23-279

In The
Supreme Court of the United States

Couy Griffin,
Petitioner,

v.

State of New Mexico, ex rel. Marco White, Mark Mitchell, Leslie Lakind,
Respondents.

On Petition for Writ of Certiorari to the New Mexico Supreme Court

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

This Court has jurisdiction over this case, and it should decide the questions below on the 1st Amendment and the 14th Amendment.

In the case *sub juris*, the trial court held that Mr. Griffin is constitutionally ineligible and barred for life from any office under the United States or under any State under Section 3 of the 14th Amendment. As the state court decided an important question of federal law which involves both the 1st Amendment and the 14th Amendment, this Court should hear the case. See Rule 10(b) and 10(c).

Each of the Questions Presented for review are novel and consequential; some have been scantly considered since the mid-19th century but are now more important than ever.

Accordingly, this Court should hold that the trial court has decided important questions of federal law that have not been, and which needs to be settled by this court.

ARGUMENT

I. LEGISLATION ON THE 14TH AMENDMENT EXISTS.

Subsequent to submitting the Petition for Writ of Certiorari, a lost law has been found. According to the Associate Historian of the U.S. Senate Historical Office, in response to a direct question to researcher Jonathon Moseley, Session Law 41st Congress,

Chapter CXIV was codified in the Revised Statutes of 1873-74 (Section 2004). It is the predecessor to the modern codification of the U.S.C. That Office advises that had the Session Law been repealed, that would be observed in the Notes. Notwithstanding that the statute does not appear in the modern codification of statutes, it is good law.

Legislation to implement § 3. Session Law 41st Congress, Chapter CXIV § 14 (later 14a), 16 Stat. 140, 143, Revised Statutes of 1873-74 (Section 2004), enacted May 31, 1870, is as follows:[1]

> Sec. 14. And be it further enacted, That whenever any person shall hold office, except as a member of Congress or of some State legislature, contrary to the provisions of the third section of the fourteenth article of amendment of the Constitution of the United States, it shall be the duty of the district attorney of the United States for the district in which such person shall hold office, as aforesaid, to proceed against such person, by writ of *quo warranto*, returnable to the circuit or district court of the United States in such district, and to prosecute the same to the removal of such person from office; and any writ of *quo warranto* so brought, as aforesaid, shall take precedence of all

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[1] Per Professor Michael McConnell of Stanford University School of Law. "**Federalist Society Discussion on Insurrection and the 14th Amendment**," November 10, 2023. https://www.c-span.org/video/?531786-2/federalist-society-discussion-insurrection-14th-amendment#

> other cases on the docket of the court to which it is made returnable, and shall not be continued unless for cause proved to the satisfaction of the court.

The 41st Congress Session Law was enacted mostly by the same members of Congress who enacted the 14th Amendment in the 39th Congress.

The fact that the legislation was enacted supports the proposition that § 3 of the 14th Amendment is not "self-executing." If the law had been repealed, that does not contradict this conclusion. Following the Civil War, President Johnson issued a pardon [2] –

> unconditionally and without reservation, to all and to every person who, directly or indirectly, participated in the late insurrection or rebellion a full pardon and amnesty for the offense of treason against the United States or of adhering to their enemies during the late civil war, with restoration of all rights, privileges, and immunities under the Constitution and the laws which have been made in pursuance thereof.

[2] "Proclamation 179—Granting Full Pardon and Amnesty for the Offense of Treason Against the United States During the Late Civil War, December 25, 1868," The American Presidency Project, https://www.presidency.ucsb.edu/documents/proclamation-179-granting-full-pardon-and-amnesty-for-the-offense-treason-against-the

§ 5 of the 14th Amendment gave Congress the power to pass legislation enforcing every aspect of the amendment. That authorization together with the actual statute confirms the notion that Congress needed to define the matters in § 3 by statute, negating the argument that legislation is not needed.

The 14th Amendment has been subject to statutory enactments to fulfill its purpose. Congress enacted the Enforcement Act of May 31, 1870,[3] of which § 14 is a component,[4] the Second Enforcement Act of February 1871,[5][6] and the Third Enforcement Act of April 1871.[7] [8] Each of these is also called a "Force Act."

Section 5 of the 14th Amendment to the United States Constitution, known as the "Enforcement Clause," provides that "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." Congress has exclusive authority to enforce the 14th Amendment, including the so-called "Disqualification Clause" set forth in Section 3 of the 14th Amendment. *See*, e.g., U.S. Const. amend. XIV, § 5; *In re Griffin*, 11 F. Cas. 7 (C.C.D. Va. 1869);

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[3]https://www.senate.gov/artandhistory/history/common/image/EnforcementAct_1870_Page_1.htm

[4]https://www.senate.gov/artandhistory/history/resources/pdf/EnforcementAct_1870.pdf

[5]https://www.senate.gov/artandhistory/history/common/image/EnforcementAct_Feb1871_Page_1.htm

[6]https://www.senate.gov/artandhistory/history/resources/pdf/EnforcementAct_Feb1871.pdf

[7]https://www.senate.gov/artandhistory/history/common/image/EnforcementAct_Apr1871_Page_1.htm

[8]https://www.senate.gov/artandhistory/history/resources/pdf/EnforcementAct_Apr1871.pdf

Hansen v. Finchem, CV-22-0099-AP/EL, 2022 Ariz. LEXIS 168 (Ariz. May 9, 2022).

II. THIS COURT HAS JURISDICTION TO HEAR THIS MATTER

The Petitioner satisfied the core requirements for the exercise of jurisdiction over a state court ruling.

The federal statute provides for the removal of federal officials by way of *quo warranto* brought in the District Court for the District of Columbia, see *Drake v. Obama*, 664 F.3d 774, 784-85 (9th Cir. 2011), "under that statute, and traditionally, *quo warranto* is brought only by the sovereign or a representative of the sovereign," *Hill v. Mastriano*, 2022 U.S. App. LEXIS 30663, *4 (3d DCA 2022) (citing *Drake*, 664 F.3d at 785; *Country Club Estates L.L.C. v. Town of Loma Linda*, 213 F.3d 1001, 1003 (8th Cir. 2000); *Commonwealth ex rel. Jud. Conduct Bd. v. Griffin*, 591 Pa. 351, 918 A.2d 87, 93 (Pa. 2007) (stating that "standing to pursue quo warranto is generally within a public entity such as, the Attorney General, or the local district attorney")).

A. This Court has Jurisdiction to Review the State Trial Court Decision

The Presented Questions stem from the Trial Court and the New Mexico Supreme Court's decisions.

Rule 10 of this Court states that in this Court's discretion, "A petition for a writ of certiorari will be granted only for compelling reasons." Rule 10 states

that a state court decision on an important question of federal law that has not been, but should be, settled by this Court is a reason the court should consider. See USCS Supreme Ct R 10

The New Mexico Supreme Court and the Trial Court's decisions intrude into Federal and Constitutional territory: Section Five of the 14th Amendment exclusively reserves the power to enforce the 14th Amendment, by appropriate legislation by Congress.

The Requirements of 28 U.S.C. § 1257(a) are satisfied here; the Supreme Court of New Mexico constructively rendered a final judgment in the underlying case against the Petitioner in its refusal to hear the appeal. The Respondents cited to *Gorman v. Wash. Univ.*, 316 U.S. 98, 100-01 (1942), which became obsolete when Congress made a statutory revision.

The Respondents point out the slight error by the Petitioner in Footnote 5 of their Brief in Opposition; the Petitioner should have cited to 28 U.S.C. § 1257 and apologize for the mistake.

B. This Court Has Jurisdiction Because the State Supreme Court Decisions Do Not Rest on Independent and Adequate State Law Grounds.

Rule 12-604 of the New Mexico Rules of Appellate Procedure governed the proceeding below for removal of the Petitioner. The proceeding below was to remove a public official and the New Mexico Supreme Court was required by its own statute to

hear the appeal, but it did not. *See John v. Paullin*, 231 U.S. 583, 587, 34 S. Ct. 178, 179 (1913).

The intentional ignoring of N.M.R. App. P. 12-604, which fell under the New Mexico Rules of Appellate Procedure, by the New Mexico Supreme Court was to improperly avoid the issues, including the issue of a denial of the right to free speech and assembly. This avoidance of an issue constructively decided the federal questions in the underlying case against the Petitioner.

If the Respondents arguments were to hold water, the refusal to consider an issue based on a technical misstep, or no misstep, of a petitioner to a state supreme court effectively would be a mechanism for a supreme court of any state to effectively ratify a decision of the court below it, and avoid review by this Court, even if it deprived the citizenry of that state of fundamental rights of the Bill of Rights.

Supreme courts of states would have the last word if they could avoid consideration of issues by technical or unjust excuses. Such conduct should not exclude a review of state courts' decisions by this Court, as it would become the tool for extremist states or courts, one way or another.

This Court must look to the true nature of what occurred. The Petitioner was found to have participated in an "insurrection," which was fundamentally exercising his Constitutional rights to free speech and assembly. If the decision, below, is to stand, at least in New Mexico, it is now the crime of insurrection to gather people to pray together for the

United States of America on the unmarked restricted grounds of the Capitol building. This Court cannot let this stand.

This Court is the last protection of our Bill of Rights and citizens from tyranny, which by its nature would eliminate their opposition from holding office, from dogcatcher to the top of the political world. When the right to free speech and assembly have been wrongly abrogated, this Court must step up to keep Americans free.

As stated, the federal statute alone provides for the removal of federal officials by way of *quo warranto* brought in the District Court for the District of Columbia, *see Drake v. Obama*, 664 F.3d 774, 784-85 (9th Cir. 2011) or the District Court where the Petitioner resided and held office.

C. This Court has Jurisdiction Because the Questions Presented Were Pressed in or Passed Upon by the State Supreme Court.

III. THE PETITION SHOULD PROCEED NOTWITHSTANDING *TRUMP v. ANDERSON.*

The Petitioner agrees with the Respondents that the Petition for Writ of Certiorari should not be delayed pending review in *Trump v. Anderson*, No. 23-719. The case at bar is judicially independent from *Trump, id.* The reasons of each side are opposite, lack of jurisdiction *vis a vis* no lack of jurisdiction, but at least they seem to agree that the case should move forward.

IV. THE CRITERIA FOR CERTIORARI ARE SATISFIED.

The Split in Authority is a guideline, not a hard rule. Section I(A) of the Petition raised the split decisions of *In re Griffin*, 11 F. Cas. 7, (C.C.D. Va. 1869), and *Hansen v. Finchem*, CV-22-0099-AP/EL, 2022 Ariz. LEXIS 168 (Ariz. May 9, 2022). Hence, there is a split in authority.

However, even if no split of authority existed, one is not needed in this case. Rule 10 of the Supreme Court is "neither controlling nor fully measuring the Court's discretion," *Brown v. United States*, 139 S. Ct. 14, 16 n.5 (2018).

A. *The State Trial Court Ruling Was Incorrect.*

1. Questions 1 and 2.

This Brief previously outlined why U.S. Const. Amend. XIV, § 5, established that only through legislation by Congress can the 14th Amendment be enforced.

Furthermore, *Griffin* and *Hansen* each recognized that Section 5 of the 14th Amendment to the United States Constitution expressly delegated to Congress the power to devise the method to enforce the Disqualification Clause. *See*, e.g., *In re Griffin*, 11 F. Cas. at 26 ("Taking the [Disqualification Clause] then, in its completeness with this final clause, it seems to put beyond reasonable question the conclusion that the intention of the people of the United States, in adopting the 14th amendment, was

to create a disability, to be removed in proper cases by a two- thirds vote, *and to be made operative in other cases by the legislation of congress in its ordinary course*.") (Emphasis added.); *Hansen*, CV-22-0099-AP/EL, 2022 Ariz. LEXIS 168 at *3.

As Congress passed legislation to implement § 3. Session Law 41st Congress, Chapter CXIV § 14 (later 14a), 16 Stat. 140, 143, Revised Statutes of 1873-74 (Section 2004), enacted May 31, 1870 exists and demonstrates that § 3 is not "self-executing," while it provided the operating statutory requirements. It remains unexplained why every other part of the 14th Amendment would require implementing legislation, except § 3. Even if no legislation is found to be in force, the necessity for legislation has been established.

2. Question No. 3.

Considering *Hill v. Mastriano,* "under that statute, and traditionally, *quo warranto* is brought only by the sovereign or a representative of the sovereign," *Hill v. Mastriano*, 2022 U.S. App. LEXIS 30663, *4 (3d DCA 2022) (citing *Drake*, 664 F.3d at 785; *Country Club Estates L.L.C. v. Town of Loma Linda*, 213 F.3d 1001, 1003 (8th Cir. 2000); *Commonwealth ex rel. Jud. Conduct Bd. v. Griffin*, 591 Pa. 351, 918 A.2d 87, 93 (Pa. 2007) (stating that "standing to pursue quo warranto is generally within a public entity such as, the Attorney General, or the local district attorney")).

The Respondents state that the Petitioner was never a federal official, and he was not ousted from

federal office. *Brief in Opposition* at 22. This ignores that the Petitioner lost his right to hold federal office in the future. As such, far more than his state rights have been revoked. He was converted into a sub-citizen.

3. Question 4.

The weight of historical evidence and precedent is in the Petitioner's favor. To constitute an "insurrection," "there must have been a movement accompanied by action specifically intended to overthrow the constituted government and to take possession of the inherent powers thereof," *Home Ins. Co. of N.Y. v. Davila*, 212 F.2d 731, 736 (1st Cir. 1954); *accord Pan Am. World Air., Inc. v. AETNA Casualty & Sur. Co.*, 505 F.2d 980, 1017-1019 (2d Cir. 1974) (defining insurrection as (1) a violent uprising by a group or movement (2) acting for the specific purpose of overthrowing the government and seizing its powers).

A good example of an "insurrection" is the Civil War, itself. It was the "insurrection" to which the framers of the 14th Amendment reacted. If the Respondents were to have their way, some Justice of the Peace in Political County, could deem a Mayor's or a Senator's public statements said while being on the grounds of some city hall to be participation in an insurrection and cancel his or her rights to hold office. To implement the 14th Amendment, a U.S. Attorney must bring the action in a federal court, as it is a federal question, and the standard must be one of proof beyond a reasonable doubt.

The trial court found that trespassing or the events taking place at the U.S. Capitol on January 6, 2021, "constituted an 'insurrection' within the meaning of Section Three of the Fourteenth Amendment." App. C at 52a. Yet the trial court relied on the *Case of Fries*, 9 F. Cas. 924 (C.C.D. Pa. 1800), a case decided over half a century before the ratification of the 14th Amendment. In *Fries. Id.*, the Court recognized that "[t]he true criterion to determine whether acts committed are treason, or a less offence (as a riot), *is the quo animo, or the intention*, with which the people did assemble," and further that "[t]he commission of any number of felonies, riots, or other misdemeanors, cannot alter their nature, so as to make them amount to treason," (Emphasis added.) *Fries, 9 F. Cas. at 930*

The Petitioner was charged with trespassing, not under 18 U.S.C.S. § 2383 governing insurrection.

The Respondents cited cases in their Footnote 10 have wildly varying circumstances, particularly when compared to the case at bar. The very first case mentioned, *United States v. Munchel*, 991 F.3d 1273, 1281 (D.C. Cir. 2021), another case involving January 6, has already been met with caution from another case involving January 6. *United States v. Donohoe* differentiates the actions of some participants in the January 6 riots to others:

> As we explained in Munchel, "those who actually assaulted police officers and broke through windows, doors, and barricades, and those who aided, conspired with, planned, or

> coordinated such actions, are in a different category of dangerousness than those who cheered on the violence or entered the Capitol after others cleared the way."

United States v. Donohoe, No. 21-3046, 2021 U.S. App. LEXIS 29212, at *2 (D.C. Cir. Sep. 27, 2021); quoting *United States v. Munchel*, 991 F.3d 1273, 1284, 451 U.S. App. D.C. 294 (D.C. Cir. 2021).

The only evidence against the Petitioner was legal political speech, associations with various individuals, and his presence at the Capitol.

4. Questions 5 and 6.

The Supreme Court's existence revolves around correcting the errors of the lower courts, especially when those errors infringe on the rights of American Citizens.

Here, the Respondent stated that the Petitioner engaged in insurrection through his unlawful trespass on the Capitol on January 6. App. 60a-61a. The Petitioner was not armed, violent, or encouraging violence at the Capitol and the Petitioner never stepped foot inside the Capitol building. The intent of the Petitioner matters, as does the severity of the actions. The bar for engaging in an insurrection is not trespassing on government property; if it were, any sit-in inside or outside of the Capitol could be considered an "insurrection."

CONCLUSION

This Court should determine that the case at bar is judicially independent and should not be delayed pending the outcome of the *Trump v. Anderson* matter. The instant case could be considered contemporaneously or before *Trump v. Anderson*.

The Court should hold that there are important questions on statutory and constitutional grounds, with a particular effect on the First and 14th Amendments.

The facts of the case satisfy all necessary criteria for this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,
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