IN THE SUPREME COURT
STATE OF ARIZONA

THOMAS HANSEN, *et al*.; Plaintiffs-Appellants, v. REP. MARK FINCHEM, *et al*.; Defendants-Appellees.	Arizona Supreme Court No. CV-22-0099-AP/EL Maricopa County Superior Court No.: CV 2022-004321 **(Expedited Election Matter)**

REPLY BRIEF

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INTRODUCTION

The Superior Court's decision should be reversed because its failure to follow binding Arizona precedent and apply the plain language of § 16-351 creates an exception that swallows the rule that unqualified candidates must be removed from the ballot, and stymies Arizona's ability to regulate its elections. Candidates who engage in insurrections are not qualified to hold office under Section Three of the Fourteenth Amendment (the "Disqualification Clause") and voters should be allowed to present evidence and challenge the nomination of such candidates.

The Superior Court's decision is not supported by its misinterpretation of the Amnesty Act of 1872, Act of May 22, 1872, ch. 193, 17 Stat. 142 (1872). The Act's terms, its legislative history, and its subsequent treatment by courts and Congress all support its retroactive, not prospective, application of amnesty.

Nor is the Superior Court's decision supported by the grab-bag of other arguments Representatives Finchem, Gosar, and Biggs (the "Candidates") have submitted on appeal based on free speech, the Qualifications clause, a faux conviction requirement, and the adequacy of the pleadings. None of these forays rescues the lower court's decision to dismiss the complaints before a hearing.

This Court should reverse the decision below to restore the scope of § 16-351 and allow Arizona's voters to challenge the Candidates' qualifications on a full record, after a hearing.

ARGUMENT

I. THE CANDIDATES ARE SUBJECT TO CHALLENGE UNDER A.R.S. § 16-351 BASED ON THE FOURTEENTH AMENDMENT

"[L]imitations on who may serve in public office are as old as the Republic." *Daunt v. Benson*, 956 F.3d 396, 429 (6th Cir. 2020). The United States Constitution imposes requirements to become a Member of Congress and gives Arizona the primary responsibility of regulating elections of Arizona congressional candidates, including Biggs and Gosar. The Disqualification Clause also imposes a requirement on candidates for state office, including Finchem, whose elections are also regulated by Arizona. The Candidates do not contest any of these fundamental principles.

To effectively regulate its elections by ensuring that only qualified candidates appear on the ballot, the Arizona legislature created § 16-351, which provides a private right of action to voters to challenge a candidate's qualifications. A.R.S. § 16-351(B). It did not limit challenges to those based on a candidate's failure to comply with certain mechanical provisions of the state election law. Instead, it used the broadest possible language and granted "*any elector*" the ability

to "challenge a candidate for *any reason* relating to qualifications for the office sought as prescribed by law." *Id.* (emphasis added).[1]

The Superior Court and the Candidates misconstrue these challenges as attempts to sue under some federal private right of action to enforce Section Three of the Fourteenth Amendment. The federal constitutional qualifications for the office of U.S. Representative include age, citizenship, inhabitancy, and absence of disqualification under the Disqualification Clause. (The latter also serves as a requirement for state office.) *See* U.S. Const. art. I, § 2; *id.* amend. XIV, § 3. Arizona law imposes additional requirements on candidates for federal and state office, such as the A.R.S. § 16-311(A) requirement that a candidate file a signed nomination paper not less than 120 days before the primary election. If a candidate fails to file their signed nomination paper by that deadline, any elector can challenge that candidate—not because § 16-311 creates a private right of action to enforce the requirement, but because § 16-351 does. If a congressional candidate is not a United States citizen, the private right of action to challenge her candidacy again lies in § 16-351, not in Article I, Section 2 of the Constitution. Likewise, the private right of action in this case is created by § 16-351, not the Disqualification

[1] Finchem's argument that the Challengers should have brought a *quo warranto* proceeding is illogical. A *quo warranto* can only be used to challenge a sitting public officer, A.R.S. § 12-2042, not candidates, A.R.S. § 16-351.

Clause, and the candidate's failure to meet the Clause's requirements is the factual predicate for the § 16-351 challenge.

The Superior Court's decision creates a radical exception to § 16-351 by holding, as neither Arizona nor any other state has held before, that Arizona does not have the power to remove a candidate from the ballot who is disqualified by a provision of the United States Constitution. If upheld, "anyone, regardless of age, citizenship or any other constitutional ineligibility would be entitled to clutter and confuse our electoral ballot." *Lindsay v. Bowen*, 750 F.3d 1061, 1064-65 (9th Cir. 2014).

For example, a 16-year-old non-citizen could file nominating papers for the next election, secure a spot as a candidate for the United States House of Representatives, and remain immune from any § 16-351 challenge based on their constitutional ineligibility under Article I, Section 2. *See Harisiades v. Shaughnessy*, 342 U.S. 580, 587 n.10 (1952) (noting that Article I, Section 2 imposes requirements on congressional "candidates"). This is well within the realm of possibility in Arizona, where a Libertarian Party candidate for the House of Representatives only needs to gather an average of 826 signatures to appear on the

primary election ballot—smaller than a graduating class at a large Arizona high school.[2]

"[A] State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies." *Bullock v. Carter*, 405 U.S. 134, 145 (1972). Biggs, Finchem, and Gosar do not address the absurd repercussions of the Superior Court's interpretation of § 16-351, which would leave Arizona "powerless to prevent" non-citizens or teenagers from running for Congress. *Greene v. Raffensperger*, No. 22 Civ. 1294, 2022 WL 1136729, at *27 (N.D. Ga. Apr. 18, 2022) (refusing to enjoin state proceedings conducted under Georgia's § 16-351 equivalent to determine constitutional eligibility of congressional candidate).

Nor does Section 5 of the Fourteenth Amendment support the Superior Court's decision. Section 5 gives Congress the authority to enforce the Fourteenth Amendment, but it has never been understood to give Congress *exclusive* authority to enforce the Fourteenth Amendment. To the contrary, as *Brown v. Board of Education*, 347 U.S. 483 (1954), and a century of federal jurisprudence demonstrates, the judiciary can and does routinely enforce the Fourteenth Amendment even in the absence of congressional action. By the same token,

[2] *See* Arizona Secretary of State, *Running for Office*, https://azsos.gov/elections/running-office (last visited May 1, 2022).

nothing in Section 5 preempts *states'* constitutional authority to run their elections and enforce qualifications. And the Candidates have "pointed to no authority holding that a state is barred from evaluating whether a candidate meets the constitutional requirements for office or enforcing such requirements," *Greene v. Raffensperger*, No. 22 Civ. 1294, 2022 WL 1136729 at *27 (N.D. Ga. Apr. 18, 2022), as the Challengers seek to do here, in a proceeding under § 16-351.

The Superior Court's decision should be reversed; the Challengers' § 16-351 cases should be decided on their merits.

II. THE CANDIDATES HAVE NO AMNESTY

The Amnesty Act does not save the decision below. The Superior Court did not decide whether it applies and raised it only "for appellate purposes," (App'x 12, ¶ 41); Finchem confirmed the lower court "did not even ultimately even decide" the issue, (Finchem Br. at 2); Gosar acknowledges "reaching that issue is likewise unnecessary," (Gosar Br. at 34); and Biggs makes no mention of the Act at all. This accord of irrelevancy should end the matter, but Finchem devotes eleven pages of his brief to "additional thoughts and rebuttals on the 'Amnesty Act' issues." (Finchem Br. at 15.) Finchem's musings can be grouped into four; none has merit.

As an initial matter, the prospective application of the Amnesty Act is precluded by: (i) the language of the Act and the Disqualification Clause; (ii) their

legislative history; and (iii) subsequent United States Supreme Court authority and Congressional actions. (Op. Br. at 28-40.) Finchem does not distinguish any of these grounds.

First, the Fourteenth Amendment did not repeal itself. Finchem incongruously argues that reading the Amnesty Act to repeal Section Three of the Fourteenth Amendment makes sense because "the Fourteenth Amendment's grant of authority to Congress to enforce Section 3 was so complete that it expressly contemplated legislation not to enforce it all." (Finchem Br. at 16.) Allowing for the removal of the penalty imposed by the Disqualification Clause with a supermajority in both Houses is not the same as allowing for repeal of a constitutional amendment without ratification by the states.

Second, the Amnesty Act's use of the past tense of the words "remove," and "impose," supports a retroactive reading of the statute. Moreover, a contrary reading that interprets the Amnesty Act as a repeal of a section of the United States Constitution would be unconstitutional (U.S. Const. art. V) and therefore disfavored. *Rust v. Sullivan*, 500 U.S. 173, 191 (1991).

Third, Finchem's attempt to interpret the Disqualification Clause together with the Amnesty Act is internally inconsistent. The Disqualification Clause should be read prospectively because it applies to those who "shall have engaged" in insurrection. U.S. Const. amend. XIV, § 3. By contrast, the Amnesty Act looks

backwards to remove past political disabilities created by the Disqualification Clause. Finchem's view—that the Disqualification Clause looks backward, and the Amnesty Act looks forward—gets it wrong, twice. (Fincham Br. at 19-21.) The *Greene* court rejected this interpretation as "not supported by the text of the 1872 Act or subsequent history." 2022 WL 1136729, at *23.

Finally, the fact that the Supreme Court has repeatedly referred to the Disqualification Clause—without suggesting it has been repealed by the Amnesty Act—is strong evidence it remains in force. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 787 n.2 (1995); *Powell v. McCormack*, 395 U.S. 486, 520 n.41 (1969). And both the House conclusion that it "would not have the power to remove any future disabilities" after the 1898 Act, (6 Clarence Cannon, Cannon's Precedents of the House of Representatives of the United States, ch. 157, §§ 56-59 (1936)), and its current consideration of legislation to create a cause of action "to remove and bar from holding office certain individuals who engage in insurrection or rebellion against the United States," (H.R. 1405, 117th Cong. (2021)), without reference to the Amnesty Act, both rebut Finchem's forced interpretation.

III. THE CANDIDATES' OTHER ARGUMENTS ARE UNAVAILING

A. The First Amendment Does Not Overrule the Disqualification Clause

As a preliminary matter, Gosar raised his First Amendment arguments in his Response to Motion for Preliminary Injunction (Gosar App'x at 123-132), but this

appeal concerns only the motions to dismiss. The Superior Court denied as moot all motions other than the motions to dismiss. (*Id.* at 19.) Thus, absent a cross-appeal, *see* ARCAP 13(2), arguments based on the court's denial of the Motion for Preliminary Injunction are not properly before this Court.

Turning to the arguments offered, the First Amendment does not apply to co-equal provisions of the Constitution.[3] For example, ordinary Americans cannot be compelled to swear an oath to defend the Constitution. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). But the Candidates do not have a right to refuse to swear that oath if they want to take office. *See* U.S. Const. art. VI, cl. 3 (Oath Clause); *Bond v. Floyd*, 385 U.S. 116, 132 (1966). Just as applying the "compelled speech" analysis to the Oath Clause would nullify that provision of the Constitution, applying *Brandenburg* to the Disqualification Clause would defeat its purpose. If organizing, facilitating, and aiding an insurrection cannot count as engaging in insurrection, then only foot soldiers would face possible disqualification. But the framers of the Fourteenth Amendment were not primarily concerned with disqualifying Confederate soldiers; they were primarily concerned with disqualifying Confederate leaders. Gerard N. Magliocca, *Amnesty and Section*

[3] Because the First Amendment arguments lack merit, Gosar's arguments about the standard of appellate review are irrelevant.

Three of the Fourteenth Amendment, 36 Const. Comment 87, 91-93 (2021). For that reason alone, Gosar and Biggs' interpretation must be rejected.

Further, *Brandenburg* only applies to speech that incites *future* violence. As the Ninth Circuit has noted, "the First Amendment is quite irrelevant if the intent of the actor and the objective meaning of the words are so close in time and purpose to a substantive evil as to become part of the ultimate crime itself." *United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985); *see also McCoy v. Stewart*, 282 F.3d 626, 631 (9th Cir. 2002) (in *Brandenburg* analysis "timing is crucial" because it separates "abstract advocacy" from advocacy of "imminent" crimes).[4] The First Amendment does not upset bedrock common law that encouraging and abetting *ongoing* violence is not protected speech. *See generally Rael v. Cadena*, 604 P.2d 822 (N.M. 1979). Similarly, intentionally *organizing* violence is not protected by the First Amendment.

On appeal, having secured a motion to dismiss that did not resolve any issues of fact (and with the lower court and this Court bound to treat all allegations as true), Gosar and Biggs cannot now rely on their own alternative facts.

[4] Gosar's citations to "heckler's veto" cases are irrelevant, as they deal with contemporaneous violent *opposition* to speech, not speech *encouraging* violence.

B. The Qualifications Clause Does Not Protect Gosar and Biggs

The Constitution's Elections Clause grants states the power to adjudicate the constitutional qualifications of congressional candidates. And Biggs and Gosar would have recourse even if Arizona courts erroneously disqualify them.

In the most comprehensive and recent decision on this question, a federal court held that adjudicating a congressional candidate's qualifications does not violate the Qualifications Clause; found the precedent from presidential election cases persuasive; held that the Qualifications Clause applies to Congress' "members," not candidates, and recognized that deciding otherwise would leave a state defenseless to protect its ballot. *Greene*, 2022 WL 1136729, at *26-*28.[5]

The Elections Clause is a "broad power" to provide a "*complete code* for congressional elections." *Arizona v. Inter Tribal Council of Ariz., Inc*., 570 U.S. 1, 8-9 (2013) (emphasis added) (citing *Smiley v. Holm*, 285 U.S. 355, 366 (1932)); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986) (describing the

[5] The Candidates' cited cases are all irrelevant: Cases concerning *post*-election adjudication are irrelevant to pre-election challenges; *State ex rel Handley v. Superior Court of Marion County* involved *adding* a qualification for congressional office, not adjudicating an existing constitutional qualification. *See* 151 N.E 2d 508, 510-15 (Ind. 1958); *cf. U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 837 (1995) (states cannot add new qualifications); and *State ex rel. Chavez v. Evans* addressed a pre-election challenge in six sentences by citing precedent dealing with *post*-election challenges. 446 P.2d 445, 448-49 (N.M. 1968). The more recent, thorough opinion in *Greene* is both applicable and persuasive.

Elections Clause as a "broad power" that allows the regulation of primaries). A "complete code" includes the power to determine whether a candidate is constitutionally ineligible. Otherwise—the logical consequence of the Candidates' approach—Arizona would be *obligated* to list, for example, *non-citizens* on the ballot, and its courts would be powerless to act.

Biggs posits that the difference between congressional and presidential elections is Congress' final judging role. (Biggs Br. at 15-16.) But Congress also has (and has exercised) final power to exclude unqualified presidential candidates. U.S. Const. amend. XII; 3 U.S.C. § 15; Beverly J. Ross & William Josephson, *The Electoral College and the Popular Vote*, 12 J. of L. & Pol. 665, 706-07 (1996) (citing Congress' rejection of electoral votes for constitutionally unqualified presidential candidate-elect).

Finally, under 2 U.S.C. § 382, if the House determines that one of them is qualified, it can refuse to seat anyone from their district, creating a vacancy and triggering a new election under A.R.S. § 16-222.

C. The Disqualification Clause Does Not Require a Prior Conviction

Candidates cite no constitutional text, judicial precedent, or practice suggesting that the Disqualification Clause requires a prior criminal conviction. From 1868-1872, the Clause was broadly applied; seminal cases involve ex-Confederates who were *never* charged with any crimes. *See, e.g.*, *Worthy v.*

Barrett, 63 N.C. 199 (1869). Indeed, *Griffin* requires procedures, "more or *less formal*" to determine disqualification 11 F. Cas. at 26; a *formal* civil proceeding (as per A.R.S. § 16-351) suffices.

D. The Complaints Allege Violations of the Fourteenth Amendment

The trial court did not address the sufficiency of the allegations below and indicated at oral argument the remedy for any such concern was re-pleading. Nonetheless, the Candidates ask this Court to scrutinize the allegations on appeal. This line of defense is fruitless.

The Challengers clearly allege that the Candidates took an oath to uphold the United States Constitution and that the events of January 6, 2021 meet the definition of an insurrection. What remains, then, is the question of what the Candidates did to aid the January 6 events.

Finchem is alleged to have assisted in planning the events of January 6, traveled to Washington, D.C. with the express purpose of disrupting the peaceful transition of power, and joined the mob of insurrectionists as they marched on the Capitol. (App'x 11-18, 29, ¶¶ 50-85, 153.) Finchem's argument—that he was not directly involved in the assault on the Capitol—is a strawman. (Finchem Br. at 8.) Finchem need only have aided the January 6 events to contravene the Fourteenth Amendment; his acts before and during the attack meet this threshold.

Gosar is alleged to have helped plan two demonstrations he knew would likely become violent that intended to prevent Congress from certifying electoral votes. And he aided the events of January 6 as they unfolded, including creating confusion about the ongoing attack. (App'x 71-74, ¶¶ 95-96, 99-105.)

Ali Alexander thanked Biggs and Gosar for their help planning the Wild Protest. (App'x 13, ¶ 50.) Biggs and Gosar met with the president and announced they were working to prevent the "disenfranchisement" of Trump voters, with Gosar tweeting afterwards, "sedition will be stopped." (*Id.* ¶ 53.) And Biggs helped organize and promote the Ellipse Demonstration that evolved into the attack on the Capitol. (App'x 102, ¶¶ 45, 60.) Bigg's defense of his actions as either free speech, peaceful protest, or legislative action (Biggs. Br. at 18-25) is misplaced. Biggs' acts, if proven, aided the January 6 events in contravention of the Fourteenth Amendment.

Each complaint alleges the three elements that, if proven, would disqualify the Candidates under the Fourteenth Amendment and require their removal from the ballot under § 16-351: an oath, insurrection, and act of engagement.

E. Gosar is Not Entitled to Attorneys' Fees

Representative Gosar's demand for attorneys' fees is performative and should be denied. He requests fees under A.R.S. § 12-752 (Gosar Br. at 36), but he did not file a motion to dismiss the action under § 12-752, as the statute requires.

(Gosar App'x at 97.) Nor is engaging in insurrection the "[e]xercise of the right of petition," A.R.S. § 12-751(1), in any event. *See also supra* at Section III.A. Gosar's motion for attorneys' fees under A.R.S. § 12-349 was denied below, and he did not appeal. (*Cf.* Gosar App'x at 19 (ruling), 121 (motion to dismiss).) Finally, the absence of controlling Arizona law and a federal court's ruling that similar litigation may proceed in another venue foreclose fees on appeal. *Fritz v. City of Kingman*, 191 Ariz. 432, 435-36, 957 P.2d 337, 340-41 (1998) (denying fees where unsuccessful party "made a good faith argument for extension of existing law").

F. A Hearing Would Be Timely

Remand is appropriate even if it results in disqualification after the ballots are printed. *See* A.R.S. § 16-343(D) (providing a process for filling a vacancy created before an election "due to voluntary or involuntary withdrawal of the candidate and that occurs following the printing of official ballots").

CONCLUSION

The order of the Superior Court should be reversed, and the Candidates' candidacy challenges should proceed to an evidentiary hearing.

DATED this 2nd day of May, 2022.

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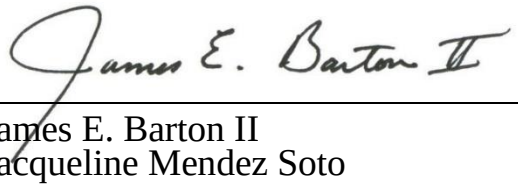

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± Motions for pro hac vice pending
* Motions for pro hac vice admission forthcoming.