State of New Mexico
County of Bernalillo
Second Judicial District Court

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| STATE OF NEW MEXICO ex rel. RAÚL TORREZ, District Attorney, Second Judicial District,<br><br>Plaintiff,<br><br>v.<br><br>NEW MEXICO CIVIL GUARD et al.,<br><br>Defendants. | No. D-202-CV-2020-04051 |

**PLAINTIFF'S OPPOSITION TO DEFENDANTS'**
**MOTION FOR JUDGMENT ON THE PLEADINGS**

## INTRODUCTION

At a time when the dangers of private military units and pseudo law-enforcement groups could not be clearer, Defendants demand that the Court short-circuit the State's effort to address that danger by granting them judgment on the pleadings. Their Motion, however, relies entirely on obscuring the nature of the State's claims and the law governing them. The State alleges that Defendant New Mexico Civil Guard (NMCG) and its members and associates have engaged in a course of conduct that violates New Mexico laws that prohibit operating as a private military unit and falsely assuming peace-officer functions. Defendants ignore a wealth of allegations supporting those claims and instead argue that the State has alleged only that Defendants identify themselves as members of New Mexico's unorganized militia (i.e., the contingent of able-bodied New Mexico citizens that is eligible to be called up by the Governor for service in the National Guard or the State Defense Force) and that a subset of them executed a citizen's arrest of Steven Ray Baca after he opened fire at a protest in June 2020. The extensive allegations in the Complaint rebut Defendants' misleading account.

Defendants also contend that all of the conduct alleged in the Complaint is permitted by New Mexico's laws regulating the state's military forces and by the citizen's arrest defense. This dangerous and warped view of the law, if embraced by this Court, would authorize groups of private citizens to function as private military units or law-enforcement agencies independent from the scores of legal safeguards that apply to such entities. This Court should reject Defendants' invitation to give its imprimatur to the vigilantism that is endemic to Defendants' conduct.

Grasping for constitutional defenses for their actions, Defendants hyperbolically distort the remedy that the State seeks. The State does not seek Defendants' "disarmament" or to prohibit them from engaging in First Amendment activity. Rather, the State requests declaratory and

injunctive relief prohibiting Defendants only from (1) organizing and operating in public as a military unit independent of New Mexico's civil authority; and (2) falsely assuming peace-officer functions by using or projecting the ability to use organized force in response to perceived threats at protests, demonstrations, or public gatherings. The Constitution does not preclude such relief.

Finally, Defendants make arguments that are irreconcilable with Rule 1-012(C) NMRA and New Mexico's well-settled notice-pleading standard. The Complaint plainly puts Defendants on notice of the claims against them, and those claims are fully supported by the law. But, contrary to New Mexico's liberal pleading standard, Defendants seek dismissal based on their insistence of what the facts ultimately will show. Defendants' Motion therefore must fail.

## BACKGROUND

To protect public safety and preserve order, New Mexico law establishes a comprehensive scheme regulating all peacekeeping activity within the state, including by the militia and law enforcement. *See* Compl. ¶¶ 29–37. Military activity within the state may take place only under the control of government officials. In particular, the New Mexico Constitution requires that the state's "military shall always be in strict subordination to the civil power." N.M. Const. art. II, § 9. All military personnel are subordinate to the Governor, who is "the commander in chief of the military forces." N.M. Const. art. V, § 4; *see* N.M. Const. art. XVIII, § 1; NMSA 1978, § 20-1-4(A); *see also* NMSA 1978, § 20-3-1–2. New Mexico armed forces also must conform to state-law requirements regulating all aspects of military training, dress, and conduct. *See* NMSA 1978, §§ 20-2-7(A); 20-5-6, -7, -9, -10.

Likewise, New Mexico law carefully circumscribes who may perform law-enforcement functions. Only peace officers are "vested by law with a duty to maintain public order or to make arrests for crime." *Id.* § 30-1-12(C). Except when authorized by the Governor during "times of

riot or unusual disturbance," "[n]o person shall assume or exercise the functions, powers, duties and privileges incident and belonging to" peace officers "without first having received an appointment." *Id.* § 29-1-9. It is a crime to "exercis[e] or attempt[] to exercise the functions of a peace officer" without due authority. *Id.* § 30-27-2.1(A)(1).

As the State's Complaint details, NMCG is a self-styled private militia group operating in New Mexico in violation of these laws. Compl. ¶¶ 38–67. The course of conduct in which NMCG and its members and associates have engaged paints a stark picture of an unlawful private paramilitary group performing unauthorized peacekeeping functions. NMCG holds itself out and is organized as a military organization, comprising several "companies" of members of varying ranks and led by a "colonel." *Id.* ¶¶ 14–21, 39, 41. Defendants have engaged in "musters" "to summon, organize, and train the Militia of NM" and various other "training" sessions where members learn military tactics and techniques to deploy at public demonstrations. *Id.* ¶¶ 38–44. NMCG's members wear military-style uniforms and carry military-style weapons, including assault rifles, rendering them virtually indistinguishable from authorized military forces or law enforcement. *Id.* ¶¶ 45–47. NMCG has also made clear that its primary purpose is to perform peacekeeping functions, including "respon[ding] to emergency and dangerous situations, including [n]atural disaster, humanitarian crisis, civil disturbances, and civil defen[s]e." *Id.* ¶ 49.

NMCG's unlawful military and law-enforcement conduct was on full display on June 15, 2020, when heavily armed NMCG members appeared at a protest at the statue of Juan de Oñate in Albuquerque. NMCG members, dressed in camouflage fatigues, helmets, and other military-style gear, and carrying assault rifles, took it upon themselves to encircle and "protect" the statue. *Id.* ¶¶ 3, 63–64. As people started to climb the statue, NMCG members began yelling, pushing, and physically restraining the protesters. *Id.* ¶¶ 63–64. In the tense atmosphere—exacerbated by

NMCG's presence—Steven Ray Baca battered several female protesters before he shot and injured another protester. *Id.* ¶¶ 3, 65. After the shooting, NMCG members surrounded and "detained" Baca with their weapons drawn and "formed a perimeter around him." *Id.* ¶ 66. Shortly thereafter, police arrived, dressed in riot gear virtually indistinguishable from the NMCG's uniform. *Id.*

And as the Complaint makes clear, the State did not bring this case based solely on the June 15 debacle. Over the summer, NMCG engaged in similar vigilante military and peacekeeping activity at other demonstrations, deploying at several racial-justice protests. *Id.* ¶¶ 50–55. To the extent that the pendency of this case has deterred further private paramilitary violence, that says nothing about what NMCG would have done over the months the case has been litigated if left to its own devices. Unless enjoined, NMCG's activity poses on ongoing threat of violence and danger to the public. *Id.*

**LEGAL STANDARD**

Motions for judgment on the pleadings under Rule 1-012(C) NMRA are reviewed "according to the same standard as motions for failure to state a claim under Rule 1-012(B)(6) NMRA." *ConocoPhilips Co. v. Lyons*, 2013-NMSC-009, ¶ 58, 299 P.3d 844 (internal quotation marks omitted). Under that standard, the court must "accept as true all facts pleaded in the complaint in order to determine whether the plaintiffs may prevail under any state of the facts alleged." *Mendoza v. Tamaya Enters., Inc.*, 2011-NMSC-030, ¶ 5, 150 N.M. 258 (internal quotation marks omitted). In addition, the "[c]ourt is required to make inferences in favor of the sufficiency of the complaint." *Milliron v. County of San Juan*, 2016-NMCA-096, ¶ 5, 384 P.3d 1089. "New Mexico is a notice-pleading state, requiring only that the plaintiff allege facts sufficient to put the defendant on notice of his claims." *Madrid v. Vill. of Chama*, 2012-NMCA-071, ¶ 17, 283 P.3d 871 (citing Rule 1-008(A) NMRA). An even more lenient standard therefore

applies to motions for judgment on the pleadings under New Mexico's Rules than under the Federal Rules of Civil Procedure. *Id.* ¶ 1. In particular, Defendants' motion may test only "the law of the claim, not the facts that support it." *Id.* ¶ 18 (quoting *Envtl. Improvement Div. v. Aguayo,* 1983-NMSC-027, ¶ 10, 99 N.M. 497). Accordingly, "granting a motion [for judgment on the pleadings] is an extreme remedy that is infrequently used." *Town of Mesilla v. City of Las Cruces*, 1995-NMCA-058, ¶ 4, 120 N.M. 69.

## ARGUMENT

The State has more than adequately stated claims under New Mexico's Constitution, public-nuisance statute, and Declaratory Judgment Act. And the State's requested relief—a declaration and injunction prohibiting Defendants from engaging in unauthorized paramilitary and law-enforcement activity—is consistent with the Constitution, necessary to prevent further injury to the State, and emphatically in the public's interest. There is no merit to Defendants' contention that this case should be dismissed for failure to satisfy the permanent injunction factors.

### I. The Complaint States Claims for Which Relief Can Be Granted

#### A. The State Has Adequately Alleged a Claim under New Mexico's Strict Subordination Clause

The State alleges in Count I that Defendants' conduct violates New Mexico's Strict Subordination Clause and related constitutional provisions that collectively ensure that all military forces in the state are accountable to and regulated by the civil authority. N.M. Const. art. II, § 9 ("The military shall always be in strict subordination to the civil power[.]"); *id.* art. V, § 4 ("[The Governor] shall be commander in chief of the military forces of the state, except when they are called into the service of the United States. He shall have power to call out the militia to preserve the public peace, execute the laws, suppress insurrection and repel invasion."); *id.* art. XVIII, § 1 ("The organized militia shall be called the 'national guard of New Mexico,' of which the governor

shall be the commander in chief."); *see also* NMSA 1978, § 20-2-1(C) (establishing the New Mexico State Defense Force as an "exclusive[] . . . state entity" that is "a component of the organized militia," the ranks of which are "filled upon order of the governor from the unorganized militia"). These provisions establish that the only lawful military units in New Mexico are those that are under the command of the Governor—the National Guard and the State Defense Force. Because the totality of Defendants' conduct renders NMCG a private military unit outside of the Governor's control, the group breaches these constitutional provisions and threatens public safety.

Count I seeks relief based on New Mexico's Strict Subordination Clause and related constitutional provisions; thus, the key legal question is whether those provisions are "self-executing." Defendants fail to even identify the doctrinal framework that governs that question. A constitutional provision is self-executing if "it requires no legislation to make it effective." *State ex rel. Delgado v. Romero*, 1912-NMSC-010, ¶¶ 10–11, 124 P. 649, 651 (finding "clearly self-executing" Article X, Section 1 of the New Mexico Constitution, which prohibits county officers from receiving "any fees or emoluments other than the annual salary provided by law"). "The mere fact that legislation might supplement and add to or prescribe a penalty for the violation of a self-executing provision does not render such provision ineffective in the absence of such legislation." *Id.*; *see also State v. Perrault*, 1929-NMSC-099, ¶ 11, 34 N.M. 438 (constitutional provision allowing legislation to be repealed by referendum was self-executing because "[a]though the Legislature might improve it, we cannot hold that anything more is necessary").

No legislative action is necessary to make New Mexico's Strict Subordination Clause effective. That clause's command that the state's military forces "shall be in strict subordination to the civil power" clearly prohibits groups of private citizens from asserting authority over others by engaging in the coordinated use of force—or projecting a willingness to do so—at public events.

N.M. Const. art. II, § 9; *see also Romero*, 1912-NMSC-010, ¶ 10 ("[T]he general rule is that negative and prohibitory provisions of a Constitution are self-executing."). Likewise, other constitutional provisions designating the Governor as the commander-in-chief of the state's military forces establish the unlawfulness of private military units like NMCG that are unaccountable to the Governor. N.M. Const. art. V, § 4; *id.* art. XVIII, § 1. In a similar case, a Virginia court found that state's Strict Subordination Clause to be self-executing where plaintiffs sought injunctive relief against private militias and other participants in the deadly 2017 Unite the Right rally. *City of Charlottesville v. Pa. Light Foot Militia*, No. CL 17-560, 2018 WL 4698657, at *4 (Va. Cir. Ct. July 7, 2018) ("[U]nder this constitutional provision, no private army or militia would have any justified existence or authority apart from the federal, state, or local authorities.").

Defendants attempt to distinguish *Pennsylvania Light Foot Militia* on two bases, neither of which is availing. First, Defendants argue that New Mexico's Strict Subordination Clause differs from Virginia's in some unspecified way. Defs.' MJP 9. But the two provisions are virtually identical. *Compare* N.M. Const. art. II, § 9 ("The military shall always be in strict subordination to the civil power[.]"), *with* Va. Const. art. I, § 13 ("[I]n all cases the military should be under strict subordination to, and governed by, the civil power."). The provisions' slight distinctions in wording and syntax make no substantive difference. Second, Defendants contend that whereas New Mexico has enacted "many statutes and regulations" governing the state's military forces, Virginia has not. Defs.' MJP 9 (citing NMSA 1978, § 9-9-1 *et seq.*; *Id.* ch. 20). That is demonstrably false. *See* Va. Code Ann. tit. 44, ch. 1 ("Military Laws of Virginia"). As in New Mexico, Virginia's Strict Subordination Clause works hand-in-glove with statutes that regulate the state's military forces: The latter ensure discipline and accountability within the military's ranks, while the former prohibits private military units from operating outside those strictures.

Relatedly, Defendants argue that because New Mexico has adopted statutes that meticulously regulate the state's military forces but that do not explicitly prohibit Defendants' conduct, New Mexico's Strict Subordination Clause provides "no independent constitutional basis" for the relief the State seeks. Defs.' MJP 9–10. But that observation cuts the other way. The finely reticulated statutory framework that applies to New Mexico's military forces illustrates what military units look like when they are in "strict subordination to the civil power." N.M. Const. art. II, § 9. As the Complaint sets forth, New Mexico law provides a clear chain of command for the state's military forces, Compl. ¶ 33 (citing NMSA 1978, §§ 20-1-4, -3-1, -3-2); specifies attire, equipment, training, and discipline for those forces, *id.* ¶ 34 (citing NMSA 1978, §§ 20-2-7, -5-6, -7, -9, -10); and enumerates limited circumstances when the Governor can order the state's military forces into active service, *id.* ¶ 32 (citing NMSA 1978, § 20-2-3). If New Mexico's Strict Subordination Clause were not self-executing, those regulations would be superfluous because private citizens could circumvent those safeguards by operating independently from New Mexico's military forces.[1]

Finally, Defendants argue that even if the Strict Subordination Clause is self-executing, the Complaint does not state a claim under that provision because the State alleges only that Defendants describe themselves as members of the "unorganized militia," which is a "statement of fact" and not "an enjoinable offense."[2] Defs.' MJP 7–8. To the contrary, the Complaint is clear

[1] As Defendants correctly note, one provision of New Mexico's Military Code does apply to the public at large—the criminal prohibition against "wearing a military uniform or facsimile thereof with intent to impersonate a person with military authority." Defs.' MJP 8 (quoting NMSA 1978, § 20-11-5). But by providing a criminal penalty for one type of private conduct that undermines civil control over the military, the Legislature could not have meant to sanction all other freelancing by private military groups like NMCG. *Cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (legislatures "do[] not . . . hide elephants in mouseholes").

[2] Among other indicia of unlawful paramilitary activity, the Complaint alleges that Defendants attempt to lend their activities an air of legitimacy by invoking in their recruitment materials the

that the State seeks an injunction prohibiting Defendants from "organiz[ing] [themselves] as a 'military' unit and exercis[ing] peacekeeping functions." Compl. ¶ 75. And a wealth of allegations demonstrate that Defendants have engaged in such unlawful conduct. *See, e.g.*, *id.* ¶ 43 & n.28 (practicing combat formations and crowd-control techniques at trainings for deployment at future public events); *id.* ¶ 43 (issuing a "standing order" instructing NMCG members to read a Special Forces Handbook to prepare for field-training exercises); *id.* ¶ 44 (sharing instructional videos on topics such as "combat movement," "urban warfare," and "ambushing"); *id.* ¶ 46 (instructing NMCG members to possess a firearm, preferably a rifle, which is "more suited to Militia purposes" than alternatives, and other military-type gear); *id.* ¶¶ 50–51 (noting public gatherings other than the Oñate protest to which NMCG has deployed for unlawful peacekeeping purposes and planned future deployments); *id.* ¶ 53 (describing NMCG members' beliefs about their authority to use lethal force).[3]

Accordingly, the State has adequately alleged a claim under the Strict Subordination Clause (Count I) and for a declaration that Defendants have violated the Clause (Count III).

### B. The State Has Adequately Alleged that Defendants Falsely Assume Peace-Officer Functions

Relevant to both the State's public-nuisance claim (Count II) and its claim for declaratory relief (Count III), the totality of Defendants' alleged conduct shows that they falsely assume peace-officer functions in violation of NMSA 1978, Section 30-27-2.1. That statute criminalizes

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statutory definition of the "unorganized militia." *See* Compl. ¶ 48. Because only the Governor has the authority to activate members of the unorganized militia, NMSA 1978, § 20-2-1(C), -2(C), Defendants can be enjoined under the Strict Subordination Clause from self-activating.

[3] Defendants raise the specter that an injunction in this case might threaten groups like the Knights of Columbus and the Salvation Army, whose leaders have military-style ranks. Defs.' MJP 8. But, to the State's knowledge, those groups do not attempt to perform unsanctioned and unregulated peacekeeping functions. They are quite secure from Defendants' parade of horribles.

"[i]mpersonat[ing] a peace officer," which consists of either (1) "without due authority exercising or attempting to exercise the functions of a peace officer" (false assumption) or (2) "pretending to be a peace officer with the intent to deceive another person" (false impersonation). *Id.* Defendants correctly note that the Complaint proceeds under a false-assumption theory, but they dispute that any of Defendants' alleged conduct overlaps with functions reserved to peace officers. Defs.' MJP 10. In addition, Defendants argue that they possess "due authority" under New Mexico law to engage in all of the conduct alleged in the Complaint. *Id.* (quoting NMSA 1978, § 30-27-2.1(A)(1)). They are wrong on both counts.[4]

***First***, Defendants argue that the State defines the functions of a peace officer at an impermissibly "high level of generality" by describing those functions as including "'maintain[ing] public order.'" *Id.* at 11 (quoting Compl. ¶ 29). Notably, although Defendants reject that definition of a peace officer's functions, they put forward no alternative. The State's definition of a peace officer's functions is drawn directly from the false-assumption statute.[5] NMSA 1978, § 30-27-2.1(C); *accord id.* § 30-1-12(C). Similarly, a statute that authorizes the appointment of "peace officers" describes their function as "preserv[ing] the public peace and . . .

[4] In addition, Defendants argue that the State does not adequately allege that any of the individual Defendants violated Section 30-27-2.1. Defs.' MJP 12. On the contrary, the Complaint specifically alleges that Defendants Bay, Burks, Espinosa, Fitzgerald, Rice, and Spangler unlawfully exercised peace-officer functions on June 15, 2020, by deploying to the Oñate protest to provide coordinated, armed "protection" to persons and property. Compl. ¶¶ 3, 15–16, 22, 24, 25, 28. As for the other individual Defendants, the Complaint alleges that they all are members of or associate with NMCG. *Id.* ¶¶ 17–19, 23, 26–27. No logical leap is required to conclude that members or associates of a group with the professed purpose of exercising peace-officer functions in fact exercise those functions. *See Milliron*, 2016-NMCA-096, ¶ 5 ("Th[e] [c]ourt is required to make inferences in favor of the sufficiency of the complaint."). And further elaboration at the pleading stage certainly is not necessary. *Madrid*, 2012-NMCA- 071, ¶¶ 17–18.

[5] Defendants attempt to draw a distinction between the terms "function" and "duty," Defs.' MJP 11, but the statute itself uses those terms interchangeably, *see* NMSA 1978, § 30-27-2.1, and Defendants identify no legally salient difference between them.

prevent[ing] and quell[ing] public disturbances." *Id.* § 29-1-9. Defendants purport to exercise those very functions but *without* appointment by any lawful authority.[6]

Indeed, NMCG has explained that it exists for the purpose of unlawfully assuming peacekeeping functions. As the group's Facebook page stated before its removal after this litigation began, NMCG's mission is to "respon[d] to emergency and dangerous situations, including [n]atural disaster, humanitarian crisis, civil disturbances, and civil defen[s]e." Compl. ¶ 49. In keeping with that mission, NMCG and its members have broadcasted the group's plans to patrol city streets to prevent feared looting and property damage, *id.* ¶ 50.a, .b; to keep groups of ideologically opposed protesters separated from one another, *id.* ¶ 50.d; and to quell supposed riots with equipment such as batons and pepper spray typically used by law enforcement, *id.* As Defendant Spangler put it, NMCG is an "auxiliary force" to law enforcement. *Id.* ¶ 53.

Defendants' actions bear out their mission and plans. In discussing the events of the June 15, 2020, Oñate protest, Defendants linger on the actions that they took after Steven Ray Baca opened fire. Defs.' MJP 13–14. Defendants' selective focus on their actions after the shooting obscures the full extent of their conduct that day. Before the shooting, Defendants coordinated with each other to guard the Oñate statue. Compl. ¶ 63. They were dressed in camouflage fatigues, helmets, and other military-style gear, and several of them carried assault rifles. *Id.* ¶ 64. Defendants attempted to stop protesters from damaging the statue by yelling at, pushing, and physically restraining them. *Id.* Those are actions that peace officers would be empowered to take

[6] To the State's knowledge, the only case interpreting Section 30-27-2.1 is *State v. Ramos-Arenas*, 2012-NMCA-117, 290 P.3d 733, which Defendants argue supports their narrow interpretation of the statute, Defs.' MJP 11–12. In that case, the defendant was convicted under Section 30-27-2.1(A)(2) on a false-*impersonation* theory, and the only relevant question presented on appeal was whether impersonation of federal officials falls within the statute. *Ramos-Arenas*, 2012-NMCA-117, ¶¶ 2, 7. The case therefore offers little edification on which "functions of a peace officer" are relevant to the false-*assumption* component of Section 30-27-2.1.

if necessary and reasonable to "maintain public order," NMSA 1978, §§ 30-1-12(C), 27-2.1(C), "preserve the public peace," and "prevent and quell" the "public disturbance[]" that occurred at the Oñate protest, *id.* § 29-1-9. And because the Oñate incident was the logical escalation of a course of conduct that demonstrated Defendants' intention to repeatedly engage in unlawful peacekeeping activity, more of that conduct likely would have occurred but for this lawsuit and likely will continue if Defendants' warped view of the law is vindicated.

***Second***, by focusing on individual aspects of Defendants' conduct in isolation rather than the conduct in its totality, Defendants argue that they had "due authority" to engage in all of their alleged activity. Defs.' MJP 11–14. Most of this argument stems from Defendants' fundamental misunderstanding of the citizen's arrest defense, which they argue gives them the authority to perform peacekeeping functions.[7] *Id.* at 11. A citizen's arrest defense is available where:

> a defendant . . . produce[s] evidence showing facts and circumstances within the defendant's personal knowledge (1) that would induce an objectively-reasonable person to believe (2) that a felony had been or was being committed (or a breach of the peace was being committed in his presence); (3) that the defendant acted in good faith based upon that belief and, if raised, (4) that the defendant acted with reasonable force under the circumstances.

*State v. Johnson*, 1996-NMSC-075, ¶ 18, 122 N.M. 696. Defendants distort this limited defense, which is available only in exigent circumstances, by presenting it as an affirmative license for groups of private citizens to ferret out and deter crime by asserting authority over others through coordinated shows of armed force.

This interpretation is belied by case law that carefully circumscribes the citizen's arrest defense specifically to prevent the sort of lawless activity in which Defendants engage. In

[7] Defendants also argue that their conduct does not violate Section 30-27-2.1 because they are legally permitted to carry firearms and to wear camouflage. Defs.' MJP 12. That is no more persuasive than arguing that attempted methamphetamine production is lawful because there is no crime against cooking or possessing Sudafed.

*Johnson*, the New Mexico Supreme Court held that the objective-reasonableness and good-faith elements of the defense are necessary to prevent "vigilantism," which the Court defined as "unreasonable self-help action by citizens that tends to disrupt the administration of the criminal justice system." *Id.* And in *State v. Emmons*, 2007-NMCA-082, 141 N.M. 875, the New Mexico Court of Appeals noted that citizen's arrests for breaches of the peace are disfavored because of "concern that such an expansion of citizen power might likely lead to more breaches of the peace and encourage vigilantism." *Id.* ¶ 15; *see also Inc. County of Los Alamos v. Johnson*, 1989-NMSC-045, ¶ 14, 108 N.M. 633 (Sosa, J. dissenting)). To further ensure that the citizen's arrest defense does not give rise to "pure self-help," it is available only for actions tailored to "holding the offender for the authorities" so as to "facilitate lawful process." *Emmons*, 2007-NMCA-082, ¶ 19.

New Mexico's statutes that pervasively regulate police officers and private security guards also preclude Defendants' interpretation of the citizen's arrest defense. The Law Enforcement Training Act requires as a condition for certification that police officers be trained on topics such as responding to domestic- and child-abuse incidents, NMSA 1978, §§ 29-7-4.1, -4.2, interacting with people suffering from mental illness or developmental disabilities, *id.* § 29-7-7.5, and ensuring the safety of children after a parent or guardian is arrested, *id.* § 29-7-7.3. The statute also provides for the revocation of law-enforcement certification for dishonesty, fraud, or the commission of certain crimes. *Id.* §§ 29-7-13, -15.

Similarly, the Private Investigations Act requires private security guards to be licensed.[8] *Id.* § 61-27B-3. A background check is a prerequisite to obtaining a security-guard license, *id.*

[8] According to Defendants, the State's interpretation of Section 30-27-2.1 would criminalize being a private investigator or security guard. Defs.' MJP 12. Unlike Defendants, however, licensed private investigators and security guards possess "due authority" to perform some functions that overlap with those of a peace officer. Their authorized activity therefore does not run afoul of

§ 61-27B-34, and licenses are not available to individuals who have been convicted of certain crimes, *id.* §§ 61-27B-10(A)(4), -16(B)(4). Training and an examination must be completed before an individual is licensed as a security guard, *id.* §§ 61-27B-10(A)(3), -16(B)(3), -16(B)(5), -17(B)(4), -18(B)(5). Violation of any of the Act's requirements is a crime. *Id.* § 61-27B-32(C).

All of the safeguards found in the Law Enforcement Training Act and the Private Investigations Act would be toothless if the citizen's arrest defense permitted private citizens to effectively operate as police officers or private security guards without complying with any of the aforementioned provisions. Defendants therefore lack "due authority" to engage in peacekeeping functions. Accordingly, this Court should not dismiss Counts II or III for failure to allege that Defendants falsely assume peace-officer functions in violation of Section 30-27-2.1.

**C. The State Has Adequately Alleged a Public Nuisance Claim**

Count II of the Complaint alleges that Defendants have engaged in, and will continue to engage in, conduct that amounts to a public nuisance. Under New Mexico law:

> A public nuisance consists of knowingly creating, performing or maintaining anything affecting any number of citizens without lawful authority which is either:
>
> A. injurious to the public health, safety, morals or welfare; or
>
> B. interferes with the exercise and enjoyment of public rights, including the right to use public property.

NMSA 1978, § 30-8-1.[9] Despite Defendants' arguments to the contrary, Defs.' MJP 14–17, the Complaint adequately alleges that Defendants' conduct amounts to a public nuisance because their

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Section 30-27-2.1. Even so, security guards possess no arrest power beyond that conferred by the citizen's arrest defense. *Santiago v. State*, 2009-NMSC-045, ¶ 35, 147 N.M. 76.

[9] Defendants argue that DA Torrez lacks standing to bring a public-nuisance claim against Defendants Petty, Vera, Harris, Lomas, Rose, or Gillespie (the latter two of whom are not party to

operation as a military unit outside of the Governor's control and their false assumption of peace-officer duties inherently endanger public safety, Compl. ¶ 81.

Numerous courts have recognized the inherent danger posed by unlawful paramilitary groups like NMCG. *E.g.*, *Presser v. Illinois*, 116 U.S. 252, 267–68 (1886) (holding that "control and regulat[ion]" by state governments of "the organization, drilling, and parading of military bodies and associations" is "necessary to the public peace, safety, and good order"); *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*, 543 F. Supp. 198, 218 (S.D. Tex. 1982) ("Military organizations are dangerous wherever they exist, because of their interference with the functioning of a democratic society and because of their inconsistency with the State's needs in operating its militia."); *Pa. Light Foot Militia*, 2018 WL 4698657, at *10 (the presence of "organized, armed, uniformed, but unofficial military-like groups . . . constitutes a danger to the public"); *Commonwealth v. Murphy*, 44 N.E. 138 (Mass. 1896) (unlawful paramilitary groups "affect[] the public security, quiet, and good order"); *Dunne v. People*, 94 Ill. 120, 141 (1879) (private military units "endanger the public peace" and "public security").

Further establishing the inherent danger posed by Defendants' conduct, their activities violate NMSA 1978, Section 30-27-2.1's criminal prohibition against the false assumption of peace-officer functions. *See supra* at 11–12. Defendants resist that inference by arguing that the violation of a criminal statute does not necessarily constitute a public nuisance. Defs.' MJP 15.

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Defendants' Motion) because the Complaint does not allege that they engaged in any tortious conduct in Bernalillo County. Defs.' MJP 17. A "public officer" has standing to bring a public-nuisance claim "in the district court of the county where the public nuisance exists, against any person, corporation or *association of persons* who shall create, perform or maintain a public nuisance." NMSA 1978, § 30-8-8(B) (emphasis added). By operating in Bernalillo County, Defendant NMCG has created a public nuisance there. All of the individual Defendants are an "association of persons" who have contributed to "creat[ing]" and "maintain[ing]" that nuisance by participating in NMCG's activities. DA Torrez therefore has standing to bring a public-nuisance claim against the aforementioned Defendants in this Court.

True enough, but violation of a statute enacted for the specific purpose of ensuring public safety does constitute a nuisance per se, i.e., one that is "always a nuisance" irrespective of "its circumstances, location, or surroundings." *Espinosa v. Roswell Tower, Inc.*, 1996-NMCA-006, ¶¶ 10, 12, 121 N.M. 306 (holding that violation of asbestos regulations is a nuisance per se); *Town of Gallup v. Constant*, 1932-NMSC-036, ¶¶ 10, 17, 36 N.M. 211 (holding that violation of a fire ordinance, which was "designed to promote the public safety itself," constituted a public nuisance even though the ordinance did not so state "in express terms"). As Defendants acknowledge, the purpose of Section 30-27-2.1 "is to protect the public from being harmed" from the false-assumption of peace-officer duties. Defs.' MJP 11 (quoting *Ramos-Arenas*, 2012-NMCA-117, ¶ 13). This public-safety purpose distinguishes Section 30-27-2.1 from the laws discussed in the cases cited by Defendants that were not nuisances per se. *See City of Sunland Park v. Harris News, Inc.*, 2005-NMCA-128, ¶ 46 138 N.M. 588 (zoning ordinance prohibiting an adult bookstore in its present location); *State v. Davis*, 1958-NMSC-138, ¶¶ 2, 11, 65 N.M. 128 (violation of liquor-licensing law).

But even if Defendants' violation of New Mexico's Strict Subordination Clause and Section 30-27-2.1 did not inherently render their conduct a public nuisance, the Complaint contains ample allegations concerning the threat Defendants' activities pose to the public.[10] Defendants' armed and uniformed appearance at public events "complicat[es] the efforts of law enforcement to respond to any unrest" by requiring law enforcement to "take into account the risk of triggering violence on NMCG's part when determining whether and how to intervene." Compl. ¶ 57. At the Oñate protest, Defendants violently interceded with protesters, *id.* ¶ 64, conduct that Defendant

[10] Defendants' armed presence at public gatherings also "interferes with the exercise and enjoyment of public rights," NMSA 1978, § 30-8-1(B), by chilling members of the public from engaging in First Amendment activity, Compl. ¶ 2.

Spangler stated NMCG would continue to engage in at future public gatherings, *id.* ¶ 58. And although Mr. Baca is responsible for his own violent actions at the Oñate protest—and, indeed, he is being criminally prosecuted for them, *see State v. Baca*, D-202-CR-2020-01326 (N.M. Second Jud. D. Ct.)—Defendants' armed presence at the protest contributed to the combustible atmosphere that was ripe for violence. Compl. ¶ 65. Defendants also have accused several members of the public of being members of Antifa, a frequent focus of Defendants' violent rhetoric, causing the targeted individuals to fear for their safety. *Id.* ¶¶ 51, 58.

Despite the clear threat to public safety Defendants' conduct poses, Defendants attempt to subject the State to a heightened pleading standard by arguing that the State is attempting to enjoin a "threatened" and "contingent" rather than an ongoing nuisance. Defs.' MJP 15–17 (quoting *Gonzalez v. Whitaker*, 1982-NMCA-050, ¶ 20, 97 N.M. 710). According to Defendants, their conduct does not amount to an ongoing nuisance because they do not "constantly and continuously attend[] public events, 'training,' or even carry[] firearms." *Id.* at 15. The defendants in *Pennsylvania Light Foot Militia* similarly argued that the plaintiffs could not obtain an injunction against their paramilitary activity because the Unite the Right Rally was an isolated event. 2018 WL 4698657, at *10. But the court rejected that argument, holding that the defendants' conduct before the rally and their plans to engage in the same kind of conduct on the anniversary of the rally demonstrated ongoing harm. *Id.* & n.8 (concluding that the defendants' conduct amounted to an ongoing nuisance based on "the overall picture" of their activities). Similarly, Defendants' dangerous conduct predated the Oñate incident, Compl. ¶¶ 38–43 (detailing Defendants' musters and trainings); *id.* ¶ 50 (noting NMCG's false assumption of peace-officer duties at racial-justice protests), and, at the time that this lawsuit was filed, Defendants showed no signs of stopping, *id.* (documenting NMCG's armed presence at a protest weeks after the Oñate

incident); *id.* ¶¶ 50.d, 58 (noting Defendant Spangler's remarks after the Oñate incident about NMCG continuing to intervene in what it deems to be riotous conduct). To the extent that Defendants have altered their conduct during the pendency of this lawsuit, that is irrelevant because NMCG's broader plans, of which the Oñate protest was only a part, show that any temporary interruption in their unlawful conduct is likely the result of the lawsuit. Any change in conduct also is beyond the scope of Defendants' Motion, which concerns the "facts on the face of the complaint." *Sanders v. Estate of Sanders*, 1996-NMCA-102, ¶ 6, 122 N.M. 468.

The cases Defendants cite do not support their argument that an injunction is unavailable to address a pattern of conduct of this sort. As an initial matter, *Gonzalez* recognizes that the "general rule" is that "ordinarily an injunction will be granted where the act or thing threatened is a nuisance per se, or necessarily will become a nuisance." 1982-NMCA-050, ¶ 20. Because Defendants' conduct constitutes a nuisance per se and is ongoing, the State is entitled to an injunction against their conduct. And even though the plaintiffs in *Gonzalez* sought an injunction against the construction of a dairy, which, unlike Defendants' conduct, was neither a nuisance per se nor yet in existence, the court held that the public-nuisance claim was not premature. *Id.* ¶ 22; *see also Scott v. Jordan*, 1983-NMCA-022, ¶¶ 13, 27–28, 99 N.M. 567 (holding that cattle-feeding operations, though not a nuisance per se and, according to the defendant, "only temporary in character or seasonal," disturbed plaintiffs' enjoyment of their home with "sufficient frequency and duration" that an injunction was justified).

Accordingly, the Court should not dismiss the State's public-nuisance claim (Count II).

### D. The Antiterrorism Act Is Not the Exclusive Remedy to Address Unlawful Paramilitary Activity

As a last-ditch argument, Defendants assert that the State cannot pursue any of its claims because the Antiterrorism Act, NMSA 1978, § 30-20A-3, a criminal statute, is the exclusive

remedy that the Legislature has provided to address unlawful paramilitary activity. Defs.' MJP 18–19. That argument, if accepted by the Court, would greatly circumscribe District Attorney Torrez's prosecutorial discretion by eliminating his civil prosecutorial authority to combat unlawful paramilitary activity, leaving him only the blunt tool of criminal enforcement.[11]

DA Torrez is "the law officer of the state . . . within his district." N.M. Const. art. 6, § 24. In that capacity, he is charged with "prosecut[ing] . . . for the state in all courts of record . . . of his district *all* cases, criminal *and civil*, in which the state . . . may be a party or may be interested." NMSA 1978, § 36-1-18 (emphasis added). "[W]hat charges to bring and what people to prosecute in the best interest of the people of the State of New Mexico" in this judicial district is a decision exclusively committed to DA Torrez. *State v. Brule*, 1999-NMSC-026, ¶ 14, 127 N.M. 368 (internal quotation marks omitted). Accordingly, "courts must be wary not to infringe unnecessarily on the broad charging authority of district attorneys," and before a court interprets a statute to "limit prosecutorial discretion" it must possess "clear evidence" of the Legislature's intent to do so. *State v. Santillanes*, 2001-NMSC-018, ¶ 21, 130 N.M. 464.

If accepted by this Court, Defendants' argument would not merely limit the State's prosecutorial discretion to choose among criminal charges potentially relevant to unlawful paramilitary activity but also would strip the State of its authority to address such conduct through the less strong medicine of civil remedies. *Cf. State v. Karpinski*, 285 N.W.2d 729, 737 (Wis. 1979) ("All things being equal a district attorney may be less likely to bring a criminal charge

[11] Defendants also incorrectly contend in conclusory fashion that the State "concedes that Defendants have not violated the Antiterrorism Act." Defs.' MJP 18. The State has made no such concession. Rather, at this time, DA Torrez has exercised his prosecutorial discretion to address Defendants' unlawful paramilitary activities through civil remedies. That decision neither implies that the State has concluded that Defendants' conduct does not meet the elements of Section 30-20A-3 nor forecloses future prosecution against them under that statute.

when an alternative civil penalty for a[] . . . violation exists[.]"). Defendants provide no evidence that, by enacting Section 30-20A-3, the Legislature intended to so drastically curtail the State's prosecutorial discretion in this arena.

## II. Prohibiting Vigilante Militia Activity Is Consistent with the Constitution

Defendants also erroneously claim that a court order preventing them from operating as an unlawful private militia and performing peace-officer functions would violate their rights under the First and Second Amendments to the U.S. Constitution. That argument misunderstands both the nature of the relief requested and the scope of those constitutional provisions.

As an initial matter, the State seeks only to enjoin a specific course of unlawful conduct: organizing and operating in public as a military unit independent of New Mexico's civil authority and falsely assuming peace-officer functions by using or projecting the ability to use organized force in response to perceived threats at protests, demonstrations, or public gatherings. Compl. p. 30. Contrary to Defendants' contentions, the State's requested relief will not as a general matter prevent Defendants from gathering as a group, expressing their political views, wearing particular clothing, or lawfully bearing firearms. Instead, the State seeks a narrow injunction prohibiting only the private paramilitary and law-enforcement activity at issue in this case, which New Mexico law has long proscribed. *See* NMSA 1978, § 29-1-9; N.M. Const., art. II, § 9; *cf.* Consent Decree, *City of Charlottesville v. Pa. Light Foot Militia*, No. CL 17-560 (Va. Cir. Ct. Mar. 14, 2018) (enjoining member of unlawful private militia from "returning to Charlottesville, Virginia, as part of a unit of two or more persons acting in concert while armed with a firearm, weapon, shield, or any item whose purpose is to inflict bodily harm, at any demonstration, rally, protest, or march").

Regulation of such conduct does not implicate the First or Second Amendment at all. But even if it did, prohibiting vigilante militia activity is tailored to achieve a compelling interest in

public safety and good order—an interest that all 50 states and the federal government have long recognized is served by maintaining strict civilian government control over military operations.

### A. Restricting Unlawful Paramilitary Activity Does Not Implicate the First or Second Amendments

Neither the First nor the Second Amendment protects the private paramilitary and law-enforcement conduct that the State seeks to enjoin. It is well established that the First Amendment does not apply to mere conduct as opposed to core expressive activity. *See Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) ("[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."); *see also Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006). Moreover, although Defendants claim that this case implicates their freedom of expression through association, the case law makes clear that the First Amendment protects that right only where such association is undertaken "for the advancement of beliefs and ideas." *NAACP v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958); *see also Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 570 (1995) (recognizing that group's "participation as a unit in the parade was . . . expressive" where the group "was formed for the very purpose of marching in it . . . in order to celebrate its members' identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants"); *NAACP v. Button*, 371 U.S. 415, 430–31 (1963) (the First Amendment "protect[s] certain forms of orderly group activity," such as activity that "makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society").

Here, although Defendants cite several cases holding generally that the First Amendment protects expressive activity and association, Defs.' MJP 20–21, Defendants do not assert that *they* intend to express a specific message or what that message might be. And NMCG has elsewhere

described its mission in terms of non-expressive peacekeeping conduct. Compl. ¶ 49; *see supra* at 11. Indeed, Defendant Burks publicly admitted that NMCG members were present at the Oñate statue on June 15, 2020, not to express a particular view on whether the statue should remain, but instead to take it upon themselves to keep the peace and prevent demonstrators from tearing the statue down. Compl. ¶ 63. An injunction prohibiting Defendants from engaging in such conduct falls outside the scope of the First Amendment's protections. *Cf. City of Chicago v. Morales*, 527 U.S. 41, 53 (1999) (plurality opinion) (rejecting First Amendment challenge to a Chicago law preventing street-gang members from loitering because it did "not prohibit any form of conduct that is apparently intended to convey a message" and "[i]ts impact on the social contact between gang members and others [did] not impair the First Amendment 'right of association'").

Nor does prohibiting private paramilitary and law-enforcement activity implicate the Second Amendment. In 1886, upholding an Illinois law prohibiting private militia activity, the Court explained, "[w]e think it clear that the sections under consideration, which only forbid bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law, do not infringe the right of the people to keep and bear arms." *Presser*, 116 U.S. at 264–65. To be sure, the Court ultimately treated as "conclusive" the fact that the Second Amendment had not been incorporated against the states. *Id.* at 265. But in 2008 the Supreme Court in *Heller* reaffirmed the substance of the *Presser* Court's dicta when it recognized that the Second Amendment protects an individual's right to bear arms in the home for self-defense. In *Heller*, the Court described *Presser* as having "held that the right to keep and bear arms was not violated by" the law against private militia activity. *District of Columbia v. Heller*, 554 U.S. 570, 620 (2008). The Court further explained that the dissent's view that *Presser* held that the Second Amendment right applies only to the militia context "is simply wrong. *Presser*

said nothing about the Second Amendment's meaning or scope, *beyond the fact that it does not prevent the prohibition of private paramilitary organizations*." *Id.* at 621 (emphasis added).

*Presser* and *Heller* control here, and there is no merit to Defendants' contrary arguments. Specifically, the Supreme Court in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), did not "gut[]" *Presser*'s recognition—reaffirmed in *Heller*—that state laws prohibiting private militia activity fall outside of the Second Amendment's protection. Defs.' MJP 22. *McDonald* held only that the Second Amendment right recognized in *Heller* was incorporated against the states through the Fourteenth Amendment; it did not address *Presser*'s discussion of the scope of the Second Amendment's substantive protections or state laws regarding militias. *McDonald*, 561 U.S. at 758–59, 791. Moreover, Defendants are wrong that the New Mexico "Legislature has not enacted a comparable law" to the one in *Presser*. Defs.' MJP 23. As explained above, New Mexico law sets forth a comprehensive scheme prohibiting private paramilitary conduct and "private" militias outside the governor's control. These laws proscribe the same type of conduct at issue in *Presser*.

### B. Even if Restricting Private Paramilitary Activity Implicated the First or Second Amendments, an Injunction Would Satisfy Constitutional Scrutiny

Even if prohibiting vigilante military and law-enforcement activity did implicate these constitutional provisions, such a prohibition would easily satisfy scrutiny. It is well established that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). Likewise—as Defendants themselves concede, Defs.' MJP 22—restrictions on the Second Amendment right to bear arms recognized in *Heller* are generally subject to intermediate scrutiny, *see, e.g.*, *United States v. Reese*, 627 F.3d 792, 800–01 (10th Cir. 2010).

Here, New Mexico, along with every other state in the Union, has enacted laws to prohibit

paramilitary and private militia activity,[12] recognizing that "the proliferation of private military organizations threatens to result in lawlessness and destructive chaos." *Vietnamese Fishermen's Ass'n*, 534 F. Supp. at 216; *see supra* at 15. This same interest in protecting public safety and maintaining order underlies New Mexico's prohibition on falsely assuming the functions of a peace officer. *See Ramos-Arenas*, 2012-NMCA-117, ¶ 13.

There can be no doubt that this interest is compelling. *See, e.g.*, *Grider v. Abramson*, 180 F.3d 739, 749 (6th Cir. 1999); *State v. Druktenis*, 2004-NMCA-032, ¶ 71, 135 N.M. 223. Indeed, more than a century ago, Kentucky's then-highest court explained that restrictions on private paramilitary and law-enforcement activity are necessary to protect against mob rule:

> Ours is a government of law. Under its authority and through its agencies alone wrongs must be redressed and rights protected. Unless this were so, there would be no assurances of peace or quiet for the law-abiding and order-loving who constitute so large a part of our people. The life and the property of the citizen would be insecure, and the lawless, reckless, and violent would be at liberty to exercise at will their disregard of civil authority. In every age of the world and in every state and country, it has been found necessary to the stability and efficiency of government that there should always be at its command a military force to support the civil authorities in times of disorder and riot; and this is so because there has never been and will never be a time in the history of any state or country in which the passions and prejudices of the people, when aroused by some real or fancied wrong, have not prompted men to take into their own hands the redress of genuine or imaginary injuries or the enforcement of what they conceived to be their rights.

*Franks v. Smith*, 134 S.W. 484, 488 (Ky. 1911); *see also Fluke v. Canton*, 123 P. 1049, 1054–59 (Okla. 1912) (similar). This rationale retains salience today, particularly in light of the insurrection at the U.S. Capitol on January 6, 2021, in which members of unlawful private militia groups played a prominent role. *See* First Superseding Indictment, *U.S. v. Caldwell, et al.*, No. 21-cr-28 (D.D.C. Feb. 19, 2021) (indicting several members of the Oath Keepers).

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[12] *See* Institute for Constitutional Advocacy and Protection, *Prohibiting Private Armies at Public Rallies* (Sept. 2020) (reprinting anti-paramilitary statutes and constitutional provisions from all 50 states), https://perma.cc/5KPP-5SLY.

Moreover, prohibiting private militia and law-enforcement activity is more than sufficiently tailored to achieve this compelling government interest. As explained above, such prohibitions do not broadly restrict individuals' rights to associate, speak, engage in expressive activity, or bear arms. Instead, they limit only activity long recognized as dangerous to public safety and civic order—i.e., private militia activity not accountable to the civil authorities and false assumption of peace-officer functions. Such restrictions are reasonable, commonplace, and have roots dating back to the Founding. *See Duncan v. Kahanamoku*, 327 U.S. 304, 325 (1946) (Murphy, J., concurring) (explaining that the Founders "shed their blood to win independence from a ruler who they alleged was attempting to render the 'military independent of and superior to the civil power'" and "[i]n the earliest state constitutions they inserted definite provisions placing the military under 'strict subordination' to the civil power at all times and in all cases"); *Fluke*, 123 P. at 1053–54 (explaining that "[t]he settlers of the colonies . . . were jealous of the encroachments of military power" and that modern restrictions on private militias "demonstrate[] the continued jealousy of the American people against the encroachment by the military against civil authority").

## CONCLUSION

For the foregoing reasons, this Court should deny Defendants' Motion for Judgment on the Pleadings.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 1st day of March, 2021, I caused the foregoing to be filed through the Court's Odyssey File and Serve System, which caused all parties and/or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

SECOND JUDICIAL DISTRICT ATTORNEY'S OFFICE

By: */s/ James Grayson*
James Grayson