

That Defendants' efforts are the mirror image of those undertaken by the "insurrectionists" whom they allege Griffin aided is lost on them. In their 28-page Opposition to Griffin's Motion for a Preliminary Injunction, the Court will find no attempt to defend their core claim—unalleged by the Department of Justice—that Griffin "engaged in insurrection." Like those of the "insurrectionists," Defendants' constitutional theories for overturning elections are axiomatic, without reference to fact or argument. Media outlets use that term. The courts may thus preside over the stripping of Griffin's right to run for political office on the mere presumption that the term applies to him, Defendants appear to believe.

Griffin's action is not "an improper collateral attack," Defs. Opp., p. 1—Defendants' effort to reverse an election is. *First*, Defendants say they are not persons acting under color of State law. *Id.*, p. 5. However, the Tenth Circuit precedent on which they themselves rely holds

[1] On Defendants' motion, the Court ordered that Plaintiff's reply is now due "on or before June 24, 2022." ECF No. 26. Plaintiff files his reply now, on the understanding he will not have another reply under the Court's order. As shown below, the matters Defendants will raise in their "supplemental briefing" are nonissues filed to delay the Court's disposition of Plaintiff's motion. Defendants are right now using the delay to immediately take in their *quo warranto* proceeding—where the indigent Plaintiff will be unrepresented and unable to raise counterclaims—that which the Constitution denies them.

that private actors to whom the State has delegated the public function of the regulation of the voting process are "persons" under Section 1983. A few pages later, Defendants acknowledge their *quo warranto* action is aimed at "regulation of the voting process": a core public function. *Id.*, p. 10. Defendants themselves concede they are Section 1983 "persons."

Second, Defendants argue that permanently banning Griffin from public office is only a "minimal, not severe" burden on his First Amendment right under the *Anderson-Burdick* test, as "candidacy itself is not a fundamental right comparable to the right to vote." Defs. Opp., p. 11. Sophisticated election lawyers, Defendants' counsel almost surely know the Supreme Court has eliminated the practical relevance of any academic debate over the "fundamentality" of the right to "candidacy itself," having "repeatedly recognized" that candidate restrictions are examined in light of "the extent and nature of their impact on *voters*." *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983) (emphasis added). Many candidacy restrictions far less severe than an outright ban on office—and a shifting of the burden of proof to the candidate to prove he did *not* commit a crime—have been voided under *Anderson-Burdick*. And, unlike in Defendants' key case involving a recent Disqualification Clause challenge, the court overseeing their *quo warranto* proceeding has *not* shifted the burden of proof back to Defendants. *Greene v. Raffensperger*, 2022 U.S. Dist. LEXIS 70961, at *53 (N.D. Ga. Apr. 18, 2022). Indeed, Defendants refuse to stipulate to such a shift—and delay this proceeding for that very reason.

Third, Defendants fail to show that application of the Disqualification Clause to Griffin is narrowly tailored to serve a compelling state interest that overbalances the *conceded* burden on Griffin's and his voters' rights. Defs. Opp., p. 16. Defendants refuse to partake in the required balancing at all. The Court must assume that the State possesses such interests, they say, even if Griffin did *not* "engage in insurrection" and thus the Disqualification Clause does not apply to

him. As such an assumption is barred by the New Mexico Constitution, Defendants' refusal to defend their "insurrection" claim on the merits means they have forfeited the second part of the *Anderson-Burdick* balancing test.

Fourth, Defendants contend that the rule against claim splitting bars Griffin's Section 1983 action. Defs. Opp., p. 20. They are mistaken and likely know it. In the *quo warranto* action, Defendants are the plaintiffs. Here, they are the defendants. Tenth Circuit precedent shows the claim splitting doctrine only applies to plaintiffs who split claims between two or more of their *own* actions. Relatedly, Defendants claim that Griffin can (indeed, must) raise his Section 1983 claims or similar constitutional defenses in their *quo warranto* action in state court. They know that is procedurally impossible. The *quo warranto* statute requires their state court action to be tried—and Griffin must now somehow prove he did *not* "engage in insurrection"—*no more than five days after Griffin files an answer to their action*. Thus, their "summary proceeding" does not vitiate the likelihood of Griffin's success on the merits in this distinct Section 1983 action; its abrupt nature stands at the center of Griffin's claim itself.

Griffin's Motion for Preliminary Injunction should be granted before Defendants seize that which the Constitution denies them, at the expense of Plaintiff's irreparable injury.

Argument

I. Griffin is likely to succeed on the merits

A. Defendants are "persons acting under color of state law" because the State has delegated to them control over "regulation of the voting process"

Although they bring their *quo warranto* action on behalf of New Mexico solely to redress the State's alleged injury, Defendants argue they are not "acting under color of state law" and are thus not "persons" under § 1983. Defs. Opp., pp., 4-9.

The very first case Defendants cite shows their error. Defs. Opp., p. 5 (citing *Johnson v. Rodrigues*, 293 F.3d 1196, 1202 (10th Cir. 2002)). The Tenth Circuit has identified four tests delineated by the Supreme Court to determine whether private parties should be deemed state actors in the context of § 1983. *Johnson*, 293 F.3d at 1202 (citing *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442 (10th Cir. 1995)). First is the "public function test." *Id.*

The public function test asks whether the State has "delegate[ed] to a private party a function 'traditionally exclusively reserved to the State.'" *Neil Young Freedom Concert*, 49 F.3d at 1456 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974)). The Tenth Circuit gave the paradigmatic example of an activity that satisfies the test: "administ[ration] [of] elections of public officials." *Id.* (citing *Terry v. Adams*, 345 U.S. 461, 468-70 (1953)). *Terry* in turn demonstrates why Defendants' claim that their efforts to ban Griffin from elected office do not involve state action must fail—lest the Fourteenth and Fifteenth Amendments lose the force of law.

In the Jim Crow era, certain States tried to subvert the Fourteenth and Fifteenth Amendments by delegating to private parties the States' traditional prerogative to regulate elections for political office. *E.g.*, *Terry*, 345 U.S. at 462; *Smith v. Allright*, 231 U.S. 649 (1944). Having delegated control over elections and primaries to private parties and associations who in turn would disqualify black candidates and voters, the States would then seek to dismiss black citizens' civil rights claims on the ground there was no "State action"; like Defendants here, the private parties would in turn argue that they were not "persons acting under color of State law." *Terry*, 345 U.S. at 462. These sterile formalisms the Supreme Court rejected. Given the importance of voting rights, whenever "a state . . . permit[s] within its

borders the use of any device that produces" what would be a constitutional voting rights violation, "state action" has occurred. *Id.* at 469.

In a concurring opinion, Justice Frankfurter described the state-action standard, in the context of voting regulation, this way: a private party is "clothed with the authority and the influence which official position affords . . . in so far as [he] determines [de jure] the [eligibility of] participants in a[n] . . . election." *Terry*, 345 U.S. at 474 (Frankfurter, J., concurring). Thus, the public function test question is whether, pursuant to the State laws vesting him with such power, a private party exerts control over who may lawfully run for public office in an election. *Id.* Or, as Justice Cardozo put it for the Court in an earlier State delegation case concerning voting regulations, the

> pith of the matter is simply this, that when those [private parties] are invested with a[] [voting] authority independent of the[ir] [inherent legal power], they become to that extent the organs of the State itself, the repositories of official power. . . What they do in that relation, they must do in submission to the mandates of equality and liberty that bind officials everywhere.

Nixon v. Condon, 286 U.S. 73, 88 (1932); *see also Flagg Bros.*, *Inc. v. Brooks*, 436 U.S. 149, 158 (1978) ("[O]ur cases make clear that the conduct of [public] elections themselves is an exclusively public function.").

Applying the *Terry*-*Condon* standard here, there can be no doubt that Defendants act under color of State law in pursuing *quo warranto*. That the right to challenge an officeholder's qualifications for public office is "traditionally exclusively reserved to the State," *Neil Young Freedom Concert*, 49 F.3d at 1456, cannot be gainsaid. New Mexico's *quo warranto* statute traces back to the American common law writ of *quo warranto*. *Abercrombie v. Dist. Court of Fourth Judicial Dist.*, 37 N.M. 407, 1933-NMSC-057 (1933); *State ex rel. Owen v. Van Stone*, 17 N.M. 41, 1912-NMSC-003 (1912). In turn, the common law writ is partly an American

inheritance from the Statute of Anne, enacted by Parliament in 1710 as a reform of the common law. *Van Stone*, 17 N.M. at 45 (citing 9 Anne, c. 20). For hundreds of years prior to Queen Anne's reform, "the information in the nature of a *quo warranto* was employed exclusively as a prerogative remedy. . ." *Id.* That is, *quo warranto* was the prerogative of the English Crown and then of colonial governments. J. High, *A Treatise on Extraordinary Legal Remedies Embracing Mandamus*, *Quo Warranto*, *and Prohibition* (3d ed. 1896), pp. 497-498. Hence, the Supreme Court has held that under the "general principles applicable to *quo warranto*," that action is a "prerogative writ," i.e., the preserve of government. *Newman v. United States*, 238 U.S. 537, 545 (1915).

Quo warranto is—quintessentially—a right "traditionally exclusively reserved to the State." *Neil Young Freedom Concert*, 49 F.3d at 1456. Defendants themselves concede that this means they are "persons" under § 1983. For just a few pages after contending they do not act under color of State law, Defendants assert that the *Anderson-Burdick* test applies to Griffin's First and Fourteenth Amendment claims—because their *quo warranto* action concerns "*regulation of the voting process*," Defs. Opp., p. 10 (emphasis added), i.e., precisely the activity that the Tenth Circuit identified as a core "public function" after *Terry*. *Neil Young Freedom Concert*, 49 F.3d at 1456.

As to whether the State has delegated power to Defendants such that it can be said they may de jure "determine[] the [eligibility of] participants in a[n] . . . election," *Terry*, 345 U.S. at 474, the *quo warranto* statute leaves no doubt:

> "An action may be brought by the attorney general or district attorney in the name of the state, upon his information *or upon the complaint of any private person*, against the parties offending in the following cases . . . when any public officer, civil or military, shall have done or suffered an act which, by the provisions of law, shall work a forfeiture of his office. . . ." NMSA 1978, § 44-3-4 (emphasis added).

Defendants counter that for the public function test to render them "persons" under § 1983 the state activity over which they assume control must be "traditionally *and* exclusively" performed by the government. Defs. Opp., p. 6 (emphasis original). They appear to mean that because the *quo warranto* statute assigns private parties the State's voting regulatory power in certain limited circumstances, *quo warranto* is not "exclusively" performed by the government. Defendants' argument proves too much: every "public function test" case necessarily concerns ostensible delegation of *some* State authority to a private party. If that alone meant a § 1983 plaintiff could not satisfy the public function test, no private party would ever act under color of State law. *Terry-Condon* show that the test asks instead whether the activity at issue was ""traditionally exclusively reserved to the State," *Neil Young Freedom Concert*, 49 F.3d at 1456, *apart from the specific manner of delegation at issue in the case*. *Terry*, 345 U.S. at 462 (regulating candidacy for public office was a traditional State prerogative that Texas had increasingly delegated to the "Jaybird Association," a private entity).[2]

Finally, Defendants cite to a few cases in California where plaintiffs who sued under that State's Private Attorney General Act (PAGA) were held not to have acted under color of State law for purposes of § 1983. Defs. Opp., p. 7 (citing *J.P. Morgan Secs v. Baumann*, 2015 U.S. Dist. LEXIS 200021, at *8 (C.D. Cal. Aug. 20, 2015)). These are easily distinguished in light of *Neil Young Freedom Concert* and *Terry-Condon*. PAGA is a statute that permits an employee to sue an employer for labor code violations, such an unpaid overtime, his own and

[2] Interestingly, just as in *Terry*, a private political organization (a 501(c)(3) entity) is attempting here to regulate who may run for public office in lieu of the State. The entity here appears not to be discriminating on the basis of race, like the Jaybirds, but rather on account of political association with those who protested at the U.S. Capitol. Like the Jaybirds, however, the 501(c)(3) organization here attempts to disenfranchise voters.

other employees.' *Baumann*, 2015 U.S. Dist. LEXIS 200021, at *3. But there is no argument whatsoever that the right to unpaid wages is "traditionally exclusively reserved to the State," *Neil Young Freedom Concert*, 49 F.3d at 1456. Rather, it is traditionally the contract prerogative of the worker himself, not of the State. That distinguishes all Defendants' cases from the delegation of the regulation of the voting process here.[3] In sum, in clothing themselves in the State's *quo warranto* authority to remove an official from office, traditionally a prerogative remedy, Defendants plainly act under color of State law.

B. Application of the Disqualification Clause to Griffin fails the *Anderson-Burdick* test

Under the *Anderson-Burdick* balancing test, "'a court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that a plaintiff seeks to vindicate against the *precise* interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden plaintiff's rights.'" *Utah Republican Party v. Cox*, 885 F.3d 1219, 1229 (10th Cir. 2018) (quoting *Burdick v. Takushi*, 504 U.S. 428, 534 (1992)) (emphasis added). Where a regulation imposes "severe burdens" on a person's associational rights, it must be "narrowly tailored to serve a compelling state interest." *Id.* Where the burdens are less severe, "a State's important regulatory interests

[3] Defendants add that "mere private use of state-sanctioned private remedies or procedures does not rise to the level of state action." Defs. Opp., p. 6. They miss the point. Unlike *quo warranto* and regulation of the voting process, Defendants' cases concern private activities that are merely authorized by state statute, not the delegation of State prerogatives to private actors. *Tulsa Pro. Collection Servs. v. Pope*, 485 U.S. 478, 485 (1988) (state merely set up a nonclaim statute to govern the procedure for traditional private action); *Scott v. Hern*, 216 F.3d 897, 906 (10th Cir. 2000) (state merely authorized physician to provide medical info to State which exercised its own "independent judgment" as to commitment of patient).

will usually be enough to justify reasonable, nondiscriminatory restrictions." *Id.* Defendants' analysis of *Anderson-Burdick* stumbles at every step in this balancing act.

1. Defendants' distinction between voting rights and the right to seek "candidacy itself" has no purchase in constitutional election law

Defendants note that the Supreme Court has not recognized "'a fundamental right to express one's political views through candidacy.'" Defs. Opp., p. 11 (quoting *Carver v. Dennis*, 104 F.3d 847, 850-51 (6th Cir. 1997)). They appear to argue that this means that stripping Griffin of his "minimally-protected interest in seeking elected office" cannot constitute a "severe" burden under *Anderson-Burdick* as a matter of law. *Id.* at 12.

Defendants know, or should know, that any theoretical distinction between a right to "candidacy itself" and voters' right to vote for *that candidate* is rendered immaterial by the *Anderson* and *Burdick* cases themselves. In *Anderson*, an independent candidate for U.S. president challenged Ohio's early filing deadline on First Amendment grounds. 460 U.S. at 782. After recognizing that the Court had not identified a distinct right to political candidacy, the Supreme Court held,

> Nevertheless, as we have recognized, the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters. . . Therefore, in approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters. The impact of candidate eligibility requirements on voters implicates basic constitutional rights. . . As we have repeatedly recognized, voters can assert their preferences only through candidates or parties or both. . . The exclusion of candidates also burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views of the issues of the day, and a candidate serves as a rallying point for like-minded citizens.

Anderson, 460 U.S. at 786-87 (internal quotation marks and citation omitted).

That is why both in *Anderson* and in *Bullock v. Carter*, 405 U.S. 134, 144, 92 S. Ct. 849, 31 L. Ed. 2d 92 (1972) (candidates' filing fee requirements), the Court found "severe" burdens in

the form of candidacy requirements *even though the plaintiffs were candidates*, not their voters. *Anderson*, 460 U.S. at 806. Thus, Defendants are wrong that because he is a current officeholder and prospective future candidate Griffin, and his voters, cannot suffer a severe burden from candidacy requirements.

2. Griffin has identified "severe" burdens on his First and Fourteenth Amendment rights

Defendants contend that (1) immediately removing and permanently banning Griffin from public office is not a severe burden on the First Amendment right they themselves acknowledge; and (2) their effort to shift the burden to Griffin to prove he did *not* "engage in insurrection" cannot amount to a due process violation because he "has no fundamental right to seek or hold elected office." Defs. Opp., p. 12. Defendants are plainly wrong.

The authorities on which Defendants themselves rely show that the Supreme Court has characterized the following candidacy requirements as "severe" (and not overcome by a narrowly tailored regulation serving a compelling state interest). In *Anderson*, the Court considered Ohio's "stringent" early filing deadline for independent candidates. 460 U.S. at 795. This regulation was "severe" in that only four other States had a similarly early deadline. *Id.* The Court held that "[a] burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment." *Id.* at 794. In *Bullock*, the Court identified a "severe" regulatory burden in Texas's $1,000 filing fee requirement *for County Commissioner candidacy*. 405 U.S. at 136. For that "burden [fell] unequally on new or small political parties or on independent candidates." *Id.* Taken together, the *Anderson-Bullock* question is whether a candidacy regulation "falls disproportionately on a discrete group of voters, thereby implicating heightened constitutional concerns." *Ariz Dem. Party v. Hobbs*, 18 F.4th 1179, 1190 (9th Cir. 2021).

If anything, the regulations in *Anderson-Bullock* were far less "severe" than Defendants' efforts vis-à-vis Griffin. So far from imposing a deadline or a filing fee, Defendants would permanently bar Griffin from office. On the other side of the coin, just as in *Anderson-Bullock*, Defendants' restrictions on Griffin's and his voters' rights "fall[] disproportionately on a discrete group of voters," namely voters who support the former president of the United States. Indeed, that Defendants' candidate elimination effort would extend beyond those who allegedly "engaged in insurrection" to candidates who are said to have verbally endorsed the same can be seen in their extensive reliance on *Greene*, 2022 U.S. Dist. LEXIS 70961. Defs. Opp., pp. 9-10, 12-13, 16, 18-19.[4]

Defendants counter that the burden on Griffin's First Amendment right cannot be severe as their *quo warranto* action "affords him ample process." Defs. Opp., p. 15. Parties in *quo warranto* actions, they represent, are "granted the same process available in 'other civil actions.'" *Id.* (citing NMSA 1978, § 44-3-1). That representation is seriously misleading. First, the statute cited by Defendants does not say that *quo warranto* parties are granted the same process as in "other civil actions"; it says that *quo warranto* actions "shall be commenced by the filing of a complaint *as in other civil actions*." § 44-3-1 (emphasis added). Secondly, the *quo warranto* statute explicitly shows that parties are *not* "granted the same process available in other civil actions." As Defendants themselves described it to Chief Judge Johnson, the *quo warranto*

[4] Defendants cite to a March article in which they say Griffin "has already declared he is not seeking re-election or election to other public office in the 2022 election cycle." Defs. Opp., p. 12. But Griffin's Complaint, filed in May, pleads that he intends to remain in office through at least December 31, 2022 and "intends to exercise his First Amendment right to run for State or federal office in the future." Compl., ¶ 37. In considering a preliminary injunction motion, the Court must accept this allegation as true. *E.g.*, *Edmisten v. Werholz*, 287 F. App'x 728, 732 (10th Cir. 2008) (reversing district court for not accepting as true plaintiff's factual allegations at preliminary injunction stage).

statute "requires that [their action] be 'summarily tried as soon as the issues are made up.'" *White et al. v. Griffin*, 22-cv-284-WJ, ECF No. 17 (D.N.M. 2022) (citing NMSA 1978, § 44-3-8). Indeed, the statute provides that trial on the *quo warranto must* begin *no more than five days after Griffin's answer.* NMSA 1978, § 44-3-8. This rule belies Defendants' representation that Griffin has the "same process available" in the *quo warranto* action that he would in this—or any other—civil proceeding.

More disingenuously still, Defendants say Griffin's "due process objection to the burden of proof in the *quo warranto* action is both unavailing and prematurely raised." Defs. Opp., p. 13. Placing the burden on Griffin to prove he did *not* "engage in insurrection," they add, is merely a "judge-made rule" which the court may or may not apply to Griffin. *Id.* Citing to the *Greene* case, Defendants characterize that decision as "rejecting [a] similar due process claim by Representative Greene based partly *on developments in the state court proceeding* that rendered her 'as-applied challenge' a 'nullity.'" *Id.* (citing *Greene*, 2022 U.S. Dist. LEXIS 70961) (emphasis added).

What Defendants misleadingly omit: the *Greene* court rejected the candidate's due process challenge there precisely because the judge in her parallel state disqualification proceeding *had shifted the burden of proving that the candidate "engaged in insurrection" back to those challenging her qualification for office*. *Greene*, 2022 U.S. Dist. LEXIS 70961, at *53. Accordingly, Griffin inquired of Defendants whether they would consent to a similar shifting of the burden of proof in their *quo warranto* action. Though they represented to this Court that "it is hardly clear how a court will allocate the relative burdens," Defs. Opp., p. 13, Defendants' counsel refused Griffin's request for a burden-shifting stipulation.

Defendants' attempt to distinguish *Speiser v. Randall*, 357 U.S. 513 (1958) fares no better. *Speiser* found a due process violation where a State law required taxpayers to prove the negative that they "do not advocate the overthrow of the Government" by force or violence. Such burden shifting violates due process when the regulation is "shown to be in reality a penalty for a crime." *Id.* at 524. *Speiser* does not apply, Defendants say, as "Griffin's disqualification from office is based not on speech but rather on the existence of an insurrection or rebellion" and also "Griffin's actions engaging therein or giving aid or comfort to those who did." Defs. Opp., p. 15.[5] The *quo warranto* action does not "implicate the speech-chilling concerns permeating *Speiser*," and it does not seek a "'penalty for a crime.'" *Id.*

Defendants' incanting of the undefined term "insurrection" does not mean their disqualification effort "is based not on speech." First, the West Front of the U.S. Capitol, where Griffin led a prayer, is a public forum. *Jeannette Rankin Brigade v. Chief of Capitol Police*, 342 F. Supp. 575 (D.D.C. 1972) (three-judge panel) *sum. aff'd* 409 U.S. 972 (1972) (finding parading-on-the-Capitol-Grounds offense facially invalid under First Amendment). Thus, protesters have "a right to assemble in the Capitol Grounds." *Id.* at 583. As to time, place and manner restrictions, "the rights to free speech and assembly may not be abridged in the guise of regulation, and the state interest which may supersede these rights must '[rise] far above public inconvenience, annoyance, or unrest . . .There is no room under our Constitution for a more restrictive view.'" 342 F. Supp. at 584 (quoting *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949)). The public forum extends to the steps of the Capitol and encompasses the right to make

[5] The Disqualification Clause concerns disqualification of those who (1) "shall have engaged in insurrection or rebellion" against the U.S. Constitution or (2) have "given aid or comfort to the *enemies* thereof." U.S. Const. amend XIV, § 3 (emphasis added). Defendants have omitted the term "enemies" from their description because it applies only to the subjects of a foreign power in a state of open hostility with the United States. Pl. Mot., p. 19.

speeches that have "the intent, effect, or propensity to attract a crowd or onlookers." *Lederman v. United States*, 291 F.3d 36, 39 (D.C. Cir. 2002) (East Front steps of Capitol a public forum).

Second, assemblies mixed with violence do not lose constitutional protection simply because some portion of the assembled engaged in violence. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 889 (1982). During NAACP's Mississippi boycott on white merchants, some picketers engaged in violence. But only those who engaged in violence could be held liable for resulting economic damages. During an outbreak of violence, NAACP member Chares Evers made "threats of vilification" to assembled picketers and intimated that "necks would be broken." 458 U.S. at 927. Because Evers' speech did not constitute incitement under *Brandenburg v. Ohio*, 395 U.S. 444 (1969), holding him liable for others' violence was inconsistent with his boycotting/picketing rights. 458 U.S. at 929.

Griffin was acquitted of a disorderly conduct charge for his actions on January 6, which included walking on the Capitol steps and leading a prayer. *United States v. Griffin*, 21-cr-92-TNM, 3/22/22 Judgment (D.D.C. 2021). The District of Columbia's definition of disorderly conduct is taken right from the *Brandenburg* incitement standard. D.C. Code § 22-1321. Griffin had a right to make a speech on the Capitol Grounds. *Jeannette Rankin Brigade*, 342 F. Supp. at 583. That others engaged in violence does not vitiate Griffin's right because his actions did not constitute incitement, as his acquittal conclusively demonstrates. *Claiborne Hardware*, 458 U.S. at 929. Finally, "engaging in insurrection" *is* a crime, 18 U.S.C. § 2383,[6] and barring Griffin from office is not just a penalty for that crime, but an infringement of his First Amendment right,

[6] Defendants say the insurrection or rebellion reference in the Disqualification Clause is not a felony offense because § 2383 was enacted 80 years after ratification of the Fourteenth Amendment. Defs. Opp., p. 15 n. 5. At best, Defendants are confused. Section 2383 was first enacted by the 37th Congress, as the Act of July 17, 1862, *before* the Fourteenth Amendment's ratification, not after. ch. 195, § 2, 37 Stat. 590. The crime has remained the same since. *Id.*

as shown above. Accordingly, Defendants have not presented one valid distinction concerning *Speiser*. In sum, Griffin has identified severe burdens on his First and Fourteenth Amendment rights under Supreme Court precedent.

3. Defendants have forfeited the second part of the *Anderson-Burdick* test

Defendants contend "there is a compelling state interest in excluding constitutionally-disqualified individuals from elected office." Defs. Opp., p. 16. However, Defendants then proceed to offer no substantive response to Griffin's arguments that he cannot be found to have engaged in insurrection or rebellion or to have given aid or comfort to the enemy, as a matter of law. For Defendants contend that Griffin's "likelihood of success in the *quo warranto* action is irrelevant to whether Griffin is entitled to a preliminary injunction." *Id.* at 21. In the words of a late Justice, Defendants' argument is "legalistic argle-bargle." *United States v. Windsor*, 570 U.S. 744, 799 (2013) (Scalia, J., dissenting). Even Defendants acknowledge Griffin has at least a "minimally protected interest in seeking elected office." Defs. Opp., p. 12. The point is not that Defendants must offer "elaborate *empirical* verification" of a State's countervailing interests. *Id.* at 16, 21 (emphasis added). Instead, if the Disqualification Clause is not a basis for imposing a burden on Griffin's acknowledged right and Defendants have not identified any other basis, Defendants have not pointed to *any* "compelling state interest" (empirically verified or otherwise), much less one for which stripping Griffin's acknowledged right is narrowly tailored. *Utah Republican Party*, 885 F.3d at 1229. By not making *any legal argument at all* that Griffin's conduct amounted to insurrection or aiding the enemy, Defendants have forfeited the second part of the *Anderson-Burdick* test. *E.g.*, *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1128 (10th Cir. 2011) (Gorsuch, J.) (a party's failure to respond to salient nonfrivolous argument constitutes an issue forfeiture). Indeed, absent any legal argument that Griffin engaged in

insurrection (which Defendants nowhere define), any other State interest conceivably identified by Defendants would violate the New Mexico Constitution. Pl. Mot., pp. 5-6. Defendants fail to show how Griffin violated any of that Constitution's exceptions to its officeholder qualification provision. N.M. Const. Art. VII, § 2. They do not dispute that Griffin meets the qualification provision. Defendants note that county commissioners are required by state law to take an oath to support the U.S. Constitution. Defs. Opp., p. 22. Yet they offer no response to Griffin's point that the New Mexico Constitution provides only one mechanism for removal of an officeholder for "violation of the oath of office": *voter recall*. N.M. Const. Art. X, § 9. Griffin defeated such a recall on the very issue on which Defendants' *quo warranto* action rests. Even if Griffin were subject to forfeiture of his office under the Disqualification Clause—which Defendants have made no argument to demonstrate—that would amount to an oath-of-office violation for which the exclusive remedy under the New Mexico Constitution is recall. Defendants' efforts here attempt to subvert that recall. By failing to respond to Griffin's argument here, Defendants forfeit this issue too. *Ernest Grp., Inc.*, 634 F.3d at 1128.[7]

4. Griffin's likelihood of success on the merits need not turn on this Court's construction of the Amnesty Act of 1872

Defendants spend considerable space arguing that the Amnesty Act of 1872 "did not repeal Section Three of the Fourteenth Amendment." Defs. Opp., pp. 17-19. Their efforts are wholly beside the point. As shown above, Defendants have both conceded that Plaintiff has a

[7] Defendants appear to cite *State ex rel. Martinez v. Padilla*, 94 N.M. 431, 434 (1980) for the proposition that *quo warranto* may be used to remove an officeholder for violation of an oath of office. Defs. Opp., p. 22. *Padilla* holds no such thing. There, the New Mexico Supreme Court rejected the officeholder's argument that he could be removed solely through recall vote for his embezzlement because there was a distinct removal provision in the Constitution for embezzlement *separate from the recall provision*. 94 N.M. at 434. By contrast, there is no removal provision in the New Mexico Constitution for an oath-of-office violation distinct from the recall provision.

First Amendment right to run for political office and failed to identify any compelling state interest for which Griffin's permanent disqualification from office is a narrowly tailored regulation. Defendants have made no legal argument showing how Plaintiff can be simultaneously innocent of disorderly conduct and guilty of insurrection based on the same set of facts. Thus, in granting Plaintiff's Motion, the Court need not even address the Amnesty Act of 1872. Nevertheless, the Fourth Circuit authority on which Defendants rely shows where they err. Defs. Opp., p. 18 (citing *Cawthorn v. Amalfi*, 2022 U.S. App. LEXIS 14220 (4th Cir. May 24, 2022)). As here, *Cawthorn* concerned a challenge to an officeholder's ability to hold office on the ground that he engaged in insurrection or rebellion under the Disqualification Clause. Yet as Judge Richardson noted in concurrence, the dispositive question had nothing to do with the Amnesty Act. *Cawthorn*, 2022 U.S. App. LEXIS 14220, at *46. Rather, the question was *who decides* whether the officeholder "engaged in insurrection." *Id.* There, only Congress could decide. The office at issue was a seat in the U.S. House of Representatives. The House is "the Judge of the Elections, Returns and Qualifications of its own Members." U.S. Const. art. I, § 5, cl. 1. Thus, the district court should not have decided the issue. *Cawthorn*, 2022 U.S. App. LEXIS 14220, at *47. Here, the same principle means that Plaintiff's Motion must be granted. The question of "who decides" whether Griffin must be removed from office under the Disqualification Clause is plainly answered by the New Mexico Constitution, no less than the U.S. Constitution answered it in *Cawthorn*. As shown above, *voters* determine whether an officeholder has committed a "violation of the oath of office." N.M. Const. Art. X, § 9(A). Thus, the court presiding over Defendants' *quo warranto* proceeding does not even have jurisdiction to entertain the action. *Cawthorn*, 2022 U.S. App. LEXIS 14220, at *46. This is yet another reason why Defendants have pointed to no "compelling state interest" under the *Anderson-Burdick* test.

C. Defendants' claim splitting argument is frivolous

Defendants contend that "Griffin's claims are compulsory counterclaims in the *Quo Warranto* Action, and thus his assertion of those claims in this later-filed suit constitutes improper claim splitting." Defs. Opp., p. 20. Defendants' error is twofold. First, the claim splitting doctrine has nothing to do with "compulsory counterclaims." The Tenth Circuit has identified Defendants' error in rejecting an argument identical to the one they make here. *Stone v. Dep't of Aviation*, 453 F.3d 1271 (10th Cir. 2006). The doctrine of claim splitting is a sister to the doctrine of claim preclusion, both of which permit a court to bar a party's claim as a result of an earlier-filed proceeding. *Id*. at 1278. Claim splitting specifically concerns "the assertion of claim preclusion against one who was the *plaintiff* in the first action." *Id.* (emphasis original). Its function "'is to force *a plaintiff* to explore all the facts, develop all the theories, and demand all the remedies in the first suit.'" *Id.* (quoting 18 *Federal Practice and Procedure* § 4408) (emphasis original). As the Tenth Circuit held in *Stone*, the claim splitting doctrine does not bar the claim of one who "was the *defendant* in the first action." *Id.* (emphasis original).[8] Claim splitting does not apply here because in the *quo warranto* proceeding, Griffin is *the defendant*.

Second, even if claim splitting doctrine somehow applied to parties that are defendants in the first-filed action, Defendants' argument fails. In the first place, they rely on the Federal

[8] Defendants cite to *Katz v. Gerardi*, 655 F.3d 1212, 1218 (10th Cir. 2021). *Katz* has nothing to do with the plaintiff/defendant distinction or with compulsory counterclaims. It merely held that application of the claim splitting doctrine does not require a final judgment in the first case. 655 F.3d at 1218. Here, the existence or absence of a final judgment has no bearing on Defendants' argument, which fails because Griffin is a *defendant* in the *quo warranto* proceeding. Indeed, *Katz* itself makes that clear. *Id* at 1217 (citing *Curtis v. Citibank, N.A*., 226 F.3d 133, 139 (2d Cir. 2000) ("*[P]laintiffs* have no right to maintain *two actions on the same subject in the same court*, against the same defendant at the same time."); *Stone*, 453 F. 3d at 1278) ("*A plaintiff's* obligation to bring all related claims together in the same action arises under the common law rule of claim preclusion prohibiting the splitting of actions.") (emphasis added).

Rules of Civil Procedure, which have no application in State court. Defs. Opp., p. 20. More to the point, the *quo warranto* statute itself shows that Griffin could not have brought his Section 1983 claims as "compulsory counterclaims" in the *quo warranto* proceeding. In that proceeding, a defendant has five days to file an answer and trial must then proceed immediately. NMSA 1978, § 44-3-8. Of course, Griffin cannot litigate multiple federal Section 1983 claims in such a summary proceeding, with no discovery rights, nor can Defendants.

Defendants add that "A final judgment in the *Quo Warranto Action* would bar this suit because both suits involve the same parties and the causes of action in both suits arise from the same transaction." Defs. Opp., p. 21. Of course, there *is* no final judgment in Defendants' *quo warranto* action. Although their arguments are not clear, Defendants appear to be seeking a premature ruling that any judgment they may extract from the indigent and unrepresented Plaintiff in state court will work a claim preclusion on his claims here. If so, they are mistaken. "To apply claim preclusion, three elements must exist: (1) a final judgment on the merits in an earlier action; (2) identity of parties or privies in the two suits; and (3) identity of the cause of action in both suits." *Lenox MacLauren Surgical Corp. v. Medtronic*, *Inc.*, 847 F.3d 1221, 1239 (10th Cir. 2017) (internal quotation marks omitted). "[E]ven if these three elements are satisfied," claim preclusion does not apply "where the party resisting it did not have a full and fair opportunity to litigate the claim in the prior action." *Id.* Here any default Defendants extract from the unrepresented Plaintiff in the *quo warranto* matter would have no preclusive effect for numerous reasons: (a) default judgments have no issue preclusive effect, *Arizona v. California*, 530 U.S. 392, 414 (2000) (quoting Restatement (Second) of Judgments § 27); (b) Defendants' *quo warranto* claim arises from Griffin's actions on January 6; Plaintiff's action arises from Defendants' efforts to remove him from office, a distinct "transaction, event or occurrence."

Medtronic, *Inc.*, 847 F.3d at 1240; and (c) Plaintiff has *no* opportunity to litigate his Section 1983 claim in Defendants' "summary proceeding," much less a "full and fair opportunity." *Id.*

II. Defendants are presently imposing irreparable injury on Plaintiff

Defendants argue that "denial of a preliminary injunction would cause no injury to Griffin, let alone an irreparable one" because he "simply need[s] to litigate the issues he improperly raises in this collateral case in the *Quo Warranto* Action." Defs. Opp., p. 23.

As shown above, Defendants are remarkably disingenuous. Defendants are attempting at this very moment to bring Griffin to trial *immediately* in the *quo warranto* proceeding. They refuse to stipulate to a continuance so he can retain counsel with his meagre resources. They refuse to stipulate that Defendants will bear the burden of proving that Griffin "engaged in insurrection," the factor that allowed the district court to deny a similar preliminary injunction in the principal case on which Defendants rely. *Greene*, 2022 U.S. Dist. LEXIS 70961, at *53. The *quo warranto* statute provides no time for Griffin to interpose counterclaims whatsoever, much less fully and fairly litigate them. NMSA 1978, § 44-3-8. On top of these facts, Defendants explicitly state that if they manage to extract a default judgment from the unrepresented Plaintiff, they will then attempt to preclude Griffin's claims, which he had no opportunity to being in the *quo warranto* action, here. Defs. Opp., p. 21. Taken together, while acknowledging Griffin's constitutional right to run for office, Defendants have stated that they will permanently disable this right if he does not himself prove, immediately, that he did not engage in insurrection, in a summary proceeding where he cannot interpose his constitutional claims. This is the very essence of irreparable injury. *Free the Nipple-Fort Collins v. City of Fort Collins*, *Colorado*, 916 F.3d 792, 802 (10th Cir. 2019) (any deprivation of any constitutional right demonstrates irreparable harm).

III. The balance of harms overwhelmingly weighs in favor of injunctive relief

Defendants do not identify a single harm to them in requiring them to litigate Griffin's constitutional arguments here. Defs. Opp., p. 24. They merely state that an injunction would "halt the *Quo Warranto* Action." *Id.* But they offer no explanation whatsoever of how that poses any harm to them. Defendants would not forfeit their claim in the *quo warranto* proceeding. Rather, an injunction would merely allow this Court to address serious and meritorious constitutional claims in a full and fair manner not permitted under the procedure of *quo warranto*. Because Defendants have identified no harm to them and Griffin has identified irreparable injury under 10th Circuit law, this factor weighs overwhelming in favor of Plaintiff.

IV. Disenfranchising voters is not in the public interest

Defendants say that the "State and People of New Mexico have a compelling interest in ensuring that their elected officials are constitutionally qualified to hold the office they claim." Defs. Opp., p. 24. That is quite true. And Griffin's action would fully and fairly determine whether he is "constitutionally qualified to hold [his] office." Conversely, Defendants *quo warranto* action (a) is an end-run around the New Mexico Constitution, which provides that the sole remedy for the act of which they accuse Griffin—violation of an oath of office—is a recall vote; and (b) affords no opportunity whatsoever for a full airing of the constitutional issues the "State and People of New Mexico have a compelling interest in ensuring." A recall effort was mounted on the very issue Defendants now use to strip Griffin of his conceded First Amendment right. It failed. Enabling Defendants' attempt to disenfranchise the voters who elected Griffin to office is not in the public interest.

V. Defendants' "supplemental" abstention and claim preclusion arguments are nonissues designed to delay this proceeding

Defendants filed an "emergency motion" requesting that the Court delay briefing on Plaintiff's Motion for Preliminary Injunction for a month so they could file supplemental briefing. ECF No. 24. They say that, because their *quo warranto* motion was remanded back to State court, *White v. Griffin,* 22-cv-284-WJ-JFR, ECF No. 33 (D.N.M.), "abstention defenses" are now "applicable." *Id.* Defendants also claim that Chief Judge Johnson's remand order "precludes re-litigation" of the order's finding that "plaintiffs in the *Quo Warranto* Action are not acting as agents for the State of New Mexico." *Id.* Defendants' arguments are makeweight.

A. Defendants' own key case rejects its *Younger* abstention argument

As Plaintiff showed in his Motion, Defendants will unsuccessfully argue that this Court must abstain from jurisdiction under *Younger v. Harris*, 401 U.S. 37 (1971). Pl. Mot., pp. 8-11. Although Defendants could have addressed abstention in their Opposition—even if only in anticipation of remand—they declined to do so. Defs. Opp., p. 5 n. 2. The issue is plainly forfeited. *Ernest Grp.*, *Inc.*, 634 F.3d at 1128.

Even if the Court were to consider it, the Disqualification Clause case on which Defendants primarily rely rejected their forthcoming abstention argument under virtually identical circumstances. *Greene*, 2022 U.S. Dist. LEXIS 70961, at *28-45. There, voters contended that a House member was disqualified from office under Section Three of the Fourteenth Amendment for engaging in insurrection. *Id.* at *3. The voters made this contention via a statute that—just like the *quo warranto* statute here—permitted "voters to challenge whether individual candidates in their districts meet the requisite legal qualifications to run for their respective positions." *Id.* They brought their claim in an administrative proceeding presided over by an administrative law judge authorized to make factual and legal findings. *Id.* Ultimately, the decision could be appealed through lower state courts to the State Supreme

Court. *Id.* As here, the challenged officeholder sought a preliminary injunction in federal court to enjoin the state proceeding and defendants argued that the district court must abstain under *Younger*. *Id.*

The *Greene* court rejected the defendants' *Younger* argument for various reasons. First, as Griffin showed, the court held that abstention is inappropriate unless one of the three circumstances identified in *Sprint Communs., Inc. v. Jacobs*, 571 U.S. 69, 79 (2013) is present: (1) "state criminal prosecutions"; (2) "civil enforcement proceedings akin to criminal prosecution"; and (3) "civil proceedings involving certain orders that are uniquely in furtherance of the state court's ability to perform their judicial functions." *Greene*, 2022 U.S. Dist. LEXIS 70961, at *31. As the *Greene* court held in identical circumstances, Defendants' disqualification proceeding is not a criminal prosecution and is not a civil enforcement proceeding akin to criminal prosecution. *Id.* at *33-36. Defendants themselves say their claim against Griffin "seeks to enforce a nonpunitive constitutional qualification for office, not a 'penalty for a crime.'" Defs. Opp., p. 15. Or, as *Greene* put it, *Younger* abstention is only appropriate where the parallel proceeding is "(1) a state-initiated proceeding which is (2) brought after a state investigation (3) to sanction or punish misconduct." *Greene*, 2022 U.S. Dist. LEXIS 70961, at *34. As Griffin previously showed, none of those things is true in Defendants' action. Pl. Mot., pp. 8-11. Finally, in circumstances indistinguishable from those here, the *Greene* court held that the state disqualification proceeding there was not a "civil proceeding[] involving certain orders that are uniquely in furtherance of the state court's ability to perform their judicial function[]" because (a) there was no order in the state court with which the plaintiff's federal action would interfere and (b) it "is true virtually any time a plaintiff seeks to enjoin a parallel state

proceeding" that an "aspect of the state judicial system" is enjoined. *Id.* at 44.[9] For all the same reasons, *Younger* abstention does not apply here, as Defendants know.

B. Chief Judge Johnson's standing ruling has nothing to do with this case

Chief Judge Johnson held that Defendants could not litigate their *quo warranto* action in federal court as plaintiffs because they lack Article III standing. *White,* 22-cv-284-WJ, ECF No. 33, p. 8. In doing so, the Court rejected the argument that Defendants were "agents" of New Mexico under the standing holding of *Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000). *Id.* at 8-9. This standing holding has nothing to do with the issues in Plaintiff's Motion or Defendants' Opposition, much less does it amount to "claim preclusion" for many reasons. A district court's remand of an action for lack of subject matter jurisdiction is not a decision on the merits, *H.L. v. Matheson*, 450 U.S. 398, 430 (1981) ("Standing is a jurisdictional issue, separate and distinct from the merits."), so the first requirement of claim preclusion fails. *Medtronic*, *Inc.*, 847 F.3d at 1239. In any case, even if Defendants were not agents of New Mexico in the context of Article III standing that does not somehow imply they do not "act under color of State law" for purposes of Section 1983. As shown above, under the *Terry*-*Condon* public function tests, there is no requirement that the private party in control of the voting process be an "agent" of the State. Indeed, *Condon* explicitly held otherwise. *Condon*, 286 U.S. at 89 ("The test is not whether [the private parties] are the representatives of the State in the strict sense in which an agent is the representative of his principal."). For all the foregoing reasons, the Court should grant Plaintiff's Motion and enjoin the *quo warranto* action so the constitutional issues may be fully and fairly resolved.

[9] Thus did the *Greene* court reject the very argument Defendants will make here: that the State has a "constitutional duty in ensuring that qualified candidates are placed on ballots." *Greene*, 2022 U.S. Dist. LEXIS 70961, at * 43.

Dated: June 2, 2022

Respectfully submitted,

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Certificate of Service

I hereby certify that on the 2nd day of June, 2022, I filed the foregoing filing with the Clerk of Court using the CM/ECF system, and counsel of record were served by electronic means.

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