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-WJ-JFR

GRIFFIN'S REPLY IN RESPONSE TO PLAINTIFFS' OPPOSITION TO HIS MOTION TO TRANSFER VENUE

Plaintiffs' *quo warranto* action claims that Griffin must be removed from office on account of what they allege he did in Washington, D.C., on January 6. Those facts have been extensively litigated in a related case in the District Court for the District of Columbia—a case on which Plaintiffs' complaint rests. This is a classic case for venue transfer. Nothing in Plaintiffs' opposition demonstrates otherwise. Their action could have been brought in D.C.; it is related to the pending case in D.C.; judicial efficiency weighs heavily in favor of that forum; litigation of Plaintiffs' case in this district risks creating inconsistent factual findings in different federal courts; and D.C. is a more convenient forum for witnesses. Plaintiffs are desperate to avoid federal court in general and the court in D.C. in particular. They know their publicity-driven flier of a lawsuit will not withstand scrutiny there.

Argument

I. Plaintiffs' action could have been brought in D.C.

Plaintiffs contend that they could not have filed their complaint in D.C. court because it "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." ECF No. 19, p. 3. They incorporate Plaintiffs' reply in support of their Motion to Remand (ECF No. 23). *Id.* Griffin will therefore briefly show why that filing fails to establish that Plaintiffs lack Article III standing.[1]

A. Relator *quo warranto* actions existed in the period immediately before and after the framing of the Constitution

Plaintiffs attempt to draw a distinction between the nature of a *qui tam* action, whose relators enjoy constitutional standing under *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000), and the nature of their *quo warranto* action. ECF No. 23, pp. 1-2, 3, 5-7. Long before *Vermont Agency*, Plaintiffs observe, it was "well established" that courts had jurisdiction to entertain the claims of private *qui tam* relators. In that case the Supreme Court held that although *qui tam* relators had no injury-in-fact of their own and sought relief for the injury-in-fact of the United States, they still enjoyed Article III standing because "at least in the period immediately before and after the framing of the Constitution," such *qui tam* actions were "prevalent in America and England." *Vermont Agency*, 529 U.S. at 777. This historical analysis was "well-nigh conclusive" on the standing question as "Article III's restriction of the judicial power to 'Cases and 'Controversies' is properly understood to mean 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.'" *Id.* at 774 (quoting *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 102 (1998)). Plaintiffs contend that no similar history exists for *quo warranto* relators. ECF No. 23, pp. 1-2, 3, 5-7.

Plaintiffs are demonstrably wrong. Courts in England and the United States had jurisdiction to entertain a private relator's suit for a writ of *quo warranto* "at least in the period immediately before and after the framing of the Constitution." *Vt. Agency of Natural Res.*, 529

[1] Griffin does not address Plaintiffs' argument that their case, which turns entirely on the Fourteenth Amendment to the U.S. Constitution, does not raise a federal question.

U.S. at 777. While the ancient writ of *quo warranto* was long the English Crown's prerogative, the Statute of Anne, enacted in 1710, "extended the remedy of quo warranto . . . to private citizens desiring to test the title of persons usurping or executing municipal offices and franchises, and rendered any person a competent relator in such proceedings who might first obtain leave of the court to file an information." J. High, *A Treatise on Extraordinary Legal Remedies Embracing Mandamus*, *Quo Warranto*, *and Prohibition* (3d ed. 1896), pp. 497-498. In turn, "[e]arly American [*quo warranto*] statutes were modeled after the Statute of Anne and, indeed, the statute has often been ruled to be part of the common law [the United States] inherited from England." C.J. Antieau, *The Practice of Extraordinary Remedies*, Vol. II, § 4 (1987); *see also State ex inf. Hancock ex rel. Banks v. Elwell* 156 Me 193, 163 A 2d 342, 345 (1960) (holding that the Statute of Anne formed a part of early American common law). Even after modern statutes began to supplement the common law writ, "the civil actions customarily follow[ed] the earlier [common] law as to both scope of the action and the relief available." *The Practice of Extraordinary Remedies*, Vol. II, § 4 (1987).

The Supreme Court of New Mexico has repeatedly endorsed the understanding that the State's *quo warranto* action ultimately derives from the Statute of Anne. *State ex rel. Abercrombie v. Dist. Court of Fourth Judicial Dist.*, 37 N.M. 407, 1933-NMSC-057 (1933); *State ex rel. Owen v. Van Stone*, 17 N.M. 41, 1912-NMSC-003 (1912). As the Court held in *State ex rel. Abercrombie*, "In America it has been generally considered that the common-law mode of testing title to office is by information in the nature of quo warranto under the Statute of Anne." 37 N.M. at 408. Previously, the Court held:

> Previous to the statute of Anne (9 Anne, c. 20, A. D. 1710) the information in the nature of a quo warranto was employed exclusively as a prerogative remedy and was never employed as a remedy in behalf of a private citizen to contest the title to an office or

> franchise. The statute of Anne, a part of our common law (*Albright v. Territory*, 13 N.M. 64, 79 P. 719), brought into the law an entirely new feature, namely, the right of a private citizen to employ the information to try title to office. High, Ex. Leg. Rem. sec. 602.

17 N.M. at 45.

Thus, just as *Vermont Agency* concluded that *qui tam* relators had Article III standing to seek relief for the injury-in-fact of the United States because it was "well-nigh conclusive" that courts had jurisdiction over such lawsuits "in the period immediately before and after the framing of the Constitution," *Vermont Agency*, 529 U.S. at 777, so do federal courts have subject matter jurisdiction to entertain Plaintiffs' *quo warranto* action.

That Plaintiffs do not receive any "cut" of the government's recovery does not mean they lack Article III standing. As Griffin showed, in the context of claim assignment, after *Sprint Communs. Co., LP v. APCC Servs.*, 554 U.S. 269, 288, 128 S. Ct. 2531, 2542 (2008) "naked legal title" to a claim confers standing, provided the plaintiff has some "obligation to the parties whose interests they vindicate through litigation." Plaintiffs neither distinguish *Sprint* nor deny that as agents of the State of New Mexico, they owe fiduciary duties to it in litigating its *quo warranto* claim. ECF No. 23, p. 10.

B. *Hollingsworth v. Perry* is inapposite; governments can and do assign claims to remedy sovereign injury, including *quo warranto* claims

Plaintiffs contend that *Hollingsworth v. Perry*, 570 U.S. 693 (2013) controls the result here. ECF No. 23, pp. 2, 4. They are mistaken. There, citizen-proponents of California's Proposition 8, a ballot initiative to amend the State's constitution, attempted to defend the provision after the State's officials dropped out of the lawsuit. The U.S. Supreme Court held that the citizens lacked Article III standing. For numerous reasons *Hollingsworth* has no application here.

First, *Hollingsworth* concerned the doctrine of "third-party standing." *Hollingsworth*, 570 U.S. at 708. That is where a party rests his claim to relief "on the legal rights or interests of third parties." *Id.* (citation omitted). But when a party asserts a claim *assigned to him*, the issue is not "third-party standing"; it's whether the *first-party* right has been legally transferred to him. That is the basis of *qui tam* relator standing. *Vermont Agency*, 529 U.S. at 777. In both *Vermont Agency* and here, plaintiffs invoke statutes by which the government has assigned its claims to them. In *Hollingsworth*, by contrast, no statute "assigned" California's right to defend Proposition 8 to the petitioners. *Hollingsworth*, 570 U.S. at 708.

Secondly, as *Hollingsworth* held, there is no long tradition of lawsuits from immediately before and after the framing of the Constitution where citizens defended ballot initiatives on behalf of a State. *Id.* at 711. As shown above, however, such a tradition does exist with respect to *quo warranto* actions—stretching back to 1710. *State ex rel. Abercrombie*, 37 N.M. 408; *State ex rel. Owen*, 17 N.M. at 45

Finally, Plaintiffs assert that *Hollingsworth* or perhaps *Vermont Agency* held that a State may not assign its sovereign injury (e.g., a breach of its laws) to a relator. ECF No. 23, p. 6. Not so. The Supreme Court has never so held, nor has any authority binding on this Court. *Vermont Agency* did hold, in the facts of that case, that "[t]he FCA can reasonably be regarded as effecting a partial assignment of the government's damages claim." 529 U.S. at 773. But that is not the same as holding that a State may *not* assign claims to remedy its sovereign injury. *Vermont Agency* arguably held the opposite. A relator's "interest," the Court held, "must consist of obtaining compensation for, *or preventing*, the violation of *a legally protected right*." *Id.* at 773 (emphasis added).[2]

[2] Plaintiffs cite to a dissenting opinion in a Tenth Circuit case. ECF No. 23, p. 6 (citing *U.S.*

Plaintiffs cite *Hollingsworth*'s statement that "'States cannot alter [Article III] simply by issuing to private parties who otherwise lack standing a ticket to the federal courthouse.'" ECF No. 23, p. 7 (quoting *Hollingsworth*, 570 U.S. at 715). But the phrase "otherwise lack standing" begs the question. As discussed, the dispositive factor that distinguishes *Hollingsworth*, on the one hand, from *Vermont Agency* and this case, on the other, is that in the latter group legislatures did not merely issue to private parties "a ticket to the federal courthouse." Instead, at the time of the framing of the Constitution English and American courts traditionally *had* jurisdiction to entertain *qui tam* and *quo warranto* relator lawsuits. *E.g.*, *The Practice of Extraordinary Remedies*, Vol. II, § 4 (1987). The very existence of the long tradition of *quo warranto* relator actions in both England and the United States, stretching back to the Statute of Anne, puts the lie to Plaintiffs' claim that a government "may not assign its sovereign injury." They have *done so*—for hundreds of years. Perhaps that is why Plaintiffs immediately proceed to argue—in direct self-contradiction—that "New Mexico's *quo warranto* statute . . . effects a *full* assignment, not a partial one." ECF No. 23, p. 9 (emphasis original).

C. Plaintiffs' claim that they do not enforce New Mexico's "financial or proprietary interests" is nonsense

Plaintiffs do not contest that a government may assign to a relator a claim to remedy its proprietary injury. But they argue that because their complaint does not explicitly lay claim to the fees and emoluments of Griffin's office, they lack Article III standing under *Vermont Agency*. ECF No. 23, pp. 7-8. That is specious. Griffin holds his office until December 31, 2022. Plaintiffs concede that their aim is to remove him from office immediately. ECF No. 23,

---

ex rel. Ritchie v. Lockheed Martin Corp., 558 F.3d 1161, 1173 (10th Cir. 2009) (Briscoe, J., dissenting)). *Ritchie* had nothing to do with the question whether a government may assign claims to remedy its sovereign injury, nor did Judge Briscoe's dissent.

p. 7. Thus, by definition, if Plaintiffs are successful, the State of New Mexico recovers all the "fees and emoluments" it would have to remit to Griffin under law between his removal from office and at least December 31. On that ground alone, Plaintiffs assert assignment under the *quo warranto* statute of "the State's financial or proprietary interests." ECF No. 23, p. 7. Moreover, Section 44-3-6 requires Plaintiffs to plead the "name of the person rightfully entitled to [Griffin's] office." NMSA 1978, § 44-3-6. Plaintiffs do not dispute that that person is entitled to the "fees and emoluments" of Griffin's office, paid from the State of New Mexico fisc, in the *quo warranto* proceeding. ECF No. 23, p. 8. But they claim that this does not mean Plaintiffs have been assigned the State's proprietary interests because . . . Section 44-3-6 does not really mean what it says. *Id.* at n. 2 (citing *State ex rel. Anaya v. McBride*, 1975-NMSC-032, ¶¶ 13, 43, 88 N.M. 244, 246, 252). Plaintiffs' citation to *State ex rel. Anaya* is misleading. There, the New Mexico Supreme Court merely held that "where a [official] vacancy has been filled *by appointment*" it will not be possible, and is thus excusable, for a *quo warranto* plaintiff not to name the person rightfully entitled to the office. 88 N.M. at 247 (emphasis added). Here, by contrast, Griffin assumed his office of County Commissioner through not just an election but two elections (including the defeat of a recall vote). Thus, Plaintiffs also claim assignment of the State's proprietary interests.

D. Plaintiffs' "*full* assignment" versus "*partial* assignment" distinction is confused

Plaintiffs claim to identify a standing distinction between "full assignment" of a claim and "partial assignment" in the wake of *Vermont Agency*. ECF No. 239, p. 9. There is no such distinction, which Plaintiffs base on a misreading of a single case. In *Magadia v. Wal-Mart Assocs.*, 999 F.3d 668 (9th Cir. 2021), plaintiff brought a class-action lawsuit against his employer on behalf of other employees for "adequate compensation for missed meal breaks"

under the California Labor Code. The statute permitted an aggrieved employee to recover penalties for CLC violations on behalf of the government *and other employees*. 999 F.3d at 672. The plaintiff didn't suffer a meal-break injury himself. The Ninth Circuit merely held that although the CLC created a type of *qui tam* action similar to the FCA in *Vermont Agency*, the State of California had no way to intervene in the case unlike the federal government in an FCA case. *Id.* at 675. Thus, the assignment in *Magadia* was "full" and not "partial." *Id.* What Plaintiffs fail to grasp: the court of appeals did not purport to identify some full-versus-partial assignment distinction with general application to all standing-through-assignment questions. Instead, the distinction was material with respect to the CLC specifically because the assignment was "full" there in that the plaintiff would be seeking to recover *not for the injury-in-fact of the State but for other employees' injuries. Id.* at 677 ("A complete assignment to this degree. . . undermines the notion that the aggrieved employee is solely stepping into the shoes of the State *rather than [] vindicating the interests of other aggrieved employees*.") (emphasis added).

Here, Plaintiffs claim that because New Mexico made a "full assignment" of its *quo warranto* claim to them, the rule of *Vermont Agency* does not apply. ECF No. 239, p. 9. That is wrong because, unlike in *Magadia* where the full/partial distinction made logical sense, Plaintiffs do not seek relief on behalf of any party other than the State of New Mexico. Thus, Plaintiffs *are* "solely stepping into the shoes of the State. . ." *Magadia*, 999 F.3d at 677. Nor, anyway, are Plaintiffs correct that the State of New Mexico cannot intervene in their *quo warranto* action. That very thing occurred in a much-cited *quo warranto* decision in the New Mexico Supreme Court. *State ex rel. White v. Clevenger*, 69 N.M. 64, 65, 1961-NMSC-109, 1, 364 P.2d 128, 129 (1961) (attorney general intervened to file "amended complaint" in relator's *quo warranto*

action). Plaintiffs plainly enjoy Article III standing under *Vermont Agency* and *Sprint Communs.* Thus, they could have brought their action originally in the D.C. court.

II. Plaintiffs' *quo warranto* action is indubitably related to the pending D.C. case

Plaintiffs spend five pages of briefing in an attempt to argue that their action is not even related to *United States v. Couy Griffin*, 21-cr-92-TNM (D.D.C. 2021). Their arguments are in vain. Although Plaintiffs' complaint exclusively relies on the D.C. case for its factual allegations regarding Griffin's conduct in D.C. on January 6, the D.C. matter has "little bearing on the present case." ECF No. 19, p. 4. This strange reality is so, Plaintiffs say, because the elements of the crimes with which Griffin was charged in D.C. are not identical to the "elements" of "insurrection or rebellion" and the burden of proof is different. *Id.* But Plaintiffs cite no authority holding that for purposes of § 1404(a) transfer, cases are related only where the elements of the offenses involved are *identical*. There is none. Nor would such a rule make sense. "The purpose of the transfer of venue statute is to prevent the waste of time, energy, and money, and to protect litigants, witnesses, and the public against unnecessary inconvenience and expense." *In re Mannatech*, *Inc.*, *Sec. Litig*., 2007 U.S. Dist. LEXIS 105219, at *5 (D.N.M. Jan. 29, 2007). That purpose would be ill-served if a party—such as Plaintiffs have done—could copy and paste allegations from a criminal case into their civil complaint, wait for the criminal case to conclude, and then sue in a different jurisdiction on the ground that certain elements of the violation they allege do not overlap with certain elements of the charges in the first case—never mind the factual allegations, witnesses, and overlapping evidence.

Plaintiffs' *factual allegations of misconduct* entirely overlap with those made in *United States v. Couy Griffin*, 21-cr-92-TNM (D.D.C. 2021). That the D.C. court may have to apply a few different elements to the legal analysis does not somehow wipe out all of the many

efficiencies the court system would reap by having the same court that presided over Griffin's criminal trial and that made factual determinations as to the facts Plaintiffs allege also handle Plaintiffs' case. Nor do Plaintiffs account for the risk of inconsistent factual findings by different federal courts. As to the burden of proof, Plaintiffs mistakenly contend that Griffin somehow bears the burden of proving a negative in their *quo warranto* action: proving that he did *not* engage in an insurrection. This error simply points to still others in Plaintiffs' misbegotten *quo warranto* action: (1) *quo warranto* actions are not designed to test the *illegality of acts* or *misconduct of an officeholder*. *State v. Clevenger*, 69 N.M. 64, 364 P.2d 128 (1961). After all, that would ludicrously permit any private person to bring de facto criminal charges, and of the gravest nature, while skirting the grand jury; and, relatedly, (2) shifting the burden to a defendant to prove he did not commit a felony offense is patently unconstitutional under the Due Process Clause. *E.g.*, *Speiser v. Randall*, 357 U.S. 513, 520 (1958). Plaintiffs cite no reason and no facts that would undermine the efficiency of having the D.C. court handle their case. Thus, the D.C. case is related to theirs.

III. The § 1404(a) factors do not "preclude" transfer

A. Plaintiff's choice of forum it is not determinative

Plaintiffs contend that a plaintiff's choice of forum "should be rarely disturbed." ECF No. 19, p. 8. In fact, where it is the only factor that weighs against transfer, a plaintiff's forum choice is commonly disturbed.[3] That is because a plaintiff's choice "carries less deference [where a] . . .

[3] *HiTex, LLC v. Vorel*, 2021 U.S. Dist. LEXIS 227356, at *17 (D.N.M. Nov. 26, 2021); *Biotronik, Inc. v. Lamorak, Ins. Co.*, 2015 U.S. Dist. LEXIS 74485, at *5 (D.N.M. June 3, 2015); *In re Mannatech, Inc., Sec. Litig.*, 2007 U.S. Dist. LEXIS 105219, at *5 (D.N.M. Jan. 29, 2007) (citing *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964)); *Assoc. Wholesale Grocers, Inc. v. Koch Foods, Inc.*, 2018 U.S. Dist. LEXIS 155877, at *18-19 (D. Kan. Sept. 13, 2018).

similar case against [the] Defendant[]" lies in the transferee forum and where the other § 1404(a) factors favor a transfer. *HiTex*, *LLC*, 2021 U.S. Dist. LEXIS 227356, at *10. That is so here.

B. The convenience of the parties and witnesses, and accessibility of evidence, do not weigh "against" transfer

As Plaintiffs themselves note, "The convenience of witnesses is the most important factor in deciding a motion under § 1404(a)." ECF No. 19, p. 11. Yet Plaintiffs name *one witness alone*: Griffin. ECF No. 19, p. 12. While Griffin appreciates their interest in his convenience, it is surely for Griffin, and not Plaintiffs, to determine which forum is more convenient for Griffin. As to every other relevant witness, D.C. is the more convenient forum. Virtually all of Plaintiffs' factual allegations are sourced from witnesses who reside in D.C. or for whom that forum is more convenient than New Mexico. Those witnesses include: Secret Service Agent Lanelle Hawa, and Capitol Police Officer John Erickson, who offered the bulk of the evidence in the D.C. case. They testified as to what Capitol CCTV depicted Griffin doing on January 6; what that video would have shown others ("insurrectionists") doing; the interactions or lack thereof between Griffin and law enforcement; and the nature of security surrounding the Capitol. Both witnesses are employed in, and reside near, D.C. Plaintiffs suggest that another witness, videographer Matt Struck, would find New Mexico more convenient than the District of Columbia. They have not even inquired with Struck and are mistaken. Thus, Plaintiffs implicitly concede that this "most important factor in deciding a motion under § 1404(a)" favors transfer. As to Plaintiffs' convenience, their motion is notably silent, as they are not witnesses but recruited by a 501(c)(3), itself based in D.C. Plaintiffs contend that "[a]ll of the likely documentary evidence in this case is either located in New Mexico or is digital and freely available nationwide through remote means." ECF No. 19, p. 14. They do not understand the nature of the evidence on which their allegations rest. The documentary evidence here is not

"available nationwide through remote means." Much of it consists of Capitol CCTV and body-worn camera footage obtained from the Capitol Police. Not only is such footage not "available nationwide through remote means," its use is restricted pursuant to special protective orders created in the D.C. federal court for January 6 matters. *E.g.*, *Griffin*, 21-cr-92-TNM, ECF No. 29. If Plaintiffs' action remains in this district, there is no guarantee that they would be able to obtain significant portions of the evidence on which their complaint's allegations unwittingly rest. Plaintiffs do not represent that they have negotiated any agreement with the Capitol or Metro police to provide them with CCTV and body-worn camera footage in this district.

C. There are no "conflicts of law"

If Griffin must be disqualified under the Fourteenth Amendment, Plaintiffs' action may proceed. If not, their case fails. Yet they maintain that their action is still "so bound up with [a] state-created . . . remedy" because "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." ECF No. 19, p. 15. But it does not follow from that perceived fact that the court would need to address *New Mexico law*. It would not, as the most efficient manner of resolving Plaintiffs' claim is to dismiss the action as Section Three of the Fourteenth Amendment no longer has legal force. *See* Amnesty Act of 1872, Pub. L. No. 42-193, 17 Stat. 142. And any court that resolves Plaintiffs' claims will need to address the federal laws at issue in Griffin's criminal case to avoid the absurd contradiction that the same set of facts can simultaneously yield a not-guilty judgment on disorderly conduct—and a finding that Griffin committed one of the most serious federal crimes, insurrection.[4]

[4] Plaintiffs claim that it is improper for Griffin to note which judge handled his D.C. criminal trial. ECF No. 19, p. 16. That is strange. The judicial efficiency factor in forum transfer analysis necessarily asks whether a single judge can more efficiently handle multiple related cases. The

Dated: May 16, 2022

Respectfully submitted,

/s/ Nicholas D. Smith
Nicholas D. Smith (Va. Bar No. 79745)
7 East 20th Street
New York, NY 10003
Phone: (917) 902-3869

Certificate of Service

I hereby certify that on the 16th day of May, 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.

/s/ Nicholas D. Smith
Nicholas D. Smith (Va. Bar No. 79745)
7 East 20th Street
New York, NY 10003
Phone: (917) 902-3869

D.C. Circuit's related-case rules also require transfer to the judge in Griffin's criminal trial. Plaintiffs are not clear as to why pointing to this reality is "improper."