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September 20, 2022

Mr. David J. Smith
Clerk of Court
U.S. Court of Appeals for the Eleventh Circuit
56 Forsyth Street NW
Atlanta, GA 30303

Re: *Greene v. Raffensperger*, No. 22-11299

Dear Mr. Smith:

I write on behalf of Appellant Marjorie Taylor Green in response to Intervenor Appellees' ("**Challengers**") notice of supplemental authority under Rule 28(j). The decision in *State ex rel. White v. Griffin* is not binding on this court, nor is it persuasive authority.

The plaintiffs in *White* were represented by attorneys at four separate law firms and four attorneys at Citizens for Responsibility and Ethics in Washington. Amici Curiae briefs were filed in support of Plaintiffs by various legal luminaries, including Floyd Abrams, Erwin Chemerinsky, and Laurence H. Tribe. In contrast, Defendant Griffin was *pro se*.

First, Challengers assert that the *White* decision is related to Rep. Greene's argument that there is no private cause of action to enforce Section Three. While the *White* Court found that Griffin was disqualified to hold office under Section Three, the opinion never references or analyzes the private cause of action argument—presumably because Griffin never raised it. *See* Motion to Quash. The court's lack of analysis on an argument never raised does not support Challengers' assertion that this case is persuasive authority against that argument.

Next, Challengers allege that the *White* Court rejected "a First Amendment defense that is similar" to Rep. Greene's argument that the Challenge Statute at issue here unconstitutionally burdens her First Amendment right to run for political office. Challengers' comparison is without merit. The *White* Court rejected the following First Amendment claims raised by Griffin: (1) prohibition of the evidentiary use of speech; (2) an "unconstitutional constitutional amendment" theory; (3) Griffin's free exercise defense; and (4) a defense that Griffin's conduct on January 6th was a constitutionally protected protest activity. Opinion, ¶¶ 55-60. Rep. Greene has asserted none of these First Amendment theories or defenses. Instead, Rep. Greene's First Amendment defense has focused on the district court's analysis of the *Anderson/Burdick* balancing test. Appellant's Br., 41-50. The *White* opinion simply does not address the same arguments surrounding the First Amendment as raised here.

For these reasons, I urge this Court to reject the *White* opinion as persuasive authority here.

Sincerely,
THE BOPP LAW FIRM, PC

CC: Counsel of record via CM/ECF
Enclosure

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Docket No.: 22-11299 Greene v. Secretary of State for the State of Georgia, et al.

**UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

**CERTIFICATE OF INTERESTED PERSONS**

**AND CORPORATE DISCLOSURE STATEMENT (CIP)**

Pursuant to FRAP 26.1 and Local Rule 26.1-1,

Greene, Marjorie Taylor

who is Appellant, makes the following disclosure:

1. Is party a publicly held corporation or other publicly held entity? No
2. Does party have any parent corporation? No
3. Is 10% or more of the stock of a party owned by a publicly held corporation or other publicly held entity? No
4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? No
5. Is party a trade association? No
6. Does this case arise out of a bankruptcy proceeding? No
7. Is this a criminal case in which there was an organizational victim? No

Signature: /s/ James Bopp, Jr. Date: 4/26/2022

Counsel for: Marjorie Taylor Greene, Plaintiff-Appellant

## Certificate of Compliance

I hereby certify that the foregoing document complies with the typeface requirements and the type-volume limitations of Federal Rules of Appellate Procedure 28(j) because it contains 338 words (calculated using the word count function of the word processing program used to draft the foregoing) in the body of the letter and used Times New Roman, 14 point font.

/s/ James Bopp, Jr.
James Bopp, Jr.

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

Couy Griffin,
Defendant.

MOTION TO QUASH and DISMISS

Defendant Couy Griffin moves this Honorable Court to Quash Plaintiffs' "Complaint for Quo Warranto Relief" (CQWR) and dismiss this action based on the following:

1. Santa Fe and Los Alamos County residents Marco White, Mark Mitchell, and Leslie Lakind, are private plaintiffs who are suing Defendant Otero County Commissioner Couy Griffin, allegedly in their private relator capacities, under the general New Mexico Quo Warranto Statutes, specifically, NMSA 1978 §44-3-4. Plaintiffs' Complaint fails to state that the Attorney General is even aware of this case. Plaintiffs' Quo Warranto removal proceeding may not be maintained under the facts and law applicable to this case.
2. Private relator Plaintiffs' Quo Warranto suit against Defendant Griffin is barred as a matter of law, as the New Mexico Legislature has enacted a specific, comprehensive, and *exclusive* statutory remedy for removal of elected county commissioners, NMSA 1978 §§10-4-1 through 10-4-29, see;

§10-4-1. **Local officers subject to removal.** (2018)
"*Any officer of a political subdivision of the state elected by the people and any officer appointed to fill out the unexpired term of any such officer may be removed from office on any of the grounds mentioned in and according to the provisions of Sections 10-4-1 through 10-4-29 NMSA 1978.*" (emphasis added)

These statutes are the exclusive, non-recall election method to remove a sitting county commissioner, see;

§10-4-29. [**Exclusive method of removal.**]
"*No officer belonging to the class mentioned in Section 10-4-1 NMSA 1978 can be removed from office in any manner except according to the provisions of this chapter.*" (emphasis added)

3. New Mexico's general Quo Warranto statutes have thus been superseded by NMSA 1978 §§10-4-1 through 10-4-29, when a party sues for removal of a local elected county commissioner, thus; the purely private relators in this case have no standing to sue under Quo Warranto. This Court thus lacks subject-matter jurisdiction to proceed under those general Quo Warranto statutes. See:

Statutory remedy for contesting elections to public office is exclusive, and has superseded quo warranto. *Orchard v. Board of Comm'rs*, 1938-NMSC-011, 42 N.M. 172, 76 P.2d 41

*Lopez v. Kase*, 1999-NMSC-011, ¶6, 126 N.M. 733, 975 P.2d 346; {6} *** Richardson is correct that this Court generally will not grant equitable relief by way of an extraordinary writ when there is an adequate remedy available to the petitioner at law, *** New Mexico law affords at least two statutory alternatives for removal of an elected official from office. See NMSA 1978, §§10-4-1 to 10-4-29 (1909) (providing for removal of local officers); NMSA 1978, §§ 44-3-1 to 44-3-16 (1919) (outlining quo warranto procedure) (emphasis added)

And see:

Misconduct of officer does not of itself amount to forfeiture of the office. An officer rightfully in office can only be removed for misconduct in a proper proceeding. *State ex rel. White v. Clevenger*, 1961-NMSC-109, 69 N.M. 64, 364 P.2d 128.

Also see:

Writ lies if no other statutory provision exists. — Quo warranto was a proper action to bring since there was no provision in the Election Code or other related statutes providing for contests for municipal school board elections. *State v. Rodriguez*, 1958-NMSC-136, 65 N.M. 80, 332 P.2d 1005.

Plaintiffs' Lack Statutory Standing…

4. Private Plaintiffs' CQWR utterly fails to show that the NM Attorney General is even aware of their suit, much less had refused to act; thus, Plaintiffs' CQWR action is specifically prohibited as a matter of law pursuant to NMSA 1978 §44-3-4 and;

*Clark V. Mitchell*, 2016-NMSC-005, ¶8, 363 P.3d 1213; {8} ***A petition for a writ of quo warranto may be brought by a private person when the district attorney refuses to act. See NMSA 1978, § 44-3-4 ("When the attorney general or district attorney refuses to act . . . such action may be brought in the name of the state by a private person on his own complaint.").

*State Ex Rel. White v. Clevenger*, 1961-NMSC-109, ¶3, 69 N.M. 64, 364 P.2d 128; {3} *** "If the attorney general did not have the right or authority to maintain this action, then the question as to whether the acts of the individual defendants, as directors of the religious corporation, constituted grounds for their removal from office is not an issue on this appeal. It follows without saying that unless the attorney general had the right and capacity to maintain the action, the court is without jurisdiction." ***
"{8} Acts of misconduct by an officer, even for which he may be subject to removal in {*68} a proper proceeding, do not necessarily and ipso facto operate as a forfeiture of the office so as to permit quo warranto to test his right to the office."

Also see:

*State Ex Rel. Community Ditches v. Tularosa Community Ditch*, 1914-NMSC-069, ¶17, 19 N.M. 352, 143 P. 207; {17} *** "Even under a statute extending the remedy to 'any person or persons desiring to prosecute the same,' the question of the relator's interest will be deemed decisive as to the exercise of the jurisdiction, and the relief will be granted only in behalf of one whose interests are affected by the matter in controversy." High's Extraordinary Legal Remedies, Sec. 699.
"But the statute of 9th Anne allowed informations at the relation of any person desiring to sue or prosecute them and under that statute the rule was that a private relator must have an interest. Our act, which substantially incorporates the provision of the British statute, has received the same construction. This court has construed the words 'any person or persons desiring to prosecute the same' to mean any person who has an interest to be affected. They do not give a private relator the writ in a case of public right, involving no individual grievance." (emphasis added)

5. Further; lack of statutory standing becomes interwoven with that of subject matter jurisdiction when a statute creates a cause of action and designates who may sue; see:

*Deutsche Bank Nat'l Trust Co. v. Johnston*, 2016-NMSC-013, ¶11, 369 P.3d 1046; {11}
As a general rule, "standing in our courts is not derived from the state constitution, and is not jurisdictional." *ACLU of N.M. v. City of Albuquerque*, 2008-NMSC-045, ¶ 9, 144 N.M.

471, 188 P.3d 1222. However, " '[w]hen a statute creates a cause of action and designates who may sue, the issue of standing becomes interwoven with that of subject matter jurisdiction. Standing then becomes a jurisdictional prerequisite to an action.'

6. NMSA 1978 statutes §§10-4-1 through 29 is the exclusive method of removal for county commissioners, other than a recall election. The general Quo Warranto statutes alleged Plaintiffs' have attempted to sue under simply cannot be stretched to apply to Defendant under the facts of this case.

7. The gravamen of Plaintiffs' CQWR for removal is specifically and its entirety based upon Defendant's alleged violation of his Oath of Office. See: CQWR, par., 9,10, 12, 32, 73, 96-100, and copy of Defendant's Oath of Office, marked Plaintiffs' Exhibit 1.

8. The ancient common-law Quo Warranto Writ based proceedings - now fully statutized in New Mexico - is generally used to remove public officers from office as their remedy, however; New Mexico law is very clear, if there is another statutory remedy for removal available, quo warranto is not available for that purpose. See:

   Misconduct of officer does not of itself amount to forfeiture of the office. An officer rightfully in office can only be removed for misconduct in a proper proceeding. *State ex rel. White v. Clevenger*, 1961-NMSC-109, 69 N.M. 64, 364 P.2d 128.

   Statutory remedy for contesting elections to public office is exclusive, and has superseded quo warranto. *Orchard v. Board of Comm'rs*, 1938-NMSC-011, 42 N.M. 172, 76 P.2d 41.

   If other election provision applies, quo warranto not available. — Quo warranto is no longer available to an unsuccessful candidate if the contest procedure established by the Election Code applies to the public office in question. *State v. Rodriguez*, 1958-NMSC-136, 65 N.M. 80, 332 P.2d 1005.

9. The State of New Mexico has **two** very specific, comprehensive, and exclusive statutory procedures for removing a local elected official from his office. The **first one** of these statutory procedures involve recall elections; See: New Mexico Constitution, Article X Sec.

9. [**Recall of elected county officials.**] This statutory/constitutional process has not been invoked by these specific Plaintiffs and thus has no bearing in this case.

10. The second procedure to remove a local, elected county commissioner is through a specific, comprehensive, and exclusive statutory system; NMSA 1978 §§10-4-1 to 10-4-29 specifically applies to elected county commissioners…

11. Private relator Plaintiffs, who are not residents in Defendant's county, have attempted to invoke the jurisdiction of this Court under the general statutory removal scheme, NMSA 1978 §§44-3-1 through 16 (New Mexico's Quo Warranto Statutes), in their misguided attempt to have the district Court order removal of Defendant from his county commission office for him allegedly violating his oath of office. This Motion does not even attempt to show this Court that Plaintiffs utterly fail on multiple other levels as to injury in fact, causation, and redressability…

12. New Mexico caselaw shows the difference between a State official and a county commissioner, see; State Ex Rel. Ulrick v. Sanchez, 1926-NMSC-060, ¶52, 32 N.M. 265, 255 P. 1077; {52} *** "*county commissioners are in no sense "officers of the commonwealth," but are county officers.*"

13. Private relator Plaintiffs in this case, who live in other counties are attempting to litigate this case and clearly lack standing under well-known guidelines firmly established in New Mexico caselaw; see generally:

> *Deutsche Bank Nat'l Trust Co. v. Johnston*, 2016-NMSC-013, ¶13, 369 P.3d 1046; {13} *** While New Mexico courts are not subject to the jurisdictional limitations imposed by Article III, Section 2 of the United States Constitution, the standing jurisprudence in our courts has "long been guided by the traditional federal standing analysis." ACLU of N.M., 2008-NMSC-045, ¶ 10. "Thus, at least as a matter of judicial policy if not of jurisdictional necessity, our courts have generally required that a litigant demonstrate injury in fact, causation, and redressability to invoke the court's authority to decide the merits of a case." Id.; see also *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 733 (2008) ("To qualify for

standing, a claimant must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling.").

14. Plaintiffs' CQWR shows that Defendant was a duly and lawfully elected Otero County Commissioner. Plaintiffs' Complaint further admits that Defendant has been a duly elected Otero County Commissioner since December 28th 2018, and has remained Commissioner (see CQWR, par. 10) on the date Plaintiffs filed their Complaint, March 21st 2022.

15. If no other New Mexico law applies, NMSA 1978 §§44-3-1 *et seq.*, New Mexico's Quo Warranto Statutes, generally apply to remove elected officials, **however;**

16. As set out above, Plaintiffs' sole remedy is through NMSA 1978, §§10-4-1 through 29.

17. Statutory "Standing" is jurisdictional in nature if it is not based in the common law; see:

*Bank of New York v. Romero*, 2014-NMSC-007, ¶15, 320 P.3d 1; "{15} We have recognized that "the lack of [standing] is a potential jurisdictional defect which 'may not be waived and may be raised at any stage of the proceedings, even sua sponte by the appellate court." (pin-point citations omitted)

18. Out of county Plaintiffs suing an elected county official in a different county for acts done which are entirely protected by the First Amendment and which acts are distinctly separate from county duties relating to a county commission office directly implicates the Due Process provisions of both the Constitution of New Mexico and the 14th Amendment of the United States Constitution.

19. Due to the nature of this motion, all opposing counsel of record are presumed to oppose.

WHEREFORE, Defendant requests this Honorable Court to; issue an Order Quashing private relator Plaintiffs' CQWR and dismissing this action on the grounds listed herein and; grant Defendant all costs and fees he is entitled to, including attorney's fees as appropriate and; grant any other or further relief deemed necessary by the Court.

Respectfully submitted by _____

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# Certificate of Service

In accordance with Rules of Practice 150 and 151, 17 C.F.R. 201.150 &.151, I certify that a copy of a Motion to Quash and Dismiss for Case Number D-101-CV-2022-00473 was served on the following on July 29, 2022, via e-mail:

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