IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

COUY GRIFFIN, Plaintiff, v. MARCO WHITE, MARK MITCHELL, and LESLIE LAKIND, Defendants.	Civil Action No. 2:22-362-KG-GJF

DEFENDANTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Per the Court's June 1, 2022 Order (ECF No. 26), Defendants submit this supplemental brief in light of Chief Judge Johnson's Memorandum Opinion and Order remanding an earlier-filed, closely-related case to state court (the "*Quo Warranto* Action"). *See State ex rel. White v. Griffin*, 2022 WL 1707187 (D.N.M. May 27, 2022). That remand order gives rise to additional defenses that reinforce that Griffin is unlikely to succeed on the merits and thus is not entitled to the "extraordinary remedy" of a preliminary injunction. *See* PI Opp. 5–21 & n.2, ECF No. 21.

I. Griffin's Complaint Should Be Dismissed or Stayed Under the *Colorado River* Abstention Doctrine (Counts I–III).

Griffin cannot prevail because this Court should "stay[] or dismiss [Griffin's] federal suit pending the resolution of a parallel state court proceeding" under the *Colorado River* doctrine. *D.A. Osguthorpe Fam. P'ship v. ASC Utah, Inc.*, 705 F.3d 1223, 1233 (10th Cir. 2013). The Court must "first determine whether the state and federal proceedings are parallel." *Fox v. Maudling*, 16 F.3d 1079, 1081 (10th Cir. 1994). If they are, then the Court must consider the following "nonexclusive list of factors" to determine if "exceptional circumstances" warrant

abstention:

> (1) whether either court has assumed jurisdiction over property; (2) the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation ... (4) the order in which the courts obtained jurisdiction; … [(5)] the vexatious or reactive nature of either the federal or the state action; [(6)] whether federal law provides the rule of decision[;] and [(7)] the adequacy of the state court action to protect the federal plaintiff's rights.

Id. at 1082. The "*Colorado River* factors are not a 'mechanical checklist'" and "[t]he weight to be given to any one factor may vary greatly from case to case." *Osguthorpe*, 705 F.3d at 1234. Here, the factors weigh heavily in favor of abstention.

First, the federal and state cases are plainly "parallel" because they involve "substantially the same parties litigat[ing] substantially the same issues in different forums." *Fox*, 16 F.3d at 1081. As Griffin concedes, the cases are "directly related" and "involve[] the same parties and the same underlying legal dispute." Related Case Stmt., ECF No. 2. Thus, the "state litigation will 'dispose of all claims presented in th[is] federal case.'" *Nat'l Loan Acq. Co. v. Hamilton*, 2016 WL 9408549, at *4 (D.N.M. June 13, 2016); *see also* PI Opp. 20–21 (explaining that Griffin's claims are compulsory counterclaims in the state case and a final judgment there would be preclusive here).[1] This case presents a "text-book example of parallel proceedings": "the reactive lawsuit … when a state defendant reciprocally files a federal suit concerning the same subject." *THI of N.M., LLC v. Archuleta*, 2012 WL 8169886, at *4 n.5 (D.N.M. Jan. 12, 2012).

"The 'paramount' consideration in *Colorado River*"—the need to avoid "piecemeal litigation," *Osguthorpe*, 705 F.3d at 1234—weighs heavily in favor of abstention. Adjudication

[1] Griffin now insists the state case and this suit arise out of "distinct" transactions. PI Reply 19, ECF No. 27. But he was right the first time, when he conceded the cases arise out of the same "underlying" dispute. ECF No. 2. Griffin's claims allege no new facts nor do they dispute Defendants' allegations; they are pure legal defenses arising out of the same factual nucleus as the state action. *See* PI Opp. 21.

of Griffin's federal claims will not and cannot resolve key issues raised in the state action, including the ultimate merits question of whether Griffin is disqualified under Section Three of the Fourteenth Amendment. *See* PI Opp. 21–23. The state court, by contrast, can "dispose of the dispute in its entirety." *Potter/Ortiz, LLC v. Lone Mountain Ranch*, *LLC*, 2014 WL 11497822, at *5 (D.N.M. July 29, 2014). Because the state case "will resolve all issues between the parties," this "factor heavily favors state jurisdiction." *Id.* Likewise weighing "strongly" in favor of abstention is the "possibility that the state and federal proceedings may render inconsistent judgments" on Griffin's federal constitutional claims (which Griffin can assert as defenses in the state case), as well as the interest in avoiding "duplicative efforts" by "state and federal courts." *Austin v. Everbank*, 2016 WL 9777221, at *6 (D.N.M. Sept. 30, 2016) (Gonzalez, J.); *accord Potter/Ortiz*, 2014 WL 11497822, at *4.

The other *Colorado River* factors similarly support abstention or are neutral. The state court obtained jurisdiction first, *see* Compl. ¶ 19, weighing in favor of abstention. This case does not involve property, so this factor is neutral. The state court in Santa Fe is closer to each plaintiff, *see id.* ¶¶ 10–12, while this Court's Las Cruces courthouse is more convenient only for Griffin, weighing in favor of abstention. The parties' claims raise both questions of state law (under New Mexico's *quo warranto* statute) and federal law (under the U.S. Constitution and 42 U.S.C. § 1983). But the state court is fully capable of protecting Griffin's federal constitutional rights. *See Osguthorpe*, 705 F.3d at 1235 (mere presence of a federal question does not "automatically compel the conclusion" that "federal courts" are "better suited" to resolve the dispute where state court has concurrent jurisdiction). Indeed, the *quo warranto* statute authorizes Griffin to file a "demurrer"—akin to a motion to dismiss—in which he can raise the

federal constitutional defenses he seeks to assert in this case. *See* NMSA 1978, § 44-3-8. And nothing in the statute precludes Griffin from pleading those defenses as counterclaims under Section 1983. *Cf.* PI Reply 11–12, 20, ECF No. 27 (incorrectly arguing otherwise). In any event, "those seeking to challenge the constitutionality of state laws are not always able to pick and choose the timing and preferred forum for their arguments," and "many federal constitutional rights are as a practical matter asserted typically as defenses to state-law claims, not in federal pre-enforcement cases." *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 537–38 (2021).

This suit is also transparently a "reactive defensive maneuver by [Griffin] to delay the state proceedings and postpone final resolution of [the] dispute." *THI*, 2012 WL 8169886, at *6; *see also Hamilton*, 2016 WL 9408549, at *7 (absence of "compelling reason for filing [a] claim[] in federal court instead of filing them as counterclaims in state court" supported abstention); *Potter/Ortiz*, 2014 WL 11497822, at *5 (same). Griffin filed this collateral case to circumvent a potential remand in the *Quo Warranto* Action, and he is simply trying to gain a perceived "tactical advantage from the application of federal court rules" and avoidance of the State's expedited *quo warranto* procedures, *see Hamilton*, 2016 WL 9408549, at *7, in which the State has a compelling interest, *see* PI Opp. 16–17, 24.

Thus, weighing the *Colorado River* factors compels the conclusion that Griffin's claims should be dismissed or stayed pending resolution of the *Quo Warranto* Action.

II. Griffin's Due Process Claim Should Be Dismissed or Stayed Under the *Pullman* Abstention Doctrine (Count II).

The *Pullman* abstention doctrine "avoids 'federal-court error in deciding state-law questions antecedent to federal constitutional issues,' by allowing for parties to adjudicate disputes involving 'unsettled state-law issues' in state courts." *Caldara v. City of Boulder*, 955

F.3d 1175, 1178 (10th Cir. 2020). Count II of Griffin's Complaint, which asserts an as-applied due process challenge to the State's *quo warranto* statute, meets each of the three *Pullman* requirements and requires adjudication by the state court. *See id.* at 1179; Compl. ¶¶ 39–44.

First, "uncertain issue[s] of state law" underlie Griffin's "federal [due process] claim," *Caldara*, 955 F.3d at 1179—namely, whether, and to what extent, a defendant in a New Mexico *quo warranto* action bears the burden of proving they are not disqualified under Section Three of the Fourteenth Amendment. This issue is one of first impression, as the *Quo Warranto* Action is the first ever Section Three disqualification suit brought in New Mexico. *See* PI Opp. 13–14. And the burden-of-proof standard challenged by Griffin is not codified in the *quo warranto* statute; it is a judicial gloss, applied in a context different from this case and which the state court could freely modify. *Id.* These weighty state-law questions of first impression can and should be addressed by the state court in the *state* action, not this Court. *Id.*; *see also Supreme v. Kan. State Elections Bd*., 2018 WL 3329864, at *4 (D. Kan. July 6, 2018) (state law issue was "uncertain" under *Pullman* where state courts had previously addressed "similar" matter, but not precise issue in dispute).

Second, the *quo warranto* statute "is fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question." *Caldara*, 955 F.3d at 1181. As noted, the statute does not address the burden of proof at all; it leaves the matter to the courts. If the state court were to conclude that due process requires the *quo warranto* plaintiffs to carry the burden of proof on their Section Three challenge, or that Griffin could shift the burden merely by providing an affidavit attesting to his qualifications for office, *see* PI Opp. 13, then "there would be no need for [this Court] to resolve the federal constitutional questions" raised in

Count II of Griffin's Complaint, *Caldara*, 955 F.3d at 1181. At a minimum, the state court's ruling could "substantially narrow the scope of the constitutional analysis in federal court." *Id.*

Third, this "case implicates state rights and a decision by this court would risk intrusion into important state functions," *id.*—namely, the legal procedures for determining who is qualified to hold state office, *see* PI Opp. 16–17, 24 (describing State's "compelling and self-evident interest" in *quo warranto* proceedings); PI Reply 21 (conceding it is "quite true" State has such an interest). For this federal court to preemptively declare a state *quo warranto* proceeding unconstitutional before the state court can even consider Griffin's as-applied due process objection, let alone adjudicate it, would "necessarily disrupt an important state interest" and cause "needless friction with state policies." *Caldara*, 955 F.3d at 1182.

In sum, "all three *Pullman* factors are satisfied and weigh in favor of abstention" as to Griffin's due process claim. *Id.*; *see also Supreme*, 2018 WL 3329864, at *4–*5 (denying preliminary injunction motion where court would likely abstain under *Pullman*).

III. The Remand Order in the *Quo Warranto* Action Precludes Griffin from Relitigating Whether Defendants Are State Agents.

In remanding the *Quo Warranto* Action, Chief Judge Johnson held that the plaintiffs lack any agency or other legal relationship with the State of New Mexico sufficient to confer Article III standing. *White*, 2022 WL 1707187, *4–*5. The court reasoned that even though the plaintiffs brought their "Complaint in the name of New Mexico" as required by the *quo warranto* statute, "no principal-agent relationship can exist" because "the *quo warranto* statute affords the State of New Mexico no right to control Plaintiffs' prosecution of this proceeding." *Id.*

The issue preclusion doctrine bars Griffin from relitigating these issues in arguing that Defendants are "state actors" subject to Section 1983 liability. *See* PI Mot. 12–13, ECF No. 20;

Matosantos Com. Corp. v. Applebee's Int'l, Inc., 245 F.3d 1203, 1207 (10th Cir. 2001) (listing elements of issue preclusion). First, the issues are "identical" insofar as Griffin asserts in both cases that Defendants are acting as State agents and asserting State injuries assigned through the *quo warranto* statute. *Id.* Second, the remand order is an "adjudication on the merits of a jurisdictional issue" that "precludes a subsequent relitigation of the same…issue," even though "the issue foreclosed in the [second] case goes to the merits" of Griffin's Section 1983 claim "rather than … jurisdiction." *Id.* at 1209–10.[2] Third, the parties are identical in both actions. And fourth, Griffin had a "full and fair opportunity" to litigate the issues in the *Quo Warranto* Action. *Id.* at 1211. Griffin is thus precluded from arguing that the *quo warranto* statute creates any agency relationship sufficient to deem Defendants state actors for purposes of Section 1983.

IV. The Anti-Injunction Act Bars Any Non-Section 1983 Claim by Griffin.

The Anti-Injunction Act, 28 U.S.C. § 2283, "is an absolute prohibition against enjoining state court proceedings," *Atl. Coast Line R.R. Co. v. Bhd. of Loco. Eng'rs*, 398 U.S. 281, 286 (1970), barring both injunctive and declaratory relief. While the Act's narrow exceptions permit Section 1983 claims, *Mitchum v. Foster*, 407 U.S. 225, 242–43 (1972), the Act bars Griffin's non-Section 1983 claims, including his claim under the 1872 Amnesty Act. Compl. ¶¶ 45–48. Any non-Section 1983 relief sought in this case is therefore barred by the Anti-Injunction Act.

V. Defendants Are Not "State Actors" under the "Public Function Test."

For the first time in his reply brief, Griffin asserts Defendants are state actors subject to

[2] Griffin insists the requirements for "claim preclusion" are not met here because a remand for lack of jurisdiction "is not a decision on the merits." PI Reply 24. Like the plaintiff in *Matosantos*, however, Griffin is simply "confus[ing]" "claim preclusion" with "issue preclusion." 245 F.3d at 1209.

Section 1983 liability under the "public function test." PI Reply 3–8; *cf.* PI Mot. 12–13 (making no such argument). However, "arguments raised for the first time in a reply brief are waived." *In re: Motor Fuel Temperatures Sales Pracs. Litig.*, 872 F.3d 1094, 1112 n.5 (10th Cir. 2017).[3]

Griffin's public function theory is meritless in any event. A private party does not engage in state action under the public function test merely by invoking a state-law remedy available to any private citizen to challenge a person's qualifications for public office. *See Libertarian Party of Ohio v. Husted*, 831 F.3d 382, 396 (6th Cir. 2016) (no state action where private party merely filed "a protest against a nomination petition under [a state] statute" authorizing any "private citizen with standing … to file a protest against a candidate's nominating petition"); *Acosta v. Democratic City Comm.*, 288 F. Supp. 3d 597, 631 (E.D. Pa. 2018) (following *Husted* and finding no state action in similar context); *Nader v. McAuliffe*, 593 F. Supp. 2d 95, 102 (D.D.C. 2009) ("[T]hat private citizens may file challenges under the ballot access statutes is antithetical to the assertion that doing so is a function traditionally exclusively reserved to the States").

Similar to the statutes in these cases, New Mexico's *quo warranto* statute authorizes any private citizen to challenge a county official's title to office. *See* PI Opp. 5–9. This private right of action was codified in 1919, *see* NMSA 1978 § 44-3-4 (1919), and has historical roots tracing back more than 300 years to the 1710 Statute of Anne, "a part of [New Mexico's] common law." *State ex rel. Owen v. Van Stone*, 1912-NMSC-003, ¶ 8, 17 N.M. 41. The longstanding statutory authorization and centuries-old tradition of private *quo warranto* actions is "antithetical to

[3] Griffin's reply also asserts, for the first time, that the *Quo Warranto* Action violates his "rights to free speech and assembly." PI Reply 13–14. But his Complaint pleads no such claim, instead alleging a purported "First Amendment right to run for and hold political office." Compl. ¶ 38. Griffin "may not amend" his "Complaint through his reply brief in support of his motion for injunctive relief." *Templeton v. Anderson*, 2013 WL 1222252, at *3 n.4 (D. Colo. Feb. 13, 2013).

[Griffin's] assertion" that *quo warranto* actions are "traditionally" and "exclusively reserved" for the government. *Nader*, 593 F. Supp. 2d at 102; *see also* PI Opp. 6 (public function test is narrow and arduous). Nor could Defendants be considered to be "administering" or "holding" an "election" merely by bringing a *quo warranto* suit. *Cf.* PI Reply 4–8; *see Husted*, 831 F.3d at 396 (rejecting similar argument). Griffin's public function theory of Section 1983 liability is thus unlikely to succeed, and his preliminary injunction motion should be denied.

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Respectfully Submitted,

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Certificate of Service

I hereby certify that on June 10, 2022, the foregoing was filed through the CM/ECF system, which caused counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

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