No. 23-279

In the Supreme Court of the United States

COUY GRIFFIN,

Petitioner,

v.

NEW MEXICO, EX REL. MARCO WHITE, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Based on his involvement in the events of January 6, 2021, Petitioner was removed from his local office as Otero County Commissioner and disqualified from future officeholding in a New Mexico state court *quo warranto* proceeding.

Petitioner seeks to present six questions for review:

1. Whether Section Five of the Fourteenth Amendment to the United States Constitution exclusively reserves the power to enforce the Fourteenth Amendment, by appropriate legislation, to Congress.

2. Whether courts have authority to adjudicate challenges pursuant to Section Three of the Fourteenth Amendment to the United States Constitution in the absence of appropriate legislative direction from Congress.

3. Whether a state court may issue a federal writ *quo warranto*.

4. Whether the events taking place at the United States Capitol on January 6, 2021, constitute an "insurrection" within the context of the Fourteenth Amendment to the United States Constitution.

5. Whether disqualifying Petitioner from holding public office on account of his speech violates

the First Amendment to the United States Constitution.

6. Whether disqualifying Petitioner from holding public office on account of his associations violates the First Amendment to the United States Constitution.

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INTRODUCTION

The Court lacks jurisdiction over this case and should deny the Petition. Petitioner seeks review of "the State of New Mexico, County of Santa Fe, First Judicial District Court's decision in this case." Pet. 1. But this Court has jurisdiction to review state court rulings only if they were rendered by "the highest court of [the] State in which a decision could be had." 28 U.S.C. § 1257(a). Here, a decision could have been had in the New Mexico Supreme Court. It was only by virtue of Petitioner's failure to comply with state procedural rules that his state court appeal was dismissed. Therefore, under the plain language of § 1257(a), this Court cannot review the state trial court judgment and should deny review.

Alternatively, this Court lacks jurisdiction to review the decisions of the New Mexico Supreme Court. That court dismissed Petitioner's appeal for failure to comply with reasonable state procedural rules requiring a statement of the issues on appeal. It then adhered to that ruling when Petitioner disputed how state procedural law applied to his appeal. Those rulings constitute independent and adequate state grounds for the dismissal of his appeal; indeed, they are the *only* grounds for its dismissal. By virtue of those rulings, the questions raised in the Petition were neither pressed nor passed upon in the New Mexico Supreme Court. On those bases, too, the Petition should be denied.

Although the Court has recently granted review of a case that also presents questions about Section Three of the Fourteenth Amendment, *see Trump v.*

Anderson, No. 23-719, the Court should deny this petition rather than hold it pending a resolution of that matter. Because of Petitioner's repeated failure to comply with state procedural rules, this Court lacks jurisdiction over the Petition and thus cannot afford Petitioner any relief at all (including a *Munsingwear* remedy or a "grant, vacate, and remand" order). Moreover, Petitioner should not receive a benefit here after he violated state procedures and then filed a jurisdictionally improper petition in an improper bid to undo his state court procedural default.

In all events, the Petition fails to satisfy the traditional criteria for certiorari. This case is an abysmal vehicle to decide anything. And Petitioner is wrong on the merits.

STATEMENT

I. Background

Petitioner served from January 2019 to September 2022 as an elected member of the Otero County Commission in New Mexico. In that role, he performed various executive functions, including in budgetary, personnel, and electoral matters. App. 16a.

On January 6, 2021, Petitioner participated in the historic attack on the United States Capitol. That attack resulted in a breach of the Capitol, the interruption of Congress's constitutionally mandated election certification process, multiple deaths, injuries to over a hundred officers, and millions of dollars in damages. App. 28a, 54a-55a.

Days before the attack, Petitioner packed three firearms and ammunition, and set out as "a featured

speaker on a multi-city bus tour to Washington, D.C." App. 21a-22a. On that tour, he rallied crowds to join the "war" and recruited "men" for "battle" in "the streets" of Washington. App. 24a-25a, 59a.

On January 6, 2021, Petitioner joined the mob that surged toward and ultimately stormed the Capitol. He illegally breached Capitol grounds by scaling walls and bypassing multiple security barriers, ultimately reaching the restricted inaugural stage on the West Terrace where he "assumed a leadership role in the mob by using a bullhorn." App. 32a-34a, 60a. There, he witnessed mob members violently assault law enforcement. *Id.* He chanted "Heave! Ho!" to synchronize the mob's crushing of police officers guarding the West Terrace tunnel, and (while it happened) he posted a social media video stating, "this is what you're going to get, and you're going to get more of it." App. 61a. Petitioner later confirmed the purpose of the January 6, 2021 attack: to ensure "Joe Biden will never be President." App. 36a (quotation marks omitted).

Petitioner remained on the inaugural stage for hours at the peak of the attack. App. 60a. He did so despite law enforcement's dispersal orders and use of chemical munitions like tear gas and pepper spray. *Id.* And he did so even after witnessing all the violence around him. *Id.*

Following the events of January 6, Petitioner threatened more bloodshed at President Biden's inauguration and "conveyed specific plans" to bring firearms to the event. App. 62a-63a. He subsequently traveled to D.C. for the January 20 inauguration—and

was arrested in D.C. on January 17 for his conduct on January 6. App. 37a.

Ultimately, Petitioner was criminally convicted of trespass at a bench trial in federal district court. *See United States v. Griffin*, No. 21 Cr. 92 (D.D.C. June 17, 2021), ECF 124. District Judge Trevor N. McFadden said the following to Petitioner at his sentencing:

> [A]s an elected state officer, you've taken an oath to uphold the Constitution. . . . Your actions on January 6 and your statements since then, I believe, are in grave tension with that oath. This is a difficult moment in our nation's history. We need our elected officials to support this country and the peaceful transfer of power, not undermine it.

Id. at 42.[1]

II. State Trial Court Proceedings

Respondents Marco White, Mark Mitchell, and Leslie Lakind are private citizens and residents of New Mexico. On March 21, 2022, Respondents brought an action under New Mexico's *quo warranto* statute, N.M. Stat. Ann. §§ 44-3-1 et seq., seeking to remove Petitioner from his office as an Otero County

[1] An unsuccessful recall effort was made against Petitioner in late 2021. It was based on allegations of misconduct unrelated to Petitioner's actions on January 6. *See* Morgan Lee, *Cowboys for Trump Founder Survives County Recall Campaign*, Associated Press (Sept. 29, 2021).

Commissioner and bar him from holding any future federal or state public office. App. 38a.

As relevant, New Mexico's *quo warranto* statute authorizes actions against any person who "unlawfully hold[s] . . . any public office" in the state, N.M. Stat. Ann. § 44-3-4(A), or "any public officer" who "shall have done or suffered an act which, by the provisions of law, shall work a forfeiture of his office," *id.* § 44-3-4(B). Respondents' complaint alleged that, pursuant to Section Three of the Fourteenth Amendment, U.S. Const. amend. XIV, § 3, Petitioner forfeited his right to hold public office by his participation in the events of January 6. App. 38a.[2]

Petitioner, then represented by counsel, removed the *quo warranto* action to federal court, but the case was remanded to state court for lack of federal subject-matter jurisdiction. *See New Mexico ex rel. White v. Griffin*, 604 F. Supp. 3d 1143, 1145 (D.N.M. 2022). Petitioner also filed a collateral federal suit under Section 1983, seeking to enjoin the *quo warranto* proceeding based on the First Amendment, the Due Process Clause, and the Amnesty Act of 1872. *See* App. 39a. That federal lawsuit was dismissed for several reasons, including lack of ripeness and lack of Article III standing. *See Griffin v. White*, 2022 WL 2315980, at *3 (D.N.M. June 28, 2022). Petitioner did not seek any form of appellate or mandamus relief from these federal rulings. App. 40a.

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[2] "[W]hen the office usurped pertains to a county," any "private person" can bring an action "on his own complaint." N.M. Stat. Ann. § 44-3-4.

After it was remanded by the federal district court, Respondents' *quo warranto* action proceeded in state trial court on a jointly proposed schedule.[3] App. 39a-40a. Petitioner filed a motion to quash and dismiss the complaint on July 25, 2022, nearly three weeks after the deadline set by that schedule. The trial court struck the motion pursuant to Rule 1-011 of New Mexico's Rules of Civil Procedure, based on Petitioner's admission that a friend who was not an attorney had drafted the pleadings.

The trial court held a bench trial on August 15 and 16, 2022. Respondents called five witnesses: (1) Petitioner; (2) Nate Gowdy, a photo journalist who had witnessed and extensively photographed Petitioner's conduct on January 6; (3) Daniel Hodges, an officer in the D.C. Metropolitan Police Department who protected the Capitol on January 6; (4) Mark Graber, a professor of law at the University of Maryland Law School and an expert on the history of Section Three; and (5) Dr. Rachel Kleinfeld, a senior fellow at the Carnegie Endowment for the Humanities and an expert on political violence. App. 40a. Respondents also presented the prior testimony of two witnesses, Capitol Police Inspector John Erickson and Secret Service Inspector Lanelle Hawa, from Petitioner's criminal trial. For his part, Petitioner "called no witnesses and offered no evidence apart from his own testimony." *Id.*

On September 6, 2022, the state trial court issued its Findings of Fact, Conclusions of Law and

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[3] Following these scheduling matters, Petitioner's counsel withdrew, and Petitioner proceeded *pro se* in the trial court.

Judgment in favor of Respondents. In a detailed opinion, the court found that the January 6 attack was an "insurrection" within the meaning of Section Three as understood by nineteenth-century Americans, App. 50a-57a; that Petitioner "engaged in" insurrection after taking an oath to support the Constitution, App. 57a-64a; and that Petitioner therefore is disqualified from holding any public office, App. 64a-65a. The trial court ordered Petitioner's immediate removal from his position and permanently enjoined him from holding public office in the future. App. 71a-73a.

The trial court rejected Petitioner's argument that his disqualification violated the First Amendment. It reasoned that the First Amendment does not bar the "evidentiary use of speech," App. 66a (quoting *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993)); the First and Fourteenth Amendments hold equal constitutional weight, App. 66a-67a; and Petitioner's disqualifying acts fell within exceptions to First Amendment protection, including the exceptions for speech integral to criminal conduct, true threats, and incitement, App. 68a. The trial court also highlighted that courts have uniformly rejected similar defenses by January 6 defendants. *Id.* Finally, relying on historical evidence, the trial court squarely rejected Petitioner's argument that an "insurrection" must involve a "collaborated effort to overthrow" and "replace" the government. App. 70a-71a.[4]

[4] The court noted that "[n]ot even the Civil War—the event that precipitated the Fourteenth Amendment—would meet" Petitioner's narrow definition, as the Confederacy's goal was to

III. State Supreme Court Proceedings

New Mexico's *quo warranto* statute provided Petitioner with an expeditious and as-of-right appeal to the New Mexico Supreme Court. *See generally* N.M. Stat. Ann. § 44-3-16. Petitioner, through counsel, appealed the trial court's judgment against him on September 20, 2022. *See* App. 1a-2a.

Rule 12-208 of the New Mexico Rules of Appellate Procedure ("NMRA") mandates, with few exceptions, that appellants file a statement of the issues within 30 days of noticing an appeal. Under Rule 12-312(A), failure to file such a statement of the issues in the state high court "may be deemed sufficient grounds for dismissal of the appeal."

Two weeks after Petitioner noticed his appeal, Respondents filed a motion in the New Mexico Supreme Court for expedited briefing and argument. App. 2a. In light of Petitioner's prior failure to comply with procedural rules, Respondents explained that—no matter whether their own motion was granted—Petitioner would be required to meet all relevant procedural deadlines, "including but not limited to his . . . deadline for filing a statement of issues." *Id.*

Notwithstanding this warning—and in disregard of a rule of New Mexico appellate procedure—Petitioner never filed a statement of the issues. Due to this failure, the New Mexico Supreme Court *sua*

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secede from, not replace, the government in Washington, D.C. App. 70a-71a.

sponte dismissed his appeal on state procedural grounds in November 2022. App. 6a-8a.

Petitioner subsequently sought reconsideration of that dismissal under state law, claiming it was a "misapplication of the Rules of Appellate Procedure." App. 3a. He argued that his appeal was actually brought under Rule 12-604 of the NMRA—and that he was thus not required to submit a statement of the issues under Rule 12-208. *Id.*

The New Mexico Supreme Court responded to this motion for reconsideration by issuing a notice of non-conforming pleading, since Petitioner had failed to indicate the position of other parties, as required by the state's procedural rules. App. 2a-3a. In response, Petitioner filed an amended motion, noting that Respondents took no position on the motion, but that Respondents maintained Petitioner was required to file a statement of the issues.

The New Mexico Supreme Court ultimately denied Petitioner's motion for reconsideration. App. 1a-5a. In doing so, the court emphasized that Rule 12-604 (the state procedural rule cited by Petitioner) applies only to "original actions filed in the Supreme Court to remove a public official upon presentment of constitutional or statutory charges [for removal] *by the governor, attorney general, or any regularly empaneled grand jury*." App. 3a (emphasis added). Of course, Respondents hold none of those state positions. The court added that Petitioner's appeal did not cite Rule 12-604; that no amended or corrected pleading had been filed; and that Respondents' motion to expedite had alerted Petitioner to his deadline for filing a

statement of the issues. App. 3a-4a. The court further observed that Petitioner did not "seek relief on equitable grounds such as excusable neglect or exceptional circumstances beyond [his] control." App. 4a. Finally, the court remarked that Petitioner "ha[d] done nothing to cure the stated reason for dismissal other than argue that [the New Mexico Supreme Court] misapplied its own Rules of Appellate Procedure." *Id.*

The New Mexico Supreme Court did not issue any other rulings in this case. Therefore, its two procedural rulings are the only decisions issued by the state supreme court.

REASONS FOR DENYING THE PETITION

I. THIS COURT LACKS JURISDICTION.

The Petition does not satisfy core requirements for the exercise of jurisdiction over a state court ruling. That is true to the extent the Petition seeks review of the state trial court opinion and is equally true to the extent the Petition seeks review of the state supreme court's procedural decisions.

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

At bottom, the Petition seeks review of a state court trial decision, which this Court lacks jurisdiction to undertake where Petitioner could have perfected (but did not perfect) an appeal of that decision in the state's high court.

Although the cover of the Petition claims that it seeks a "writ of certiorari to the New Mexico Supreme

Court," the text of the Petition instead (and more accurately) asks this Court "to review the State of New Mexico, County of Santa Fe, First Judicial District Court's decision in this case," Pet. 1. Petitioner doubles down on that request in his argument section. *See* Pet. 6 ("As such, and for the following reasons, this Court should grant this Petition to review the decision of the trial court in this matter."). And then he hammers home the point throughout the rest of the Petition. *See, e.g.*, Pet. 11 (header entitled "The Trial Court Decided Important Federal Questions That Haven't Been, but Should be, Settled by this Court"); Pet. 13, 16, 19 (sub-headers all referring only to the trial court ruling).

Under 28 U.S.C. § 1257(a), this Court may review a state court decision only if it was rendered "by the highest court of [the] State *in which a decision could be had*" (emphasis added). Accordingly, "no decision of a state court should be brought here for review either by appeal or certiorari until the possibilities afforded by state procedure for its review by all state tribunals have been exhausted." *Gorman v. Wash. Univ.*, 316 U.S. 98, 100-01 (1942).

Here, the trial court was not "the highest court of [New Mexico] in which a decision could be had." Under New Mexico law, the trial court's decision was subject to an as-of-right appeal to the New Mexico Supreme Court. N.M. Stat. Ann. § 44-3-16. Therefore, this Court lacks jurisdiction to review the state trial court's

decision. Since that is all Petitioner seeks, the Petition must be denied.[5]

B. This Court Lacks Jurisdiction Because the State Supreme Court Decisions Below Rest on Independent and Adequate State Law Grounds.

Alternatively, if Petitioner in fact sought review of the decisions issued by the New Mexico Supreme Court, this Court would lack jurisdiction because those rulings rest on an independent and adequate state law ground: namely, Petitioner's straightforward failure to comply with New Mexico's state law rules of appellate procedure.

"This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). "This rule applies whether the state law ground is substantive or procedural." *Id.* As relevant here, "[i]n the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional." *Id.*; *see also, e.g.*, *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review

[5] Petitioner purports to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1). *See* Pet. 2. But § 1254 establishes this Court's jurisdiction concerning cases in the federal courts of appeals. It is irrelevant to this matter, which is controlled by the plain language of 28 U.S.C. § 1257.

could amount to nothing more than an advisory opinion.").

When a state high court dismisses an appeal for failure to comply with reasonable state procedural rules governing the state appellate process, that ruling is an independent and adequate state law ground precluding this Court's review of any federal question in the case. *See John v. Paullin*, 231 U.S. 583, 585 (1913); *Newman v. Gates*, 204 U.S. 89, 95 (1907).

As a leading treatise puts the point: "[A] litigant must comply with the requirements of state appellate procedure. If the state's highest court denies review for failure to comply with reasonable procedural rules, the case stands as though no appeal had been prosecuted from the judgment rendered by the trial court . . . . Noncompliance with proper state procedural rules furnishes an independent and adequate state ground for refusing to consider the federal questions, as not properly presented to the highest state court." Charles Wright et al., *Federal Practice and Procedure* § 4007 (3d ed.) (cleaned up); *accord* Stephen M. Shapiro et al., *Supreme Court Practice* § 3.14 ("If the [state court's] order dismissing [an] appeal is based upon the failure to conform to state rules of practice in perfecting the appeal, neither the order nor the lower court judgment will support the Supreme Court's jurisdiction.").

Here, that rule precludes this Court from exercising jurisdiction. The New Mexico Supreme Court dismissed Petitioner's appeal because he failed to submit a statement of the issues as required by reasonable state procedural rules. App. 6a-8a.

Following that dismissal, Petitioner made no attempt to file a statement of the issues. Instead, he sought reconsideration, asserting that the New Mexico Supreme Court had misapplied its own rules in requiring him to submit such a statement. The New Mexico Supreme Court considered and rejected those contentions, highlighting that Petitioner (despite ample opportunity) had never sought to cure the reasons for the dismissal of his appeal. Thus, the only decisions issued by the New Mexico Supreme Court concerned the application of reasonable state procedural rules to Petitioner's appeal. This Court lacks jurisdiction to review those decisions—and so the Petition should be denied.

C. This Court Lacks Jurisdiction Because the Questions Presented Were Neither Pressed in Nor Passed Upon by the State Supreme Court.

Finally, and relatedly, this Court lacks jurisdiction (or should exercise its discretion to deny review) because the Petition raises federal issues that were neither pressed nor passed upon in the New Mexico Supreme Court.

"It would be unseemly in our dual system of government to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Adams v. Robertson*, 520 U.S. 83, 90 (1997) (*per curiam*). Thus, "this Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision we have

been asked to review.'" *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (*per curiam*) (citation omitted).

Here, because of Petitioner's failure to perfect his direct appeal pursuant to well established state procedural rules, the New Mexico Supreme Court never had an opportunity to review (let alone adjudicate) any of the federal law issues that he now asks this Court to decide. Bypassing the state's highest court in this case would be particularly problematic since it concerns Petitioner's removal from local office, and "the authority of . . . the States to determine the qualifications" of their officers "lies at the heart of representative government." *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991). For this separate reason, too, the Court should deny the Petition.[6]

II. THE PETITION SHOULD NOT BE HELD PENDING *TRUMP v. ANDERSON*.

On January 5, 2024, this Court granted expedited review in *Trump v. Anderson*, No. 23-719, a case that also presents questions concerning Section Three. Petitioner may request that his Petition be held pending a disposition in that matter. Any such request should be denied for two reasons. *First*, as explained in Part I, the Court lacks jurisdiction over the Petition—and thus cannot properly afford any relief to Petitioner, no matter the outcome in *Anderson*. Neither a "GVR" nor a *Munsingwear* remedy would be appropriate in the absence of jurisdiction. *Second*, and

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[6] This Court has not resolved whether the presentation requirement is jurisdictional. But "even treating the rule as purely prudential, the circumstances here justify no exception." *Howell*, 543 U.S. at 446 (citation omitted).

independently, the Court should not exercise its power to Petitioner's benefit after he violated state procedures in such a blatant, willful manner. It would send the wrong message—and be inequitable—to afford Petitioner relief when he had a full and fair opportunity to litigate his claims below but failed to follow the rules governing all litigants in New Mexico.

III. NONE OF THE STANDARD CRITERIA FOR CERTIORARI ARE SATISFIED.

Independent of the jurisdictional defects that preclude review, the Petition should also be denied because there is no split in relevant authority, the Petition is a poor vehicle to address any of the legal questions it seeks to present, and (in all events) Petitioner's position fails on the merits.

A. There Is No Split in Authority.

Petitioner does not identify any split in authority, on any question presented, involving a federal court of appeals or state court of last resort. Moreover, because this very case involves only a state trial court decision, it could not itself create a split worthy of the Court's attention under the traditional criteria. In all events, Petitioner does not even purport to identify a split regarding most of the issues raised in the Petition.[7]

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[7] Petitioner claims that there is a split on the question whether Section Three of the Fourteenth Amendment can be enforced absent specific implementing legislation from Congress. Although Chief Justice Chase concluded that it could not while riding circuit in 1869—basing his conclusion mainly on an "argument from inconvenience"—his solo opinion does not control in any court. *In re Griffin*, 11 F. Cas. 7, 24 (C.C.D. Va. 1869) (No.

B. This Case Is a Poor Vehicle.

Yet another reason why review should be denied is that this case is a poor vehicle to review any of the questions in the Petition. That is true in two respects.

First, because of Petitioner's failure to comply with the rules of the New Mexico Supreme Court, this case arrives without the ventilation provided by an appellate record. *See McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940) ("[T]here are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review.").

5,815); *see Cawthorn v. Amalfi*, 35 F.4th 245, 279 n.16 (4th Cir. 2022) (Richardson, J., concurring in the judgment) (describing this opinion as "not binding on us"). Regardless, *Griffin* is inapposite: Chief Justice Chase did not address whether a state can pass legislation (or rely on *quo warranto* actions) to enforce Section Three. There was no reason for Chief Justice Chase to have necessarily considered and decided that legally distinct issue, since, in 1869, Virginia was an unreconstructed territory under federal military control and thus lacked state law that could have enforced Section Three. *See id.* at 11, 14, 26-27. In the *Griffin* case, the only question necessarily at issue was whether Section Three could be enforced collaterally through a federal habeas petition—not whether a functional state (without a provisional military government) could pass legislation enabling Section Three enforcement. For that reason, *Griffin* can be easily distinguished. And there is more: Chief Justice Chase himself held a contrary view of this same issue in the treason prosecution of Jefferson Davis, where he implicitly agreed with Davis's counsel that Section Three "executes itself" and "needs no legislation on the part of congress to give it effect." *In re Davis*, 7. F. Cas. 63, 90, 102 (C.C.D. Va. 1871) (No. 3,621a).

Second, many of the issues that Petitioner seeks to raise were not addressed by the state trial court or were addressed by that court only in passing. As a result, this Court would be forced to review these questions with hardly any analysis or record below.

C. The State Trial Court Ruling Was Correct.

Finally, review should be denied because the state trial court ruling was correct and Petitioner's arguments to the contrary are meritless.

1. The first and second questions presented.

In his first two questions, Petitioner contends that Section Three cannot be enforced without congressional legislation. Given the paucity of briefing on this issue, the state trial court addressed it only in a single sentence, noting that "[s]tate courts have adjudicated Section Three challenges through *quo warranto* or similar state-law proceedings." App. 47a (citing *Louisiana ex rel. Sandlin v. Watkins*, 21 La. Ann. 631 (1869); *Worthy v. Barrett*, 63 N.C. 199, 205 (1869); *In re Tate*, 63 N.C. 308, 309 (1869)).

In all events, the trial court was right. *See* William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. PA. L. REV. (forthcoming 2024), at 17-49 (explaining why Section Three is self-executing absent congressional legislation).

As relevant, Section Three imposes a constitutional qualification for state office that can be (and has been) enforced through state law. The state trial court here did exactly that, properly adjudicating

a challenge to Petitioner's constitutional eligibility to hold his state office under New Mexico's *quo warranto* statute. *See* App. 15a (citing N.M. Stat. Ann., §§ 44-3-4, -14); *see also Clark v. Mitchell*, 363 P.3d 1213, 1216 (N.M. 2016) ("One of the primary purposes of *quo warranto* is to ascertain whether one is constitutionally authorized to hold the office he claims, whether by election or appointment[.]").[8]

Nothing in the Constitution's text suggests that federal legislation is required to enforce Section Three. "The only mention of congressional power in Section Three is that 'Congress may by a vote of two-thirds of each House, remove' the disqualification of a former officer who had 'engaged in insurrection.'" *Anderson v. Griswold*, 2023 CO 63, ¶ 89 (quoting U.S. Const. amend. XIV, § 3). That Section Three expressly creates a role for Congress in *removing* a disability but not in *imposing* one reinforces that congressional action is unnecessary to activate Section Three. Rather, Congress's power to "remove" a disability "connotes taking away something that has already come into being." *Cawthorn v. Amalfi*, 35 F.4th 245, 260 (4th Cir. 2022). Section Three itself creates the disability. And if, as Petitioner claims, a simple majority in Congress could control the operation of Section Three, "then this would nullify Section Three's supermajority

[8] Petitioner does not dispute that Section Three imposes a qualification for office. *See Anderson v. Griswold*, 2023 CO 63, ¶¶ 65-66 (so holding and citing cases); Cong. Globe, 39th Cong., 1st Sess. 3036 (June 8, 1866) (statement of Sen. Henderson) (Section Three "fix[es] a qualification for office" and is not a "punishment mean[t] to take away life, liberty, or property").

requirement" for removing a disability. *Anderson*, 2023 CO 63, ¶ 114.

Moreover, the Supremacy Clause explicitly "charges state courts with a coordinate responsibility to enforce [federal] law according to their regular modes of procedure." *Howlett v. Rose*, 496 U.S. 356, 367 (1990). This principle applies "absent a provision for exclusive federal jurisdiction." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989). That means state courts *must* enforce Section Three and other federal constitutional qualifications for office under applicable state law procedures. And that is what state courts have done, even without federal enforcement legislation. *See Anderson*, 2023 CO 63, ¶¶ 88-106; *Worthy*, 63 N.C. 199; *In re Tate*, 63 N.C. 308; *Sandlin*, 21 La. Ann. 631; *cf. Elliott v. Cruz*, 137 A.3d 646 (Pa. Commw. Ct. 2016).

Section Five of the Fourteenth Amendment—which says, "Congress shall have the power to enforce" the Amendment—does not provide *exclusive* federal jurisdiction to enforce Section Three and does not displace state courts' coordinate duty to do so. Indeed, this Court has already made clear that the Reconstruction Amendments—each of which includes a materially identical enforcement clause—impose "self-executing" limits that courts have the "power to interpret" even without congressional legislation. *City of Boerne v. Flores*, 521 U.S. 507, 522, 524 (1997); *see also Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009); *The Civil Rights Cases*, 109 U.S. 3, 20 (1883). It is the Court's interpretation of the Fourteenth Amendment that constrains Congress's

Section Five enforcement power, not the other way around. *See Boerne*, 521 U.S. at 524-29.[9]

2. The third question presented.

The third question presented is "[w]hether a state court may issue a federal writ quo warranto." Pet. i. Petitioner never raised this issue at any stage of the state court proceedings. Nowhere did he argue that he could be enjoined from federal office only in a *quo warranto* proceeding initiated "by the United States in the District Court for the District of Columbia." Pet. 13. Nor did the state trial court reach this question.

In any event, the proceedings below were based on New Mexico's *quo warranto* statute, and did not involve a federal writ of *quo warranto*, which extends only to "the removal of *federal* officials." *Hill v. Mastriano*, 2022 WL 16707073, at *2 (3d Cir. Nov. 4, 2022) (*per curiam*) (removal of state official is not a federal *quo warranto* claim); D.C. Code § 16–3501 (*quo warranto* extends to challenge a person holding "a franchise conferred by the United States or a public office of the United States, civil or military").

[9] The "label 'self-executing' has on occasion been used to convey different meanings." *Medellín v. Texas*, 552 U.S. 491, 505 n.2 (2008). Relevant here is that Section Three is "self-executing" in terms of "operat[ing] of itself without the aid of any legislative provision." *Id.* at 505. Some have questioned whether Section Three is "self-executing" in a different sense: whether it "provide[s] for a private cause of action." *Id.* at 506 n.3; *see Anderson*, 2023 CO 63, 19 n.11 (noting arguments "that the Section is not self-executing in the sense that it does not create an independent private right of action"). Given New Mexico's creation of a private right of action in its *quo warranto* statute, that separate question about causes of action is not at issue here.

Petitioner is not, and does not claim to have been, a federal official, and the proceeding below did not oust him from any such position. So there is no merit to the third question he seeks to raise.

3. The fourth question presented.

The fourth question presented is whether the events at the U.S. Capitol on January 6, 2021, constituted an "insurrection" under Section Three. Petitioner insists that the answer is "no," but his contention is against the overwhelming weight of historical evidence and precedent.

The January 6 attack was "the most significant assault on the Capitol since the War of 1812." *Trump v. Thompson*, 20 F.4th 10, 18-19 (D.C. Cir. 2021), *cert. denied*, 142 S. Ct. 1350 (2022). In this case, based on eyewitness and expert testimony, as well as extensive video footage of the attack, Petitioner's own statements, and over two hundred exhibits, the trial court properly found that the events of January 6 were an "insurrection." App. 52a-57a.

Specifically, the trial court determined that "the January 6 Attack followed a weeks-long campaign to stop—through extralegal means—certification of the 2020 presidential election and the transfer of power as mandated by federal law." App. 53a. Participants in this attack "did not hide their objective" to stop the "lawful transfer of power." *Id.* Thousands of people arrived in D.C. and, using "a variety of weapons," they "brutally attacked and injured more than one hundred police officers, sought to intimidate the Vice President and Congress, and called for the murder of elected officials." App. 54a. As the trial court found, the mob

that attacked the Capitol on January 6 was unified by a common purpose. App. 29a, 54a. Their attack, "for the first time in our Nation's history, disrupted the peaceful transfer of presidential power." App. 55a.

Those actions constitute an "insurrection" as that term was understood by the framers of Section Three. Looking to contemporary case law, jury charges, and dictionaries—and rightly crediting an expert—the trial court found that "[k]nowledgeable nineteenth-century Americans including Section Three's framers would have regarded the events of January 6, and the surrounding planning, mobilization, and incitement, as an insurrection." App. 51a-55a. By its terms (and applying basic rules of grammar), Section Three refers to an "insurrection" against "the Constitution." That is exactly what occurs when a violent mob attacks our seat of federal government to thwart the operation of the Twelfth and Twentieth Amendments—and to extra-legally maintain a preferred president in office past the expiration of his specified four-year term.

That conclusion is supported by countless modern legal authorities. *See, e.g.*, *Anderson*, 2023 CO 63, ¶ 185 ("We have little difficulty concluding . . . the events of January 6 constituted an insurrection."). At least three dozen federal decisions have described the events of January 6 as an insurrection.[10] So has the

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[10] *See, e.g.*, *United States v. Munchel*, 991 F.3d 1273, 1281 (D.C. Cir. 2021); *In re Lux Rsch. v. Hull McGuire PC*, 2023 WL 8190821, at *1 (D.D.C. Nov. 27, 2023); *United States v. Krauss*, 2023 WL 7407302, at *1 (D.D.C. Nov. 9, 2023); *United States v. Bennett*, 2023 WL 6847013, at *1 (D.D.C. Oct. 17, 2023); *United States v. Thomas*, 2023 WL 5289294 , at *2 (D.D.C. Aug. 17, 2023); *Davis v. Meta Platforms, Inc.*, 2023 WL 4670491, at *3

(E.D. Tex. July 20, 2023); *United States v. Ballenger*, 2023 WL 4581846, at *1 (D.D.C. July 18, 2023); *United States v. Shaw*, 2023 WL 3619416, at *1 (D.D.C. May 24, 2023); *United States v. Griffith*, 2023 WL 3477249, at *1 (D.D.C. May 16, 2023); *United States v. Chwiesiuk*, 2023 WL 3002493, at *1 (D.D.C. Apr. 19, 2023); *Mahoney v. U.S. Capitol Police Bd.*, 2023 WL 2770430, at *1 (D.D.C. Apr. 4, 2023); *Brody v. Fox Broad. Co., LLC*, 2023 WL 2758730, at *1 (S.D.N.Y. Apr. 3, 2023); *United States v. Wright*, 2023 WL 2387816, at *1 (D.D.C. Mar. 4, 2023); *United States v. Carpenter*, 2023 WL 1860978, at *1 (D.D.C. Feb. 9, 2023); *United States v. MacAndrew*, 2023 WL 196132, at *1 (D.D.C. Jan. 17, 2023); *United States v. Grider*, 651 F. Supp. 3d 1, 5 (D.D.C. 2022); *United States v. Dennis*, 2022 WL 17475401, at *1 (D.D.C. Dec. 6, 2022); *United States v. Eicher*, 2022 WL 11737926, at *1 (D.D.C. Oct. 20, 2022); *United States v. Zoyganeles*, 2022 WL 6100164, at *1 (D.D.C. Oct. 7, 2022); *United States v. Sutton*, 2022 WL 4653216, at *4 (D.D.C. Sept. 30, 2022); *United States v. McAbee*, 628 F. Supp. 3d 140, 146 (D.D.C. 2022); *Budowich v. Pelosi*, 610 F. Supp. 3d 1, 8 (D.D.C. 2022); *United States v. Rivera*, 607 F. Supp. 3d 1, 10 (D.D.C. 2022); *United States v. Bingert*, 605 F. Supp. 3d 111, 115 (D.D.C. 2022); *United States v. Puma*, 596 F. Supp. 3d 90, 94 (D.D.C. 2022); *United States v. Brockhoff*, 590 F. Supp. 3d 295, 298 (D.D.C. 2022); *O'Handley v. Padilla*, 579 F. Supp. 3d 1163, 1172 (N.D. Cal. 2022); *United States v. DeGrave*, 539 F. Supp. 3d 184, 196 (D.D.C. 2021); *Noem v. Haaland*, 542 F. Supp. 3d 898, 906 (D.S.D. 2021); *Alsaada v. City of Columbus*, 536 F. Supp. 3d 216, 274 (S.D. Ohio), *modified*, 2021 WL 3375834 (Apr. 30, 2021); *United States v. Hunt*, 573 F. Supp. 3d 779, 807 (E.D.N.Y. 2021); *United States v. Brogan*, 2021 WL 2313008, at *2 (E.D.N. Y. June 7, 2021); *O'Rourke v. Dominion Voting Sys. Inc.*, 552 F. Supp. 3d 1168, 1199 (D. Colo.), *modified*, 2021 WL 5548129 (D. Colo. Oct. 5, 2021); *United States v. Randolph*, 536 F. Supp. 3d 128, 132 (E.D. Ky. 2021); *Amalgamated Transit Union Loc. 85 v. Port Auth. of Allegheny Cnty.*, 2021 WL 719671, at *2 (W.D. Pa. Feb. 24, 2021).

U.S. Department of Justice under President Trump.[11] Bipartisan majorities of each House of Congress have echoed that understanding.[12] Even President Trump's own impeachment counsel was in accord. *See* 167 Cong. Rec. S717, S733 (Feb. 13, 2021) (noting "everyone agrees" there was "a violent insurrection of the Capitol").

Against all this, Petitioner musters merely a few cases interpreting state statutes or insurance contracts. Pet. 14. Those cases post-date Section Three by nearly a century. *See N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 2137 (2022). They also arise from a facially inapposite context and, if adopted as a guide to the meaning of Section Three, would produce bizarre results. As the trial court noted, Petitioner's proposed test excludes the Civil War, where states sought to secede from (rather than overthrow) the Union. App. 70a-71a. And even under that narrow test, using violence at the Capitol to thwart the inauguration of a rightfully-elected president—and to instead extend the term of a mob's preferred ruler—would count as insurrection.

For all these reasons, there is no merit to Petitioner's claim that the trial court erred in interpreting Section Three.

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[11] Gov't Br. in Support of Det. at 1, *United States v. Chamley*, No. 21-mj-05000, ECF No. 5 (D. Ariz. Jan. 14, 2021).

[12] 167 Cong. Rec. H191 (daily ed. Jan. 13, 2021); 167 Cong. Rec. S733 (daily ed. Feb. 13, 2021); H.R. 503, 117th Cong. (2021); S. 35, 117th Cong. (2021); H.R. 3325, 117th Cong. (2021).

4. The fifth and sixth questions presented.

That leaves only Petitioner's fifth and sixth questions presented, where Petitioner essentially contends that the state trial court misapplied First Amendment principles to the facts of his case. Pet. 16-20. Of course, this Court does not customarily grant certiorari to address asserted fact-bound "misapplication of a properly stated rule of law." S. Ct. Rule 10. It should decline Petitioner's invitation to engage in that kind of purported error-correction here.

Such avoidance is particularly warranted because the trial court's ruling that Petitioner engaged in "insurrection" under Section Three did not depend solely on a rejection of Petitioner's First Amendment arguments. The trial court's ruling was supported by an alternative holding that Petitioner engaged in insurrection through his unlawful trespass on the Capitol on January 6—conduct for which Petitioner was also criminally convicted. App. 60a-61a. In light of this alternative holding, which independently supports the trial court's ultimate finding, the Court has no reason to review the fifth and sixth questions presented.[13]

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[13] As explained, Petitioner rallied with the mob that stormed the Capitol, scaling walls and crossing security barriers to reach the inaugural stage on the West Terrace. App. 60a. He remained there at the height of the attack, despite witnessing nearby mob members assault police officers, and despite police officers' use of chemical munitions to disperse the crowd he was a part of. *Id.* The trial court found that these actions constituted "overt acts in support of the insurrection." *Id.* And Petitioner does not argue

Regardless, the trial court's First Amendment analysis was correct, and its "evidentiary use of speech" to discern Petitioner's subjective intent did not offend the First Amendment. *See Mitchell*, 508 U.S. at 489; *see also* App. 27a, 28a, 31a-32a. Nor did the First Amendment properly protect Petitioner's conduct in "incit[ing] the mob that attacked and seized the Capitol," App. 60a; *see Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969), or speech otherwise "integral" to his crimes, *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949); *see also* App. 59a-62a, 67a.

And even if there were force to Petitioner's claims under the Free Speech Clause—which there is not—Section Three is an "equal" to the First Amendment. *Prout v. Starr*, 188 U.S. 537, 543 (1903); *see also Cole v. Richardson*, 405 U.S. 676, 681-82 (1972) (Constitution's oath requirements may overcome First Amendment). Accordingly, any application of the First Amendment in this case must "give effect" to both constitutional provisions, *Cohens v. Virginia*, 19 U.S. 264, 393 (1821), recognizing that a person may engage in insurrectionist activity through speech as well as other forms of conduct, *see* Cong. Globe, 39th Cong., 1st Sess. 3035-36 (1866) (statement of Sen. Henderson). Here, Petitioner's behavior involves virtually no cognizable First Amendment interest—but does involve core Section Three interests—and so the trial court's resolution was justified.[14]

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that the First Amendment somehow protects this flagrantly criminal conduct. Pet. 16-20.

[14] In all events, enforcement of Section Three is narrowly tailored to serve extraordinarily compelling interests in preventing oath-

* * *

In sum, not only does this Court lack jurisdiction over the case, and not only does Petitioner fail to satisfy any of the standard criteria for certiorari, but the contentions that he advances are all meritless.[15]

CONCLUSION

The Petition should be denied.

January 16, 2024 Respectfully submitted,

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breaking officials who engage in insurrection from obtaining political power.

[15] If past is prologue, Petitioner may seek to raise new arguments in his reply brief. Needless to say, any such novel points are waived.

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