No. 22-11299-JJ

IN THE
United States Court of Appeals
FOR THE ELEVENTH CIRCUIT

MARJORIE TAYLOR GREENE, an individual,

Plaintiff-Appellant

v.

MR. BRAD RAFFENSPERGER, in his official capacity as Georgia Secretary of State, MR. CHARLES R. BEAUDROT, in his official capacity as an Administrative Law Judge for the Office of State Administrative Hearings for the State of Georgia,

Defendants-Appellees, and

DAVID ROWAN, *et al.*,

Intervenor-Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Georgia Atlanta Division

BRIEF OF APPELLANT

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

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CERTIFICATE OF INTERESTED PERSONS

AND CORPORATE DISCLOSURE STATEMENT (CIP)

Pursuant to FRAP 26.1 and Local Rule 26.1-1,

Greene, Marjorie Taylor

who is Appellant, makes the following disclosure:

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

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

Counsel for: Marjorie Taylor Greene, Plaintiff-Appellant

Statement Regarding Oral Argument

This case involves important questions of both federal and constitutional law. The challenge to Appellant's candidacy for Congress is based on Section Three of the Fourteenth Amendment to the U.S. Constitution, and the questions of law are both complicated and not previously decided by this Court. Oral argument would assist this Court in analyzing the complex questions of law involved. Appellant's counsel respectfully requests this Court schedule an expedited oral argument at its earliest convenience, after requiring Appellees to expeditiously file a response brief.

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Jurisdictional Statement

Plaintiff-Appellant Marjorie Taylor Greene ("**Rep. Greene**") alleged the district court had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3). Pl.'s Verified Compl. for Decl. and Inj. Relief, ECF No. 3, ¶ 5. The district court found it had subject matter jurisdiction over Counts I - III of Rep. Greene's Complaint because she had Article III Standing and *Younger* abstention was inappropriate. Op. and Order, ECF No. 52, 20, 38. ("**Inj. Order**"). The district court found that it did not have jurisdiction over Count IV of Rep. Greene Complaint, which was based upon The Amnesty Act of 1872. ("**1872 Act**"). Inj. Order at 24. The district court found Rep. Greene did not carry her burden to establish jurisdiction over the 1872 Act claim because the "parties have not briefed the novel issue as to whether the [1872 Act] creates a private right that may serve as the basis for a private suit." Inj. Order at 23-24.

On April 18, 2022, the district court denied Rep. Greene's Motion for Temporary Restraining Order and Motion for Preliminary Injunctive Relief. Inj. Order at 72. On April 19, 2022, Rep. Greene timely filed an appeal from the Order denying injunctive relief. Notice of Appeal, ECF No. 53.

This Court has jurisdiction under 28 U.S.C. §§ 1291 and 1292(a)(1) to review the district court's denial of preliminary injunctive relief, on an

interlocutory basis.

Statement of Issues

1. The district court declined to assert jurisdiction over Rep. Greene 1872 Act claim (Count IV) because the "parties have not briefed the novel issue as to whether the [1872 Act] creates a private right that may serve as the basis for a private suit." Inj. Order at 23-24. Did the district court err, as a matter of law, when it declined to assert jurisdiction over Rep. Greene 1872 Act claim?

2. Did the district court abuse its discretion by denying Rep. Greene's motion for preliminary injunctive relief?

Statement of the Case

Rep. Greene currently serves as a Member of the U.S. House of Representative, for Georgia's 14th Congressional District. Stipulated Facts, ECF No. 38 ¶ 1. Rep. Greene filed her candidacy, for the upcoming midterm elections, for Georgia's 14th congressional district on March 7, 2022 and amended that filing on March 10, 2022. *Id.* ¶ 2.

On March 24, 2022, several voters in Rep. Greene's congressional district ("**Challengers**") filed a Challenge against Rep. Greene under Georgia law. *Id.* ¶ 3; O.C.G.A. § 21-2-5 ("**Challenge Statute**"). The Greene Challenge stated that Rep. Greene "does not meet the federal constitutional requirements for a Member of the

U.S. House of Representatives and is therefore ineligible to be a candidate for such office." "**Greene Challenge**", ECF No. 3-1, ¶ 1. The Greene Challenge was based upon claims that Rep. Greene "aided and engaged in insurrection to obstruct the peaceful transfer of presidential power, disqualifying her from serving as a Member of Congress under Section 3 of the 14th Amendment ("**§ 3**") and rendering her ineligible under state and federal law to be a candidate for such office." *Id.*

The Greene Challenge has been referred by the Secretary of State for the State of Georgia ("**Sec. Raffensperger**") to the Office of State Administrative Hearings, State of Georgia ("**OSAH**"), which assigned the matter to Administrative Law Judge Charles Beaudrot ("**ALJ Beaudrot**"). Stipulated Facts, ¶ 6.[1] In addition to their challenge, Challengers filed a notice to produce documents and a notice to take Rep. Greene's deposition. *Id.* ¶ 7. ALJ Beaudrot denied both of these motions after briefing by the parties. *Id.* ¶ 10.

On April 1, 2022, Rep. Greene filed her Verified Complaint and her motion for preliminary injunction in the district court. Compl., ECF No. 3-1; Mot. for Prelim. Inj., ECF No. 5. Rep. Greene sought declaratory and injunctive relief

[1]Collectively, Sec. Raffensperger and ALJ Beaudrot will be referred to as "**State Defendants**."

prohibiting State Defendants from proceeding to adjudicate the Greene Challenge to her candidacy for Congress under the Challenge Statute. Rep. Greene brought four claims:

- **(Count I)** The Challenge Statute's provision triggering a government investigation based solely upon a Challenger's "belief" that Rep. Greene is unqualified violates Rep. Greene First Amendment right to run for political office.
- **(Count II)** The provision of the Challenge Statute which shifts the burden of proving a negative to the Candidate, as applied to any Challenge under [§ 3], violates the Due Process Clause of the Fourteenth Amendment.[2]
- **(Count III)** The Challenge Statute usurps the U.S. House of Representative's power to make an independent, final judgment on the qualifications of its Members, so it violates U.S. Const. Art. 1, § 5.
- **(Count IV)** The Challenge Statute, as applied to Rep. Greene under [§ 3], violates federal law. 1872 Act.

The Challengers filed a motion to intervene, ECF No. 13, which the district court granted after all parties responded. Order Granting Intervention, ECF No. 33. The district court held a hearing on the preliminary injunction on April 8, 2022. *See* ECF No. 39, Notice of Hearing Transcript. The district court denied Rep. Greene's motion for preliminary injunction on April 18, 2022. *See* Inj. Order. The district court held that:

- Rep. Greene alleged a "concrete, particularized, and actual or imminent"

[2]ALJ Beaudrot issued a prehearing order which shifted the burden of proof to the Challengers. ALJ Beaudrot Order, ECF No. 48-1, 3-4.

injury sufficient to demonstrate Article III Standing. *Id*. at 20.

- Rep. Greene did not carry her burden to establish jurisdiction over the 1872 Act claim because the "parties have not briefed the novel issue as to whether the [1872 Act] creates a private right that may serve as the basis for a private suit." Inj. Order at 23-24.
- *Younger* abstention was inappropriate because Rep. Greene "did not seek to thwart any state court compliance process and thus does not seek to enjoin a proceeding uniquely in furtherance of a state court's ability to perform its judicial functions." *Id*. at 38.
- Rep. Greene was unlikely to succeed on her First or Fourteenth Amendment claims (Counts I and II), because "[t]he only burden on Plaintiff at this stage is her participation in an expedited streamlined administrative review process. . . . The State's interest in ensuring the integrity and efficiency of its election process is sufficiently weighty to justify that relatively minimal burden." *Id*. at 63.
- Rep. Greene was unlikely to succeed on the merits of Count III, "[g]iven the preliminary stage of the proceedings, the difficulty of the legal questions posed," and the court's finding of a lack of persuasive legal authority to support Rep. Greene claim. *Id*. at 71.

During the pendency of this litigation, the OSAH proceeding has continued. Rep. Greene has filed: a motion to dismiss with the OSAH, filed objections to the notice to produce documents, a motion to quash her subpoena, an objection to a notice to take her deposition, a motion to set the burden of proof with Challengers, a motion to exclude a witness, a motion in limine detailing her objections to evidence proposed to be admitted during the OSAH hearing, and subsequent specific objections to the Challengers' exhibit list. Finally, Rep. Greene testified at the nearly eight hour OSAH hearing that was held on April 22, 2022. Within 30 days after the close of the record, the ALJ "shall issue a decision to all parties in the case." O.C.G.A. § 50-13-41(c). The ALJ's decision must "contain findings of fact, conclusions of law, and a disposition of the case." *Id.*

After the ALJ issues a decision on the Challenge, Sec. Raffensperger will review this decision—treating it as an initial decision under Georgia law. *Id.* at (d)(2). On review, Sec. Raffensperger shall consider the whole record or such portions of it as may be cited by the parties. When reviewing the ALJ's initial decision, Sec. Raffensperger "shall give due regard to the [ALJ's] opportunity to observe witnesses. If Sec. Raffensperger "rejects or modifies a proposed finding of fact or a proposed decision, [he] shall give reasons for doing so in writing in the form of findings of fact and conclusions of law." *Id.*

Sec. Raffensperger has 30 days following the entry of the decision by the ALJ to "reject or modify such decision." O.C.G.A. § 21-2-5(d)(3). If he does not reject or modify the ALJ's decision within that 30 day period, the ALJ's decision is affirmed by operation of law. *Id.* Based upon the consideration of the ALJ's initial decision, Sec. Raffensperger "shall determine if the candidate is qualified to seek and hold the public office for which such candidate is offering." O.C.G.A. § 21-2-5(c).

If Sec. Raffensperger determines Rep. Greene is not qualified, he "shall withhold the name of the candidate from the ballot or strike such candidate's name from the ballot if the ballots have been printed. If there is insufficient time to strike the candidate's name or reprint the ballots, a prominent notice shall be placed at each affected polling place advising voters of the disqualification of the candidate and all votes cast for such candidate shall be void and shall not be counted." *Id.*

Either the Challengers or Rep. Greene will have the right to appeal the decision of Sec. Raffensperger "by filing a petition in the Superior Court of Fulton County within ten days after the entry of the final decision by the Secretary of State." *Id.* at (e). "An aggrieved party may obtain a review of any final judgment of the superior court by the Court of Appeals or the Supreme Court, as provided

by law." *Id.*

The Georgia Primary Election is scheduled to take place on May 24, 2022.[3] Counties may begin mailing absentee ballots as soon as April 25, 2022. *Id.* Early in-person voting begins on May 2, 2022. *Id.* Absentee allots have to be printed in advance of mailing. As a practical matter, it is virtually impossible to fully adjudicate the Greene Challenge, including all appeals as of right, before at least these absentee ballots are printed, and likely not before they are mailed. Pl.'s Mem. in Supp. of Mot. for Prelim. Inj., ECF No. 5-1 at 10. ("**PI Mem.**")

Rep. Greene vigorously denies that she "aided and engaged in insurrection to obstruct the peaceful transfer of presidential power," but this litigation is not based in Rep. Greene's factual defenses. Instead, this matter is before the Court based upon various constitutional and legal challenges to the Georgia Challenge Statute itself and its application here.

Summary of Argument

The district court abused its discretion when it denied Rep. Greene's motion for injunctive relief because it made several erroneous conclusions of law.

The Challengers only have a "generalized grievance" that does not give rise

[3] https://sos.ga.gov/sites/default/files/forms/2022%20State%20Scheduled%20Elections%20Short%20Calendar.pdf

to a an injury in fact for Article III standing. The Challenge Statute provides voters a process to file a challenge, but it does not guarantee a right to file a challenge on any particular basis. That process is available to *all* voters in Georgia. Furthermore, no voter in Georgia has a private cause of action to seek to remove Rep. Greene from the ballot, because she is disqualified under § 3, and, ipso facto, Challengers can have no right, conferred by state law, to litigate their § 3 candidacy challenge before the OSAH. Therefore, the Challengers lack Article III standing here, generally. As the State Defendants have not argued the 1872 Act claim, and as such have waived it, the Challengers must have standing in order to mount their own defense. They do not have standing as the mere generalized grievances asserted by the Challengers here do not assert a concrete and personalized injury.

It is no mere oversight that § 3 imposes no disability to a person as a candidate for office. The framers knew how to impose a disability at such time. In the case of § 3, they chose to impose the disability *only* upon those who had *already* been elected and when the Congressman-elect presents herself to swear the oath of office. Accordingly, the district court erred in finding that any § 3 disability bars candidacy.

The court said "Count IV, as alleged, is brought directly under the 1872

Amnesty Act, not Section 1983." *Id.* at 22. But Rep. Greene stated at the beginning of her complaint and thereafter that it was brought under 42 U.S.C. § 1983. Compl. ¶¶ 1, 4, 11, 12. So it was unnecessary to repeat that in Count IV. And the district court acknowledged that Rep. Greene reasserted that Count IV was brought under § 1983 at oral argument, and it analyzed jurisdiction on the basis that Court IV was brought under § 1983. Inj. Order at 20, 22-24. Given the unique nature of the 1872 Act—removing a political disability from persons subject to it—Congress would have thought the 1872 Act's wording entirely adequate to authorize what it intended, namely, that persons freed from disability by the Act may assert that right to immunity as a cause of action against those who would reimpose the disability.

The District Court also stated that the 1872 Act must be construed to avoid unconstitutionality, and that reading it as prospectively would render § 3 ineffective. *Id.* at 63. But the plain language of § 3 gave Congress plenary power to remove any and all § disabilities, in the final sentence to § 3, and the district court identifies no provision limiting the breadth of that power. The plain language of the 1872 Act removes this political consequence from any Representative other than those who served during the 36th and 37th Congresses. Rep. Greene is a Member of the 117th Session of Congress, so the 1872 Act

removed the ability to apply § 3 to her. Since § 3 doesn't apply to her (or any Member holding office after the 37th Congress), the application of § 3 to her is prohibited by federal law. In any event, since Congress can remove any disability incurred by Rep. Greene up to the very moment before she takes the oath of office, it cannot be determine whether Rep. Greene is disqualified to take that oath now or at anytime until that moment. So declaring her disqualified to be a candidate now, based on § 3, violates § 3.

The district court also erred in its Anderson/Burdick analysis of Rep. Greene's First and Fourteenth Amendment claims. The district court waves Rep. Greene's claims of burden away by portraying an unrealistic series of events to suggest that the Challenge Statute's process *could* ensure that the question of Rep. Greene's candidacy is resolved in time to avoid the irreparable harm inherent in trying to recover votes wrongly denied under the Challenge Statute process. This is plainly insufficient. The lower court erred in concluding that the burdens imposed by the Challenge Statute were "mere inconvenience," based on this erroneous analysis. Because Rep. Greene's burden is severe, the State's interest must be compelling to outweigh that burden. None of the cases relied on by the district court described the ballot protection interest as compelling and none found that it was sufficient to justify any regulation analogous to one as burdensome as

the Challenge Statute.

Surely if the elected members of Congress can only prevent a member from being seated with two thirds vote, a state cannot adopt a law that allows a candidate for federal office to be stricken from the ballot administratively. Indeed, it would have made little sense to prohibit former members of Congress who thereafter joined the Confederacy from again serving in Congress, but leave the decision of who was disqualified to the same states that rebelled only a few years prior. Because the Challenge Statute directly usurps Congress' constitutional responsibilities, it also violates Article 1, § 5 of the U.S. Constitution.

Although not analyzed by the district court, the other three injunctive relief factors weigh in Rep. Greene's favor. At this point, even if this Court would rule in an extremely expedited fashion, Rep. Greene could be irreparably harmed by having campaigned (and potentially won the nomination) and then having her constitutional right to run for office in the general election taken away. Rep. Greene could lose her right to run for office and her supporters would lose their right to vote for her because the Challenge Statute allowed the belief of five voters in her district to trigger an unconstitutional and unlawful process that may erroneously prevent her from running for office in the first place.

Opposing a candidate you disagree with is one thing—using the political

system to prevent that same candidate from running is quite another. If political operatives are able to use a quasi-judicial process, fraught with constitutional and legal infirmaries, to select who their favored candidate will have to run against, irreparable harm is hardly adequate to describe the danger to our Republic.

Even if Challengers are somehow harmed by enjoining the State of Georgia from proceeding with their candidate challenge, they are not irreparably harmed because they can petition Congress, upon Rep. Greene's reelection, urging Congress to disqualify her from taking the oath of office. Further, nothing is preventing Challengers from campaigning for, supporting, or voting for any of Rep. Greene's opponents in either the primary or general election.

Finally, the public interest is served by an injunction here. Of course, the public's interest is served by the state's enforcement of constitutional laws. But the public's interest is most definitely not served when unconstitutional or unlawful laws are enforced. The Challenge Statute is one such unconstitutional and unlawful statute, and the public interest favors injunction.

Argument

I. Intervenors lack Article III Standing.

Standing is a threshold jurisdictional inquiry, reviewed *de novo*. *Wood v. Raffensperger*, 981 F.3d 1307, 1313 (11th Cir. 2020).

While "[m]ost standing cases consider whether a plaintiff has satisfied the requirement when filling suit, [] Article III demands that an "actual controversy" persists throughout all stages of litigation." *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013) (citing *Already, LLC v. Nike, Inc.,* 568 U.S. 85, 89 (2013)). Where a defendant waives an argument or does not defend against a claim, as the State Defendants did here, an intervenor must have standing to defend that claim. *See Hollingsworth*, 570 U.S. at 705-706. *See also Diamond v. Charles*, 476 U.S. 54, 63 (1986).

In *Hollingsworth*, the Court found that the intervenors had no standing to defend the challenged statute as their only interest "was to vindicate the constitutional validity of a generally applicable California law." 570 U.S. at 706. "Such a 'generalized grievance,' no matter how sincere, is insufficient to confer standing." *Id.* Similarly in *Diamond*, "[t]he interests Diamond asserted before the District Court in seeking to intervene plainly are insufficient to confer standing on him . . . now." 476 U.S. at 69. Further, "an intervenor's interest must be a particularized interest rather than a generalized grievance." *Chiles v. Thornburgh*, 865 F.2d 1197, 1212 (11th Cir. 1989). *See also Howard v. McLucas*, 782 F.2d 956, 959 (11th Cir. 1986).

A right or entitlement created by a state statute can give rise to a cognizable

"property" interest protected under the Fourteenth Amendment. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). But such a property interest requires more than an abstract need or desire for it, and he must have more than a unilateral expectation of it. *Id.* "He must, instead, have a legitimate claim of entitlement to it." *Id.*

The Challengers only have a "generalized grievance" that does not give rise to a an injury in fact. The Challenge Statute provides voters a process to file a challenge, but it does not guarantee a right to file a challenge on any particular basis. That process is available to *all* voters in Georgia. Any decision regarding the Challenge Statute would affect all citizens equally as well. If a different set of voters had brought the same § 3 Challenge against a different candidate as the Challengers brought here, they would not have standing as their interest is only a generalized grievance that all voters of Georgia would have. Similarly, the Challengers' interest is that of every Georgia voter, bringing a § 3 challenge. Thus, they "have no personal stake in defending its enforcement that is distinguishable from the general interest of every citizen of [Georgia]." *Hollingsworth,* 570 U.S. at 707. "Such a generalized grievance, no matter how sincere, is insufficient to confer standing." *Id.* at 706.

II. The district court erred in denying the preliminary injunction.

The Circuit Court reviews a district court's "decision to deny a preliminary injunction for abuse of discretion," *Scott v. Roberts*, 612 F.3d 1279, 1289 (11th Cir. 2010) (citation omitted), overturning decisions with "a clear error of judgment," *United States v. Kelly*, 888 F.2d 732, 745 (11th Cir. 1989), or which "fail[] to . . . apply the correct legal standard," *Cheney v. Anchor Glass Container Corp.*, 71 F.3d 848, 850 (11th Cir. 1996). In short, the Court reviews "findings of fact . . . for clear error and legal conclusions *de novo*." *Scott*, 612 F.3d at 1289 (citation omitted). *De novo* review of legal conclusions mean that this Court "review[s] and correct[s] errors of law without deference to the district court." *Alabama v. U.S. Army Corps of Eng'rs*, 424 F.3d 1117, 1129 (11th Cir. 2005).

Even though the district court did not issue a holding on the 1872 Act claim, it analyzed jurisdictional issues involving the 1872 Act, finding the "parties have not briefed the novel issue as to whether the [1872 Act] creates a private right that may serve as the basis for a private suit." Inj. Order at 23-24. The district court also used this Act to analyze Rep. Greene's First and Fourteenth Amendment claims. Therefore, the 1872 Act will be addressed first, followed by Rep. Greene's other claims.

A. Congress has not granted a private cause of action for § 3 against a candidate which Challengers can assert.

Finally, in order for Challengers to litigate their § 3 candidacy challenge, Congress must provide a private right of action. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326 (2015) (rejecting mandatory private enforcement of the Supremacy Clause). This limitation prevents an individual from bring a claim, as Challengers attempt to do, that attempts to enforce this constitutional provision against Rep. Greene.[4]

Congress, however, has not created a private right of action to allow a citizen to enforce § 3 by having a candidate declared by the state as "not qualified" to hold public office. *Hansen, et al. v. Finchem, et al.*, Case No. CV 2022-004321, slip op. at ¶¶ 7-21 (Superior Court of Arizona, Maricopa County April 21, 2022). Addendum. *Hansen* relied primarily on (1) *In Re Griffin*, 11 F. Cas. 7 (C.C.D. Va. 1869), that held that the procedures necessary for the individualized determinations that a person violated § 3 "can only be provided for by congress," which it had not done, *Hansen*, at ¶¶ 9-11 (citing *Griffin*, 11 F. Cas. at 26), (2)

[4]This requirement does not prevent a court from providing equitable relief in order to prevent *state officials* from violating federal law. *Armstrong*, 575 U.S. at 327. So, the lack of a private right of action to enforce a constitutional provision does not prevent a citizen from seeking injunctive relief *from* a state's process that violates her rights under a provision of federal law or the U.S. Constitution, as Rep. Greene has done here in Count IV of her Complaint.

Section 5 of the Fourteenth Amendment which authorized Congress to "enforce, by appropriate legislation, the provision[s] of this article," which Congress had not done for § 3, *Hansen*, at ¶¶ 10-13, 16, and (3) a bill introduced in Congress, which would have provide a cause of action "to remove and bar from holding office certain individuals who engage in insurrection or rebellion against the United States, and for other purposes." *Id*. at ¶¶ 17 (citing 2021 Cong U.S. H.R. 1405, 117th Congress, 1st Session).

Therefore, no voter in Georgia has a private cause of action to seek to remove Rep. Greene from the ballot because she is disqualified under § 3, and, ipso facto, Challengers can have no right, conferred by state law, to litigate their § 3 candidacy challenge.

B. The district court erred in holding that § 3 could be applied to disqualify Rep. Greene (Count IV).

1. The State Defendants failed to contest Count IV, so the Challengers do not have Article III standing to contest that claim.

The State Defendants did not defend the Challenge Statute against Rep. Greene's 1872 Act claim. (Count IV). Therefore, they waived that defense. *See Continental Tech. Services, Inc. v. Rockwell Intern. Corp.*, 927 F.2d 1198, 1199 (11th Cir. 1991) ("An argument not made is waived.").

In *Diamond*, the state defendants did not defend the challenged statute on

appeal. 476 U.S. at 61. The intervenor, however, appealed the decision. *Id.* Unlike *Hollingsworth*, the state defendants filed a "letter of interest," invoking the Court's Rule 10.4, providing that "[a]ll parties to the proceeding in the court from whose judgment the appeal is being taken shall be deemed parties in this Court." *Id.* Despite this, the Court required the intervenors to have standing. *Id.* at 61-62. While intervenors are considered parties, "an intervenor's right to [defend a suit] in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III." *Id.* at 68.Thus, "[t]he interests Diamond asserted before the District Court in seeking to intervene plainly are insufficient to confer standing on him . . . now." *Id.* at 69.

Where the original defendant does not defend against a suit, an intervenor must have standing to defend against the suit. *Dillard v. Chilton Cty. Com'n,* 495 F.3d 1324, 1330-36 (11th Cir. 2007). In *Dillard*, the State defendants had decided to stop defending against the lawsuit. *Id.* at 1327. The intervenors sought to intervene in order to mount a defense themselves. *Id.* at 1327-28. In order to do so, they were required to have standing. *Id.* at 1330. The Court ultimately held that the intervenors did not have standing as "the mere generalized grievances asserted by the intervenors here do assert a concrete and personalized injury, and accordingly

they lack personal standing to bring them for judicial resolution." *Id.* at 1333.

Again, the Challengers only have a generalized grievance, held by all the voters of Georgia. As the State Defendants have not argued the 1872 Act claim, and as such have waived it, the Challengers must have standing in order to mount their own defense. They do not have standing as "the mere generalized grievances asserted by the [challengers] here do not assert a concrete and personalized injury." *Id.*

2. Rep. Greene's "disqualification" under § 3 cannot be determined prior to January 3, 2023.

The district court erred in its legal conclusion that § 3 bars candidacy, *see, e.g.*, Inj. Order at 64 (referencing "candidates who are not disqualified by [§ 3] . . . ."). Georgia law permits removal of candidates from the *ballot* based on prospective ineligibility to *take office*. But § 3 bars only office-holding, which disability may be removed by Congress at *any time* before Rep. Greene is sworn in on January 3, 2023. Rep. Greene cannot be removed as a candidate now, since it cannot be determined now that she will be ineligible to take office then.

In finding otherwise, the district court failed to apply the plain meaning inherent in every word of § 3. Not only is § 3's disability aimed at holding *office* (who have "previously taken an oath") and their *office-holding* ("[n]o person shall

be a . . . Representative"), but Congress may remove the disability at any time before the Congressman-elect presents herself to take the oath of office. Statutory construction requires giving effect to each word of a statute. A construction applying § 3 to a candidacy, way before it can be dermined that the candidate is qualified to take office, renders its second sentence—one of only two—a nullity.

This likewise gives no effect to the whole first clause ("[n]o person *shall be*"—not "shall run for office to be"—"a Senator or Representative in Congress . . . " (emphasis added)); and its modifying phrase ("who, *having previously taken an oath* . . . " (emphasis added)); thus leaving us with only one modifying phrase ("shall have engaged in insurrection . . . .") which, standing alone, is meaningless. Thus, state procedures purporting to block candidacy under § 3 not only ignore § 3's plain meaning, but also circumvent Congress' role in removing a disability, which it is authorized to do at any time, even up to the moment the Congressman- elect presents herself to take the oath of office. Whether such disability applies, then, cannot be determined now.

Constitutional comparison confirms this. Article I, Section 2 of the Constitution provides, "No Person shall be a Representative who . . . shall not, *when elected*, be an Inhabitant of that State . . . ." Article I, Section 3, contains the same language for Senators. It is no mere oversight, then, that § 3 does not apply

its disability to a person "when elected," but only when taking office. The framers knew how to impose a disability at either time. In the case of § 3, they chose to impose the disability *only* upon those who had *already* been elected.

Accordingly, the district court erred in finding that § 3's disability bars candidacy.

3. The district court erred in its holding that it did not have jurisdiction over Rep. Greene's 1872 Act claim.

The district court abused its discretion by making an error of law when it held that "Plaintiff has . . . not carried her burden to establish that the Court has jurisdiction over her 1872 Act claim," because the "parties have not briefed the novel issue as to whether the [1872 Act] creates a private right that may serve as the basis for a private suit." Inj. Order at 23-24.

The court said "Count IV, as alleged, is brought directly under the 1872 Amnesty Act, not Section 1983." *Id.* at 22. But Rep. Greene stated at the beginning of her Complaint and thereafter that it was brought under 42 U.S.C. § 1983. Compl. at ¶¶ 1, 4, 11, 12. So it was unnecessary to repeat that in Count IV. And the district court acknowledged that Rep. Greene reasserted that Count IV was brought under § 1983 at oral argument, and it analyzed jurisdiction on the basis that Court IV was brought under § 1983. Inj. Order at 20, 22-24.

The district court correctly noted that § 1983 is a "'vehicle'" for "suits against those acting under color of state law for deprivation of any rights, privileges, or immunities secured by the Constitution and laws." *Id.* at 22 (quoting *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1299 (11th Cir. 2007)). So the "'text and structure'" of 1872 Act must show that "'Congress intended to confer individual rights upon a class of beneficiaries.'" *Id.* at 23 (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285-86 (2002)). But the district court didn't believe the 1872 Act provided any such right to immunity, based "especially" on its rejection of the Act's prospective application. *Id.* at 24.

However, as established below, in the 1872 Act, Congress employed its authority under § 3 to eliminate the sort of disabilities § 3 imposed (with exceptions later eliminated) both retroactively *and prospectively*. That *was* briefed below, PI Mem. at 21-24, contrary to the court's assertion that a "private right" was "not briefed," Inj. Order at 23.

Since the 1872 Act's text and structure indicate that it eliminated § 3's disability, "Congress intended to confer individual rights upon a class of beneficiaries." The "individual right" is immunity from § 3's disability. The "class of beneficiaries," under the 1872 Act, is those that would have otherwise been subject to § 3 disability, but now removed from them by the 1872 Act. That class

includes *holders* of offices listed in § 3[5] and *candidates* for such offices against whom a § 3 disqualification effort is made since such an effort is based on the notion that they can't *hold* the office due to a § 3 disability.

Given that Rep. Greene is part of the class of beneficiaries on whom the individual right to immunity from a § 3 disability was conferred by the 1872 Act, she has a "private right that may serve as the basis for a private suit" and "the Court ha[d] jurisdiction to entertain a claim brought under this Act." Prelim. Inj. Ord. 23. Because the Act removed any potential disability from her, she has a private right of action to assert that Act's immunity as a claim against those seeking to impose that disability on her. And it also means that § 3 can't be used against her to begin with, undercutting the whole disqualification effort.[6]

The United States Supreme Court recognized this dichotomy in *Armstrong*, 575 U.S. 320, where the Court held that the Supremacy Clause in the U.S. Constitution did not create a private cause of action to enforce constitutional or federal law obligations, *id*. at 324, and that Congress itself must create the private cause of action. *Id*. at 331–332. However, "federal courts may in some

[5]No one seeks to disqualify Rep. Greene under § 3 as a Representative *now*.

[6]In this respect, the district court was correct that, even absent a cause of action, 1872 Act arguments have other application. Inj. Order 24.

circumstances grant injunctive relief against state officers who are violating, or planing to violate, federal law. *Id*. at 326. Thus, here, Challengers do not have a private cause of action to enforce § 3, while Rep. Greene has a claim against the State Defendants from imposing a § 3 disability on her, contrary to the U.S. Constitution and federal law.

Furthermore, the 1872 Act did not amount to "repealing" § 3, fails for three reasons: (i) repeal can't be done by statute, (ii) employing § 3's express and plenary[7] authority can't be a repeal of § 3, and (iii) by exercising § 3's authority, Congress could reverse its elimination of § 3 disabilities. So the 1872 Act's text and structure indicate that Congress was getting out of the burdensome § 3 disability-removal business. If Congress wants to get back into the disability-removal business, it must reinstate § 3 disability under its § 3 authority. It has not. Unless and until it does, § 3 disabilities have been removed retrospectively and prospectively, so those against whom a § 3 disability is asserted may assert their immunity under the 1872 Act as a claim against efforts to assert § 3 disability.

Any argument that the 1872 Act lacks the clarity required by the U.S. Supreme Court for private rights of action fails. Recent cases put Congress on notice of the need to unambiguously create new private rights, including those

[7]No authority has been cited limiting that authority.

enforceable under § 1983, *see, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Gonzaga*, 536 U.S. at 273, reversing a recent trend of rather easily finding private causes of action. *See, e.g.*, *Cort v. Ash*, 422 U.S. 66 (1975). But in the heyday of federal common law, before *Erie v. Tompkins*, 304 U.S. 64 (1938), overruled *Swift v. Tyson*, 41 U.S. 1 (1842), courts typically implied private rights of actions for federal-statute violations, focusing on remedying wrongs instead of congressional intent. So imposing current clarity standards on the 1872 Act would be anachronistic. Given the unique nature of the 1872 Act—removing a political disability from persons subject to it—Congress would have thought the 1872 Act's wording entirely adequate to authorize what it intended, namely, that persons freed from disability by the Act may assert that right to immunity as a cause of action against those who would reimpose the disability.

In sum, the district court had jurisdiction over Count IV.

4. The district court erred in its analysis of the 1872 Act [Count IV].

The disqualification attempt by Challengers is based on § 3 barring one from assuming office (not *candidates*), who "having previously taken an oath . . . to support the Constitution . . . shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may . . . remove such [§ 3] disability." Since "such disability" includes disability

of persons who "shall have engaged in" insurrection, this disability has both prospective and retroactive effect, as would any removal of § 3's disability.

The district court, however, says the 1872 Act only has retrospective effect, because it "utilizes only the past tense phrase that 'all political disabilities *imposed* by the third section of the fourteenth article.'" Inj. Order at 58.

But the court err grammatically. "Imposed" is used here as a past *participle*[8]*—not* a "past tense" *verb*—in the participial phrase "imposed by [§ 3]," which acts as an adjective to show *which* "disabilities" are referenced. And those are disabilities imposed *by* § 3, not *based on* § 3, so the reference is to the *sort* of *legal* disability § 3 imposes, not particular applications of § 3 to individuals. *Accord Impose* www.merriam-webster.com/dictionary/impose ("to establish or apply by authority"). Accordingly, "imposed" doesn't justify the court's use of "disabilities *already* imposed" to claim only retrospective application. Thus, when the 1872 Act says that particular legal disability created by § 3 is "hereby removed from all persons whomsoever," it meant "all" to apply prospectively too.

The only exception (Congress knew *how* to make exceptions) to 1872 Act's

[8] Participles are "verbals" (not verbs but based on verbs) that come in "past" ("imposed") and "present" ("imposing") versions. Purdue Online Writing Lab, Participles, https://owl.purdue.edu/owl/general_writing/mechanics/gerunds_participles_and_infinitives/participles.html.

removal of § 3 legal disability were some office-holders and military personnel. The 1898 Act removed their disability: "the disability imposed by [§ 3] *heretofore incurred* is hereby removed. (Emphasis added)." "[H]eretofore" indicates retrospective application (Congress knew *how to do this*) and "incurred" indicates application to particular persons—both unlike the 1872 Act.

The district court completely disregarded the difference between the two acts, stating that the differences don't matter and that Rep. Greene's sole argument for why the 1872 Act is prospective is that "Congress did not include the 'heretofore incurred' language that was later included in the 1898 Act." Inj. Order at 59. That is false, the use of the 1898 Act is to show that Congress knew *how* to create retrospective application only. Standing alone, the 1872 Act is both prospective and retroactive. As before "disability imposed [§ 3]" is a participial phrase indicating *which* legal disability is at issue. If "imposed by" had meant only prior application to particular persons, there would have been no need for "heretofore incurred" in the 1898 Act, violating construction cannons.

The District Court recites legislative history. Inj. Order at 56-57. But since the 1872 Act is clear and unambiguous, consideration of legislative history [i]s unnecessary and improper. *See Tobib v. Radloff*, 501 U.S. 157, 162 (1991) (quoting *Blum v. Stenson*, 465 U.S. 886, 896 (1984)). Even so, that argument is

unpersuasive.

The District Court first discussed the numerous requests and calls for Amnesty following the Civil War. Inj. Order at 56-57. However, none of that extraneous material confirms why the district court's declaration that the 1872 Act applies only retrospectively is correct. This is especially true considering the plain language of the 1872 Act removed the political consequence of § 3 from any Representative other than those who served during the 36th and 37th Congresses.

The district court next claims that Congress interpreted the 1872 Act retrospectively, citing the House's refusal to seat Berger. Inj. Order at 59. Berger's exclusion, after criticizing American involvement in World War I, predated modern First Amendment doctrine. *See* Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comment. 87, 130 (2021). Further, the House considered only the 1898 Act, not the 1872 Act, as the District Court conceded. "In Berger's defense, he argued . . . that he could not be disqualified by [§ 3] because [it] had been 'entirely repealed' by the 1898 Act." Inj. Order at 59. Congress' determination regarding Berger has no bearing on this case, as it involved only "the 1898 Act," which by its terms had only retroactive application.

The district court also stated that the 1872 Act must be construed to avoid

unconstitutionality, and that reading it as prospectively would render § 3 ineffective. *Id.* at 63. But the plain language of § 3 gave Congress plenary power to remove any and all § 3 disabilities, which applied both retroactively and prospectively, and the district court identifies no provision limiting the breadth of that power.

The plain language of the 1872 Act removes this political consequence from any Representative other than those who served during the 36th and 37th Congresses. Rep. Greene is a Member of the 117th Session of Congress, so the 1872 Act removed the ability to apply § 3 to her. Since § 3 doesn't apply to her (or any Member holding office after the 37th Congress), the application of § 3 to her is prohibited by federal law.

5. The district court's analysis of the 1872 Act is dicta.

The district court's analysis of the 1872 Act should not be afforded any deference as it is just dicta. Dicta is "a statement that neither constitutes the holding of a case, nor arises form a part of the opinion that is necessary to the holding of the case." *U.S. v. Gillis*, 938 F.3d 1181, 1198 (11th Cir. 2019) (quoting *Black v. U.S.*, 373 F.3d 1140, 1144 (11th Cir. 2004). Stated another way, an analysis is dicta "if it is unnecessary to the decision in the case." *Id.* (citing Obiter Dictum, Black's Law Dictionary (10th ed. 2014). "[Courts] are not required to

follow dicta." *Id.*

Before going into its analysis of the 1872 Act, the district court had previously held that Rep. Greene did not have a cause of action under that Act. Inj. Order at 20-24. "[Rep. Greene] has therefore not carried her burden to establish that the Court has jurisdiction over her 1872 Act claim [Count IV]. . . . Nevertheless, the Court may still consider certain arguments [Rep. Greene] has made regarding the 1872 Act in the context of Plaintiff's remaining constitutional claims." *Id.* at 24. However, the 1872 Act applied only to Rep. Greene's Count IV. Any consideration or analysis regarding Rep. Greene 1872 Act claim by the district court is just dicta as it was not necessary to the holding regarding that claim.

Further, the district court's determination was entirely based on the 1898 Act. While the court spends some time analyzing 1872 Act, that analysis was unnecessary to the holding of the court as the court states that Rep. Greene's main argument is the 1898 Act. "Rep. Greene argues here—that [she] could not be disqualified by [§ 3]because [it] had been entirely repealed by the 1898 Act." *Id.* at 59. As the district court's determination did not rest on its analysis of the 1872 Act, which is the actual basis of Rep. Greene's claim in Count IV, that analysis is just dicta entitled to no deference.

C. The district court erred in its analysis of Rep. Greene's First and Fourteenth Amendment claims [Counts I and II].[9]

Under the *Anderson/Burdick*[10] balancing test,"the court must weigh the character and magnitude of the burden the State's rule imposes on those rights [Step 1] against the interests the State contends justif[ies] that burden, and consider the extent to which the State's concerns make the burden necessary [Step 2]." *Common Cause Ga. v. Kemp*, 347 F.Supp.3d 1270, 1292 (N.D. Ga. 2018).

1. The character and magnitude of Rep. Greene's First and Fourteenth Amendment injuries are severe.

The issue of whether Rep. Greene's challenge fails on *Anderson/Burdick* grounds is a mixed question of law and fact and is reviewed *de novo*. *Duke v. Smith*, 13 F.3d 388, 392 (11th Cir.), *writ denied*, 513 U.S. 867 (1994).

The lower court compared the burdens of the Challenge Statute to the "mere inconvenience" of petition-signature and voter-ID requirements and absentee voting schedules. Inj. Order at 53; 51-53. But as the district court admits, "'[b]urdens are severe if they go beyond the merely inconvenient'"[11] and the

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[9] As the district court noted, the ALJ shifted the burden of proof to the Challengers for the upcoming administrative hearing.

[10] *See Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992).

[11] Inj. Order at 53 (quoting *Crawford v. Marion County Election Board*, 553 U.S. 181, 205 (2008) (Scalia, J., concurring)).

Challenge Statute is a "candidate eligibility requirement" with distinct, recognized burdens. *Green Party of Georgia v. Kemp*, 171 F. Supp. 3d1340, 1351 (N.D. Ga. 2016), *aff'd*, 674 F. App'x 974 (11th Cir. 2017). Those burdens are not "mere inconvenience" and are instead severe. Consequently the lower court erred in Step 1 of its analysis of the Challenge Statute under *Anderson/Burdick*.

First, the lower court lessens the burden by suggesting that the case does not present a justiciable claim for voter right infringement. *Id.* at 48 n.18. But it is well established that rules such as the Challenge Statute are a restriction on both ballot access and voting rights, *Cowen v. Georgia Secretary of Sate*, 960 F.3d 1339, 1342 (11th Cir. 2020) ("candidate eligibility requirements . . . implicate[ ] the basic constitutional rights of both voters and candidates under the First and Fourteenth Amendments." (cleaned up)), and injuries to rights of voters and candidates are cognizable in either sort of case. *See Burdick*, 504 U.S. at 438, n8 ("[i]ndeed, voters as well as candidates, have participated in the so-called ballot access cases").

If any voters' rights *are* at issue, the district court opined, the burden on them is comparable to that of the state voiding their opportunity to vote for a dead person. Inj. Order 48 n.18. But the distinction is obvious. The burden from the statute voiding votes is less because "the fact of [a] candidate's death" deprives

the voters of their choice as much as the statute does. *Rhoden v. Athens-Clarke Cty. Bd. of Elections*, 850 S.E.2d 141, 148 (Ga. 2020).

Second, the Challengers were able to assert their § 3 Challenge against Rep. Greene based upon a "belief," O.C.G.A. § 21-2-5(b), which automatically triggered the administrative process and hearing. *Id*. "Belief" cannot support infringement upon a fundamental First Amendment right by the triggering a government investigation. *Watkins v. United States*, 354 U.S. 178, 197 (1957). And the trigger must be probable cause. *Tobey v. Jones*, 706 F.3d 379, 387 (4th Cir. 2013) (holding that it violates the First Amendment to arrest someone who is peacefully protesting, without probable cause). Under the Challenge Statute, Rep. Greene's First Amendment right to be a candidate for office will be investigated based upon a "belief," violating the First Amendment. And simultaneously, Rep. Greene must conduct a campaign for election during the primary and defend himself against baseless charges of engaging in an insurrection—in no known universe could that burden on her First Amendment right to run be considered a mere inconvenience.

The district court made an error of law in concluding that Challenge Statute's expedited procedure reduced the burden on cognizable rights while it actually increased it. The Challenge Statute's process is a *legal adjudication*—in

this case, involving federal constitutional rights—without any of the practical and procedural protections ordinarily afforded defendants in legal adjudications. Under the Challenge Statute's process, defensive mechanisms ordinarily available pre-trial are available only after the trial—the OSAH hearing. Rep. Greene cannot halt the proceedings on the basis of Challengers' standing or the legal indefensibility of their claims; she cannot assert her Constitutional and federal law defense and have them ruled upon by the ALJ; and she is not afforded adequate discovery to test the authenticity of their factual assertions. As the lower court admitted, though the ALJ is authorized to rule on motions to dismiss, Inj. Order 12, as provided by the OSAH procedure, Rep. Greene's motion to dismiss will not be resolved until after the hearing, *id.*, and, as the court admits, the ALJ is not authorized to "declare a statute unconstitutional," *id.*, a critical basis for Rep. Greene's motions.[12]

As a result, the Challenge Statute's "process" requires Rep. Greene to appear and respond in person to her accusers' "case"—no matter how factually far-fetched, legally deficient, or constitutionally offensive it may be, in a hearing that the ALJ ruled must be live streamed, *id.* at 11, and at which the ALJ may

[12]"[T]hough he may develop the record on issues of constitutional validity in presenting the record to the Secretary of State."

consider, as would a Georgia Tax Tribunal judge in a small claims hearing,[13] evidence "of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs," OSAH Rules 616-1-2-.18. Stripped of illusory adjudicatory protections, the Challenge Statute, like a subpoena from the Committee on Un-American Activities, summons Rep. Greene to appear and testify "about h[er] beliefs, expressions or associations," which "is [itself] a measure of governmental interference [with First Amendment freedoms]." *Watkins v. United States*, 354 U.S. 178, 197 (1957). The burden from those subpoenas was deemed severe enough to warrant protection from compulsory process, yet the lower court found here that the burdens resulting from the Challenge Statute's process, which leaves Rep. Greene in a comparable situation, are comparable to the burdens inflicted by petition-signature and voter-ID requirements.

The timing and practical effect of the Challenge Statute's process burden both candidates' and voters' rights in another way. That ballots have already been printed including Rep. Greene's name, Inj. Order 48, means little because, as the court implicitly acknowledged, the relevant question is "whether the votes cast for her on those ballots will ultimately be counted." *Id.*

After the hearing and the ALJ's recommendation, if the Secretary of State's

[13]O.C.G.A. § 50-13A-14.

decision disqualifies Rep. Greene from candidacy, her name will be withheld from or struck from printed ballots. O.C.G.A. § 21-2-5(c). It is only after the hearing, the ALJ's recommendation, and the Secretary of State's decision that Rep. Greene may raise constitutional and federal law defenses in an appeal to the Superior Court of Fulton County. *See* O.C.G.A. § 21-2-5(e). The Secretary of State's decision is immediately effective. If there is insufficient time to strike her name or reprint ballots,[14] all polling places will have a prominent notice placed noting her disqualification and all votes cast for her shall be void and shall not be counted. *Id.*

There are three "levels" of "removal," the first of which—ballots on which Rep. Greene's name *never* appeared—is not at issue, State Defendants assure us. The second level is a ballot on which Rep. Greene's name is "struck" or does not appear at all. The third level is a ballot on which Rep. Greene's name appears,

[14]Counsel for State Defendants has represented that the ballots are already printed with Rep. Greene's name on the ballot, "and that it will remain on the ballot, 'no ifs, ands, or buts about that.'" Inj. Order 7 (quoting TRO Hr'g Tr., (Doc. 39) at 29). It is unclear what State Defendants mean by "remain on the ballot," but the plain language of the law presents two separate ways of amending the ballot—reprinting or striking the name. Ordinary rules of statutory construction lead to the conclusion that if the ballots contain Rep. Greene's name, if the Secretary of State decides in favor of Challengers and there is sufficient time, the name will be *struck from* the ballot, with the result that a vote for her *cannot* be recorded.

"unstruck," but a prominent sign advises voters that votes for Rep. Greene "shall be void and shall not be counted."

Some absentee ballots have gone out since April 5, and regular absentee ballots may go out starting April 25. Advanced in-person voting begins May 2. *See* Office of the Secretary of State/Elections Division, *2022 Scheduled Elections Calendar of Events*.[15] If her name is struck when absentee ballots go out or advanced in-person voting begins (level two removal), votes for Rep. Greene are not possible. If her name is not struck but the voter has been advised that a vote for Rep. Greene is void and will not be counted (level three removal), votes for Rep. Greene will be suppressed if not eliminated.[16]

If Rep. Greene subsequently wins an appeal in the Superior Court of Fulton County—meaning that her name was wrongly removed—how will those votes be "recovered"? Absentee ballots with a vote for Rep. Greene that are voided could be counted after the successful appeal—if it happens soon enough—and *if the ballot had a means of recording a vote for Rep. Greene.* But absentee ballots and

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[15]Available at https://sos.ga.gov/sites/default/files/forms/2022%20State%20Scheduled%20Elections%20Short%20Calendar.pdf

[16]Ostensibly, if those voters are advised that an appeal could reverse the disqualification, then some who would vote for her will do so, perhaps preserving some votes for recovery. Publicizing this information would be a substantial burden in itself.

advanced in-person ballots on which Rep. Greene's name was struck are not recoverable and the loss of the votes and the opportunity to vote for Rep. Greene are irreparable. Likewise, there is no way to recover those votes that are suppressed or eliminated by level three removal, and the loss of the votes and the opportunity to vote for Rep. Greene are irreparable.

The lower court waves this away by portraying an unrealistic series of events to suggest that the Challenge Statute's process *could* ensure that the question of Rep. Greene's candidacy is resolved in time to avoid the irreparable harm inherent in trying to recover votes wrongly denied under the Challenge Statute process. This is plainly insufficient. The lower court erred in concluding that the burdens imposed by the Challenge Statute were "mere inconvenience."

2. The State's interest does not outweigh Rep. Greene's burden.

The lower court found the State's interest in "preventing fraudulent or ineligible candidates from being placed on the ballot" is sufficient justification for the Challenge Statute's burdens. Inj. Order at 54. First, because the burdens inflicted are not "mere inconvenience" and thus are severe, the interest asserted must be "of compelling importance" and the regulation "narrowly drawn" to advance that interest." *Burdick*, 504 U.S. at 434. None of the cases the lower court

cites hold a "ballot protection" interest as sufficiently compelling[17] to justify anything like the severely burdensome Challenge Statute.

The court in *Rhoden* found a ballot protection interest was sufficient to justify voiding votes that were cast for a candidate who had died. 850 S.E.2d at 149. As noted above, the burden on voters' right to vote for a candidate of their choice is less when the candidate is dead. In *Burdick*, the Court found a sufficient fit between the interests in "avoiding the possibility of unrestrained factionalism at the general election," and "guard[ing] against party raiding" and the "limited burden" of a ban on write-in voting. 504 U.S. 428, 439 (1992) (cleaned up).[18] The Court in *Anderson v. Celebrezze* observed that the state's interest in keeping ballots free of "frivolous candidates" was sufficient to require candidates "to make a preliminary showing of substantial support," 460 U.S. 780, 788 n.9 (1983), and that an interest in avoiding "distortion of the electoral process" justified holding party-specific primaries, *id.* In *Bullock v. Carter*, the Court noted that requiring

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[17]*See*, *e.g.*, *Rhoden*, 850 S.E.2d at 149 ("Because we have already concluded that the burden occasioned by this rule is slight, the Board need not establish a compelling interest . . . .")

[18]The "state election law requirements" that the Court mentioned in footnote 10 as being "eminently reasonable" were those that a write-in candidate might be circumventing, such as candidate filing deadlines and demonstration of sufficient support, *id.* at 440 n.10, not regulations such as the Challenge Statute.

large filing fees did further the legitimate state interest in "protecting . . . from frivolous or fraudulent candidacies," 405 U.S. 134, 145 (1972), but held that it did not justify them. *Id.* at 149. In *Hassan v Colorado*, the Tenth Circuit agreed that because Article II plainly prevented Mr. Hassan from assuming the office of president, the "state's legitimate interest in protecting the integrity and practical functioning of the political process" justified excluding his name from the ballot. 495 Fed. App'x 947, 948 (10th Cir. 2012). None of the cases relied on by the lower court described the ballot protection interest as compelling and none found that it was sufficient to justify any regulation analogous to one as burdensome as the Challenge Statute.

The lower court erred in its *Anderson/Burdick* analysis and, consequently, its analysis of Rep. Greene's First and Fourteenth Amendment claims.

D. The district court erred in its analysis of Rep. Greene's Article 1, Section 5 claim [Count III].

The court erred unlikely to succeed on the merits of Count III, "[g]iven the preliminary stage of the proceedings, the difficulty of the legal questions posed," and the court's finding of a lack of persuasive legal authority to support Rep. Greene claim. Inj. Order at 71.

> Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall

> constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

U.S. Const. art. I, § 5, cl. 1.

Voters have unfettered discretion in voting to independently evaluate whether federal candidates meet the constitutional qualifications for office. Derek T. Muller, *Scrutinizing Federal Electoral Qualifications*, 90 Ind. L.J. 559, 592 (2015) ("**Muller**") (citations omitted). But Congress has an exclusive role in judging the qualifications of its own members to determine if they are eligible to take a seat in Congress. *Id*. at 611 (collecting cases). This exclusive role is consistent with the Supreme Court's logic in *Roudebush v. Hartke*. 405 U.S. 15 (1972). The *Roudebush* Court held that a recount doesn't usurp the Senate's function because it doesn't "frustrate the Senate's ability to make an independent final judgment." *Id.* at 25-26 (cleaned up).

Here, the Challenge Statute permits the State of Georgia to make its own independent evaluation of whether a Candidate is constitutionally qualified to be a Member of the U.S. House of Representatives. O.C.G.A. § 21-2-5.

A fundamental principle of our representative democracy is, in Hamilton's words, 'that the people should choose whom they please to govern them.' 2

Elliot's Debates 257. Both the intention of the Framers, to the extent it can be determined, and an examination of the basic principles of our democratic system persuade us that the Constitution does not vest in the Congress a discretionary power to deny membership by a majority vote. *Powell v. McCormack,* 395 U.S. 486, 548 (1969).

Surely if the elected members of Congress can only prevent a member from being seated with two thirds vote, a state cannot adopt a law that allows a candidate for federal office to be stricken from the ballot administratively. Indeed, it would have made little sense to prohibit former members of Congress who thereafter joined the Confederacy from again serving in Congress, but leave the decision of who was disqualified to the same states that rebelled only a few years prior. Because the Challenge Statute directly usurps Congress' constitutional responsibilities, it violates Article 1, § 5 of the U.S. Constitution.

III. The remaining injunction factors favor Rep. Greene.

In order for Rep. Greene to be entitled to injunctive relief, she must establish that: (1) she has substantial likelihood of success on the merits; (2) she will suffer irreparable injury if the injunction is not granted; (3) the threatened injury to Rep. Greene outweighs the harm to the State Defendants or Challengers; and (4) an injunction would not be adverse to the public interest. *See KH Outdoor,*

LLC v. City of Trussville, 458 F.3d 1261, 1268 (11th Cir. 2006); *see also* Inj. Order at 15-16. Because the district court denied injunctive relief on its finding that she was unlikely to succeed on the merits, the court did not analyze the other injunctive factors. These factors all weigh in favor of injunctive relief.

A. Rep. Greene will suffer irreparable injury if injunctive relief is not granted.

Political opponents of Rep. Greene have Challenged her candidacy based upon claims that Rep. Greene "aided and engaged in insurrection to obstruct the peaceful transfer of presidential power." Greene Challenge, ¶ 1. Rep. Greene has been required to simultaneously: (1) mount a defense in a widely publicized—and unlawful—quasi-judicial proceeding in which she was accused of aiding and engaging in insurrection against the United States by political opponents; (2) defend her constitutional rights in federal court; and (3) campaign for office in the U.S. House of Representatives. Now she is faced with the potential of being removed from the ballot by Sec. Raffensperger with less than a month to go before the primary election, or being found to be disqualified after having won the primary election. O.C.G.A. § 21-2-5(c).

Further, at this time in the election cycle, ballots have already been printed and absentee ballots have already been mailed; in-person early voting starts in less

than a week.[19] At this point, even if this Court would rule in an extremely expedited fashion, Rep. Greene could be irreparably harmed by having campaigned (and potentially won the nomination) and then having her constitutional right to run for office in the general election taken away.

But the irreparable harm doesn't stop at Rep. Greene—all those who voted for Rep. Greene will lose their right to vote for the candidate of their choosing. *See Bullock*, 405 U.S. at 143 (recognizing that restrictions affecting candidates can have derivative effect on the fundamental right to vote). Not because she made the decision to withdraw her candidacy. Not because she is incapacitated and unable to serve. Rep. Greene could lose her right to run for office and her supporters would lose their right to vote for her because the Challenge Statute allowed five voters in her district to prevent her from running for office in the first place. Opposing a candidate you disagree with is one thing—using the political system to prevent that same candidate from running is quite another. If political operatives are able to use a quasi-judicial process, fraught with constitutional and legal infirmaries, to select who their favored candidate will have to run against, irreparable harm is hardly adequate to describe the danger to our Representative

[19] https://sos.ga.gov/sites/default/files/forms/2022%20State%20Scheduled%20Elections%20Short%20Calendar.pdf

Republic.

B. The threatened injury to Rep. Greene outweighs the harm an injunction would inflict on State Defendants or Challengers.

Challengers have no federal due process right under the Fourteenth Amendment to have their challenges heard by the OSAH. In order to be constitutionally entitled to have their candidate challenges heard by the OSAH, they would need to demonstrate they have been deprived of a cognizable liberty or property interest. *Roth*, 408 U.S. at 578. Neither interest is at stake here because any interest given to them by state law is only their authorization to file a candidate challenge, which they have already done and which has not been enjoined.

Challengers can also raise their concerns about Rep. Greene's qualifications to Congress. Under Article 1, Section 5, Clause 1 of the U.S. Constitution, Congress has the power to judge the election of its own members, including members' qualifications. Even if an injunction would be granted, Challengers would still have the ability to petition Congress to review Rep. Greene's qualifications if she is reelected. Nor does it prevent Congress from acting under § 3, by amending the 1872 Act to remove its prospective effect before Rep. Greene takes the oath of office.

Challengers have a right to petition Congress to influence their decisions. U.S. Const. amend. I. Thus, even if Challengers are somehow harmed by enjoining the State of Georgia from proceeding with their candidate challenge, they are not irreparably harmed because they can petition Congress, upon Rep. Greene's reelection, urging Congress to disqualify her from taking the oath of office.

Further, nothing is preventing Challengers from campaigning for, supporting, or voting for any of Rep. Greene's opponents in either the primary or general election.

C. The public interest favors granting Rep. Greene an injunction.

"Protecting public confidence in elections is deeply important—indeed, critical—to democracy." *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312 (11th Cir. 2019) (citing *Crawford*, 553 U.S. at 197). Upholding constitutional rights and federal law serves the public interest. *See id.* In contrast, the public interest is harmed when unlawful or unconstitutional statutes are enforced and used against those seeking to lawfully exercise their constitutional rights.

But most importantly, the public interest is served in choosing the People's representatives by democratic processes, not by state bureaucrats, which Challengers propose here. The undemocratic scheme contained in the Challenge Statute supplants voters for state bureaucrats who will determine who can

represent the People. This is fundamentally anti-democratic and contrary to the public interest.

Both the State Defendants and the Challengers argue the public interest is served by the enforcement of the Challenge Statute. *See* State Defs.' Resp. to PI at 24 ("the state has an important and well-established interest in regulating ballot access and preventing fraudulent or ineligible candidates from being placed on the ballot"); *see also* Intervenor's Resp. to PI at 24 ("there is a public interest in the enforcement of statutes enacted by the peoples' democratically elected representatives").

By this logic, an enormous amount of civil rights litigation did not serve the public interest. After all, the State of Georgia asserted an interest in keeping schools segregated, even following the landmark decision in *Brown*. *Hunt v. Arnold*, 172 F. Supp. 847 (N.D. Ga. 1959) (enjoining Georgia State College of Business Administration from limiting admission to white students only, and enjoining defendants from "requiring Negro applicants to that institution to furnish certificates as to their personal qualities which may be certified to only by alumni of the white institutions").

Of course the public's interest is served by the state's enforcement of constitutional laws. But the public's interest is most definitely not served when

unconstitutional or unlawful laws are enforced. The Challenge Statute is one such unconstitutional and unlawful statute, and the public interest favors injunction.

Conclusion

For all the foregoing reasons, this Court should reverse the decision of the district court and grant the preliminary injunction.

April 27, 2022

Respectfully submitted,

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Certificate of Compliance

I hereby certify that the foregoing document complies with the typeface requirements and the type-volume limitations of Federal Rules of Appellate Procedure 32(a)(7)(B) because it contains 10,969words (calculated using the word count function of the word processing program used to draft the foregoing), excluding the parts of the motion exempted by Federal Rules of Appellate Procedure 32(f) and used Times New Roman, 14 point font.

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

Certificate of Service

I certify that on April 27, 2022, I caused the foregoing document and all attachments thereto to be electronically filed with the Clerk of Court for the U.S. Court of Appeals for the Fourth Circuit using the appellate CM/ECF system. Counsel for parties received notice of this filing through the CM/ECF system and via email.

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

Addendum to Appellant's Brief

Hansen, et al. v. Finchem, et al., Case No. CV 2022-004321, slip op. (Superior Court of Arizona, Maricopa County, April 21, 2022)

Clerk of the Superior Court
*** Filed ***
04/22/2022 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-004321 04/21/2022

HONORABLE CHRISTOPHER COURY

CLERK OF THE COURT
L. Gilbert
Deputy

THOMAS HANSEN, et al.

JAMES E BARTON II

v.

MARK FINCHEM, et al.

JOHN DOUGLAS WILENCHIK

JOSHUA D BENDOR
COLLEEN CONNOR
RYAN N DOOLEY
RYAN ESPLIN
WILLIAM J KEREKES
JOSEPH EUGENE LA RUE
KORY A LANGHOFER
JASON MOORE
WILLIAM P RING
CHRISTINE J ROBERTS
JEAN A ROOF
LAURA ROUBICEK
ROGER W STRASSBURG JR.
JEFFERSON R DALTON
DANIEL JURKOWITZ
SCOTT M JOHNSON
JOHN S BULLOCK
CELESTE MARIE ROBERTSON
ROBERT DOUGLAS GILLILAND
CRAIG C CAMERON
JACQUELINE MENDEZ SOTO
TIMOTHY A LASOTA
COURT ADMIN-CIVIL-ARB DESK
DOCKET-CIVIL-CCC
JUDGE COURY

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-004321 04/21/2022

UNDER ADVISEMENT RULING

The Court has reviewed and considered the following:

A. *Defendant Mark Finchem's Motion to Dismiss,* filed April 11, 2022.

B. Congressman Paul Gosar's *Motion to Dismiss*, filed April 11, 2022, and *Rep. Gosar's Notice of Supplemental Authority*, filed April 14, 2022.

C. *Congressman Biggs's Motion to Dismiss*, filed April 11, 2022.

D. Plaintiffs' *Opposition to Defendant Finchem's Motion to Dismiss*, filed April 14, 2022.

E. Plaintiffs' *Opposition to Defendant Gosar's Motion to Dismiss*, filed April 14, 2022.

F. Plaintiffs' *Opposition to Defendant Biggs's Motion to Dismiss*, filed April 14, 2022.

G. *Defendant Mark Finchem's Reply in Support of Motion to Dismiss*, filed April 18, 2022.

H. *Congressman Gosar's Reply in Support of Motion to Dismiss*, filed April 18, 2022.

I. *Congressman Biggs' Reply in Support of Motion to Dismiss*, filed April 18, 2022.

J. *Plaintiffs' Notice of Supplemental Authority,* filed April 18, 2022.

K. Congressman Gosar's *Response to Plaintiffs' Notice of Supplemental Authority,* filed April 19, 2022.

L. *Congressman Biggs's Response to Notice of Supplemental Authority*, filed April 19, 2022.

M. The *Verified Complaint* in each of the original three cases filed.

N. The authorities and arguments presented at the oral argument held on April 20, 2022.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-004321 04/21/2022

Plaintiffs have filed complaints seeking to disqualify United States Congressman Paul Gosar ("Rep. Gosar"), United States Congressman Andy Biggs ("Rep. Biggs") and Arizona Representative Mark Finchem ("Rep. Finchem") from the ballot of the primary election. (In this ruling, Rep. Gosar, Rep. Biggs and Rep. Finchem shall collectively be referred to, at times, as the "Candidates".) Plaintiffs argue that the Candidates are not qualified to hold office because each has been disqualified pursuant to federal law – specifically, Section 3 of the Fourteenth Amendment to the United States Constitution (the "Disqualification Clause"). Based on the lack of qualifications to appear on the ballot, Plaintiffs seek injunctive relief barring the appearance of the Candidates on the ballot for the 2022 primary election.

In the pending motions, the Candidates seek dismissal of Plaintiffs' Complaints. The Candidates argue that they are not disqualified from serving by the Disqualification Clause and, therefore, they should not be enjoined from appearing on the ballot for the 2022 primary election.

This Court has jurisdiction to consider the election challenge.

THE COURT FINDS as follows:

1. Each of the Candidates has filed a motion to dismiss pursuant to Rule 12(b)(6), *Arizona Rules of Civil Procedure*, arguing that the respective Verified Complaint against that Candidate fails to state a claim upon which relief may be granted. Dismissal under Rule 12(b)(6), *Arizona Rules of Civil Procedure* is appropriate only if "as a matter of law plaintiffs would not be entitled to relief under any interpretation of the facts susceptible of proof." *Verduzco v. American Valet*, 240 Ariz. 221 (App. 2016). In considering such a motion, all material allegations of the complaint are taken as true and read in the light most favorable to the Plaintiffs. *Logan v. Forever Living Products Intern., Inc.*, 203 Ariz. 191 (2002).

2. A.R.S. § 16-351(B) provides: "Any elector may challenge a candidate for any reason relating to qualifications for the office sought as prescribed by law, including age, residency, professional requirements or failure to fully pay fines, penalties or judgments as prescribed in sections 16-311, 16-312 and 16-341, if applicable."

3. Under Arizona law, the grounds for the issuance of preliminary injunctive relief are as follows: "The party seeking a preliminary injunction is obligated to establish four traditional equitable criteria:

    a) A strong likelihood that he will succeed at trial on the merits;

b) The possibility of irreparable injury to him not remediable by damages if the requested relief is not granted;

c) A balance of hardships favors himself; and

d) Public policy favors the injunction."

Shoen v. Shoen, 167 Ariz. 58, 63 (App. 1990).

4. Under Arizona law, permanent injunctive relief is available only when "the plaintiff [is able to] show a likelihood that the defendant will in the future engage in the conduct sought to be enjoined." *State ex rel. Babbitt v. Goodyear Tire & Rubber Co.*, 128 Ariz. 483, 487 (App. 1981). "[T]he standard for issuing a permanent injunction is substantially the same as that applied to a request for preliminary injunctive relief, except that the plaintiff must prove *actual* success on the merits rather than the *likelihood* of success on the merits." 42 Am. Jur. 2d Injunctions § 10 (Supp. 2008) (emphasis added).

5. Plaintiffs argue that the Candidates are disqualified from holding office. Plaintiffs rely exclusively on federal law for this proposition – specifically, the Disqualification Clause in Section 3 of the Fourteenth Amendment of the United States Constitution – as the sole legal basis for arguing that the Candidates are disqualified from serving in the respective offices that each seeks to hold. The Disqualification Clause provides as follows: "No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability."

6. The Candidates raise numerous arguments as to why, as a matter of law, they are not disqualified from serving in elective office by the Disqualification Clause.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-004321 04/21/2022

A. Does A Private Right of Action Exist to Enforce the Disqualification Clause?

7. The Candidates argue that no private right of action exists to enforce the Disqualification Clause.

8. There are few cases which have interpreted Disqualification Clause. The seminal case considering the Disqualification Clause, one written shortly after its enactment, is *In Re Griffin*, 11 F. Cas. 7 (C.C.D. Va. 1869).[1]

9. In *Griffin*, squarely at issue before the court was the construction of the Disqualification Clause. The court[2] concluded that "[t]he object of the amendment is to exclude from certain offices a certain class of persons. Now it is obviously impossible to do this by a simple declaration, whether in the constitution or in an act of congress, that all persons included within a particular description shall not hold office. For, in the very nature of things, it must be ascertained what particular individuals are embraced by the definition, before any sentence of exclusion can be made to operate. To accomplish this ascertainment and ensure effective results, proceedings, evidence decisions, and enforcement of decisions, more or less formal, are indispensable; ***and these can only be provided for by congress***." *Id.* at 26 (emphasis added).

10. The court in *Griffin* went on to emphasize that it was imperative upon the United States Congress to pass legislation to enforce the Disqualification Clause, stating: "Now, the necessity of this is recognized by the [Fourteenth] amendment itself, in its fifth and final section, which declares that 'congress shall have power to enforce, by appropriate legislation, the provision[s] of this article.' There are, indeed, other sections than the [Disqualification Clause], to the enforcement of which legislation is necessary; but there is no one which more clearly requires legislation in order to give effect to it. The fifth section [of the Fourteenth Amendment] qualifies the [Disqualification Clause] to

[1] *In re Griffin* involved a *habeas corpus* challenge by a former slave (Caesar Griffin) of his conviction for assault with intent to kill. Griffin is emblematic of a number of challenges by former slaves to confederate judges who presided over their trials and convictions. *See* C. Ellen Connally, *The Use of the Fourteenth Amendment by Salmon P. Chase in the Trial of Jefferson Davis*, 42 AKRON L. REV. 1165, 1189–90 (2009).

[2] *Griffin* was written by Hon. Salmon J. Chase, the Chief Justice of the United States Supreme Court at the time.

the same extent as it would if the whole amendment consisted of these two sections." *Id.*

11. The court in *Griffin* then summarized how the Disqualification Clause was intended to operate: "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 fourteenth 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.***" *Id.* (emphasis added).

12. The conclusion in *Griffin* mirrors the express language of Section 5 of the Fourteenth Amendment to the United States Constitution, which provides: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."

13. The use of the term "the Congress" differs from use of the term "State" in Section 1 of the Fourteenth Amendment. This plainly demonstrates an intention that the United States Congress, and not individual states, would be responsible for creating legislation to enforce the terms of the Fourteenth Amendment.

14. Since the ratification of the Disqualification Clause, Congress has passed some legislation enforcing the Disqualification Clause. Congress enacted the First Ku Klux Klan Act (also known as the Enforcement Act of 1870). Ch. 114, 16 Stat. 140 (1870). Section 15 of this Act provided: "And be it further enacted, ***that any person who shall hereafter knowingly accept or hold any office under the United States, or any state to which he is ineligible under the third section of the fourteenth article of amendment of the constitution of the United States, or who shall attempt to hold or exercise the duties of any such office, shall be deemed guilty of a misdemeanor against the United States***, and, upon conviction thereof before the circuit or district court of the United States, shall be imprisoned not more than one year, or fined not exceeding one thousand dollars, or both, at the discretion of the court." *See U.S. v. Powell*, 65 N.C. 709, at n.1 (Circuit Court, D. N.C. 1871) (emphasis added). This authority was repealed in the 1940s. Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 365 Const. Comment. 87, 108 n.112 (2021).

15. Congress ***has acted*** to create a private right of action to enforce other provisions of the Fourteenth Amendment. *See, e.g.*, 42 U.S.C. § 1983.

16. Congress ***has not*** created a civil private right of action to allow a citizen to enforce the Disqualification Clause by having a person declared to be "not qualified" to hold public office.

17. Congress is presently considering legislation to enforce the Disqualification Clause. H.R. 1405 was introduced in the 117th Congress on February 26, 2021. The purpose of H.R. 1405 is "[t]o provide a cause of action to remove and bar from holding office certain individuals who engage in insurrection or rebellion against the United States . . . ." This proposed legislation would apply to members of Congress as well as holders of state office. Notably, however, this proposed legislation does not create a private right of action; rather, the legislation proposes that "The Attorney General of the United States may bring a civil action for declaratory judgment and relief . . . ." The claim would need to be brought in federal court, and be "heard and determined by a district court of three judges . . . ." A heightened burden of proof – clear and convincing evidence – would be required. H.R. 1405 has not been enacted at this time.

18. Congress has enacted a criminal statute prohibiting rebellion or insurrection (18 U.S.C. § 2383). Although the Court declines to express whether this is the exclusive criminal offense Congress has enacted to enforce the Disqualification Clause,[3] the fact that the statute is a criminal one demonstrates an intention that ***only the government***, and not private citizens, must be the party initiating the action.[4]

19. None of the Candidates has been charged with or convicted of any state or federal crime that relates to insurrection or rebellion.

20. The Court notes that its conclusion that no private right of action exists is consistent with, and supported by, the analysis in the recent decision by the United States District Court in *Greene v. Raffensperger*, 2022 WL 1136729, No. 1:22-cv-01294-AT (N.D.

[3] The Court need not address whether the Disqualification Clause would be deemed to be enforced by convictions for various federal crimes, including obstructing congressional proceedings (18 U.S.C. § 1505), entering and remaining in a restricted building (18 U.S.C. § 1752(a)(1)), or disorderly and disruptive conduct in a restricted building (18 U.S.C. § 1752(a)(2)). None of the Candidates has been charged or convicted of any of these crimes.

[4] The Court declines the invitation from Rep. Finchem to opine as to whether only a criminal conviction is required to enforce the Disqualification Clause. The Court need not reach this issue.

Ga., Apr. 18, 2022). In *Greene*, the court cited well-established law to conclude that Congress did not create a private remedy in favor of candidates who wish to assert alleged violations of the Amnesty Act of 1872. *Id.* at *8-9. Indeed, in *Greene*, the court concluded that "[i]n circumstances where a plaintiff asserts a claim directly under a federal statute and that statute does not afford a private right of action, federal courts have explained that they lack jurisdiction." *Id.* at *9 (citing *Acara v. Banks*, 470 F.3d 569, 572 (5th Cir. 2006) (no private cause of action under HIPAA); *Abner v. Mobile Infirmary Hosp.*, 149 F.App'x 857, 858-859 (11th Cir. 2005) (no private right of action under Medicare Act)). The court in *Greene* concluded that "[u]ltimately, 'where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action." *Id.*, at *9 (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 286 (2002)).

21. The express language of the United States Constitution controls this issue. The Disqualification Clause creates a condition where someone can be disqualified from serving in public office. However, the Constitution provides that legislation enacted by Congress is required to enforce the disqualification pursuant to the Disqualification Clause. Aside from criminal statutes dealing with insurrection and rebellion which Congress has enacted (lawsuits which require the government, not private citizens, to initiate), Congress has not passed legislation that is presently in effect which enforces the Disqualification Clause against the Candidates. Legislation that proposes to enforce the Disqualification Clause currently is pending in the United States Congress, but has not yet been enacted. Therefore, given the current state of the law and in accordance with the United States Constitution, Plaintiffs have no private right of action to assert claims under the Disqualification Clause.

B. Does Arizona Law Create A Private Right of Action in A.R.S. § 16-351(B)?

22. Plaintiffs argue that federal legislation is unnecessary to create a private right of action to enforce the Disqualification Clause. Plaintiffs argue that the private right of action is created by A.R.S. § 16-351(B).

23. Assuming *arguendo* that the Arizona could create a private right of action notwithstanding the express language of Section 5 of the Fourteenth Amendment and the holding in *In Re Griffin*, the Court does not agree that A.R.S. § 16-351(B) creates the private right of action to enforce the Disqualification Clause.

24. "Election contests 'are purely statutory and dependent upon statutory provisions for their conduct.'" *Pacion v. Thomas*, 225 Ariz. 168, 170 (2010)(quoting *Van Arsdell v. Shumway*, 165 Ariz. 289, 291 (1990)).

25. A.R.S. § 16-351(B) provides in pertinent part: "Any elector may challenge a candidate for any reason relating to ***qualifications for the office sought as prescribed by law*** . . . ." (Emphasis added.)

26. This statute uses the word "prescribed" – which commonly means "to lay down a rule; to specify with authority." Merriam-Webster.com Dictionary (2022). A.R.S. § 16-351(B) does not use the word "proscribed" – which commonly means "to condemn or forbid as harmful or unlawful" and "prohibit." Merriam-Webster.com Dictionary (2022).

27. Election challenge statutes of other states historically have included provisions that proscribed candidates from holding office if certain conditions existed. For example, immediately after the Civil War, North Carolina had a statute providing: "no person prohibited from holding office by section 3 of the Amendment to the Constitution of the United States, known as Article XIV, shall qualify under this act or hold office in this State." North Carolina Acts of 1868 ch. 1. sec. 8; *see also Worthy v. Barrett*, 63 N.C. 199, 200 (N.C. 1869).

28. A.R.S. § 16-351(B) addresses only "qualifications for the office sought as ***prescribed*** by law . . . ." (Emphasis added.) This statute does not address candidates who may be "proscribed," or prohibited, from holding office if certain conditions exist. To expand the inquiry to include disqualifications – or who is proscribed from holding office – would re-write the applicable statute and create a cause of action and remedy in a statutorily-created body of law. This would be contrary to established precedent. Arizona's courts "decline to infer a statutory remedy into . . . statutes that the legislature eschewed." *Pacion*, 225 Ariz. at 170 (declining to apply A.R.S. § 16-351 to alleged violations of campaign finance laws).[5]

[5] The Court notes that Arizona has enacted a framework to assert that a person holds or exercises public office unlawfully. This is the *quo warranto* procedure. A.R.S. § 12-2041, *et seq*. Although a *quo warranto* is to be brought by the Arizona Attorney General or by a County Attorney (if the Attorney General does not act), Arizona's statutory framework allows a private person to request leave of court to file suit if public officials do not bring such a claim. A.R.S. § 12-2043.

29. The United States Supreme Court has declined to hold that the Disqualification Clause creates a "qualification" for office. *U.S. Term Limits, Inc. v. Thorton*, 514 U.S. 779 (1995).[6]

30. With respect to Rep. Gosar and Rep. Biggs, as discussed *infra.*, the qualifications for Members of Congress are exclusively determined by each House of Congress. Article 1, Section 5 of the United States Constitution provides in pertinent part: "Each House shall be the Judge of the . . . Qualifications of its own Members."

31. With respect to Rep. Finchem, Article 5, Section 2 of the Arizona Constitution establishes the following qualifications for officials in the Executive Branch of Arizona government: "No person shall be eligible to any of the offices mentioned in section 1 of this article except a person of the age of not less than twenty-five years, who shall have been for ten years next preceding his election a citizen of the United States, and for five years next preceding his election a citizen of Arizona."

32. In sum, even assuming *arguendo* that the Court were to accept Plaintiffs' argument that Arizona (and not just Congress) had the power to create a private right of action to enforce the Disqualification Clause, A.R.S. § 16-351(B) does not do this. Although it creates a private right of action allowing citizens to bring independent actions to establish that a person has not met the requirements ***prescribed by law***, the plain language of this statute does not create a private right of action to argue that a candidate

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[6] In *U.S. Term Limits, Inc. v. Thorton*, 514 U.S. 779 (1995), the United States Supreme Court expressly declined to resolve the question about whether the Disqualification Clause established a "qualification" to hold office. The Court noted: "***It has been argued that [the Disqualification Clause], as well as the Guarantee Clause of Article IV and the oath requirement of Art. VI, cl. 3, is no less a 'qualification' within the meaning of Art. I, § 5, than those set forth in Art. I, § 2.*** *Powell v. McCormack,* 395 U.S. 486, 520, n. 41, 89 S.Ct. 1944, 1963, n. 41, 23 L.Ed.2d 491 (1969) (emphasis added). In *Powell,* we saw no need to resolve the question whether those additional provisions constitute 'qualifications,' because 'both sides agree that Powell was not ineligible under any of these provisions.' *Ibid.* ***We similarly have no need to resolve that question today***: Because those additional provisions are part of the text of the Constitution, they have little bearing on whether Congress and the States may add qualifications to those that appear in the Constitution." *U.S. Term Limits,* 514 U.S. at n.2 (emphasis added).

is ***proscribed by law*** from holding office. In sum, a private right of action to enforce the Disqualification Clause was not created by A.R.S. § 16-351(B).[7]

C. Does the Amnesty Act of 1872 Bar Enforcement of the Disqualification Clause?

33. The Candidates argue that the Amnesty Act of 1872 (the "Act") "forecloses" enforcement of the Disqualification Clause.

34. The Act provides, in pertinent part: "all political disabilities imposed by the third section of the fourteenth article of amendments of the Constitution of the United States are hereby removed from all persons whomsoever, except Senators and Representatives of the thirty-sixth and thirty-seventh Congresses, officers in the judicial, military, and naval service of the United States, heads of departments, and foreign ministers of the United States."

35. There has been little federal case law discussing the interplay between the Act and the Disqualification Clause. Two recent cases – each considering the events of January 6, 2021 – arrived at exactly the opposite conclusions. In both of these cases, a candidate sought injunctive relief to prohibit the enforcement of a state statute allowing citizens to challenge the qualifications of a candidate to appear on a ballot.

36. In the first case – *Cawthorn v. Circosta*, ___ F. Supp. 3d ____, 2022 WL 738073 (E.D.N.C. Mar. 10, 2022) – the court ruled that the Act was not ambiguous, and applied the plain language of the Act. The court concluded that the Act was intended to apply prospectively, and ruled as follows: "By the plain language of Section 3 and the 1872 Act, Congress removed all of [the Disqualification Clause's] disabilities from all person whomsoever who were not explicitly excepted." *Id.* at *12. The Court in *Cawthorn* granted injunctive relief in favor of the candidate, and stayed the state election challenge proceeding. *Id.* at *14. *Cawthorn* is on appeal. The United States Court of Appeals for the Fourth Circuit declined to stay the decision, and has oral argument set for May 3, 2022. (*see* internetcalMay032022ric.pdf (uscourts.gov))

[7] The Court notes that because of the procedural posture of the case in *Greene,* the issue of the existence of a private right of action was not ripe for consideration in that case. In addition, the language used in the election challenge statutes in Arizona and Georgia differs. Thus, while at first blush the cases may appear nearly identical, there are important differences that the Court must consider.

37. In the second case – *Greene v. Raffensperger*, 2022 WL 1136729 (N.D. Ga. Apr. 18, 2022) – the court held the Act of 1872 did not apply prospectively, and applied only retroactively, because its removal language is phrased in the past tense, and "Congress can[not] 'remove' something that does not yet exist." *Id.* at *23. The court declined to grant injunctive relief in favor of the candidate, and allowed the Georgia administrative proceedings to continue. *Id.* at *28. Given the recency of this opinion at the time of oral argument on April 20, 2022, this Court was not informed about whether an appeal had been taken.

38. Given the procedural posture of *Cawthorne* and *Greene*, whether a private right of action existed to bring suit pursuant to the Disqualification Clause was not at issue in those cases. The candidates were seeking injunctive relief to stop state court proceedings against them, as opposed to defending against injunctive relief (as is the case here).

39. *Cawthorn* and *Greene* are persuasive, but not binding on this Court. The Court notes, however, that these are two well-reasoned decisions which reach diametrically opposite conclusions. Each was written by a distinguished federal judge. At this time, no clarity exists as to how this federal issue will ultimately be decided by the federal courts.

40. Because this Court has concluded, *supra.,* that no private right of action exists under the United States Constitution or Arizona law, the Court raises this issue for appellate purposes, but declines to decide this issue as it is unnecessary for the resolution of the pending motions.

41. The current uncertainty in the federal courts about the prospective applicability of the Act to the Disqualification Clause precludes the issuance of injunctive relief here as a matter of law. Given the state of the law, Plaintiffs cannot demonstrate a strong likelihood of success on the merits that is required for the issuance of injunctive relief. *See* discussion *infra.*

D. Does the Constitution of the United States Reserve Determination of the Qualifications of Members of Congress Exclusively to the U.S. House of Representatives?

42. Rep. Gosar and Rep. Biggs raise the additional argument that only the United States Congress has the constitutional right and power to judge the qualifications of its

members. Again, Article 1, Section 5 of the United States Constitution provides in pertinent part: "Each House shall be the Judge of the . . . Qualifications of its own Members." Rep. Gosar and Rep. Biggs assert that the Verified Complaints against them must be dismissed, essentially arguing that this Court lacks jurisdiction to determine the qualifications of Members of Congress due to the express terms of the United States Constitution.

43. Plaintiffs argue that the States have the right to regulate congressional elections and candidacies pursuant to the authority conferred by Article 1, Section 4 of the United States Constitution. This section of the Constitution affords the States the authority and control of the time, place and manner of elections.

44. Plaintiffs rely on two cases – *Hassan v. Colorado*, 495 Fed. Appx. 947 (10th Cir. 2012), and *Lindsay v. Bowen*, 750 F3d 1061, 1065 (9th Cir. 2014) – for the proposition that the the States have authority to judge of the qualifications of members of Congress. These cases, however, are inapposite. Both *Hassan* and *Lindsay* involved qualifications of candidates for ***Presidential elections,*** not elections for Congress. The Constitution does not expressly identify who would be the judge of the qualifications of candidates for President. By contrast, the Constitution expressly provides that each House of Congress "shall be ***the*** Judge" of the "Qualifications of its own Members." (Emphasis added.)

45. The text of the Constitution is mandatory. It sets forth the single arbiter of the qualifications of members of Congress; that single arbiter is Congress.[8] It would contradict the plain language of the United States Constitution for this Court to conduct any trial over the qualifications of a member of Congress. Moreover, a state judicial trial relating to the qualifications of Rep. Biggs and Rep. Gosar arguably implicates the doctrines of federalism and separation of powers between the branches of the government (as this state judicial branch ultimately would be entering a judgment relating to a power reserved and assigned exclusively to the federal legislative branch of government).

[8] This further supports the conclusion reached, *supra.*, that legislation by Congress is necessary to enforce the Disqualification Clause. With such legislation, Congress would be delegating its exclusive power to assess whether members of Congress were disqualified pursuant to the Disqualification Clause.

E. Are the Lawsuits Barred by the Doctrine of Laches?

46. Finally, Rep. Gosar and Rep. Biggs argue that the election challenges against them are barred by the doctrine of laches.

47. Laches is an equitable doctrine that bars claims brought with unreasonable delay. *League of Ariz. Cities & Towns v. Martin*, 219 Ariz. 556, 558, ¶ 6 (2009). In determining whether a delay was unreasonable, courts must "examine the justification for delay, including the extent of plaintiff's advance knowledge of the basis for challenge." *Harris v. Purcell*, 193 Ariz. 409, 412, ¶ 16 (1998). The unreasonable delay "must also result in prejudice, either to the opposing party or to the administration of justice, which may be demonstrated by showing injury or a change in position as a result of the delay." *Martin*, 219 Ariz. at 558, ¶ 6 (citation omitted).

48. The Candidates' reliance on laches arguments are misplaced in the pending motions. To invoke such a laches defense, the Candidates necessarily must introduce factual evidence indicating prejudice to each of them.[9] That would convert the purely legal motion before the Court to a motion for summary judgment requiring consideration of evidence.

49. In the exercise of judicial restraint, the Court believes the doctrine of laches should be considered at one time – both in the context of prejudice to the Candidates and of prejudice to the administration of justice. However, because the issue of prejudice to the Candidates requires a factual determination,[10] the Court declines further consideration and application of the laches defense at this time.

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[9] Laches also can be applied in instances where "delay has prejudiced the administration of justice." *Ariz. Libertarian Party v. Reagan*, 189 F. Supp. 3d 920, 923 (D. Ariz. 2016). When determining whether delay has prejudiced the administration of justice, "a court considers prejudice to the courts, candidates, citizens who signed petitions, election officials, and voters." *Id.* (citing *Sotomayor v. Burns*, 199 Ariz. 81, 83, ¶ 9 (2000); *Mathieu v. Mahoney*, 174 Ariz. 456, 460 (1993)). Although likely applicable, *see discussion infra.*, the Candidates have not argued this theory of laches at this juncture.

[10] The Court likewise declines to consider the arguments as to whether the factual allegations relating to the Candidates meet the technical definition of "insurrection" or "rebellion." Because of the very expedited time constraints in issuing this ruling, and because this is a motion to dismiss testing the legal sufficiency of the pleadings, this ruling is based only upon on the legal arguments raised.

F. Have Plaintiffs Satisfied Arizona's Legal Standards for Injunctive Relief?

50. Assuming *arguendo* that Plaintiffs had stated a claim upon which relief could be granted, Plaintiffs request for injunctive relief still fails as a matter of law.

51. As to the first requirement for injunctive relief, the foregoing analysis reveals that there is not a reasonable likelihood for success on the merits by Plaintiffs. Plaintiffs have failed to cite persuasive legal authority or even include a developed legal argument about how they have a private right of action. There is an outright split of legal authority on the interplay between the Disqualification Clause and the Amnesty Act of 1872. And, with respect to Rep. Gosar and Rep. Biggs, proceeding with this lawsuit would contradict the express terms of the United States Constitution, and undermine the notion of separation of powers. "Circumstances involving resolution of relatively undeveloped body of law or novel factual settings make a determination of success on the merits difficult to forecast." *Greene*, at 71 (quoting *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 640 F. 2d 560, 569-70 (5th Cir. 1981)). "[W]here there are novel or complex issues of law or fact that have not been resolved a preliminary injunction should be denied." *Greene*, at p. 71 (quoting *Cincinnati Bengals, Inc. v. Bergey*, 453 F. Supp. 129, 145 (S.D. Ohio 1974)). "There can be no substantial likelihood of success, if there are complex issues of law and fact, resolution of which is not free from doubt." *Greene*, at p. 71 (quoting *Miller v. Am. Tel. & Tel. Corp.*, 344 F. Supp. 344, 349 (E.D. Pa. 1972)).

52. As to the second requirement for injunctive relief, the foregoing analysis reveals that there is not a showing of irreparable injury if the injunctive relief is not granted. If any of the Candidates are wrongfully enjoined from appearing on the ballot, the Candidate suffers the prejudice as they must be excluded from office. If, however, the Candidate appears on the ballot, and it is subsequently determined that the Candidate was disqualified, Arizona law has mechanisms in place to replace candidates who no longer are able to serve in office.

53. As to the third requirement, the foregoing analysis reveals that Plaintiffs have not made a sufficient showing that the balance of the hardships favors the issuance of injunctive relief.

54. Plaintiffs have failed to demonstrate the necessary elements for the issuance of a preliminary injunction. Plaintiffs have failed to state a claim upon which relief can be granted in this action. Dismissal is warranted.

G. Should an Advisory Trial Proceed Despite the Dismissal?

55. Plaintiffs have requested that, even if the pending motions to dismiss are granted, the Court still conduct an "advisory" evidentiary hearing.

56. In Arizona, election challenges are some of the most expedited proceedings in the court system. Courts are required to hear and render a decision within days after a matter is filed. A.R.S. § 16-351(A).

57. Issues of whether a person has participated in "insurrection" or "rebellion" often are, by their nature, detailed matters which involve the interplay between legal and constitutional rights. Moreover, facts involved in the adjudication of these claims can be detailed and particularly involute. This case illustrates the point:

    a. During oral argument, counsel for Rep. Gosar raised legitimate constitutional rights, issues and legal defenses that would need to be considered and decided. These include the rights to free speech and assembly under both the United States Constitution and Arizona Constitution.

    b. Factually, even though ten (10) Requests for Production are the presumptive limit pursuant to Rule 26.2, *Arizona Rules of Civil Procedure*, Plaintiffs have requested leave to serve more than twice the presumptive limit: Plaintiffs have requested to serve 25 Requests for Production to Rep. Finchem, 23 Requests for Production to Rep. Gosar, and 21 Requests for Production to Rep. Biggs. In Arizona's courts, such expansive requests appear only in the most complex of cases.

    c. Plaintiffs first disclosed the identity and scope of their expert testimony one week before the evidentiary hearing.

    d. One federal court has described the interplay of the events of January 6, 2021 and the Disqualification Clause as "novel and complex constitutional issues of public interest and import." *Greene*, at *1.

58. In *Ariz. Libertarian Party v. Reagan*, 189 F. Supp. 3d 920 (D. Ariz. 2016) the United States District Court for the District of Arizona aptly described the prejudicial effect of waiting until an election challenge to assert detailed claims that could have been litigated sooner. The Court noted: "More importantly, Plaintiffs' delay has prejudiced the administration of justice. Plaintiffs' delay left the Court with only 18 days before the . . . deadline to obtain briefing, hold a hearing, evaluate the relevant constitutional law, rule on Plaintiffs' motion, and advise the Secretary [of State] and the candidates [of the Court's decision]." *Id.*, at 924.

59. "The real prejudice caused by delay in election cases is to the quality of decision making in matters of great public importance." *Id.* (quoting *Sotomayor v. Burns*, 199 Ariz. 81, 83, ¶ 9). "Unreasonable delay can prejudice the administration of justice 'by compelling the court to steamroll through . . . delicate legal issues in order to meet' election deadlines." *Id.* (quoting *Lubin v. Thomas*, 213 Ariz. 496, 497–98, ¶ 10 (2006). Delaying the filing of lawsuits works to "deprive judges of the ability to fairly and reasonably process and consider the issues . . . and rush appellate review, leaving little time for reflection and wise decision making." *Mathieu*, 174 Ariz. at 460; accord *Ariz. Libertarian Party*, 189 F. Supp. 3d at 923.

60. Delay exists here in filing suit to obtain a judicial determination that the Candidates are disqualified from holding office by the Disqualification Clause. The Disqualification Clause applies to both candidates ***and sitting public officials***. Each of the Candidates holds public office. The events in question occurred in January 2021. Plaintiffs have asked this Court to take judicial notice of numerous media stories and social media postings involving the Candidates – most are dated between ***January 2021 and June 2021***. *See Plaintiffs' Motions in Limine and Request for Judicial Notice,* filed April 11, 2022, April 12, 2022 and April 14, 2022. Because each of the Candidates is a public official, litigation about whether each participated in an insurrection or rebellion, and whether each was disqualified under the Disqualification Clause, could have been filed much earlier than April 2022. The importance of the events of January 6, 2021, and the legal and constitutional issues associated with a judicial inquiry of these events, compels a deliberate and reasoned judicial inquiry.

61. The federal courts handling disputes relating to the events of January 6, 2021 have taken measured approaches, declining to act both in the absence of developed legal argument and where unnecessary. In *Greene*, the court declined to grant relief (issuing an injunction) due, in part, to the plaintiffs "failure to cite persuasive legal authority or

even include a developed legal argument" supporting their position. *Greene* at p. 71. Likewise, in *Cawthorn*, the court declined to allow the parties to develop the factual underpinnings of their claims and defenses when the legal rulings precluded a trial on the merits. The court in *Cawthorn* stated: "Should the court's statutory interpretation prove incorrect, it will of course engage in the factual development necessary and give these arguments full consideration." *Cawthorn,* __ F. Supp. 3d __ at n.7.

62. This Court will follow the restrained and judicious lead of the federal courts. Arizona's election challenge framework is ill-suited for the detailed analysis of the complex constitutional, legal and factual issues presented in this case. Plaintiffs have not cited persuasive authority or presented a developed legal argument suggesting that an advisory trial in this expedited framework must occur, and the Court declines the invitation to transform this election challenge into something for which it was not intended. The request to conduct an advisory trial on an expedited basis is declined.[11]

LET THE RECORD REFLECT that this ruling neither validates nor disproves Plaintiffs' allegations against the Candidates. The Court expressly is not reaching the merits of the factual allegations in this case.

Good cause appearing,

IT IS ORDERED granting *Defendant Mark Finchem's Motion to Dismiss,* filed April 11, 2022, and dismissing the *Verified Complaint* filed in CV 2022-004321.

IT IS FURTHER ORDERED granting Congressman Paul Gosar's *Motion to Dismiss,* filed April 11, 2022, and dismissing the *Verified Complaint* originally filed in CV 2022-004325.

IT IS FURTHER ORDERED granting *Congressman Biggs's Motion to Dismiss,* filed April 11, 2022, and dismissing the *Verified Complaint* originally filed in CV 2022-004327.

[11] To be clear, it is a mistake to conclude that the Court is opining that the Candidates' involvement in the events of January 6, 2021 never can be subject to any judicial review. This decision should not be misconstrued in this way. Indeed, there may be a different time and type of case in which the Candidates' involvement in the events of that day appropriately can and will be adjudicated in court. However, the special, statutorily-created, limited and expedited lawsuit simply is not designed for such an adjudication. And, irrespective of this decision, there ultimately will be a different trial for each Candidate: one decided by Arizona voters who will have the final voice about whether each Candidate should, or should not, serve in elective office.

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IT IS FURTHER ORDERED declining to conduct an evidentiary hearing.

IT IS FURTHER ORDERED vacating all future court hearings, including all trial settings in this matter.

IT IS FURTHER ORDERED denying as moot all other remaining motions.

IT IS FURTHER ORDERED directing that all parties shall bear their own respective costs and attorneys' fees incurred.

IT IS FURTHER ORDERED that because no further matters remain pending, this is a final judgment entered pursuant to Rule 54(c), *Arizona Rules of Civil Procedure.*

DATED: April 21, 2022

/s/ Christopher A. Coury

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Christopher A. Coury
Superior Court Judge