UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

STATE OF NEW MEXICO, *ex rel.*, MARCO WHITE, MARK MITCHELL, and LESLIE LAKIND, Plaintiffs, v. COUY GRIFFIN, Defendant.	Case No. 22-cv-284-RB-JFR

GRIFFIN'S OPPOSTION TO PLAINTIFFS' MOTION TO REMAND

Plaintiffs are relators who assert the right to bring their lawsuit on behalf of the State of New Mexico, *ex relatione*. Their claim that Couy Griffin usurped his County Commissioner position rests on one legal ground: that he subjected himself to disqualification from federal and state office under Section Three of the Fourteenth Amendment to the U.S. Constitution. If that is correct, the statute creating Plaintiffs' *quo warranto* cause of action requires Griffin to remit to relators, and thus to the State of New Mexico, all fees and emoluments of his "usurped" office. According to Plaintiffs' remand motion, these facts do not create subject-matter jurisdiction in federal court.

Plaintiffs are wrong. Omitted from their motion is a body of Article III standing law concerning "relator standing." Under Supreme Court precedent, New Mexico's alleged injury-in-fact (a usurped office and its fees and emoluments) confers constitutional standing on the relators who aim to redress that injury in court. Such standing traces back to the longstanding doctrine that the assignee of a claim has standing to assert the injury-in-fact suffered by the assignor. Provided certain conditions are satisfied, the *quo warranto* statute assigns claims belonging to

the State of New Mexico to relators. Plaintiffs' second argument, that the Court lacks federal question jurisdiction, fares even worse. If Griffin is subject to disqualification from office under the Fourteenth Amendment, their cause of action may succeed. If he is not subject to such disqualification, Plaintiffs' cause of action will necessarily fail as a matter of law. Thus, the constitutional question at issue is not just a "substantial question" in this matter creating federal question jurisdiction—it is the dispositive question. This case or controversy belongs in federal court.

Argument

I. Plaintiffs enjoy Article III standing because they seek to redress the alleged injuries-in-fact of the State of New Mexico, a claim assigned to them under New Mexico law

A. Plaintiffs have relator standing under Supreme Court precedent

To establish Article III standing, a plaintiff must meet three requirements: (1) he must demonstrate injury in fact, *i.e.*, a harm that is both "concrete" and "actual or imminent, not conjectural or hypothetical." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990); (2) he must establish causation between the alleged injury in fact and the alleged conduct of the defendant. *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41 (1976); and (3) he must demonstrate redressability, a "substantial likelihood" that the requested relief will remedy the alleged injury in fact. *Id.*

Plaintiffs could hardly quarrel with the second and third of those requirements—that would imply their claims must be dismissed, not merely remanded. And yet the same outcome of dismissal will likely obtain should their case be aired in federal court on the merits. So, although they take it upon themselves to reverse in court the electoral choices of thousands of

New Mexico residents through the strained use of arcane constitutional provisions,[1] Plaintiffs become exceptionally modest about their own standing under the first requirement, injury in fact. Their "standing in state court does not rest upon any particularized or concrete injury; it is instead based solely on their status as residents of New Mexico, where state law authorizes any 'private person'—irrespective of any particularized or personal injury—to bring a *quo warranto* action to remove a disqualified county official." ECF No. 10, p. 5 (citing NMSA 1978, 44-3-4). Thus, Plaintiffs liken their situation to that of a named plaintiff in a class action who has not suffered injury in fact. ECF No. 10, p. 6 (citing *Buscema v. Wal-Mart Stores E. LP*, 485 F. Supp. 3d 1319, 1332 (D.N.M. 2020)). Just as such a named class-action plaintiff does not establish injury in fact by posing as a "private attorney general . . .seeking to enforce statutes on behalf of the general public," *Buscema*, 485 F. Supp. 3d at 1331, the relators here have no injury in fact. So Plaintiffs argue. ECF No. 10, p. 6.

Plaintiffs' analogy to the class-action context stumbles—as they omit a body of law creating Article III standing for relators who purport to enforce claims belonging to the federal or state government. Article III standing for relators lies "in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor." *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000). In *Vt. Agency of Natural Res.*, the Supreme Court held that *qui tam* relators who bring False Claims Act (FCA) claims on behalf of the federal government enjoy Article III standing even though they assert "injury to the United

[1] Recently, a federal court found that a strained interpretation of other seldom considered constitutional provisions might even constitute federal obstruction of justice when it is directed at disenfranchising voters. *John C. Eastman v. Bennie G. Thompson, et al.*, 22-cv-99-DOC (C.D. Cal. Mar. 28, 2022). Plaintiffs might counter that their strained constitutional theories aimed at voter disenfranchisement are nothing like Dr. Eastman's, for their novel theories are in service of the right kind of disenfranchisement, not the wrong kind.

States—both the *injury to its sovereignty arising from violation of its laws* [and, *separately*] . . . *proprietary injury*. . .” and do not allege that relators themselves have suffered injury in fact. 529 U.S. at 772.

Reviewing the “long tradition” of relator actions in England and the American Colonies, the Court held that “the FCA can reasonably be regarded as effecting a partial assignment of the Government’s damages claim” for fraud. *Vt. Agency of Natural Res.*, 529 U.S. at 773. Thus, a constitutional “Case” or “Controversy” exists in a lawsuit brought *ex relatione* where the *government’s* injury “in fact suffices to confer standing on” the relator. *Id.* at 774. That is why, even though a relator is the named plaintiff, “the government remains the real party in interest. . .” *United States ex rel. Mergent Servs. v. Flaherty*, 540 F.3d 89, 92 (2d Cir. 2008). That is true even where the government does not formally intervene and a relator litigates the claim alone. *E.g.*, *United States ex rel. Michaels v. Agape Senior Cmty., Inc.*, 848 F.3d 330, 340 (4th Cir. 2017) (holding that the government remains the real party in interest in relator lawsuit even when it declines to intervene); *United States ex rel. Zissler v. Regents of the Univ. of Minn*., 154 F.3d 870, 872 (8th Cir. 1998) (same); *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1215 (9th Cir. 1996) (same); *United States ex. Rel. Kuriyan v. HCSC Ins. Servs.*, 2021 U.S. Dist. LEXIS 241990, at *4 n. 4 (D.N.M. Dec. 20, 2021) (same).

The New Mexico *quo warranto* statute is no different from the FCA in this respect. Like the FCA, the statute partially assigns New Mexico’s claims to relators, provided certain conditions are satisfied. It provides:

> 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:

> A. when any person shall usurp, intrude into or unlawfully hold or exercise any public office, civil or military, or any franchise within this state, or any office or offices in a corporation created by authority of this state; or,
>
> B. 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. . . .
>
> When the attorney general or district attorney refuses to act, or when the office usurped pertains to a county, incorporated village, town or city, or school district, such action may be brought *in the name of the state by a private person on his own complaint*.

NMSA 1978, § 44-3-4 (emphasis added).

As to the judgment brought about by a *quo warranto* action, the statute provides that it will determine whether a money judgment must be entered against the officeholder-defendant for the "fees and emoluments" he earned from the "usurped" office:

> In every case such judgment shall be rendered upon the right of the defendant and also upon the right of the party alleged to be entitled, or only upon the right of the defendant, as justice may require. When the action shall not be terminated during the term of the office in controversy it may notwithstanding be prosecuted to completion and *judgment rendered, which shall determine the right which any party had to the office, and to the fees and emoluments thereof.*

NMSA 1978, § 44-3-9 (emphasis added).

This is also seen in a separate statutory section which requires the relator to plead in the complaint the "name of the person rightfully entitled to the office," so that person can be awarded the "fees and emoluments" of the "usurped office":[2]

> Whenever such action shall be brought against a person for usurping an office, the attorney general, district attorney or person complaining, in addition to the statement of the cause of action, *shall also set forth in the complaint the name of the person rightfully entitled to the office with a statement of his right thereto*, and in such cases, upon *proof by affidavit that the defendant has received or is about to receive the fees and emoluments of the office by virtue of his usurpation thereof*, the judge of the district court wherein such proceeding is pending, or a justice of the supreme court, if the proceeding be therein pending, may by order require the defendant to furnish a good and sufficient bond, within a designated time not exceeding fifteen days, executed and acknowledged as

[2] Plaintiffs' complaint fails to plead the "name of the person rightfully entitled to [Griffin's] office" and thus fails to state a *quo warranto* cause of action. NMSA 1978, § 44-3-6.

> required by law in the case of supersedeas bonds on appeal, to be approved by said judge, conditioned *that in case the person alleged to be entitled to the office should prevail, the defendant will repay to him all fees and emoluments of the office received by him and by means of his usurpation thereof*, and in addition to said bond, or in case of a failure to give said bond, the said judge or justice shall upon good cause shown, issue a writ of injunction directed to the proper disbursing officer enjoining and restraining him from issuing to the defendant or his assigns any warrant, check, certificate or certificates of indebtedness representing fees or emoluments of said office, until the final adjudication of said cause.

NMSA 1978, § 44-3-6 (emphasis added).

The *quo warranto* statute also provides that if a relator is successful in his lawsuit against the usurping officeholder, the former may recover his costs from the latter:

> The prevailing party in such proceedings may recover his costs from his opponent, provided that no costs shall be taxable against the state nor the attorney general when acting as relator, but such costs shall be taxable against and recovered from a private relator whenever the judgment is for the defendant.

NMSA 1978, § 44-3-11.

After *Vt. Agency of Natural Res.*, the Article III question is not whether *the relator* has suffered injury in fact, but whether (a) the government has suffered an injury in fact and (b) the government assigned or partially assigned that claim to the relator. 529 U.S. at 773. Plaintiffs' complaint and the above-referenced *quo warranto* statute plainly show that relators here enjoy Article III relator standing.

First consider the alleged injury to the State of New Mexico. As the Supreme Court has held, a government's injury in fact need not be "proprietary" (as in the case of the FCA). Instead, a government party suffers injury in fact "from violation of its laws." *Vt. Agency of Natural Res.*, 529 U.S. at 772. This is known as sovereign standing, based on a State's "exercise of sovereign power over individuals and entities within the relevant jurisdiction" which "involves the power to create and enforce a legal code." *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 268 (4th Cir. 2011); *see also West Virginia v. E.P.A.*, 362 F.3d 861,

868, 360 U.S. App. D.C. 419 (D.C. Cir. 2004) (concluding that State has standing to challenge EPA regulations that would require revising State implementation plans under the Clean Air Act); *Florida v. Weinberger*, 492 F.2d 488, 494 (5th Cir. 1974) ("Florida has standing, arising from its clear interest . . . in being spared the reconstitution of its statutory program[.]").

Here, Plaintiff-relators' complaint alleges that the State of New Mexico suffered such a sovereign injury in fact when Griffin allegedly usurped the office of County Commissioner, contrary to New Mexico law and federal law. Griffin Notice of Removal, Exh. 1, Compl., p. 2. That alone establishes relators' Article III injury in fact. *Vt. Agency of Natural Res.*, 529 U.S. at 772.

But Plaintiff-relators allege another injury-in-fact to the State of New Mexico. A State may also establish constitutional standing by alleging an injury to its financial or proprietary interests. *See, e.g., Wyoming v. Oklahoma*, 502 U.S. 437, 112 S. Ct. 789, 117 L. Ed. 2d 1 (1992) (concluding that Wyoming had standing to challenge an Oklahoma law that caused Wyoming to lose tax revenues). As shown above, the *quo warranto* statute provides that if Griffin "usurped" his office, the State of New Mexico was led to disburse the "fees and emoluments" of the office not to the "person rightfully entitled to the office" but to Griffin. If true, that was an unlawful disbursement of State funds under New Mexico law. NMSA 1978, § 44-3-6; NMSA 1978, § 44-3-9. Thus, Plaintiff-relators' complaint also alleges a proprietary injury in fact on the part of the State of New Mexico. That is precisely the type of injury that led the Supreme Court to formally recognize the doctrine of relator standing in the first place. *Vt. Agency of Natural Res.*, 529 U.S. at 772.

The second question is whether the State of New Mexico assigned a claim to redress of these injuries to relators, much as the federal government did in the FCA. *Vt. Agency of*

Natural Res., 529 U.S. at 772. Here, the issue is not even contested. The above-referenced *quo warranto* provisions clearly show that the State assigned the type of claim Plaintiffs assert to relators, provided that certain statutory conditions are satisfied. "When the attorney general or district attorney refuses to act, or when the office usurped pertains to a county, incorporated village, town or city, or school district, such [*quo warranto*] action may be brought *in the name of the state by a private person on his own complaint*. NMSA 1978, § 44-3-4 (emphasis added).

B. Relator standing does not require a "personal stake"

In reply, Plaintiff-relators will attempt to distinguish an FCA relator from a relator under the *quo warranto* statute by arguing that, although the former has no injury in fact, he at least receives a portion of the federal government's monetary recovery. Thus (they will argue), the FCA relator, unlike Plaintiffs, possesses a necessary "personal stake" in the lawsuit. However, the Supreme Court has already rejected that argument. *Sprint Communs. Co., LP v. APCC Servs.*, 554 U.S. 269, 286, 128 S. Ct. 2531, 2542 (2008).

In *Sprint Communs. Co.*, the question was "whether an assignee of a legal claim for money owed has standing to pursue that claim in federal court, even when the assignee has promised to remit the proceeds of the litigation to the assignor." 554 U.S. at 271. The answer was "yes." When payphone customers make long-distance calls with an access code or 1-800 number issued by a long-distance communications carrier, the customers pay the carrier (which completes the call), but not the payphone operator (which connects that call to the carrier in the first place). *Id.* The payphone company can sue the long-distance carrier for any compensation that the carrier fails to pay for these "dialed-around" calls. But payphone companies also assigned those claims to "aggregators" (collection firms) that would sue the carriers on behalf of

the payphone companies. *Id.* The Court held that the aggregators' Article III standing was dictated by its decision in *Vt. Agency of Natural Res. Sprint Communs. Co.*, 554 U.S. at 286.

Reviewing the history of claim assignment, the Court concluded that "naked legal title" has ipso facto long permitted federal suit. *Sprint Communs. Co.*, 554 U.S. at 287. It observed that "federal courts routinely entertain suits which will result in relief for parties that are not themselves directly bringing suit":

> Trustees bring suits to benefit their trusts; guardians ad litem bring suits to benefit their wards; receivers bring suit to benefit their receiverships; assignees in bankruptcy bring suit to benefit bankrupt estates; executors bring suit to benefit testator estates. . .

Sprint Communs. Co., 554 U.S. at 287.[3]

None of those entities has a "personal stake" in the federal lawsuit. Yet they enjoy standing because they "have some sort of 'obligation' to the parties whose interests they vindicate through litigation." *Sprint Communs. Co.*, 554 U.S. at 287.

The dissent contended that the Court had "never approved federal-court jurisdiction over a claim where the entire relief requested will run to a party not before the Court. Never." *Sprint Communs. Co.*, 554 U.S. at 287. The dissent added that, unlike the *qui tam* relators in *Vt. Agency of Natural Res.*, the aggregators did not possess a "personal stake." *Id.* at 288. FCA *qui tam* relators receive a "cut" of the federal government's FCA recovery, but the aggregators did not. *Id.* Yet the opinion of the Court rejected all these arguments:

> The problem with [those] argument[s] is that the general "personal stake" requirement and the more specific standing requirements (injury in fact, redressability, and causation)

[3] The Court may have added that shareholders bring derivative lawsuits against corporate board members to secure relief on behalf of the corporation itself, not for the particular shareholders bringing suit. *E.g.*, *Donoghue v. Bulldog Inv. Gen. P'ship*, 696 F.3d 170, 173 (2d Cir. 2010) (holding that in a derivative action, the shareholder-plaintiff's Article III standing is derived from the standing of the issuer, because a shareholder "steps into the shoes" of the issuer and brings a suit belonging to the corporation, and thus that plaintiff's security ownership at the time of the challenged transaction (his "personal stake") is not determinative).

> are flip sides of the same coin. They are simply different descriptions of the same judicial effort to ensure, in every case or controversy, that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination. *See also Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) ("At bottom, the gist of the question of standing is whether petitioners have such a personal stake in the outcome of the controversy *as to assure that concrete adverseness*.").

Sprint Communs. Co., 554 U.S. at 288 (emphasis added).

In sum, Article III standing does not require that relators possess a financial "personal stake" in their lawsuit brought on behalf of the government, which has suffered an injury in fact. As the dissent in *Sprint Communs. Co.* itself put it, "today's decision [means] that a plaintiff need no longer demonstrate a personal stake in the outcome of the litigation" to establish Article III standing. 554 U.S. at 301-02. After *Sprint Communs. Co.*, and in the context of relator claim assignment, the "gist of the [standing] question" is whether there is sufficient assurance of "concrete adverseness." *Sprint Communs. Co.*, 554 U.S. at 288. Another factor is whether the plaintiff has some "'obligation' to the parties whose interests they vindicate through litigation." *Id.* In *Sprint Communs. Co.*, that was demonstrated by the plaintiffs' contractual assignments with the real party in interest and "general business goodwill." *Id.* at 301.

Here, Plaintiff-relators have many legal obligations to the State of New Mexico, the real party in interest. They are not merely contractual, as in *Sprint Communs. Co.*, but statutory and from common law. Their complaint itself is brought in the name of the State of New Mexico. Relators are therefore legal agents of the State. *Kuriyan v. HCSC Ins. Servs.*, 2021 U.S. Dist. LEXIS 241990, at *4 n. 4 (citing *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1215 (9th Cir. 1996) (the "relator" is the person who sues on "behalf of the government as [an] agent[] of the government. . ."); *United States ex rel. Rodgers v. Arkansas*, 154 F.3d 865, 868 (8th Cir. 1998) (holding that a relator is an "agent" of the government); *Bagley v. United States,* 963 F. Supp. 2d 982, 1001 (C.D. Cal. 2013) ("[T]he relator acts as an agent . . . for the

government. . ."); *Friedman v. Rite Aid Corp*., 152 F. Supp. 2d 766, 771 (E.D. Pa. 2001) (a relator is "a representative agent of the Government. . .").

Under New Mexico law, an agent stands in a fiduciary relationship with, and therefore owes a fiduciary duty to, the principal. *See, e.g., Moser v. Bertram,* 1993-NMSC-040, ¶ 6, 115 N.M. 766, 858 P.2d 854 (stating that an "agent stands in a fiduciary relationship with his or her principal, a position of great trust and confidence commanding the utmost good faith"); Restatement (Third) of Agency § 8.01 (Am. Law Inst. 2006) ("An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship."). New Mexico courts recognize that a fiduciary duty or confidential relationship can exist in a variety of contexts depending upon whether the relationship between the parties is one of trust and confidence. *See, e.g., Allsup's Convenience Stores, Inc. v. The North River Ins. Co.*, 1999 NMSC 6, P37, 127 N.M. 1, 976 P.2d 1 [Vol. 38, No. 6, SSB 8] (insurer-insured); *In re Estate of Gersbach*, 1998 NMSC 13, P11, 125 N.M. 269, 960 P.2d 811 (testator-beneficiary); *GCM, Inc. v. Kentucky Cent. Life Ins. Co.*, 1997 NMSC 52, P19, 124 N.M. 186, 191, 947 P.2d 143 (between business partners); *State ex rel. Udall v. Colonial Penn Ins. Co.*, 112 N.M. 123, 131, 812 P.2d 777, 785 (1991) (investment advisor-client); *Kern v. St. Joseph Hosp., Inc.*, 102 N.M. 452, 456, 697 P.2d 135, 139 (1985) (physician-patient); *Swallows v. Laney*, 102 N.M. 81, 84, 691 P.2d 874, 877 (1984) (real estate broker-principal); *In re Nelson*, 79 N.M. 779, 780, 450 P.2d 188, 189 (1969) (per curiam) (attorney-client).

As the Court observed in *Sprint Communs. Co.*, such duties extend to the agent's management of litigation on behalf of the principal. *Sprint Communs. Co.*, 554 U.S. at 287 ("Trustees bring suits to benefit their trusts; guardians ad litem bring suits to benefit their wards; receivers bring suit to benefit their receiverships; assignees in bankruptcy bring suit to

benefit bankrupt estates; executors bring suit to benefit testator estates. . .”). Just so, here. Plaintiff-relators brought this *ex relatione* lawsuit as agents on behalf of the State of New Mexico, the principal to whom the office-removal claims belong. Plaintiffs thus stand in a fiduciary relationship with the State with respect to this litigation. That is an “‘obligation’ to the part[y] whose interests [Plaintiffs] vindicate through litigation.” *Sprint Communs. Co.*, 554 U.S. at 287.

Moreover, just as the plaintiffs in *Sprint Communs. Co.* established “concrete adverseness” sufficient for standing through “general business goodwill” they obtained in the lawsuit, Plaintiffs here secure “general political goodwill”—including financial donations. Indeed, CREW’s website encourages readers and voters who are pleased with this lawsuit to make donations to CREW. *Lawsuit Filed to Remove Couy Griffin From Office,* CREW, Mar. 21, 2022, available at: https://www.citizensforethics.org/legal-action/lawsuits/lawsuit-filed-to-remove-couy-griffin-from-office/.

In sum, under binding Supreme Court precedent, Plaintiff-relators do not lack Article III standing in this Court.[4]

II. Plaintiffs’ federal-question argument has no merit

The gravamen of Plaintiffs’ complaint is that Griffin must be removed from public office because he is disqualified from it by operation of Section Three of the Fourteenth Amendment to the U.S. Constitution. Griffin Notice of Removal, Exh. 1, Compl., pp. 2-3, 24-32. Now

[4] Plaintiffs did not argue that they lack standing under the causation and redressability prongs. Any such arguments are now forfeited. *E.g.*, *Pedroza v. Lomas Auto Mall*, *Inc.*, 2013 U.S. Dist. LEXIS 116237, at *62 (D.N.M. Aug. 2, 2013) (“As a general rule, the Court will not consider arguments or evidence raised for the first time in a reply brief.”).

Plaintiffs move to remand the matter to state court on the basis that their case does not create federal-question jurisdiction. That makes no sense.

"Congress has authorized the federal district courts to exercise original jurisdiction in 'all civil actions arising under the Constitution, laws, or treaties of the United States.'" *Gunn v. Minton*, 568 U.S. 251, 257 (2013) (quoting 28 U.S.C. § 1331). "For statutory purposes, a case can 'aris[e] under' federal law in two ways." *Id.* First, "a case arises under federal law when federal law creates the cause of action asserted." *Id.* (citing *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916)). Second, where state law creates the cause of action, federal-question jurisdiction still exists where the "state-law claim necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.,* 545 U.S. 308, 314 (2005).

Thus, the *Grable* "substantial question" test holds that federal jurisdiction over a state law claim will lie if a federal issue is (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress. Where these factors are present, jurisdiction is proper because there is a "serious federal interest in claiming the advantages thought to be inherent in a federal forum. . ." 545 U.S. at 314.

After reciting this standard, Plaintiffs proceed to ignore it and offer halfhearted handwaving instead. ECF No. 10, pp. 9-11. The State of New Mexico has a compelling interest in the interpretation of the U.S. Constitution, it says. *Id.* at 9. That is both true and not a part of the *Grable* test. This case is "predominantly local," it adds. *Id.* at 10. That is neither true nor a

part of the *Grable* test.[5] Next, Plaintiffs offer that "State courts also historically played a key role in enforcing Section Three of the Fourteenth Amendment against state officials . . ." *Id.* Again, even if that were true it has nothing to do with the *Grable* test.[6]

Turning to the actual *Grable* test, it is clear that Plaintiffs' complaint plainly raises a substantial federal question. It "necessarily raises" the "disputed" and "substantial" question whether Griffin "engaged in insurrection or rebellion" against "the Constitution of the United States," U.S. Const. amend. xiv, § 3—by walking on the Capitol steps and leading a prayer. For which Griffin was recently acquitted of disorderly conduct. But Plaintiffs' complaint would meet a federal-question burden far greater than the substantial question test.

Plaintiffs' entire complaint turns on interpretation of Section Three of the Fourteenth Amendment to the U.S. Constitution. *See* Griffin Notice of Removal, Exh. 1, Compl., pp. 1-34.

The sole alleged legal basis on which Plaintiffs' usurpation-of-office claim rests is Section Three of the Fourteenth Amendment. *Id.*, pp. 2-3, 32-34. Plaintiffs explicitly allege: "By taking action resulting in his disqualification under Section Three of the Fourteenth Amendment," Griffin "'work[ed] a forfeiture of his office,' NMSA 1978 § 44-3-4(B), and is presently 'unlawfully hold[ing] . . . public office' in the State, *id.* § 44-3-4(A)." *Id.*, p. 33.

The bulk the complaint's pages are taken up with a legal analysis of Section Three of the Fourteenth Amendment. *Id.*, pp. 25-32.

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[5] All the alleged facts that are said to justify Griffin's removal from office occurred in Washington, D.C., on January 6, 2021. Griffin Notice of Removal, Exh. 1, Compl., pp. 2-3, 24-32.

[6] The Court will notice that all the authorities cited by Plaintiffs are from the year 1869. ECF No. 10, p. 10. That is because the 14th Amendment disqualification provision they frivolously attempt to apply to Griffin has had no application, and was not intended to apply, to contexts outside of the U.S. Civil War, as shown below.

CREW, the 501(c)(3) organization that recruited Plaintiffs and organized this lawsuit, has issued multiple press statements about this case. They focus entirely on disqualification under "Section 3 of the 14th Amendment." *E.g.*, *Lawsuit filed to remove Couy Griffin from office,* CREW, Mar. 21, 2022, available at: https://www.citizensforethics.org/legal-action/lawsuits/lawsuit-filed-to-remove-couy-griffin-from-office/. They scarcely mention New Mexico law. *Id.*[7]

In sum, if Griffin is subject to disqualification from office under the Fourteenth Amendment, Plaintiffs' *quo warranto* cause of action may succeed. If he is not subject to such disqualification, their cause of action will necessarily fail as a matter of law. Courts have found "substantial question" jurisdiction in identical situations.

Consider *Country Club Estates, LLC v. Town of Loma Linda*, 213 F.3d 1001 (8th Cir. 2000). Plaintiff was a country club that brought a *quo warranto* action in state court against the town of Loma Linda, Missouri. The *quo warranto* complaint challenged the legal validity of the town itself. After the town removed the case to federal court, the plaintiff moved to remand, asserting there was no federal question jurisdiction because its cause of action was created under state law. 213 F.3d at 1003. Plaintiff pointed out that "most of their complaint alleges violations of state law, including state statutes laying out the procedures for the creation of municipal corporations." *Id.*

Nevertheless, the court of appeals affirmed the district court's denial of plaintiff's remand motion. For "the complaint quite clearly allege[d] a violation of the federal Constitution at several points." 213 F.3d at 1003. Specifically, it alleged that:

[7] Its very name indicates that CREW's mission is focused on responsibility and ethics "in Washington," not in New Mexico. It takes no special insight to see that this lawsuit is a stalking horse for non-indigenous political prey.

> The Court order [establishing the town of Loma Linda] is further invalid because Relators were not given proper notice of the hearing as required by the Statutes and Constitution of Missouri and the Constitution of the United States of America, including those provisions which prohibit the taking of property without due process of law, which process requires proper notice.

213 F.3d at 1003.

The court of appeals held that this "reference to the Constitution is unequivocal. If the Due Process Clause is given one construction, [plaintiff's] claim will prevail; if it is given another, the claim will fail. This is a paradigm case for arising-under jurisdiction." *Town of Loma Linda*, 213 F.3d at 1003.

Just so, here. Not only is there one "unequivocal reference to the Constitution" in Plaintiffs' complaint, the entire pleading turns on nearly constant references to Section Three of the Fourteenth Amendment to the U.S. Constitution. Griffin Notice of Removal, Exh. 1, Compl., pp. 1-34. Just as in *Town of Loma Linda*, "if the [14th Amendment] is given one construction, [Plaintiffs'] claim will prevail; if it is given another, the claim will fail." 213 F.3d at 1003. If Griffin's prayer on the Capitol steps on January 6 did not constitute "engag[ing] in insurrection or rebellion" against "the Constitution of the United States," U.S. Const. amend. xiv, § 3, then Griffin has not "usurped" his office, according to the complaint itself. Griffin Notice of Removal, Exh. 1, Compl., p. 34.

Or consider *Smith v. Kanas City Title & Trust Co.*, 255 U.S. 180 (1921), which the *Grable* court itself called "the classic example" of a substantial "arising under" federal question. *Grable*, 545 U.S. at 312. *Smith* involved a suit by a shareholder claiming that the defendant corporation could not lawfully buy certain bonds of the National Government because their issuance was unconstitutional. Although Missouri law provided the cause of action, the Court recognized federal-question jurisdiction because the principal issue in the case was the federal

constitutionality of the bond issue. *Smith* thus held that a state-law claim could give rise to federal-question jurisdiction so long as it "appears from the [complaint] that the right to relief *depends upon* the construction or application of [federal law]." 255 U.S. at 199 (emphasis added). Here, of course, Plaintiffs' relief "depends upon" the Court's construction of Section Three of the Fourteenth Amendment, as the complaint itself concedes. Griffin Notice of Removal, Exh. 1, Compl., p. 34.

Plaintiffs seem to contend that the *Grable* factors do not apply, or are somehow superseded, any time there are "'fact-bound'" or "'situation-specific'" questions. ECF No. 10, p. 11 (quoting *Gilmore v. Weatherford*, 694 F.3d 1160, 1170 (10th Cir. 2012) (quoting *Empire Healthchoice Assurance*, *Inc. v. McVeigh*, 547 U.S. 677, 690 (2006)). Plaintiffs misconstrue those dicta from *Empire Healthchoice Assurance* and, in any case, their argument fails on its own terms.

Empire Healthchoice Assurance originated when the administrator of a man's estate pursued tort litigation in state court, under state law, against parties who caused the decedent's injuries. The decedent's medical expenses had been previously covered by a private health insurance carrier engaged by the Office of Personnel Management to provide health insurance for federal employees under The Federal Employees Health Benefits Act of 1959 (FEHBA). 547 U.S. at 683. When the tort litigation terminated in a settlement, the carrier filed suit in federal court seeking reimbursement of the decedent's medical expenses. The Court found no substantial federal question, distinguishing *Grable* because there was no question concerning a federal statute or the U.S. Constitution at all, much less one on which the plaintiff's relief depended. FEHBA contained no provision addressing reimbursement rights of carriers. *Id.* at 683. And while the Court acknowledged that "distinctly federal *interests* [were] involved"

(attracting able workers to the federal workforce), *id.* at 696 (emphasis added), even sorting out those tangentially-federal-question-at-best matters involved "fact-bound" and "situation-specific" questions. *Id.* at 701.

Contrary to Plaintiffs' apparent suggestion, *Empire Healthchoice Assurance* did not hold that every time a court must apply federal law to fact in a trial—and every time there is a mixed question of federal law and fact in a trial—there can be no "arising under" federal question jurisdiction. Plaintiffs confuse the fact-finding stage with the remand stage. In ruling on their motion to remand, the Court must assume the truth of the factual allegations contained in the complaint. *E.g.*, *Davis v. United* States, 192 F.3d 951 (10th Cir. 1999); *Batoff v. State Farm Ins. Co.*, 977 F.2d 848, 851-52 (3d Cir. 1992) (same). Thus, contrary to Plaintiffs' brief, there is no "fact question" the Court must consider now concerning "whether Defendant personally 'engaged in' the January 6th insurrection or provided 'aid or comfort' to insurrectionists." ECF No. 10, p. 11. Rather, the remand question is whether, assuming the truth of the factual allegations in the complaint concerning Griffin's alleged actions on January 6, Plaintiffs' claim for *quo warranto* relief depends upon the Court's legal construction of Section Three of the Fourteenth Amendment. Plaintiffs do not dispute that it does.[8]

There are additional reasons why the question of whether Plaintiffs are entitled to the relief they seek is not "fact-bound" or "situation-specific." Namely, by subsequent congressional enactment the constitutional provision on which the complaint is solely based no longer has the force of law. For Congress removed the disabilities stated in Section Three of the Fourteenth

[8] Similarly, the question posed by a forthcoming motion to dismiss will be whether, assuming the truth of the factual allegations in Plaintiffs' complaint, it properly states a claim that Griffin "engaged in insurrection or rebellion" against "the Constitution of the United States," U.S. Const. amend. xiv, § 3.

Amendment "from all persons whomsoever" and for all time. The Amnesty Act of 1872 provides that "*all political disabilities imposed* by the third section of the fourteenth article of amendments of the Constitution of the United States are hereby removed *from all persons whomsoever*, except Senators and Representatives of the thirty-sixth and thirty-seventh Congresses, officers in the judicial, military and naval service of the United States, heads of departments, and foreign ministers of the United States." Amnesty Act of 1872, Pub. L. No. 42-193, 17 Stat. 142 (emphasis added). In 1898, Congress removed the disabilities from the excepted persons: "the disability imposed by section three of the Fourteenth Amendment to the Constitution of the United States *heretofore incurred* is hereby removed." Amnesty Act of 1898, ch. 389, 30 Stat. 432 (emphasis added).

Only a month ago, a federal court held that the Amnesty Acts of 1872 and 1898 precluded a virtually identical office-disqualification effort under Section Three of the Fourteenth Amendment, also based on an officeholder's acts and statements in connection with January 6, 2021. *Madison Cawthorn v. Damon Circosta*, 22-cv-50-M, ECF No. 78 (E.D.N.C. Mar. 10, 2022) ("By the plain language of Section 3 and the 1872 Act, Congress removed *all* of Section 3's disabilities from *all* persons whomsoever who were not explicitly excepted.") (emphasis original).

In sum, the question of whether Plaintiffs are entitled to the relief they seek is not "fact-bound" or "situation-specific," but a purely legal, federal issue.

III. The filing of Plaintiffs' remand motion does not suspend briefing on Griffin's motion to transfer venue

On April 17, Griffin filed a motion to transfer venue to the U.S. District Court for the District of Columbia. ECF No. 2. The next day, the Court entered an order *sua sponte*, finding

good cause to delay entering a scheduling order, given Griffin's motion to transfer venue. ECF No. 7.

Plaintiffs now contend that "common practice, consistent with common sense and principles of judicial economy, requires that the Court address issues of its jurisdiction prior to those of venue." ECF No. 10, p. 2 n. 1. If Plaintiffs mean that their remand motion has suspended the briefing schedule on Griffin's motion to transfer venue, they are mistaken. Neither the rules of this Court nor the Federal Rules of Civil Procedure prohibit a party from filing a motion to transfer venue along with a notice of removal. Thus, if Plaintiffs file no opposition to Griffin's transfer motion within 14 days of April 17, the Court may grant the motion by default. D.N.M.LR-Civ. 7.4.

Conclusion

For all the foregoing reasons, the Court should not remand this matter to state court.

Dated: April 24, 2022

Respectfully submitted,

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Certificate of Service

I hereby certify that on the 24th day of April, 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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