IN THE 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. Civil Action No. 22-284 RB-JFR

COUY GRIFFIN,

Defendant.

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO TRANSFER VENUE UNDER 28 U.S.C. § 1404(a)

Plaintiffs respectfully respond in opposition to Defendant's Motion to Transfer Venue under 28 U.S.C. § 1404(a). Defendant bases his Motion entirely on the erroneous premise that this case is an extension of his recent criminal prosecution in the U.S. District Court for the District of Columbia. Defendant's Motion must fail for its fundamental misunderstanding of both the claims at issue in the present litigation and the law governing the Court's power to transfer cases. This *quo warranto* action is rooted in New Mexico law, brought by New Mexico residents against a New Mexico public official to determine his qualifications to hold office in the State, concerns conduct that began and ended in New Mexico, and requires resolution in New Mexico's local courts. Defendant's Motion is contrary to the interests of justice and should be denied.

ARGUMENT

"The purpose of venue is to assure that lawsuits are filed in appropriately convenient courts for the matters raised and for the parties involved in the action." *State ex rel. Balderas v. Real*

Estate Law Ctr., P.C., 430 F. Supp. 3d 900, 915 (D.N.M. 2019). Consistent with that principle, 28 U.S.C. § 1404(a) allows that, "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought[.]" In considering a motion to transfer, the Court weighs nine discretionary factors:

> the plaintiff's choice of forum; the accessibility of witnesses and other sources of proof, including the availability of compulsory process to insure attendance of witnesses; the cost of making the necessary proof; questions as to the enforceability of a judgment if one is obtained; relative advantages and obstacles to a fair trial; difficulties that may arise from congested dockets; the possibility of the existence of questions arising in the area of conflict of laws; the advantage of having a local court determine questions of local law; and[ ] all other considerations of a practical nature that make a trial easy, expeditious and economical.

Emps. Mut. Cas. Co. v. Bartile Roofs, Inc., 618 F.3d 1153, 1167 (10th Cir. 2010) (alteration in original). Defendant, as the movant seeking transfer, "bears the burden of establishing that the existing forum is inconvenient.'" *Id.* "Merely shifting the inconvenience from one side to the other, however, obviously is not a permissible justification for a change of venue." *Id.*

Rather than analyze each of the factors as this Court must weigh them, Defendant bases his entire Motion on a single erroneous premise: that this New Mexico state-law *quo warranto* action is "related to" his federal criminal prosecution in the U.S. District Court for the District of Columbia. *See* Transfer Mot. at 1-7, ECF No. 2; Civil Cover Sheet, ECF No. 4 (erroneously designating this case as "related" to the federal criminal case). This premise is false. The legal elements, standards of proof, and nature of the two cases are materially different. Defendant fails

to meet his burden. Neither the location of his criminal case nor any other factor weighs in favor of transfer. The Motion to Transfer must be denied.

I. The U.S. District Court for the District of Columbia is not a "district or division where" this matter "might have been brought."

As a threshold matter, separate from the 1404(a) factors, Section 1404(a) does not permit transfer in the present case because the U.S. District Court for the District of Columbia is not a "district or division where" this matter "might have been brought." Rather, Plaintiffs brought this matter in the only jurisdiction available to them: a New Mexico state district court. As explained in Plaintiffs' Motion to Remand and forthcoming reply in support of that motion, incorporated here by reference, the federal court lacks subject matter jurisdiction over the present case both as a result of Plaintiffs' lack of Article III standing and for lack of federal question jurisdiction. *See generally* Plaintiffs' Motion to Remand, ECF 10 (April 20, 2022). And while the questions of venue and jurisdiction are distinct, with jurisdictional issues necessarily decided before those of venue, *see Real Estate Law Ctr.*, P.C., 430 F. Supp. 3d at 915, the lack of subject matter jurisdiction over this matter *in any federal district* renders Section 1404(a) inapplicable as a matter of law.[1]

II. Plaintiffs' state law *quo warranto* case is not "related to" Defendant's federal criminal prosecution.

Underpinning Defendant's argument that this matter should be transferred to the District of Columbia is his assertion that the state law *quo warranto* action seeking to disqualify him from state public office on the basis of his engagement in the January 6 insurrection is "related" to Defendant's criminal case in Washington D.C., in which he was convicted for entering a restricted

[1] 28 U.S.C. § 1404(a) does permit the Court to transfer the matter to "or to any district or division," regardless of whether Plaintiffs could have originally brought the case in such district or division, so long as "all parties have [so] consented." Plaintiffs do not consent to any such transfer.

area within the United States Capitol and its grounds in violation of 18 U.S.C. § 1752(a)(1), and acquitted of disorderly conduct under 18 U.S.C. § 1752(a)(2). Transcript of Bench Trial, *United States v. Griffin*, No. 21-cr-00092-TNM, ECF No. 106 at 337:24-25 (D.D.C. March 22, 2022). These offenses, while illustrative of the extent of Defendant's legal entanglements,[2] have little bearing on the present case.[3]

This is because these cases are fundamentally distinct with differences in (i) the nature of the claim, (ii) the burden of proof, (iii) the elements of the claims raised, and (iv) the nature of the proof to be presented to the Court. This state law *quo warranto* action seeks to remove Defendant from office on the basis of his having forfeited the same by his violation of Section Three of the Fourteenth Amendment to the U.S. Constitution. Section Three, ratified in 1868 as part of the Reconstruction Amendments, disqualifies from public office anyone who (1) took an oath to support the U.S. Constitution as a qualifying officer, and then (2) during an insurrection or rebellion against the Constitution, (3) engaged in said insurrection or rebellion., or provided aid or comfort to those who did. U.S. Const. amend XIV, § 3. Unlike the federal offenses of trespass and

[2] The New Mexico Attorney General has also filed a misdemeanor charge against Defendant for failing to register a political committee, which is currently pending. *State of New Mexico v. Couy Griffin*, D-1215-CR-2022-00164 (12th Jud. Dist. Ct. N.M.); *see also* Anna Padilla, *'Cowboys for Trump' founder facing charges for failing to register group with state,* KRQE (Mar. 19, 2022, 8:15 AM MDT) (https://www.krqe.com/news/new-mexico/cowboys-for-trump-founder-facing-charges-for-failing-to-register-group-with-state/).

[3] Defendant claims Plaintiffs filed this suit "as a result of his conviction." Transfer Mot. at 1. But this is demonstrably false. Plaintiffs filed this suit *before* a verdict was rendered in his criminal case. *See* Compl. (filed March 21, 2022); Minute Entry, *United States v. Griffin*, 21-cr-92 (D.D.C. March 22, 2022) (verdict rendered on March 22, 2022). And while Plaintiffs' Complaint does reference the government's allegations in Defendant's criminal case, Defendant's ultimate conviction or acquittal on those allegations is not dispositive to his disqualification under Section Three for the reasons outlined herein.

disorderly conduct under 18 U.S.C. § 1752, Section Three does not impose a criminal penalty and is not penal in nature.

Rather, Section Three imposes a qualification for public office, much like an age or residency requirement; it is not a criminal penalty or punishment. *See State ex rel. Sandlin v. Watkins*, 21 La. Ann. 631, 632-33 (La. 1869) (holding that Section 3 disqualification lawsuit was brought "against the defendant … not to inflict punishment or to impose penalties or disabilities upon him, but to inquire legally into his right to hold and exercise the office which he contends he is entitled to"); 39th Cong. Globe 1st Sess. 2918 (Section Three is "not … penal in its character, it is precautionary. It looks not to the past, but it has reference … wholly to the future."); Cong. Globe, 39th Cong. 1st Sess. 3036 (loss of office "has never been regarded in the American courts as a punishment"). Underlying Section Three is the principle "that one who had taken an oath to support the Constitution and violated it, ought to be excluded from taking it again, until relieved by Congress." *Worthy v. Barrett*, 63 N.C. 199, 204 (1869), *appeal dismissed sub nom. Worthy v. Comm'rs*, 76 U.S. 611 (1869); *see also* 39th Cong. Globe, 1st Sess. 2900 (rejecting amendment that excluded pardoned individuals from scope of Section 3).

Not only is Section Three not itself a penal or criminal statute, but judicial precedent and historical practice make clear that a criminal conviction is not a prerequisite for a Section Three disqualification. *See, e.g.*, *State ex rel. Sandlin*, 21 La. Ann. at 631, 634 (disqualifying state official without an underlying criminal conviction); *Worthy*, 63 N.C. at 200, 204 (same); *In re Tate*, 63 N.C. 308, 309 (1869) (same); 69 Cong. Globe, 39 Cong. 1st Sess. 2534 (noting "John Smith, then a Senator in Congress from the State from Ohio[,] Smith was never tried by a civil tribunal, but for his participation in the so-called conspiracy, was expelled from the Senate"); Cong. Globe,

40th Cong. 2d Sess. 893 (1868) (recognizing that though Mr. Brown could not be criminally convicted for his actions, he could be excluded from Congress for them); Cong. Globe, 39th Cong., 1st Session 2901 (arguing Section Three imposed qualification on office, stating "[d]oes, then, every person living in this land who does not happen to have been born within its jurisdiction undergo pains and penalties and punishments all his life … because by the Constitution he is ineligible to the Presidency."); Cong. Globe, 39th Cong., 1st Sess. 2916 ("[A]n obvious distinction between the penalty which the State affixes to a crime and that disability which the State imposes and has the right to impose against persons whom it does not choose to entrust with official station.").[4] This *quo warranto* matter thus does not function as some sort of extension of Defendant's federal criminal prosecution.

The elements of the statutes under which Defendant was charged, 18 U.S.C. § 1752(a)(1) and (a)(2) align neither with those of the *quo warranto* statute, *see* NMSA 1978, § 44-3-4(B), (requiring only that Defendant "shall have done or suffered an act which, by the provisions of law, shall work a forfeiture of his office"), nor of Section Three of the Fourteenth Amendment. Unlike Section Three, establishing a violation under 18 U.S.C. § 1752 does not require proof (1) that Defendant took an oath to support the U.S. Constitution as a qualifying officer; (2) that an "insurrection or rebellion" later occurred; or (3) that Defendant "engaged in" said insurrection or rebellion or gave "aid or comfort" to those who did. Because these are not elements of an 18 U.S.C.

[4] In this respect, Section Three is analogous to state constitutional qualifications that do not require a predicate criminal conviction to deem an official disqualified from office. *See State ex rel. Martinez v. Padilla*, 1980-NMSC-064, ¶ 5, 94 N.M. 431, 433 ("N.M. Const. Art. VIII, § 4, does not require that a public officer be convicted of a felony before he can be disqualified, but merely requires a judicial finding that the officer has knowingly misused public funds. Each sanction described by Art. VIII, § 4 is separate and distinct; disqualification is not dependent on a felony conviction.").

§ 1752 prosecution, Judge McFadden appropriately did not address or rule on any of these issues in Defendant's federal criminal case.

Unlike 18 U.S.C. § 1752, Section Three does not require proof that Defendant had the specific "intent to impede or disrupt the orderly conduct of Government business or official functions." 18 U.S.C. § 1752(a)(2). Nor does Section Three require proof that Defendant engaged in "disorderly or disruptive conduct" or that his conduct "in fact impede[d] or disrupt[ed] the orderly conduct of Government business or official functions." *Id.* Instead, Defendant is disqualified under Section Three if he "[v]oluntarily aid[ed] the [insurrection], by personal service, or by contributions, other than charitable, of anything that was useful or necessary" to the insurrectionist cause. *Worthy*, 63 N.C. at 203. This is an entirely different showing than that required to establish criminal intent and liability under Section 1752.

The standards of proof in the two cases also differ significantly. To secure a conviction under Section 1752, the United States had to prove each element beyond a reasonable doubt. By contrast, in this *quo warranto* action, Defendant "at all times" bears the burden of proof to justify that he is legally qualified to hold public office in New Mexico. *State ex rel. Huning v. Los Chavez Zoning Comm'n*, 1982-NMSC-024, ¶ 10, 97 N.M. 472, 474.

Lastly, as discussed *infra*, though Defendant's activities at the Capitol on January 6 are plainly relevant to this case, the proof here will also focus on the existence of an insurrection or rebellion—an issue that extends far beyond Defendant's conduct. Additionally, the evidence of Defendant's engagement in or aid to the insurrection is not limited to the District of Columbia, *see* Compl. ¶¶ 31-36, 52-60, and the remaining element depends on proof entirely unrelated to his criminal case.

Defendant's conviction or acquittal for criminal offenses under 18 U.S.C. § 1752 is not determinative of whether he is disqualified from office by virtue of Section Three of the Fourteenth Amendment, a non-punitive constitutional qualification for public office ratified over 100 years before 18 U.S.C. § 1752 was enacted. Defendant's various Section 1404(a) arguments, based on the erroneous premise that the two cases are "related," Transfer Mot. at 5-7, fail to justify transfer. *See Greater Yellowstone Coal. v. Bosworth*, 180 F. Supp. 2d 124, 129 (D.D.C. 2001) (declining to transfer case based on purportedly related case pending in transferee district where the "potentially related case" was in fact "very different from the instant case").

III. The Section 1404(a) factors preclude transfer.

Even assuming *arguendo* that the Court does have subject-matter jurisdiction and that the case is, therefore, subject to transfer under Section 1404(a), a review of the 1404(a) factors demonstrates that transfer would be against the interests of justice.

A. Plaintiffs' choice of forum weighs against transfer.

When weighing the factors in consideration of a motion to transfer under Section 1404(a), "[u]nless the balance is strongly in favor of the movant[,] the plaintiff's choice of forum should rarely be disturbed." *Emps. Mut. Cas. Co.*, 618 F.3d at 1167 (quoting *Scheidt v. Klein*, 956 F.2d 963, 965 (10th Cir. 1992)). This is particularly so where, as in this case, Plaintiffs and Defendant reside in the district. *See id.* at 1168. And while courts afford less deference to "a plaintiff's choice of forum 'where the facts giving rise to the lawsuit have no material relation or significant connection to the plaintiff's chosen forum,'" *id.* (quoting *Cook v. Atchison, Topeka & Santa Fe Ry. Co.,* 816 F. Supp. 667, 669 (D. Kan. 1993)), there can hardly be a connection more "significant" than the forfeiture of a state office in the chosen forum. *See State ex rel. Sandlin*, 21

La. Ann. at 632 ("[T]he State has obviously a great interest in … and a clear right to" determine "whether persons holding office under the authority of the State of Louisiana are incompetent to exercise the duties of those offices by reason of the disabilities imposed upon certain classes of people by the Constitution of the United States.").

The connections to Plaintiffs' chosen forum continue. Plaintiffs are three New Mexico residents, and Defendant is a New Mexico resident and elected county commissioner. He is accused of breaching an oath of office he took in New Mexico, prior to January 6, 2021, to uphold the Constitution of the United States, and of presently holding office unlawfully in New Mexico. While Defendant forfeited his public office based partly as a result of his actions in Washington, D.C. on January 6, 2021, relevant evidence includes events both before and after January 6, including events that occurred in New Mexico and other locations outside of Washington, D.C. *See* Compl. ¶¶ 31-36, 52-60. These connections are evident in every facet of the case including the locations of the parties themselves, the location of much of the evidence that demonstrates Defendant's engagement in the January 6 insurrection and surrounding events, and the strong local interest in adjudicating whether state officers are disqualified under Section Three of the Fourteenth Amendment. *See State ex rel. Sandlin*, 21 La. Ann. at 632.

Given Plaintiffs' choice of forum in New Mexico and the compelling local interest in adjudicating the constitutional qualifications of state officers, this factor weighs heavily against transfer.

B. The convenience of parties weighs against transfer.

In arguing that "the district court for the District of Columbia is a forum more convenient for the Defendant and relevant witnesses," Defendant disregards that *all parties* reside in New

Mexico. Consistent with that failure, Defendant does not cite any case that permitted transfer when all parties were in the original venue. *Cf. Aguilar v. Michael & Sons Servs. Ins.*, 292 F. Supp. 3d 5, at *12 (D.D.C. 2017) (transferring case where both parties resided in transferee venue). Like Plaintiffs, Defendant resides in New Mexico and he, indeed, faces criminal charges in the State. It is unclear, therefore, whether Defendant would be permitted to travel to Washington, D.C. in any event.[5]

Defendant's convenience argument, therefore, does not rest on his own convenience, as he is a New Mexico resident, but rather on that of his counsel. *See* Transfer Mot. at 7. "The convenience of counsel, however, is not a factor this Court will consider." *Navajo Nation v. Urban Outfitters*, Inc., 918 F. Supp. 2d 1245, 1257 n. 7 (D.N.M. 2013); *see also Studdard By & Through Studdard v. Connaught Laboratories, Inc.*, 793 F. Supp. 291, 292 (D. Kan. 1992) ("convenience of counsel is entitled to little, if any, weight in ruling on a § 1404(a) transfer"). Nor does the location of Defendant's retained counsel have any functional effect on litigation. Rather, the physical location of counsel matters less as the vast majority of litigation can be conducted remotely via videoconferencing. Because all parties reside in New Mexico, the convenience thereof weighs strongly against transfer.

[5] Defendant is currently under conditions of release in his pending criminal matter in the Twelfth Judicial District Court of New Mexico, and one of his conditions of release is not to leave Otero and Lincoln Counties, New Mexico without prior permission of the Court. Order Setting Conditions of Release, *State of New Mexico v. Couy Griffin*, D-1215-CR-2022-00164 (12th Jud. Dist. Ct. N.M., Apr. 4, 2022); Order Amending Conditions of Release, *State of New Mexico v. Couy Griffin*, D-1215-CR-2022-00164 (12th Jud. Dist. Ct. N.M., Apr. 5, 2022).

C. Accessibility of witnesses weighs against transfer.

The accessibility of witnesses and sources of proof weighs against transfer. Defendant argues, without identifying any witnesses or the nature or materiality of their testimony, that transfer would be more convenient for "relevant witnesses" and that "there are no witnesses in this district or State whatsoever." Transfer Mot. at 7. This statement is not only demonstrably false (Defendant himself resides in New Mexico), but also unsupported by any evidence so as to afford little weight to Defendant's argument.

"The convenience of witnesses is the most important factor in deciding a motion under § 1404(a)." *Emps. Mut. Cas. Co.*, 618 F.3d at 1169 (quoting *Cook*, 816 F. Supp. at 669). To demonstrate inconvenience, however, the movant may not simply allude to the potential inconvenience of unnamed witnesses. 15 Wright & Miller, Fed. Prac. & Proc. Juris. § 3851(4th ed. 2022) ("If the moving party merely has made a general allegation that necessary witnesses are located in the transferee forum, ... the application for transferring the case should be denied ...."). Rather the movant must (1) identify the witnesses and their locations; (2) "indicate the quality or materiality of the[ir] testimony"; and (3) "show[ ] that any such witnesses were unwilling to come to trial … [,] that deposition testimony would be unsatisfactory[,] or that the use of compulsory process would be necessary." *Scheidt,* 956 F.2d at 966 (brackets omitted) (internal quotation marks omitted); 17 Moore's Federal Practice, § 111.13[f][v] (3d ed. 2010) ("The materiality of the prospective witnesses[‘] testimony, and not merely the number of prospective witnesses, will determine the extent to which their convenience will be weighed." (citation omitted)). Defendant's failure to identify, "with specificity," which witnesses, if any, are located in D.C. and his failure

to "indicate[] the subject matter of their testimony" render his argument a losing one. *See Emps. Mut. Cas. Co.*, 618 F.3d at 1169.[6]

Rather all indications are that the most relevant witnesses, not least of all Defendant himself, reside in or near Plaintiffs' chosen forum. Other than Defendant, the Complaint names only one other potential witness—Cowboys for Trump videographer Matthew Struck—who resides in Colorado, which is far closer to New Mexico than to Washington D.C.

Notably, these—along with any others to whom Defendant alludes—are Plaintiffs' potential witnesses. As the movant, Defendant bears the burden of identifying the witnesses *he* plans to call and the materiality of their testimony. *See id.*; *see also Crossroads State Bank v. Savage*, 436 F. Supp. 743, 745 (W.D. Ok. 1977) (denying transfer where no affidavits of evidence introduced); *see also* Wright & Miller, § 3851 n. 14. Not only has Defendant failed to meet his burden, but there is no indication that he has any witnesses to call. He called none at his criminal trial. Defendant identifies no law that would support the proposition that the Court should transfer this matter to his proposed venue in order alleviate *Plaintiffs'* burdens of calling witnesses to New Mexico. Rather, even assuming *arguendo* that the majority of witnesses do reside in the D.C. area, the location of Plaintiffs' potential witnesses carries little weight in Defendant's motion to transfer. This is because "Defendant['s] concern is for the convenience of witnesses to be called by" Plaintiffs. *United States v. Menendez*, 109 F. Supp. 3d 720, 728 (D.N.J. 2015). His "concern may

[6] Any attempt by Defendant in his reply brief to identify witnesses in D.C., the substance of their testimony, and the difficulty in obtaining their presence for trial is unavailing, as "[i]t is improper for a moving party to introduce new facts or different legal arguments in the reply brief than those presented in the moving papers." *U.S. ex rel. Giles v. Sardie*, 191 F. Supp. 2d 1117, 1127 (C.D. Cal. 2000); *Gold v. Wolpert*, 876 F.2d 1327, 1331 n.6 (7th Cir. 1989) ("It is well-settled that new arguments cannot be made for the first time in reply. This goes for new facts too.").

be sincere, but is less urgent when the [Plaintiffs], not Defendant[], will be responsible for securing and facilitating the witness's trial appearances." *Id.* Defendant's concern is both misplaced and insufficient to sustain transfer.

D. Accessibility of proof weighs against transfer.

Defendant wrongly asserts that all relevant facts, and therefore all sources of proof, occurred in D.C.[7] But central to Plaintiffs' claim is that Defendant took his oath of office in New Mexico and is presently unlawfully holding office within the State. *See* Compl. at ¶¶ 32, 99. The Complaint further alleges, and Plaintiffs intend to show, that Defendant's participation in the insurrection was not limited to his actions at the Capitol on January 6, 2021. *See id.* at ¶¶ 33–36. Rather, Defendant's engagement in and aid to the insurrection started in New Mexico, where he participated in and promoted an insurrectionary movement to stop certification of the 2020 presidential election. As part of those efforts, he traveled across the country from New Mexico to Washington, D.C. to participate in the events of January 6, 2021, and later continued to promote the insurrection and its goals back in New Mexico.

Even with regard to evidence that might *originate* in Washington D.C., Defendant fails to demonstrate that any such evidence is not *available* in New Mexico. *See Data Locker, Inc. v. Apricorn, Inc.*, 2013 WL 3388900, at *2 (D. Kansas July 8, 2013) (rejecting request to change

[7] In his Motion for Transfer, Defendant States: "There is no fact alleged in Plaintiffs' Complaint that was not the subject of fact-finding by the Honorable Trevor N. McFadden in the District Court for the District of Columbia." Transfer Mot. at 3. Defendant fails to quote or cite to the complaint, but instead refers to matters extraneous to the complaint. The complaint, of course, alleges numerous matters that were not decided in the criminal case. For example, Defendant took an oath to support the United States Constitution, Compl. at ¶ 32; the January 6, 2021 attack on the U.S. Capitol and surrounding events constituted an insurrection, *id.* at ¶¶ 74-80; and Defendant engaged in the insurrection and gave aid or comfort to insurrectionists, *id.* at ¶¶ 81-91. None of these facts were at issue in the criminal trial.

venue because defendant failed to identify purported records unavailable in venue); Wright & Miller, § 3853 ("The moving party must establish the location of the documents in question, their importance in the resolution of the case, and the inability to move or copy them easily."). Given digitization and the readily available nature of information from any location, this "factor tends to be given relatively little weight." Wright & Miller, § 3853; *see also Data Locker, Inc.*, 2013 WL 3388900, at *2 ("[I]nconvenience associated with the transportation of records is mostly irrelevant in the year 2013, when most records can be electronically produced and transported.").

All of the likely documentary evidence in this case is either located in New Mexico or is digital and freely available nationwide through remote means. Much of the evidence will consist of video files documenting Defendant's conduct before, during, and after the January 6, 2021 attack, and video files documenting the January 6 insurrection generally. This includes both evidence admitted at Defendant's criminal prosecution and other evidence not admitted at that trial. Other evidence will concern the events leading up to January 6, including attacks on ballot counting places and election officials throughout the country; security footage of the Capitol on January 6 that is available nationwide; records of Defendant's taking oath of office, available in New Mexico; and evidence of Defendant's promotion of the insurrectionary "Stop the Steal" movement and associated events ahead of the January 6 attack. This evidence was created and exists in digital format. To the extent that Defendant plans to introduce some form of evidence not available to the Court in New Mexico, he has failed entirely to identify that evidence and has, as a consequence, failed to meet his burden. *See Data Locker, Inc.*, 2013 WL 3388900, at *2. This factor weighs against transfer.

E. The conflicts of law and advantage of having a local court determine questions of local law factors weigh against transfer.

Plaintiffs' claims are rooted in a state cause of action and an analysis of state *quo warranto* law. When analyzing venue transfer and the potential for a conflict of law in matters in which state substantive law applies, "courts prefer the action to be adjudicated by a court sitting in the state that provides the governing substantive law." *Emps. Mut. Cas. Co.*, 618 F.3d at 1169. Even acknowledging the role Section 3 of the Fourteenth Amendment will play in the present action, New Mexico's *quo warranto* statute and caselaw provide substantive law to be applied in the case, and the *quo warranto* statute further contains various expedited procedural requirements and other provisions that "exist to influence substantive outcomes" and are "so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy." *Racher v. Westlake Nursing Home Ltd. P'ship*, 871 F.3d 1152, 1164 (10th Cir. 2017) (cleaned up). The need to apply New Mexico substantive law in adjudicating these issues weighs heavily against transfer.

Here Defendant returns to his central argument that Plaintiffs' *quo warranto* action is based on "the very issues" already decided by the District Court for the District of Columbia. Transfer Mot. at 5. As it has for every other factor, however, this argument fails as a matter of law. As explained *supra*, at no point during the course of this litigation will the Court need to make conclusions of law from any local jurisdiction outside of New Mexico. The Court will not, for example, be required to construe or analyze the trespass or disorderly conduct statutes local to D.C. that Defendant claims were relevant to his federal criminal case. *See* Transfer Mot. at 6. Rather, as explained above, the elements of those crimes are distinct from the non-criminal laws at issue in the present case: namely whether Defendant swore an oath to the United States Constitution and betrayed that oath by engaging in an insurrection or rebellion against the same or

providing air or comfort to those who did. At no point would this litigation present the possibility of a "conflict" with Judge McFadden's construction of federal or D.C. law and their implication in Defendant's criminal trial.

This Court will, however, as Defendant acknowledges in his Notice of Removal, ECF 1 at 2, be required to construe New Mexico law. And as a result, the conflict and local court factors weigh heavily against transfer.

IV. Defendant's request to transfer this case to a specific district judge is improper and suggests he is forum shopping.

Defendant asks this Court to transfer this case not just to the U.S. District Court for the District of Columbia, but specifically to U.S. District Judge Trevor N. McFadden. *See* Transfer Mot. at 7. The Court, however, lacks authority to grant this request because Section 1404(a) only permits transfer to another "district or division"—not an individual judge. *See Sardinas v. Infinity Auto Ins. Co.*, 2020 WL 6478525, at *1 (M.D. Fla. Feb. 7, 2020) ("It is clear that a district judge lacks the authority to transfer a case to a specific judge in another District or even within the transferor judge's own district.").

In addition to lacking any legal basis, Defendant's request smacks of forum shopping. As his motion makes clear, Defendant intends to advance the erroneous argument that Judge McFadden's verdict acquitting him of "disorderly conduct" under 18 U.S.C. § 1752(a)(2) is somehow a complete defense to his disqualification under Section Three of the Fourteenth Amendment. *See* Transfer Mot. at 6 (claiming that "the question of whether [Defendant's] conduct was 'disorderly'" under 1752(a)(2) is a "predicate for Plaintiffs' claim that his alleged lawbreaking on January 6 results in his disqualification from federal office"). This argument is wrong. But given Defendant's clear intent to advance the argument, his request to transfer this case to the

same judge who acquitted him of the Section 1752(a)(2) charge is "suspect" and weighs heavily against transfer. *See Bosworth*, 180 F. Supp. 2d at 130 ("Viewing the totality of circumstances, the defendants' request to transfer this case to a specific judge [in another district] is suspect."). "The plausible possibility that [Defendant is] using Section 1404(a) as a means of forum shopping weighs against granting the defendant['s] motion." *Id.*[8]

CONCLUSION

Defendant, a New Mexico official, seeks to transfer this *quo warranto* action—brought by New Mexico residents under a New Mexico statute challenging Defendant's qualifications to hold a New Mexico state office based on his betrayal of an oath taken in New Mexico—to a federal court nearly 2,000 miles outside of the state, for the purported "convenience" of unidentified witnesses he has declared no intention of calling. He does so based entirely on the erroneous premise that this case is an extension of his federal criminal prosecution in the U.S. District Court for the District of Columbia. Defendant is wrong, and his motion must be denied.

Date: May 2, 2022

Respectfully Submitted,

Freedman Boyd Hollander
& Goldberg, P.A.

/s/ Joseph Goldberg
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[8] Defendant oddly accuses Plaintiffs of "forum shopping" for filing this suit under New Mexico's *quo warranto* statute in New Mexico, as opposed to in federal court in Washington, D.C. Transfer Mot. at 1. Defendant does not explain how Plaintiffs could have filed this suit in the U.S. District Court for the District of Columbia, when none of the parties resides in D.C., and Plaintiffs' cause of action is created by a New Mexico statute. Indeed, as explained *supra*, Plaintiffs *inability* to have filed this action in the U.S. District Court for the District of Columbia renders 28 U.S.C. § 1404(a) inapplicable as a matter of law.

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Certificate of Service

I hereby certify that on May 2, 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.

/s/ Joseph Goldberg
Joseph Goldberg