IN THE SUPREME COURT
STATE OF ARIZONA

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

OPENING BRIEF

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INTRODUCTION

The trial court's opinion should be reversed because its misinterpretation of A.R.S. § 16-351(B)—foreclosing any challenge to a candidate based on the United States Constitution—forfeits the core gatekeeping function for which the Arizona Legislature enacted the statute.

By its terms, § 16-351(B) allows Arizona's voters to "challenge a candidate for any reason relating to qualifications for the office sought as prescribed by law." This includes the qualifications set by the Fourteenth Amendment of the United States Constitution. In a departure from the plain reading of this text, the lower court manufactured a distinction between *proscribed* and *prescribed* qualifications that prevents voters from challenging an arbitrary set of conditions.

In addition, the trial court's suggestion that The Amnesty Act of 1872 might prospectively foreclose the application of the Fourteenth Amendment for all time to all people radically over-reads that statute. The plain language of the statute, legislative history, subsequent United States Supreme Court authority and actions by Congress, and the supremacy of constitutional mandates over legislative acts all show the Act applies only retrospectively.

Defendants-Appellees Biggs, Finchem, and Gosar (collectively, the "Candidates") are subject to a challenge under § 16-351(B). This Court should

remand these proceedings to undertake a hearing to determine whether they should be on Arizona's ballots.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this expedited candidate challenge pursuant to A.R.S. § 16-351(A), which provides that the decision of the Superior Court in this expedited election matter is appealable only to the Supreme Court.

STATEMENT OF FACTS

This is a ballot challenge to the Candidates based on their engagement in the events of January 6, 2021, the culmination of a movement to block the certification of a presidential election. Appellants' Appendix ("App'x") 31, ¶ 57.[1] Because all three candidates moved to dismiss the action for failure to state a claim under Rule 12(b)(6), Plaintiffs-Appellants Thomas Hansen, *et al.* (the "Challengers") provide the following summary of their allegations to demonstrate that if all material allegations of the complaint are taken as true and read in the light most favorable to them, the Challengers have stated a claim for relief. (App'x 3.[2])

[1] A copy of the Verified Complaint in *Hansen v. Finchem*, Case No. CV2022-004321, is provided in the Appellants' Appendix at pages App'x 20-51.
[2] A copy of the trial court's Under Advisement Ruling, Case No. CV2022-004321 filed on April 22, 2022, is provided in the Appellants' Appendix at pages App'x 1-19.

I. THE JANUARY 6, 2021 ATTEMPT TO STOP THE VOTE COUNT

On January 6, 2021, a crowd gathered at the Ellipse in Washington, D.C., to protest the counting of electoral votes.

The votes of presidential electors, under the provisions of the Twelfth Amendment to the U.S. Constitution and the Electoral Count Act, 3 U.S.C. §§ 15 *et seq.*, are officially counted on January 6 of the year following a presidential election. (App'x 32, ¶ 60.) The U.S. Senate and the U.S. House of Representatives meet jointly in the House Chamber, with the Vice President of the United States (in his capacity as President of the Senate) presiding to conduct the count. (*Id.*)

As Congress gathered to count the votes, the crowd at the Ellipse swelled to nearly 15,000. Speakers at the event called for "trial by combat," to "start taking down names and kicking ass" and be prepared to sacrifice their "blood" and "lives" and "do what it takes to fight for America" by "carry[ing] the message to Capitol Hill," since "the fight begins today." (App'x 37, ¶ 86.) These calls for violence were predictable and an expected culmination of similarly violent events leading up to the attack on the Capitol. (App'x 35-37, ¶¶ 74-82.) The President told the crowd they would "stop the steal," (App'x 19, ¶ 89), and that they would "walk down to the Capitol, and we're going to cheer on our brave senators, and congressmen and women. We're probably not going to be cheering so much for

some of them because you'll never take back our country with weakness. You have to show strength, and you have to be strong." (*Id.*)

The demonstrators then marched to the Capitol, where they joined a crowd of 300 members of the violent extremist group "Proud Boys."(*Id.* ¶ 91.) The crowd then attacked police protecting the barricades surrounding the Capitol.

Law enforcement retreated as people scaled the walls of the Capitol. (App'x 20, ¶ 94.) Many were armed with weapons, pepper spray, and tasers. Some wore full body armor; others carried homemade shields. Many used flagpoles, signposts, or other weapons to attack police officers defending the Capitol. *Id.*

Over the next two hours, hundreds stormed the Capitol, attacking police with weapons and pyrotechnics. (App'x 21, ¶ 101.) One police officer was crushed against a door, screaming in agony as the crowd chanted "Heave, ho!" *Id.* An attacker ripped off the officer's gas mask, beat his head against the door, took his baton, and hit his head with it. (*Id.* ¶ 102.) Another officer was pulled into a crowd, beaten and repeatedly Tased. (*Id.* ¶ 103.)

The crowd demanded the arrest or murder of various other elected officials who refused to participate in their attempted coup. (*Id.* ¶ 104.) They chanted "hang Mike Pence" and threatened House Speaker Nancy Pelosi. (*Id.* ¶ 105.) They taunted a Black police officer with racial slurs for pointing out that overturning the election would deprive him of his vote. (*Id.* ¶ 106.)

Vice President Pence was removed by the Secret Service; the House adjourned at 2:20 p.m. (*Id.* ¶ 108.) The crowd had successfully obstructed Congress from certifying the votes, temporarily blocking the peaceful transition of power from one presidential administration to the next. (*Id.* ¶ 109.)

The crowd then attempted to force their way into the Speaker's Lobby (adjacent to the House Chamber) as lightly armed security guards tried to hold the door long enough to evacuate Members of Congress and others. (App'x 22, ¶ 112.) Senate staffers took the electoral college certificates with them when they were evacuated from the Chamber. (*Id.* ¶ 113.) Shortly after, the House Chamber and Senate Chamber fell. (*Id.* ¶ 114.) Members of the mob, some carrying zip ties and tactical equipment, overtook the defenses of the United States government and achieved, through force, effective control over the seat of the United States Congress. (*Id.* ¶ 115.)

DHS, ATF, and FBI agents, and police from Virginia and Maryland, then joined Capitol Police to help regain control of the Capitol. (*Id.*) Members of the mob attacked officers guarding the Capitol, beating them with improvised weapons, spraying them with mace, and beating one so badly he required staples. (App'x 23, ¶ 118.)

The D.C. National Guard arrived and by 6:00 p.m. the crowd had been removed from the Capitol, though some committed sporadic acts of violence

through the night. (*Id.* ¶ 120.) Vice President Pence was not able to reconvene Congress until 8:06 p.m., nearly six hours after the process had been obstructed. (*Id.* ¶ 121.)

In total, five people died and over 150 police officers suffered injuries, including broken bones, lacerations, and chemical burns. (*Id.* ¶ 124.) Four Capitol Police officers on duty during January 6 have since died by suicide.

II. THE OATHS AND ACTS OF THE CANDIDATES

Each of the respondent candidates took an oath to uphold the United States Constitution and each of the candidates engaged in acts to support the events of January 6, 2021.

A. Representative Finchem

Representative Finchem took an oath as an elected member of the Arizona House of Representatives. A.R.S. § 38-231(E)-(F); App'x 11, ¶ 47. That oath included a promise to "support the Constitution of the United States." (App'x 11, ¶ 47). A record of the oath is filed with the Secretary of State. *Id.* He is running for Secretary of State of Arizona. (App'x 4, ¶ 2.)

After the 2020 election, Finchem publicly insisted that then-President Trump had won the election, posting those false claims online consistently from November 2020 through January 6, 2021. (App'x 11, ¶ 50.) He publicly coordinated with other public officials to advance a scheme orchestrated by the

President to introduce a slate of false electors. (*See* App'x 11-18, ¶¶ 50-85.) Finchem then went to Washington, D.C. the week of January 6 to bring that plan to fruition. Finchem admits he was in Washington, D.C. before and on January 6 to, among other things, lobby Vice President Pence to suspend or delay the January 6 "award of electors" to the winner of the 2020 presidential election: then-President-elect Joe Biden. (App'x 18, ¶ 87.) Finchem raced to the Capitol when he heard it was being stormed by the crowd, despite being warned to stay away. He knew he was racing toward an unlawful act. Instead of turning back, he joined the crowd as it breached the Capitol building, took a photo of the crowd, and posted the photo online with words of encouragement. (App'x 29, ¶ 153.)

B. Representative Gosar

Paul Gosar took an oath as an elected member of the United States House of Representatives, which included a promise to support the Constitution of the United States pursuant to Article IV of the United States Constitution. (App'x 57, ¶ 24.[3]) He is running for reelection to the United States House of Representatives. (App'x 54, ¶ 7.)

Gosar, like Finchem, coordinated and helped lead the scheme orchestrated by the President to pressure the Vice President to unilaterally and illegally accept

[3] A copy of the Verified Complaint in *Costello v. Gosar*, originally Case No. CV2022-004325, is provided in the Appellants' Appendix at pages App'x 52-87.

false electors. (*See* App'x 59-65 ¶¶ 33-68.) Gosar helped plan the Ellipse Demonstration. (App'x 13, ¶¶ 55-56.) He offered its planners "blanket pardons" for unrelated criminal charges to induce them to plan the event—despite public knowledge that those planners' recent events had led to violence. (*Id.* ¶¶ 56-58.) He also helped plan the Capitol Protest with violent extremist Ali Alexander. (App'x 14, ¶ 60.) Gosar was in constant contact with Alexander from November 2020 to January 6, 2021, despite Alexander's public threats to use violence to prevent the lawful certification of electoral votes. (*Id.* ¶¶ 60-63.)

Gosar encouraged, promoted, and gave aid and comfort to the events of January 6 as they unfolded. He posted a picture of people scaling the Capitol walls with the caption "Americans are upset"; suggested that the attack would end if Congress caved to its demands; and justified and encouraged the crowd as it rampaged through the Capitol. (App'x 71-74, ¶¶ 95-96, 99-101, 103-05.) Contemporaneous replies indicate Gosar's posts were understood as supporting the insurrection as it occurred. (App'x 72, ¶¶ 100-01.) Gosar publicly disseminated disinformation as the attack occurred, knowingly and falsely claiming that "antifa" was responsible. (App'x 73, ¶ 102.) This "ruse of war" aided the attack by creating confusion about ongoing events during the fog of battle.

Gosar voluntarily gave the attack "personal service" and things of value. He helped plan two demonstrations, which he knew or should have known would

likely become violent, with the express purpose of delaying or preventing Congress from certifying electoral votes. And he gave it the encouragement, imprimatur, and aid and comfort of a sitting member of Congress *in real time*, while impeding the response to the attack by sowing disinformation. And Gosar's request for a Presidential pardon demonstrates consciousness of culpability. (App'x 75, ¶ 114.)

C. Representative Biggs

Biggs took an oath, as a member of the U.S. House of Representatives, to support the Constitution of the United States, under Article VI of the U.S. Constitution. (App'x 94, ¶ 24.[4]) And he is running for reelection to the U.S. House of Representatives. (App'x 89, ¶ 7.)

Biggs publicly coordinated with Representative Gosar and others to advance the campaign to delegitimize, challenge, and unlawfully overturn the 2020 presidential election. Biggs followed Gosar's lead and promoted a plan to prevent Congress from certifying the 2020 vote on January 6, 2021. (App'x 95, ¶¶ 31-32.)

Biggs and Gosar or their staff were in close contact with other organizers of the Ellipse Demonstration, the Trump White House and Members of Congress regarding planning the event. (App'x 98, ¶ 45.)

[4] A copy of the Verified Complaint in *Goode v. Biggs*, originally Case No. CV2022-004327, is provided in the Appellants' Appendix at pages App'x 52-87.

Biggs and Gosar were thanked by Alexander for their help in planning the Wild Protest. (App'x 13, ¶50.) Biggs supplied Alexander a video that he played to the crowd at a December 19, 2020 "Stop the Steal" rally at the Arizona State Capitol, where Biggs stated: "I wish I could be with you today." Alexander introduced Biggs as one of the "heroes" of Alexander's "movement" to overturn the 2020 election.[5] On December 22, 2020, Biggs and Gosar met with President Trump and announced they were working to prevent the "disenfranchisement" of Trump voters, with Gosar tweeting afterwards, "sedition will be stopped." (*Id.* ¶ 53.) Finally, Gosar and Biggs helped organize and promote the January 6 Ellipse Demonstration that evolved into the attack on the Capitol. (App'x 102, ¶ 60.)

DECISION BELOW

Although Plaintiffs brought their cases as candidate challenges under A.R.S. § 16-351, the trial court began its decision by deciding that, in the alternative, these cases could not have been brought pursuant to "a private right of action to assert claims under the Disqualification Clause." (App'x 5, ¶ 8.)

Turning to the statute upon which Plaintiffs brought these cases, the court noted that A.R.S. § 16-351(B) concerns challenges to candidates "relating to qualifications for the office sought as prescribed by law." (App'x 9, ¶¶ 25-26.)

[5] The Intercept, *Freedom Caucus Chair Rep. Andy Biggs Helped Plan January 6 Event, Lead Organizer Says*, https://youtu.be/99Xez3lkp_8.

Focusing on this passage of the statute, the court emphasized the word "prescribed" and reasoned the "statute does not address candidates who may be 'proscribed,' or prohibited, from holding office if certain conditions exist." (*Id*.) Relying on this prescribed/proscribed distinction, the court held that "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 is *proscribed by law* from holding office." (App'x 10-11, ¶ 32.) The court did not explain why the question of whether a candidate is qualified under A.R.S. § 16-351 should be framed as a "private right of action," of the Constitution, as opposed to the application of the statute itself.

Next, the trial court considered the question of whether the Amnesty Act of 1872 acted to bar enforcement of the Disqualification Clause, "but decline[d] to decide this issue as it [was] unnecessary for the resolution of the pending motions." (App'x 11).

The court then considered whether a state court was precluded from considering a candidate's qualification under the United States Constitution because "only the United States Congress has the constitutional right and power to judge the qualifications of its members." (App'x 12-13.) The court concluded that "[i]t 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." (App'x 13.)

The court declined to consider the defense of laches and then held that the consequences of its rulings meant that no injunction should issue. (App'x 14.)

Finally, the court decided not to hold an evidentiary hearing, reasoning that "Arizona's election challenge framework is ill-suited for the detailed analysis of the complex constitutional, legal and factual issues presented in this case." (App'x 18, ¶ 62.) Notably, one day after the court's decision—a Georgia state administrative court planned to hold (and in fact held) an evidentiary hearing on a similar challenge under a similar election challenge framework on a similarly compressed timeline.[6]

ISSUES PRESENTED

1. Whether A.R.S. § 16-351 allows constituents to challenge candidates based on Section Three of the Fourteenth Amendment to the United States Constitution?
2. Whether the Amnesty Act of 1872 applies prospectively to relieve all political disabilities imposed by Section Three of the Fourteenth Amendment to the United States Constitution?

[6] *See* C-SPAN, *Rep. Marjorie Taylor Greene Testifies at Administrative Hearing, Part 1*, https://bit.ly/MTGHearing (Apr. 22, 2022) (video of evidentiary hearing).

ARGUMENT

This appeal presents two issues: (i) Arizona's right to regulate its elections under A.R.S. § 16-351 and (ii) the application of the Amnesty Act of 1872.

The Superior Court divided its opinion into seven different questions. The first—whether a private right of action exists to assert a claim under the Disqualification Clause—is addressed only in passing in § I, below, because Plaintiffs did not plead any federal constitutional claims. The Superior Court's second and ultimately dispositive question—whether A.R.S. § 16-351 can be used to enforce the requirements of the Disqualification Clause—is also addressed in § I. The third question—whether the Amnesty Act of 1872 bars enforcement of the Disqualification Clause—addressed by the Superior Court only "for appellate purposes," is addressed below in § II. The fourth question—whether only Congress can make determinations of the qualifications of its members—is closely related to question two and is therefore addressed in § I.B. The fifth question—whether Plaintiffs' challenges are barred by the doctrine of laches—was not considered or resolved by the Superior Court and is not addressed here. As the Superior Court's answer to question six—whether Plaintiffs have satisfied the standard for injunctive relief—simply reiterated its answers to questions two and three, it need not be addressed separately here. Finally, the seventh question—whether the

Superior Court should have conducted an evidentiary hearing even though it granted the Candidates' motion to dismiss—is addressed in the conclusion.

I. A.R.S. § 16-351 PERMITS CANDIDATE CHALLENGES BASED ON FEDERAL CONSTITUTIONAL REQUIREMENTS FOR OFFICE

Plaintiffs' candidacy challenge was brought under A.R.S. § 16-351, which provides a private right of action and broadly states: "Any elector may challenge a candidate for any reason relating to qualifications for the office sought as prescribed by law." A.R.S. § 16-351(B). Although Plaintiffs' state law cause of action includes an embedded federal ingredient, Plaintiffs did not plead any federal constitutional *claims*, under the Disqualification Clause or otherwise. Thus, the Superior Court's initial analysis of the existence *vel non* of a federal cause of action under the Disqualification Clause is a *non sequitur*.[7]

[7] It is also incorrect. The Superior Court relied on *In re Griffin*, 11 F. Cas. 7, 26 (C.C.D. Va. 1869), for the proposition that the Disqualification Clause is not self-executing and procedures "can only be provided for by congress." (App'x 5.) But *Griffin* was decided when Virginia had no state government, and was under direct federal rule; much like Washington, D.C. today, *all* of its laws could "only be provided for by congress." *See* Gerard N. Magliocca, Amnesty and Section Three of the Fourteenth Amendment, 36 Const. Comment. 87, 130 & n.91 (2021) (noting that *Griffin* "was not denying states the power to enforce Section Three on their own") (App'x 137-138). Furthermore, the decision seems to assume that 42 U.S.C. § 1983 is necessary to enforce constitutional claims against *state* officials in *state* courts, (App'x 6), and cites law regarding private rights of action to enforce *statutes*, (App'x 7-8.) There is no requirement of congressional action—or even state action—to enjoin state officials from unconstitutional actions in state courts. *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 327 (2015). Arizona has created a statutory scheme with A.R.S. § 16-351 that supplants an action in equity against the secretary of state, but it did not need to do so. Further, any

In its decision below, the Superior Court held that Plaintiffs could not use § 16-351 to challenge Biggs, Finchem, and Gosar's candidacy on the basis that they are ineligible for office under the Disqualification Clause because "a private right of action to enforce the Disqualification Clause was not created by A.R.S. § 16-351(B)." (App'x 11, ¶ 32.) The Superior Court's framing of this issue as whether § 16-351 created a "private right of action to enforce the Disqualification Clause" was incorrect. Section § 16-351 explicitly provides "*[a]ny elector*" a private right of action to challenge the nomination of a candidate. A.R.S. § 16-351(B) (emphasis added). The actual question—and the one the Superior Court answered in its decision—is whether an elector can use that private right of action to mount a challenge based on a candidate's ineligibility under the Disqualification Clause.

In any event, the decision below was based on the Superior Court's conclusion that § 16-351 does not allow challenges to candidates based on "disqualifications." *Id.* at 9. This central holding finds no support in the statutory text, contravenes binding Arizona precedent, and frustrates the purpose of § 16-351. It was erroneous and requires reversal.

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doctrine concerning private rights of action to enforce federal *statutes* is inapplicable here.

A. A.R.S. § 16-351 Allows Challenges for "Any Reason Relating to Qualifications . . . as Prescribed by Law," Including Federal Constitutional Requirements

Under § 16-351, "a court may enjoin placement on the primary ballot of a candidate who does not meet the *statutory or constitutional requirements* for the office sought." *Pacion v. Thomas*, 225 Ariz. 168, 170 ¶ 15, 236 P.3d 395, 397 (2010) (emphasis added). The United States Constitution and Arizona Constitution both provide such "constitutional requirements." For example, Finchem's candidacy for the office of Arizona Secretary of State is governed by the Arizona Constitution, which states that "[n]o person shall be eligible" for a State executive office, including the office of Secretary of State, unless he or she is not less than 25 years old, a citizen of the United States for at least ten years, and a citizen of Arizona for at least five years. Ariz. Const. art. V, § 2; *see id.* art. IV, pt. 2, § 2 (stating similar requirements for State legislative candidates). The Arizona Constitution also states that "[t]he ability to read, write, speak, and understand the English language . . . shall be a necessary qualification for all state officers and members of the state legislature." Ariz. Const. art. XX, pt. 8. The United States Constitution, in Article I, Section 2, requires that congressional candidates, such as Biggs and Gosar, be at least 25 years of age, have been United States citizens for seven years, and reside in the state in which they seek to be elected. U.S. Const.

art. I, § 2; *see* U.S. Const. art. II, § 1 (stating requirement that only a "natural born Citizen . . . shall be eligible to the Office of President").

Just like these federal and State constitutional provisions concerning age, citizenship, and residency, the specific section of the United States Constitution at issue in this case—the Disqualification Clause of the Fourteenth Amendment—also provides a "requirement[] of the office sought" by Biggs, Gosar, and Finchem. Specifically, the Disqualification Clause states:

> 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.

U.S. Const. amend. XIV, § 3. The Disqualification Clause imposes a constitutional requirement barring anyone from running for federal or state office who previously took an oath to support the Constitution and subsequently engaged in insurrection or rebellion against the United States. *See id.* "Insurrection" as understood at the time this clause was drafted included "[a] rising against civil or political authority." (App'x 167.) The United State Congress awarded four congressional gold medals to Capitol Police who "protected the U.S. Capitol on January 6, 2021" from "a

mob of insurrectionists." (App'x 117.) Plaintiffs challenged the Candidates' candidacy under § 16-351 on the basis that they failed to meet the requirement imposed by the Disqualification Clause because they engaged in the events of January 6, 2020, and those events met the definition of an insurrection against the United States.

B. States Can and Do Disqualify Constitutionally Ineligible Candidates

There is nothing novel about the proposition that States can disqualify candidates for public office, including federal office, on the basis that they fail to meet applicable constitutional requirements. States, including Arizona, have exercised this power to regulate ballot access in federal and state elections with the approval of federal and state appellate courts. The Superior Court erred by not doing so here, as required by § 16-351's broad language.

Arizona has the power to regulate elections of candidates to the State legislature and executive offices, such as Finchem, who is running for statewide office. *See generally* Ariz. Const. art. 7; *see Oregon v. Mitchell*, 400 U.S. 112, 125 (1970) (noting that states retain primary authority "to regulate the elections of their own officials").

With respect to the election of congressional candidates like Biggs and Gosar, the "Elections Clause" of the United States Constitution gives states the power to regulate the "Times, Places, and Manner" of electing United States

Senators and Representatives. U.S. Const. art. I, § 4. The United States Supreme Court has interpreted the states' powers under the Elections Clause Article I, Section 4 broadly, explaining that the Section's "comprehensive words" provide a "complete code for congressional elections" and give the states the power "to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Roudebush v. Hartke*, 405 U.S. 15, 25 (1972).

"Consistent with this broad power, federal appellate courts have held that states have the power to exclude from the ballot constitutionally unqualified or ineligible candidates." *Greene v. Raffensperger*, No. 22 Civ. 1294, 2022 WL 1136729, at *23 (N.D. Ga. Apr. 18, 2022). For example, in examining the states' parallel power under Article II, Section 1 of the United States Constitution in *Hassan v. Colorado*, then-Circuit Judge Gorsuch held that Colorado was permitted to exclude a candidate from the ballot for the presidential election because he was a naturalized citizen rather than a "natural born Citizen," as Article II, Section I requires. 495 Fed. App'x 947, 948 (10th Cir. 2012) (Gorsuch, C.J.). Judge Gorsuch explained that "a state's legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office." *Id.* In *Lindsay v. Bowen*, the Ninth Circuit held that California properly excluded from the ballot a

27-year-old candidate who was constitutionally disqualified from becoming the President of the United States because of her age. 750 F.3d 1061, 1064-65 (9th Cir. 2014); *see* U.S. Const. art. II, § 1 (providing that "neither shall any person be eligible to [the Office of President] who shall not have attained to the Age of thirty five Years"). The *Lindsay* court reasoned that a contrary holding would compel the "absurd result" that "anyone, regardless of age, citizenship or any other constitutional ineligibility would be entitled to clutter and confuse our electoral ballot." *Id.* at 1064.

In its decision, the Superior Court wrote in *dicta* that Congress is the "single arbiter of the qualifications of [its] members," and "[i]t would contradict the plain language of the United States Constitution for [the Superior] Court to conduct any trial over the qualifications of a member of Congress." (App'x 13, ¶ 45.) But the power of each house of Congress to judge the qualifications of its members under Article I, Section 5, is not applicable here, where Plaintiffs seek to remove Biggs and Gosar from the ballot as *candidates,* not remove them from office as *members* of Congress. This case also does not, as the Superior Court suggested, require an Arizona court to "enter[] a judgment relating to a power reserved and assigned exclusively to the federal legislative branch of government," this violating "the doctrines of federalism and separation of powers." (*Id.*) As explained above, under Article I, Section 4 of the United States Constitution, Arizona, not Congress, plays

the primary role in regulating elections of the representatives its citizens send to Congress.

Congress makes the *final* decision as to presidential electoral votes. States cannot, after the presidential electors are chosen, interfere with the counting of electoral votes. 3 U.S.C. §§ 15 *et seq*. But they may refuse to allow unqualified *candidates* on the ballot in the first place, as in *Hassan* and *Lindsay*. Similarly, a state's refusal to allow an unqualified congressional candidate does not "usurp" the final—not exclusive—power of each house to judge the qualifications of its members. *Roudebush*, 405 U.S. at 25-26; *see also Greene*, 2022 WL 1136729, at *26-*28 (holding that barring unqualified congressional candidates from the ballot does not usurp the final judgment of the House); *Kryzan v. N.Y. State Bd. of Elections*, 55 A.D.3d 1217, 1220-21 (N.Y. Sup. Ct, App. Div. 2008) (a disqualified congressional candidate may withdraw his candidacy).

Nor, contrary to the decision below, may Congress "delegate" its power to judge the qualifications of its members. The power is given to each house of Congress, so it cannot be delegated by Congress, just as Congress could not pass laws affecting each house's ability to set its own rules. Instead, it is the Elections Clause that gives states the power to regulate elections, including by refusing to allow unqualified candidates on the ballot.

Furthermore, the Superior Court's decision conflicts with decades of Arizona precedent. Arizona, like the federal government, makes each house of the legislature the judge of the qualifications of its members. Ariz. Const. art. 4, pt. 2, § 8. Despite that "plain text," in *Bearup v. Voss*, the Court of Appeals affirmed the removal of a candidate for the Arizona House of Representatives in a § 16-351 proceeding after the Superior Court determined that the candidate had not been resident of the State for the three years "immediately preceding" the election, as required by Article IV, Part 2, Section 2 of the Arizona Constitution. 142 Ariz. 489, 489, 690 P.2d 790, 790 (Ct. App. 1984). This was cited approvingly by this Court in *Pacion*, 225 Ariz. at 170.

The Superior Court's ruling that it cannot hear cases regarding the constitutional qualifications of congressional candidates flatly contradicts Arizona precedent that courts *can* hear parallel state legislative cases, despite the presence of nearly identical constitutional language in both situations. In fact, Arizona courts can hear challenges to both state and federal candidates, notwithstanding the chamber-as-judge-of-qualifications language in both constitutions. In neither case does barring an unqualified *candidate* interfere with the power of any chamber—state or federal—to judge the qualifications of its *members*.

Nor is this particular qualification unusually complex. This Court's decision in *Escamilla v. Cuello* serves as an instructive example of how § 16-351 can be

used to challenge candidates on an even more fact-intensive and nuanced basis than the citizenship, age, and residency provisions at issue in *Hassan*, *Lindsay*, and *Bearup*. *Escamilla* involved Arizona's longstanding statutory and related constitutional requirement that public officers must be able to read, write, speak, and understand English. *Escamilla v. Cuello*, 230 Ariz. 202, 203 ¶ 2, 282 P.3d 403, 404 (2012). In that case, an elector brought a § 16-351 challenge to the candidacy of a San Luis City Council candidate, alleging that the candidate could not meet the State's English language proficiency requirements. *Id.* The superior court held an evidentiary hearing under the expedited procedures specified by § 16-351, determined that the candidate was "not sufficiently proficient in English to perform as a city council member for San Luis," and enjoined the candidate from appearing on the ballot. *Id.* at 204-05 ¶ 3, 282 P.3d at 404-05. This Court affirmed the candidate's disqualification. *Id.* at 204-07, 282 P.3d at 405-08.

Arizona, like any other state, has the power to regulate who appears on the ballot for federal and state office by enforcing state and federal requirements for candidacy. Section 16-351—the statute used by Plaintiffs here—is the appropriate vehicle for such a challenge.

C. The Superior Court's New Exception to § 16-351 Disregards Binding Precedent and Frustrates the Purpose of the Statute

Instead of following the broad mandate of § 16-351 and determining on the merits whether the Candidates met the "requirements for office sought" imposed

by the Disqualification Clause, the Superior Court invented an exception to § 16-351 and held that the statute can only be used to challenge candidates on the basis that they are *not qualified* to run for office, rather than *disqualified* from running for office. (App'x 9.) Specifically, the Superior Court held that Plaintiffs are barred from using § 16-351 here because there is a difference between challenging a candidate for any reason relating to qualifications "as *prescribed* by law," as provided by § 16-351, and challenging a candidate for any reason relating to qualifications "*proscribed*" by law. *Id*. Plaintiffs' challenge based on the Disqualification Clause, the Superior Court determined, falls in the latter category and improperly "expand[s] the [§ 16-351] inquiry to include disqualifications – or who is proscribed from holding office." *Id.*

The Superior Court's newly-created exception to § 16-351 was error and should be reversed for three reasons: it is not grounded in any reasonable reading of the unambiguous language of § 16-351, it defies binding Arizona precedent, and would render § 16-351 useless by foreclosing Arizonans' ability to challenge candidates on the basis of other constitutional and statutory requirements.

First, the statutory language of § 16-351 is expansive and provides no exception for "disqualifications," as the Superior Court erroneously held. As this Court has instructed, "[a] cardinal principle of statutory interpretation is to give meaning, if possible, to every word and provision so that no word or provision is

rendered superfluous." *Nicaise v. Sundaram*, 245 Ariz. 566, 568, ¶ 11, 432 P.3d 925 (2019). The Superior Court's reading of § 16-351 disregards this Court's "cardinal principle of statutory interpretation" and renders the broad phrase "as prescribed by law" superfluous.

Accepting the Superior Court's chosen definition, "the word 'prescribed' . . . commonly means 'to lay down a rule; to specify with authority.'" (App'x 9, ¶ 26) (quoting Merriam-Webster.com Dictionary (2022).) As detailed *supra* in § I.A, the United States and Arizona Constitutions prescribe by law various qualifications for elected office by laying down rules barring underage individuals, non-citizens, and non-residents from holding state and federal legislative and executive offices. The Arizona Constitution and related statutes further lay down rules disqualifying non-English speakers from holding office. The Disqualification Clause is no different: it too prescribes by law a qualification for elected office by laying down a rule barring an individual who engaged in insurrection against the United States from holding elected state or federal office.

If an individual ran for Congress and was either 19 years old, a citizen of France (but not the United States), a resident of California (but not Arizona), or violated their oath to support the Constitution by engaging in insurrection or rebellion against the United States, he or she would be barred from running for office "as prescribed by" the United States Constitution, making his or her

candidacy ripe for a challenge under § 16-351. The Superior Court's conclusion to the contrary turns the plain language of the statute on its head. It should be reversed.

The Superior Court's distinction between "not qualified" candidates, who may be challenged, and "disqualified" candidates, who may not, is likewise unsustainable. The court's logic produces the self-contradictory result that persons who are "constitutionally disqualified" are nonetheless "constitutionally qualified."

Second, the Superior Court's new rule runs afoul of Arizona courts' longstanding application of § 16-351, including this Court's decision in *Escamilla*. The Superior Court's central holding is that § 16-351 does not "include disqualifications" and "does not address candidates who may be 'proscribed,' or prohibited from holding office if certain conditions exist." (App'x 9.) But Arizona courts have repeatedly allowed electors to use § 16-351 to challenge and successfully remove candidates from the ballot on the basis that "certain conditions exist" that "prohibit" their candidacy. In *Bearup*, the Court of Appeals held that a candidate for the Arizona House of Representatives was *prohibited* by the Arizona Constitution from holding that office because *certain conditions existed*: he was not a resident of Arizona for the three years preceding the election. *Bearup*, 142 Ariz. at 489, 690 P.2d at 790.

Likewise, in *Escamilla*, this Court held that a candidate for city council was *prohibited* by State law from holding that office because *certain conditions existed*: the candidate could not read, write, and speak English. *Escamilla*, 230 Ariz. at 204-07, 282 P.3d at 405-08.[8] In the *Escamilla* opinion, the Court even noted that the candidate was "not forever barred from running for office. Should she obtain a sufficient English proficiency to perform as a city councilmember, she could then run for that office." *Id.* at 207 ¶ 27, 282 P.3d at 408. In other words, the Court explicitly instructed that the candidate would no longer be prohibited from running for office and susceptible to a challenge under § 16-351 if certain conditions—her lack of English language proficiency—no longer existed.

Third, the Superior Court's interpretation of § 16-351 would frustrate the statute's purpose by prohibiting Arizona electors from challenging candidates on the basis that they are disqualified by other constitutional and statutory provisions, including age, citizenship, residency, and English language requirements.

Indeed, the Superior Court's interpretation of § 16-351 ignores the basis for disqualification identified in the statute: "failure to fully pay fines, penalties or judgments as prescribed in §§ 16-311, 16-312 and 16-341." Although the cross-

[8] Even comparably routine § 16-351 challenges involving noncompliant nominating petitions involve candidates who are *prohibited* by State law from appearing on the ballot and holding office because *certain conditions exist*, such a lack of signatures or a failure to include certain required information in nominating papers.

referenced statutes prohibit the filing officer from accepting nomination papers from candidates with outstanding fines, any elector may also challenge the nomination of a such candidates, via § 16-351, as having engaged in conduct that disqualified the candidate from the ballot. The distinction the Superior Court attempts to create between standards that describe qualifications and those that describe disqualifications is nonsensical.

If Plaintiffs cannot use § 16-351 to challenge Biggs, Finchem, and Gosar's candidacy under the Disqualification Clause because § 16-351 does not cover, as the Superior Court held, "disqualifications," then the statute cannot be used to challenge candidates who are disqualified because they are underage, not citizens, not residents, do not speak English, or have unpaid fines. This restrictive reading of the statute would render it a nullity and thwart the Arizona legislature's priorities in regulating elections. It should not be adopted by this Court.

The Superior Court's new reading of § 16-351 finds no support in the text of the statute or binding Arizona precedent. It was error and should be reversed.

II. THE AMNESTY ACT OF 1872 DOES NOT APPLY PROSPECTIVELY TO SHIELD BIGGS, FINCHEM, AND GOSAR

The Amnesty Act of 1872, Act of May 22, 1872, ch. 193, 17 Stat. 142 (1872) (the "Amnesty Act") does not shield Defendants from the Disqualification Clause or Plaintiffs' challenge under § 16-351.

The Superior Court determined, in *dicta*, that the "uncertainty in the federal courts about the prospective applicability of the [Amnesty] Act to the Disqualification Clause" precludes the issuance of an injunction removing Defendants from the ballot. (App'x 12, ¶ 41.[9]) The Superior Court ultimately "decline[d] to decide" whether the Amnesty Act applied to the Candidates but "raise[d] the issue for appellate purposes." *Id.* If this Court does rule on the issue of the applicability of the Amnesty Act here, it should clarify that the Act does not apply prospectively to the Candidates because: (a) the plain language of the Disqualification Clause and the Amnesty Act, as well as the constitutional avoidance canon, make clear that the Act applied retroactively; (b) the legislative history of the statute confirms the Amnesty Act was designed to only have retroactive effect; and (c) subsequent United States Supreme Court authority and actions by Congress establish that the Amnesty Act did not prospectively remove any political disabilities imposed by the Disqualification Clause.

A. The Plain Language of the Amnesty Act Was, and Could Only Be, Retroactive, Not Prospective

A plain reading of the Amnesty Act supports only one conclusion: the Act applied retroactively, not prospectively.

[9] The decisions of lower federal courts do not bind Arizona courts; their "uncertainty" is no reason to refrain from interpreting the constitution.

"When interpreting a statute," the "primary goal" of the Supreme Court "is to give effect to the legislature's intent." *J.D. v. Hegyi*, 236 Ariz. 39, 40-41 ¶ 6, 335 P.3d 1118, 1119-20 (2014). "If the language is subject to only one reasonable meaning," the Court applies that meaning. *Id.* at 41 ¶ 9, 335 P.3d at 1120. "Words in statutes, however, cannot be read in isolation from the context in which they are used." *Id.* Likewise, the United States Supreme Court has instructed that "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). Furthermore, under the canon of constitutional avoidance, "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Gonzales v. Carhart*, 550 U.S. 124, 153 (2007) (cleaned up). Indeed, "a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (cleaned up).

Congress does not have the power to repeal any section of the United States Constitution by statute, including the Disqualification Clause. *See* U.S. Const. art. V (describing the process for amending the Constitution). The Amnesty Act could not, under any interpretation, repeal the Disqualification Clause. It was merely an act of Congress and did not include any action by the states, as required by Article

V. Therefore, to the extent the Amnesty Act is ambiguous (which it is not) it must be interpreted to be constitutional—that is, not as a functional repeal of the Disqualification Clause.[10] This alone is grounds for ignoring the erroneous opinion in *Cawthorn v. Circosta*, No. 22 Civ. 50, 2022 WL 73807, at *10-*12 (E.D.N.C. March 10, 2022) and following the persuasive opinion in *Greene*, 2022 WL 1136729, at *22-*25.

Rather than repeal the Disqualification Clause, the Amnesty Act relieved certain individuals who supported the Confederacy from disabilities imposed by the Clause. Congress was able to remove those disabilities imposed by the Disqualification Clause for these former Confederates because the Clause provides a procedure for granting amnesty. U.S. Const. amend. XIV, § 3. The last sentence of the Disqualification Clause provides this procedure and states: "Congress may by a vote of two-thirds of each House, *remove* such disability." *Id.* (emphasis added).

To that end, the Amnesty Act provides in relevant 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

[10] Any argument that the Disqualification Clause is not repealed by prospective amnesty is an empty formalism. Under that logic, Congress could extend a president's term indefinitely via calendar reform legislation that eliminates the month of January. *Cf.* U.S. Const. amend. XX, § 1.

> judicial, military, and naval service of the United States, heads of departments, and foreign ministers of the United States.

The verb "remove," which appears in both the text of the Disqualification Clause and the Amnesty Act, means "to get rid of" or "eliminate."[11] Here, the only reasonable reading of "remove," as used in the Disqualification Clause and the Amnesty Act, is "to get rid of" or "eliminate" an *existing* political disability previously imposed on an individual. Accordingly, the Disqualification Clause only gives Congress the power, "by a vote of two-third of each House," to remove an extant political disability already imposed on an individual. U.S. Const. amend. XIV, § 3. And the Amnesty Act, as a statutory exercise of that power, only removed political disabilities that existed when the Act was passed in 1872.

It "strains credulity" to ignore this plain language of the Disqualification Clause and the Amnesty Act and instead "argue that Congress can 'remove' something that does not exist." *Greene*, 2022 WL 1136729, at *23. Yet that is precisely what the Superior Court's decision portends: intimating that the Amnesty Act, when it was signed into law in 1872, removed all of Section 3's disabilities from all persons whomsoever– *past, present or future*, including the Candidates.

[11] Merriam-Webster Dictionary, *remove*, https://www.merriam-webster.com/dictionary/remove (last visited Apr. 26, 2022).

Just last week, a federal district court in Georgia rejected identical arguments made by United States Representative Marjorie Taylor Greene, who is also facing a challenge to her candidacy for reelection on the basis that she engaged in the January 6 insurrection in violation of the Disqualification Clause. *See Greene*, 2022 WL 1136729, at *22-*25.

The *Greene* court squarely rejected Representative Greene and the Candidates' prospective interpretation of the Amnesty Act and determined that their position "is not supported by the text of the 1872 Act or subsequent history." *Id.* The court concluded that it is "much more likely that Congress intended for the 1872 Amnesty Act to apply only to individuals whose disabilities under [the Disqualification Clause] has already been incurred, rather than to all insurrectionists who may incur disabilities under that provision in the future." *Id.* at *24. This Court should do the same.

Even if Congress did theoretically have the constitutional authority to remove political disabilities imposed by the Disqualification Clause prospectively, the Amnesty Act's unambiguous language again shows that Congress did no such thing when it passed the statute. This Court must "look[] first to the statutory language itself" when interpreting a statute "to give effect to the legislature's intent." *Baker v. Univ. Physicians Healthcare*, 231 Ariz. 379, 383 ¶ 8, 296 P.3d 42, 46 (2013). When interpreting statutory language, the United States Supreme Court

has "frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach." *Carr v. United States*, 560 U.S. 438, 448 (2010); *see Gundy v. United States*, 139 S. Ct. 2116, 2127 (2019) (noting that the use of past tense indicates that a statute applies to pre-enactment conduct).

Here, the Amnesty Act uses the past tense "imposed" when referring to political disabilities. If Congress had wanted to make the Amnesty Act prospective, it would have used forward-looking language. For instance, the statute could have explicitly removed "all future disabilities, disabilities that may be incurred, disabilities that shall be incurred, or the like." *Greene*, 2022 WL 1136729, at *23.The Disqualification Clause itself is prospective because it applies to those who "shall have engaged" in insurrection. U.S. Const. amend. XIV, § 3. But the Amnesty Act is not.

The Court should apply the plain language of the Amnesty Act, reject the Candidates' far-fetched interpretation of the statute, and adopt "[t]he far more plausible reading . . . that Congress's grant of amnesty only applied to *past* conduct." *Greene*, 2022 WL 1136729, at *25 (emphasis supplied).

B. The Amnesty Act's Legislative History Supports Only a Retroactive Application of the Act

Where, as here, the "statutory language is unambiguous and the statutory scheme is coherent and consistent," the Court's inquiry into the meaning of the statute "must cease." *Robinson*, 519 U.S. at 340; *accord Baker*, 231 Ariz. at 383 ¶

8, 296 P.3d at 46 ("When the language is clear and unambiguous, and thus subject to only one reasonable meaning, we apply the language without using other means of statutory construction."). When the language of a statute is subject to multiple reasonable interpretations, this Court "must consider other factors" to interpret the statute, "including its context, subject matter, and historical background, as well as its purpose and effect." *J.D.*, 236 Ariz. at 41 ¶ 9, 335 P.3d at 1120. Because the use of the word "remove," as used in the Disqualification Clause and the Amnesty Act, has an unambiguous and consistent meaning and supports only a retroactive application of the Act to relieve then-existing political disabilities, the Court need not delve into the legislative history of the Clause or the Act.

However, even if the plain language of the Disqualification Clause and Amnesty Act were ambiguous or inconsistent, the legislative history confirms that the Act does not relieve Biggs, Finchem, and Gosar of any disabilities imposed by the Disqualification Clause.

The legislative history of the Amnesty Act confirms that its sole purpose was to retroactively relieve political disabilities imposed by the Disqualification Clause from certain Americans who violated their oath to protect the Constitution

by supporting the Confederacy during the Civil War—or, as it was commonly known at the time in the Union, the "rebellion."[12]

The Fourteenth Amendment was ratified in 1872 in the wake of the Civil War. When the 39th Congress convened in December 1865, "Senators and elected Representatives from the ex-Confederate States showed up ready to take their seats," thereby "infuriat[ing] most Republicans in Congress." Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comment. 87, 91 (2021) (App'x 124). This inspired the framers of the Fourteenth Amendment to add Section Three, the Disqualification Clause, to the Amendment. *Id.*

After the Fourteenth Amendment was ratified but before the Amnesty Act was passed, Congress passed private bills to remove disqualifications from former Confederates. *See id.* at 112. That soon became cumbersome, with thousands of names in each bill. *Id.* Rather than pass another statute with a long list of names Congress chose to use a general phrase to identify those former Confederates it was relieving of disqualification, with a few exceptions for some of the most prominent Confederate leaders. *Id.* at 116-20.

[12] Livia Gershon, *How the Civil War Got Its Name*, JSTOR Daily (Jan. 15, 2021), https://daily.jstor.org/how-the-civil-war-got-its-name/ (noting that "[d]uring and immediately after the war, northerners most commonly referred to it as a "rebellion") (App'x 168-71).

The legislative history leaves no room for the argument that the Amnesty Act was designed to grant amnesty to potential future insurrectionists. Just nine days before passing the Act, when Congress debated an earlier version that enumerated over seventeen thousand names, one Representative proposed adding the phrase "and all other persons" to the bill. Cong. Globe, 42d Cong., 2d sess. 3382 (May 13, 1872) (Rep. Perry). The bill's sponsor, Representative Butler, a Republican from Massachusetts, rejected that amendment precisely because it would suggest that those who had not (yet) committed insurrection would be the subjects of amnesty—as he quipped, "I do not want to be amnestied myself." *Id.* (Rep. Butler). That elicited laughter on the House floor. *Id.* The legislature that authored the Amnesty Act in 1872 found the idea of prospective amnesty for those who had not yet committed insurrection laughable.

A retroactive reading of the Amnesty Act "is supported not only by the text of the statute and the practical limitations on Congress's authority, but also by pure common sense." *Greene*, 2022 WL 1136729, at *25. "[I]t would make little sense for Congress to have prohibited Jefferson Davis and other leaders of the Confederacy from serving in Congress in 1872 while simultaneously granting blanket amnesty to all future insurrectionists regardless of their rank or the severity of their misconduct." *Id.* The Candidates asked the Superior Court to adopt that ahistorical, unreasonable reading. It should be rejected.

C. Subsequent United States Supreme Court Authority and Actions by Congress Demonstrate that the Disqualification Clause Remains in Effect

The argument that the Amnesty Act removed "past, present or future" political disabilities under the Disqualification Clause, effectively rendering the Clause moot, is further undermined by the Supreme Court and Congress' subsequent treatment of the Clause.

1. Subsequent United States Supreme Court Authority

"[A] close reading of past Supreme Court authority demands the conclusion that [the Disqualification Clause] remains operative," and not foreclosed by the Amnesty Act. *Greene*, 2022 WL 1136729, at *25. For example, in 1995, the United States Supreme Court referenced the Disqualification Clause and noted that it remains an existing "part of the Constitution." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 787 n.2 (1995). In 1969, the Court acknowledged that Section Three "of the 14th Amendment disqualifies 'any person who having previously taken an oath . . . to support the Constitution of the United States, shall have engaged in an insurrection or rebellion against the same, or given aid or comfort to the enemies thereof." *Powell v. McCormack*, 395 U.S. 486, 520 n.41 (1969). "[I]t is unlikely—even inconceivable—that the *U.S. Term Limits* and *Powell* Court would have referred to [the Disqualification Clause] as a disqualification if it has been effectively repealed by the 1872 Amnesty Act."

Greene, 2022 WL 1136729, at *25. The Candidates' interpretation that the Amnesty Act "removed [the Disqualification Clause's] disability forevermore is at odds with the acknowledgements in *U.S. Term Limits* and *Powell*." *Id.*

2. Subsequent Actions by Congress Concerning the Disqualification Clause

Congress confirmed this understanding of its power under Section Three in 1919 when it rejected a similar argument, based on the Amnesty Act of 1898, from a Representative-elect who had been convicted of espionage. The House concluded that "manifestly it could only remove disabilities incurred previously to the passage of the [1898 Amnesty] act, and Congress in the very nature of things would not have the power to remove any future disabilities." 6 Clarence Cannon, Cannon's Precedents of the House of Representatives of the United States, ch. 157, § 56-59 (1936); *see Greene*, 2022 WL 1136729, at *23-*24 (discussing the same).

Congress' unbroken understanding that the Amnesty Act had no prospective effect on any future insurrectionists is further confirmed by proposed legislation currently before the United States House of Representatives. The Superior Court found it particularly important that "Congress is presently considering legislation to enforce the Disqualification Clause," House Resolution 1405 ("H.R. 1405") (App'x 175-89). (App'x 7, ¶ 17.) If passed into law, H.R. 1405 would provide a cause of action enforceable by the United State Attorney General "to remove and bar from holding office certain individuals who engage in insurrection or rebellion

against the United States." H.R. 1405, 117th Cong. (2021). But H.R. 1405, as drafted, does not mention the Amnesty Act or otherwise reimpose any political disabilities the Candidates argue were forever removed by the Amnesty Act. *See id.* In other words, the Candidates' argument that Amnesty Act had prospective effect requires believing that Congress, having gone to the effort of drafting H.R. 1405, forgot to realize that H.R. 1405 would have no effect whatsoever because everyone received amnesty in 1872.

"For all of these reasons—the plain text of the 1872 Act, the nature of Congressional power vis-à-vis the Constitution, common sense, and the Supreme Court's recognition of [the Disqualification Clause] in cases after the passage of the 1872 Act—it is apparent that the 1872 Act does not provide amnesty prospectively." *Greene*, 2022 WL 1136729, at *25.

CONCLUSION

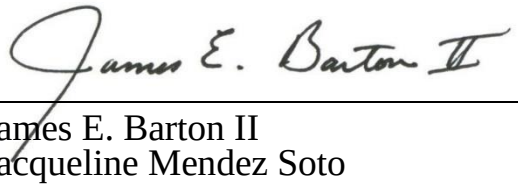
In Arizona, qualifications for office under the Fourteenth Amendment may be challenged under Section 16-351. To determine whether the Candidates are qualified, however, it is necessary for the Superior Court to conduct an evidentiary hearing. (Such a hearing should have been undertaken before this appeal, notwithstanding the legal questions presented. *Mandraes v. Hungerford*, 127 Ariz. 585, 586, 623 P.2d 15, 16 (1981)).

Remand for a hearing now is appropriate, regardless of whether it occurs before or following the printing of the ballots. Section 16-343(D), provides a process for filling a vacancy created before an election that is "due to voluntary or *involuntary withdrawal* of the candidate and that occurs following the printing of official ballots." A.R.S. § 16-351(D) (emphasis added). A candidate who is disqualified under § 16-351 has involuntarily withdrawn from the primary election. Should that be determined after the ballots are printed, as envisioned in § 16-343(D), the disqualified candidate's name will remain on the ballot, but the candidate's political party is offered the relief of permitting write-in candidates up to five days before the election to file nomination papers. *Id.* Should the candidate who involuntarily withdrew his candidacy due to his disqualification achieve the most votes, the candidate's party will be permitted to replace the nominee just as if the vacancy occurred after the primary election but before the general elections. *See Tellez v. Superior Ct. In & For Pima Cty.*, 104 Ariz. 169, 173, 450 P.2d 106, 110 (1969).

Accordingly, for the reasons given above, the order of the Superior Court granting the Candidates' motions to dismiss should be reversed, and the Candidates' candidacy challenges should proceed to an evidentiary hearing.

DATED this 27th day of April, 2022.

BARTON MENDEZ SOTO PLLC



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