STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

STATE OF NEW MEXICO, ex. rel.,
MARCO WHITE, MARK MITCHELL,
and LESLIE LAKIND,

Plaintiffs,

vs. Case No. D-101-CV-2022-00473

COUY GRIFFIN,

Defendant.

PLAINTIFFS' MOTION FOR LEAVE TO FILE SURREPLY IN OPPOSITION TO DEFENDANT'S MOTION TO QUASH AND DISMISS

Plaintiffs respectfully move this Court for leave to file a surreply in opposition to Defendant's Reply in Support of his Motion to Quash and Dismiss. Plaintiffs attach their proposed surreply as Exhibit A. In the alternative, Plaintiffs request that this Court disregard and strike arguments Defendant raised for the first time in his reply brief. As grounds for this Motion, Plaintiffs state the following:

1. On June 14, 2022, the Court entered a Scheduling Order setting a trial date of August 15, 2022. That order, consistent with the expedited nature of *quo warranto* proceedings and with the mandates set forth by NMSA 1978, Section 44-3-8, prescribed tight timelines within which the parties would have to file dispositive motions. Defendant's deadline for demurrer was July 5, 2022, with corresponding deadlines for Plaintiffs' response and Defendant's reply falling on July 11 and July 12, respectively.
2. On July 25, 2022, Defendant filed his Motion to Quash and Dismiss. Plaintiffs filed their opposition on July 29.
3. Ten days later, on August 8, 2022, Defendant filed his Reply in Support of Defendant's Motion to Quash and Dismiss. In that brief, Defendant raised, for the first time, his "Objection for Failure to Join an Indispensable Party."

4. Defendant's objection, while meritless, is of a dispositive nature and warrants a response. On that basis Plaintiffs ask the Court to exercise its discretion to permit leave to file a surreply. *See Dollens v. Wells Fargo Bank, N.A.*, 2015-NMCA-096, ¶ 23, 356 P.3d 531 (a surreply "requires leave of the court and is only granted as a matter of discretion").

5. While Rule 1-007.1 NMRA provides only for a motion, response, and reply, the Court has discretion to grant leave for a party to file a surreply. *Dollens*, 2015-NMCA-096, ¶ 23. "Surreplies are often granted when a new argument or new evidence is presented in a reply brief." *SEC v. Goldstone*, No. CIV 12-0257 JB/LFG, 2014 U.S. Dist. LEXIS 160231, at *5-6 (D.N.M. Nov. 4, 2014); *see also Walker v. THI of N.M. at Hobbs Ctr.*, No. CIV 09-0060 JB/KBM, 2011 U.S. Dist. LEXIS 76385, 2011 WL 2728344, at *1 (D.N.M. July 6, 2011) (Browning, J.) ("A surreply is appropriate and should be allowed where new arguments are raised in a reply brief."). Defendant's reply brief is the first time that Defendant has raised the argument that the United States is an indispensable party and must be joined pursuant to Rule 1-019 NMRA.

6. As a result, Plaintiffs respectfully ask this Court to exercise its discretion to allow Plaintiffs leave to file the attached proposed surreply.

7. In the event that the Court does not wish to permit this surreply, Plaintiffs ask that, in the alternative, the Court strike those arguments raised for the first time in Defendant's reply brief.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2022, the foregoing Plaintiffs' Motion for Leave to File Surreply was filed through the New Mexico Odyssey File & Serve system, which caused all counsel of record to be served by electronic means.

Defendant Griffin was served with the same on August 11, 2022 by e-mail to the following address and by priority overnight Federal Express for delivery on August 12, 2022.

Couy Griffin
[redacted]

Date: August 11, 2022

Respectfully submitted,

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PLAINTIFFS' PROPOSED SURREPLY IN OPPOSITION TO DEFENDANT'S MOTION TO QUASH AND DISMISS

Plaintiffs respectfully file this surreply in opposition to Defendant's Reply in Support of his Motion to Quash and Dismiss ("Defendant's Brief" or "Reply"). Defendant raises, on the eve of trial and for the first time, the argument that the United States is an indispensable party within the meaning of Rule 1-019 NMRA. This argument functions as little more than yet another effort to conflate this case to Defendant's criminal case in federal court and to have this matter decided by the federal courts. Defendant's motion should be denied. Like those arguments raised in Defendant's underlying Motion, this position lacks merit and should be dismissed.

ARGUMENT

In his newly raised objection, Defendant argues that the United States is an indispensable party and bases this argument on the facts (i) that Plaintiffs have cited to federal law, (ii) that some of the alleged events took place on federal land and were witnessed by federal employees, and, (iii) that, according to Defendant, the present litigation will have an "impact" on the United States. Reply at 15-21. Defendant, however, misconstrues both the nature of the present action as well as the allegations that underly it and misapprehends the elements of joinder under Rule 1-019 NMRA.

Rule 1-019 requires that a party be joined, if feasible, if either (1) in the absence of that party, "relief cannot be accorded among those already parties;" or (2) if the absent party "claims an interest relating to the subject of the action" and if failure to join would impede that party's ability to protect

that interest or "leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his claimed interest." Rule 1-019(A) NMRA. "The question of indispensability is a factual question that the district court determines, and the district court decides, in its discretion, whether the suit can continue without a specific party." *Srader v. Verant*, 1998-NMSC-025, ¶ 21, 125 N.M. 521, 964 P.2d 82 (citing *Sims v. Sims*, 1996-NMSC-078, ¶ 50, 122 N.M. 618, 630, 930 P.2d 153,165). The facts in this case demonstrate that Defendant cannot meet either of the criteria set forth in Rule 1-019(A).

I. Relief Can be Accorded Among those Already Parties.

The presence of the United States as a party would have *no* bearing on whether relief can be accorded among the parties. Plaintiffs seek declaratory relief that (1) the events of January 6 constituted an insurrection; (2) that Defendant engaged in that insurrection; and (3) that such engagement disqualifies him from state and federal office pursuant to Section Three of the Fourteenth Amendment. Compl. at 33-34. The Complaint seeks further *quo warranto* relief removing and precluding Defendant from holding such public office. Plaintiffs seek *nothing* from the United States and neither, for his part, does Defendant, who has not filed any cross or counter-claims. Rather, the relief sought can be — and traditionally is — afforded entirely with the present parties to the action pursuant to the purpose and practice of *quo warranto*. *See State ex rel. Anaya v. McBride*, 1975-NMSC-032, ¶ 16, 88 N.M. 244, 247, 539 P.2d 1006, ("One of the primary purposes of *quo warranto* is to ascertain whether one is constitutionally authorized to hold the office he claims, whether by election or appointment, and [courts] must liberally interpret the quo warranto statutes to effectuate that purpose.").

State courts have historically effectuated that purpose — without joinder of the United States — even when directly considering and enforcing Section Three of the Fourteenth Amendment. *See, e.g.*, *Louisiana ex rel. Sandlin v. Watkins*, 21 La. Ann. 631 (1869) (disqualifying state judge); *Worthy v. Barrett*, 63 N.C. 199 (1869) (disqualifying county sheriff), *appeal dismissed sub nom. Worthy v. Comm'rs*, 76 U.S. 611 (1869); *In re Tate*, 63 N.C. 308 (1869) (disqualifying state solicitor). In

Sandlin, the Louisiana Supreme Court rejected an argument that state courts lack jurisdiction to adjudicate Section Three challenges, reasoning that "the 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." 21 La. Ann. at 632. As a result of these powers, the Court, without joinder of the United States, is both adequately empowered and well-situated to afford the relief requested.

Defendant fails to meet his burden to demonstrate joinder under Rule 1-019(A)(1) NMRA.

II. The United States has not Claimed an Interest in the Litigation.

Also unavailing is Defendant's attempt to claim, on behalf of the United States, that it has an "interest" in Commissioner Couy Griffin's disqualification from office. As a threshold matter, at no stage during this litigation has the United States "claimed an interest" in this action, rendering joinder inapplicable and unnecessary. *See* Rule 1-019(A)(2) NMRA. Defendant, however, argues that the United States has an interest because this litigation involves conduct that occurred, in part, on federal land and because the Fourteenth Amendment empowers congress "to enforce, by appropriate legislation, the provisions of this article." Motion ¶ 19 (quoting U.S. Const., Amend. XIV § 5) (Defendant's emphasis omitted). Defendant fails to provide any authority for the proposition that the United States has an automatic interest simply because of *where* some events are alleged to have taken place.[1] Nor does Defendant propose that the United States *Congress*, in its legislative capacity, is an indispensable party. Indeed, Defendant fails entirely to articulate how state residents enforcing a state law regarding the eligibility of a state officer impacts Congress' interest in legislating pursuant to the Constitution. Rather, "[w]here the interests of the United States are *separable* from those of the other parties, it is *not* an indispensable party." *Grady v. Mullins*, 1983-NMSC-017, ¶ 7, 99 N.M. 614, 616, 661 P.2d 1313 (emphasis in original). Plaintiffs' interests are to effectuate the purpose of

[1] Of course, Defendant's conduct of which Plaintiffs complain did not occur *only* on federal land. This assertion is one of Defendant's persistent attempts to characterize Plaintiffs' claims as identical to those in his separate criminal action in federal court.

quo warranto and ensure that only constitutionally eligible persons hold public office. This is an interest that has been repeatedly litigated *without* joinder of the federal government. *See supra*, at 3. The interest of the United States, in contrast, is in its ability to enact legislation enforcing the provisions of the Fourteenth Amendment. This action has no bearing on that ability whatsoever.

Consistent with this conclusion, Defendant's cited caselaw fails entirely to support its proposition that the United States is somehow indispensable to the adjudication of a state law to determine whether a state official is eligible to hold office. *State Game Comm'n v. Tackett*, for its part, has nothing to do with joining the United States as party, but rather involved the application of black letter law that, where a controversy involves a question regarding a state lease, the commissioner of public lands "is not only a necessary party, but is an indispensable party." 1962-NMSC-154, ¶ 7, 71 N.M. 400, 379 P.2d 54 (quoting *Swayze v. Bartlett*, 1954-NMSC-019, 58 N.M. 504, 511, 273 P.2d 367, 371). *Srader* is similarly inapposite as it does not address a situation in which joinder of the United States is either contemplated or required. 1998-NMSC-025, 125 N.M. 521, 964 P.2d 82. In that case, several plaintiffs sued various financial entities for their alleged support of what Plaintiffs characterized as illegal gaming on tribal land. *Id.* The New Mexico Supreme Court held that the claims could not proceed in the absence of the Indian gaming tribes, as the requested relief would, if granted, "halt the exchange of money upon which the tribes rely for business at their casinos." *Id.* ¶ 24. Defendant points to no such similar financial interest of the United States in this case. All these cases stand for is that s*ometimes* joinder is required. The cases simply do not stand for any proposition that joinder is required in this case.

The only case to which Defendant points that required joinder of the United States was one in which the litigation would have a tangible effect on the property and administrative interests of the United States, a factual scenario entirely inapposite to the one here. In *Elephant Butte Irrigation Dist. v. Gatlin*, the New Mexico Supreme Court held that the United States was an indispensable party where a district court order enjoining the flow of Rio Grande waters to a federally-protected refuge would necessarily and directly affect the United States and its properties and administration. 1956-

NMSC-030, ¶ 1, 61 N.M. 58, 294 P.2d 628. The court reasoned that the district court judgment would "expend itself upon the United States, its properties and administration[,]" and that, therefore, "the United States [was] an indispensable party not before the court and that [ ] has not consented to be sued." *Id.* ¶ 39. Unlike in *Gatlin*, Defendant cannot point to any property or administrative interest of which the United States would be divested or otherwise adversely affected if Defendant were to lose his office of county commissioner. This is because the interest of Defendant is *not* the interest of the United States. The interests are distinct and separable so that the United States is neither a necessary nor indispensable party. *See Grady*, 1983-NMSC-017, ¶ 7.

CONCLUSION

Defendant's attempt to cast the United States as an indispensable party is little more than another effort to avoid the relief permitted by *quo warranto* and to conflate this case with Defendant's criminal trial in federal court. These matters, however, remain distinct both as a result of the underlying nature of the claims brought and for the relief sought. Plaintiffs urge the Court to reject Defendant's eleventh hour attempt to muddy the waters and instead ask that court address the merits of Plaintiffs' claims at trial.

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I hereby certify that on [date], the foregoing Plaintiffs' Proposed Surreply in Opposition to Defendant's Motion to Quash & Dismiss was filed through the New Mexico Odyssey File & Serve system, which caused all counsel of record to be served by electronic means.

Defendant Griffin was served with the same on [date] by e-mail to the following address and by priority overnight Federal Express for delivery on [date].

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