No. 22-1251

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

MADISON CAWTHORN, an individual,

Plaintiff-Appellee,

v.

MR. DAMON CIRCOSTA, in his official capacity as Chair of the North Carolina State Board of Elections, *et al.*,

Defendants, and

BARBARA LYNN AMALFI, *et al.*,

Proposed-Defendant-Intervenor-Appellants.

On Appeal from the United States District Court for the Eastern District of North Carolina at Raleigh

BRIEF OF APPELLEE

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 22-1251 Caption: Madison Cawthorn v. Barbara Lynn Amalfi, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Madison Cawthorn
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

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? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ James Bopp, Jr. Date: 03/09/2022

Counsel for: Madison Cawthorn, Plaintiff-Appellee

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Jurisdictional Statement

On December 7, 2021, Plaintiff-Appellee Rep. Madison Cawthorn ("**Cawthorn**") filed a notice of candidacy for North Carolina's then-13th Congressional District. JA492. On January 10, 2022, a group of voters ("**January Challengers**") filed a Challenge with the North Carolina State Board of Elections ("**NCSBE**"), alleging that Cawthorn should be removed from the ballot for Congress from the 13th District, because Cawthorn "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." *Id.* Cawthorn filed this suit on January 31, 2022, alleging subject matter jurisdiction under 28 U.S.C. §§ 1331, 1332. JA24.

On February 21, 2022, the district court denied without prejudice the January Challengers' motion to intervene. JA312. The district court denied the January Challengers' motion on the grounds they could not overcome the "strong presumption of adequate representation" by the NCSBE and that the January Challengers made no showing of "adversity of interest, collusion, or malfeasance." JA310-11. The district court also denied permissive intervention because it was not only "unnecessary, but also would delay this matter," unduly prejudicing the parties' interests. *Id.*

Due to redistricting litigation, North Carolina's congressional districts changed; the NCSBE informed the January Challengers that their Challenge against Cawthorn was "no longer valid." JA495. Accordingly, the district court continued the previously scheduled hearing on the merits, noting that it would consider an "expedited proceeding if circumstances necessitated it." *Id.* On March 2, 2022, the NCSBE informed the district court that Cawthorn had withdrawn his notice of candidacy for the 13th District, but had filed a notice of candidacy for the newly drawn 11th Congressional District; two days later, two individuals from that district filed a Challenge against Cawthorn's candidacy in the 11th District with the NCSBE ("**March Challengers**")[1]. At that time, the March Challengers did not file a motion to intervene with the district court and the NCSBE defended the Challenge Statute against Cawthorn's claims in the district court. *Id.*

On March 4, 2022, the district court granted, from the bench, Cawthorn's motion for a preliminary injunction, enjoining the NCSBE from engaging "in a determination of whether or not Representative Cawthorn has violated Section 3 of the Fourteenth Amendment ("**§ 3**")." JA475. On March 9, 2022, the *January*

[1]One of the individuals who was a January Challengers is also a March Challenger, but the January Challenge was for Cawthorn's candidacy for the 13th District, while the March Challenge was against his candidacy for the 11th District – a different, newly drawn congressional district – in which he is now running.

Challengers (who no longer had valid Challenges before the NCSBE) appealed the denial of the motion for intervention and the district court's injunction. JA19. The January Challengers also filed an Emergency Motion for Stay of Injunction Pending Appeal with this Court. ECF No. No. 3. On March 10, 2022, the district court followed its bench ruling with a written order, granting a permanent injunction on the same grounds, and finding it had subject matter jurisdiction over this case. JA492 (citing 28 U.S.C. §§ 1331, 1332). JA492. On March 10, 2022, the January Challengers filed an amended notice of appeal on the denial of the January Challengers' motion to intervene, as well as the preliminary and permanent injunction. JA518.

This Court denied the January Challengers' Emergency Motion for Stay, but ordered a limited remand in order for the district court to "consider a *new* motion to intervene on an expedited basis." ECF No. 33, 2-3 (emphasis added). The *March* Challengers then filed an Expedited Renewed (*sic*) Motion to Intervene as Defendants with the district court on March 17, 2022. JA520 (emphasis added). The district court noted that, while the March Challengers' motion was titled "renewed," only one of the original proposed intervenors (i.e., the January Challengers) also brought the "renewed" motion to intervene. JA747.

The district court denied that motion to intervene as well, finding that the

March Challengers "failed to file their motion in a timely manner once they became aware that their interests changed from Defendants' interests" and that intervention "would unduly prejudice the Plaintiff." JA755. The March Challengers filed a second amended (*sic*)[2] notice of appeal on March 31, 2022.

This Court has jurisdiction under 28 U.S.C. § 1291 to review the district court's denial of the March Challengers' motion to intervene. This Court has jurisdiction under 28 U.S.C. §§ 1291 and 1292(a)(1) to review the district court's injunctions, if it determines that March Challengers' motion to intervene should have been granted and if it determines that the March Challengers have Article III standing, since the NCSBE did not appeal. Otherwise, since the NCSBE did not appeal the merits of the injunction, this Court would not have jurisdiction to consider the March Challengers' appeal of the merits.

Statement of Issues

1. The district court denied the January Challengers' motion to intervene as of right on the grounds they could not overcome the "strong presumption of adequate representation" by the NCSBE and that the January Challengers made no showing of "adversity of interest, collusion, or malfeasance." JA310-11. The district court

[2]Since the January Challengers, not the March Challengers, filed the original notice of appeal, the March Challengers' notice of appeal is not a "second" one, not an "amended" one.

also denied permissive intervention because it was not only "unnecessary, but also would delay this matter," unduly prejudicing the parties' interests. *Id.* Did the District Court abuse its discretion in denying the January Challengers' Motion to Intervene?

2. The district court denied the March Challengers' motion to intervene because it was untimely, as they filed it post-judgment and only after this Court instructed them to do so. JA754-55. The district court held that the March Challengers could have filed a motion to intervene between March 2, 2022, (when they filed a challenge against Cawthorn's candidacy in the newly drawn 11th district) and March 10, 2022, (when the district court issued its written order on injunction). Because Cawthorn had not litigated "the merits of his claims with the movants at the district level and may be required to respond to 'new' arguments, unanticipated theories, and possible re-litigation of issues already decided," the district court held intervention would unduly prejudice Cawthorn. Did the District Court abuse its discretion in denying the March Challengers' Motion to Intervene?

3. Even if the March Challengers' Motion to Intervene should have been granted, since the state defendants did not appeal, do the March Challengers have Article III standing to appeal the merits of the district court's injunction?

4. The district court ruled that the NCSBE was permanently enjoined from

proceeding "under N.C. Gen. Stat. §§ 163-127.1, et seq., with the challenges lodged against Plaintiff based on § 3 because such a challenge violated The Amnesty Act of 1872." Did the District Court abuse its discretion in granting the injunction?

Statement of the Case

On December 7, 2021, Cawthorn filed a notice of candidacy for North Carolina's 13th Congressional District. JA747-48. The January Challengers filed a "challenge" with the NCSBE, alleging that Cawthorn does not meet the federal constitutional requirements for a Member of the U.S. House of Representatives. *Id.* at 748. On the next day, however, January 11, 2022, the Wake County Superior Court in North Carolina issued an indefinite stay on all challenges filed with the Board pending a final resolution regarding the litigation surrounding North Carolina's redistricting. *Id.*

Cawthorn filed his Complaint and a motion for preliminary injunction on January 31, 2022, seeking declaratory and injunctive relief prohibiting the NCSBE from proceeding to adjudicate the January Challenge under the state statute. *Id.* On February 7, 2022, the January Challengers filed a motion to intervene ("**First Intervention Motion**"), which the court denied, on the grounds they could not overcome the "strong presumption of adequate representation" by the NCSBE and

that the January Challengers made no showing of "adversity of interest, collusion, or malfeasance." JA310-11. The district court also denied permissive intervention because it was not only "unnecessary, but also would delay this matter," unduly prejudicing the parties' interests. *Id.* On February 21, 2022, the court granted Cawthorn's motion to advance the trial on the merits and consolidate with the hearing on the motion for preliminary injunction. JA748.

Underlying the district court proceedings was the redistricting litigation. On February 2, 2022, the Supreme Court of North Carolina heard arguments regarding the redistricting question and on February 4, 2022, ruled that the current districts were unconstitutional. *Id.* On February 23, 2022, the state court issued newly drawn maps for congressional districts. *Id.* The next day, the NCSBE issued a letter to the January Challengers informing them that their challenge was no longer valid as they were no longer "qualified registered voters" in the newly drawn 13th Congressional District. *Id.* at 3.

On February 28, 2022, Cawthorn withdrew his December notice of candidacy and filed a notice for the newly drawn 11th Congressional District. *Id.* Two days later, on March 2, 2022, the March Challengers filed challenges with the NCSBE, arguing the same basis as the January Challengers, that Cawthorn was not eligible under § 3. *Id.* The March Challengers did not file a motion to

intervene with the district court and the NCSBE defended the merits of this action.

On March 4, 2022, the district court granted, from the bench, Cawthorn's motion for a preliminary injunction, enjoining the NCSBE from engaging "in a determination of whether or not Representative Cawthorn has violated [§ 3]." JA475. On March 9, 2022, the *January Challengers* (who no longer had valid Challenges before the NCSBE) appealed the denial of the motion for intervention and the district court's injunction. JA19. The January Challengers also filed an Emergency Motion for Stay of Injunction Pending Appeal with this Court. ECF No. 3. On March 10, 2022, the district court followed its bench ruling with a written order, granting a permanent injunction on the same grounds. JA492. On March 10, 2022, the January Challengers filed an amended notice of appeal on the denial of the January Challengers' motion to intervene, as well as the preliminary and permanent injunction. JA518.

This Court denied the January Challengers' Emergency Motion for Stay, finding that January Challengers were private individuals, not parties, to the litigation and thus were not entitled to a stay. Order with Limited Remand, ECF No. 33 at 2. This Court then ordered a limited remand in order for the district court to "consider a *new* motion to intervene on an expedited basis." ECF No. 33, 2-3 (emphasis added). The *March* Challengers then filed an Expedited Renewed

(*sic*) Motion to Intervene with the district court on March 17, 2022. JA520 (emphasis added). The district court noted that, while the March Challengers' motion was titled "renewed," only one of the original proposed intervenors (the January Challengers) also brought the "renewed" motion to intervene. JA747.

The district court denied the March Challengers' motion to intervene as well. In that order, the district court found that in regards to the first question, "the January challengers, including Laurel Ashton, lost any standing that they may have had to intervene in this case on February 24, 2022, when they were notified that their challenges were no longer valid." JA750. The district court held the March Challengers "failed to file their motion in a timely manner once they became aware that their interests changed from Defendants' interests" and that intervention "would unduly prejudice the Plaintiff." JA755. The March Challengers filed a second amended notice of appeal on March 31, 2022. In addition, the March Challengers also filed a second emergency motion to stay. Challengers 2nd Emergency Motion to Stay, ECF No. 34. This Court again denied the motion to stay, but granted the March Challengers motion to expedite their appeal. Order Denying 2nd Em. Mot. to Stay, ECF No. 69.

The deadline has passed for the NCSBE to file an appeal of the District Court's Order, and it has not filed one.

Statement of the Standard of Review

This Court reviews denials of motions to intervene, whether as of right or permissive, as well as preliminary and permanent injunctions, for abuse of discretion. *Stuart v. Huff*, 706 F.3d 345, 349 (4th Cir. 201) (intervention); *WV Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009) (preliminary); *SAS Inst., Inc. v. World Programming Ltd.*, 874 F.3d 370, 385 (4th Cir. 2017) (finding district court abuses its discretion on a permanent injunction when it "relies on incorrect legal conclusions or clearly erroneous findings of fact," . . . or otherwise acts ""arbitrarily or irrationally" in its ruling). (internal citations omitted). According, this Court will "review factual findings for clear error and legal conclusions *de novo*." *Id.*

Summary of Argument

The district court did not abuse its discretion in denying the January Challengers' motion to intervene. The court correctly found that the January Challengers were unable to overcome the heightened presumption of adequate representation. Further, the district court did not abuse its discretion in denying the March Challengers' motion to intervene. There the court correctly found that the March Challengers motion was untimely and would result in prejudice to the existing parties of the suit.

Even if March Challengers' motion to intervene should have been granted, March Challengers do not have Article III standing to appeal the merits of the district court's injunction. All they have is a generalized grievance available to all voters of North Carolina. Further, they have no protectable property interest in a candidate challenge based on § 3.

Finally, the district court was correct in granting Cawthorn's permanent injunction as the Amnesty Act of 1872 prospectively removed all the political disabilities imposed by § 3 and, by its terms, Cawthorn's disability under § 3 cannot be determine until he presents himself to be sworn in as a member of Congress upon his election.

Argument

I. The District Court did not Abuse its Discretion in Denying Either Intervention.

The deferential abuse of discretion review stems from "the district court's superior vantage point for evaluating the parties' litigation conduct and whether an existing party adequately represents a proposed intervenor's interests." *N. Carolina State Conference of NAACP v. Berger*, 999 F.3d 915, 927 (4th Cir. 2021), *cert granted sub nom. Berger v. N. Carolina State Conf. of the NAACP,* No. 21-248, 2021 WL 5498793 (U.S. Nov. 24, 2021).

March Challengers cannot appeal the denial of the January Challengers' intervention. The January Challengers were Challengers against Cawthorn's candidacy in the 13th Congressional District. JA748. That Challenge was voided by the NCSBE once Cawthorn withdrew his candidacy in that district and filed in the newly drawn 11th Congressional District. JA749. The March Challengers filed a Challenge against Cawthorn's candidacy in the 11th Congressional District. *Id.* However, the March Challengers never sought intervention prior to the district court's final judgment or even afterwards (until instructed to do so by this Court after the March Challengers appealed). JA750. The district court proceeded to the merits of Cawthorn's motion for injunctive relief with the State defending the Challenge Statute. *Id.* The March Challengers now seek an appeal of an intervention they never sought in the district court. The January Challenge and the March Challenge are much different—they are Challenges to Cawthorn's candidacy in different districts— and the January Challenge to Cawthorn's candidacy in the 13th District is now moot.

A. The District Court did not abuse its discretion in finding that January Challengers were adequately represented by the NCSBE.

Under Federal Rule of Civil Procedure 24(a)(2), a court must grant intervention as a matter of right if the movant can demonstrate (1) an interest in

the subject matter of the action; (2) the protection of his interest would be impaired because of the action; and (3) that interest is not adequately represented by existing parties to the litigation. *Stuart*, 706 F.3d at 349. A failure to meet any one of these elements will preclude intervention as of right. *Berger* 999 F.3d at 927.

In denying the January Challengers' motion to intervene, the district court found that they could not overcome a heightened presumption of adequate representation. JA310. Adequate representation has long been presumed when "the party seeking intervention has the same ultimate objective as a party to the suit." *Berger*, 999 F.3d at 930. Further, "a heightened presumption of adequacy applies when would-be intervenors share the same ultimate objectives as a government defendant." JA309 (citing *Berger*, 999 F.3d at 932). In order to rebut this heightened presumption of adequacy, January Challengers must make a showing of "adversity of interest, collusion, or nonfeasance." *Berger*, 999 F.3d at 930.

The district court found that January Challengers could not persuasively rebut this presumption finding, "the movants and Defendants share the same ultimate objective in *this* case." JA310. Further, any "argument [] to the contrary conflate[s] their challenge to [Cawthorn's] qualifications before the State Board of

Elections with this litigation." *Id.* "Finally, [Challengers] make no showing of 'adversity of interest, collusion, or malfeasance.'" JA311.

Rather, the district court found that, after reviewing the Janurary Challengers' proposed response to Cawthorn's preliminary injunction motion, submitted with their Motion to Intervene, and the response filed by the NCSBE, that their arguments were substantially the same. JA311 (finding January Challengers also argued lack of jurisdiction based on ripeness and abstention doctrines, that Plaintiff failed to demonstrate likelihood of success on the merits of his constitutional claims, that "the Qualifications Clause does not conflict with the challenge statute, and that the 1872 Amnesty Act applied at one time and not to future 'insurrectionist.'").

Appellants don't attempt to rebut these findings about the January intervention, rather stating that the January Challengers' interests were not identical to the NCSBE and, since it was their challenge, they must be allowed to intervene. Appellants' Brief at 22-23. Even if January Challengers had *some* interest in the lawsuit, they must still satisfy *all* the factors for intervention as of right. *Berger*, 999 F.3d at 927. Here, that means inadequate representation.

Appellants cannot point to how the district court abused its discretion in denying the January intervention. Instead, the difference of interests that they cite

to is something that did not happen until long after the court issued its order denying intervention and the order granting permanent injunction. "[T]hat the NCSBE has refused to appeal, the disconnect between its interests and those of the Challengers is palpable." Appellant's Br., 24. It seems as though the Appellants fault the district court for failing to be able to peer into the future in order to divine that, at sometime in the future, the State's and January Challengers' interests would diverge, which then would establish inadequate representation. The district court had not such ability or obligation, if it did.

At the time of issuing its decision on the January intervention, the district court correctly noted that "the movants and Defendants share the same ultimate objective in *this* case: to obtain a court order rejecting the Plaintiff's claims and upholding the constitutionality of the challenged statute." JA310. In so finding, the district court then applied the correct legal framework established by this Court that "a heightened presumption of adequacy applies when would-be intervenors share the same ultimate objectives as a government defendant." JA309. This heightened presumption can be overcome by "showing adversity of interest, collusion, or malfeasance." *Id.* The district court correctly found that the Challengers could not make this showing. Showcased by how their proposed response to the motion of preliminary injunction was substantially the same as the

NCSBE's. JA311.

For these reasons, the district court did not abuse its discretion in denying January Challengers' Motion to Intervene.

B. The District Court did not abuse its discretion in finding that the March Challengers' motion to intervene was untimely.

A district court's denial of a motion to intervene for being untimely is reviewed for abuse of discretion. *Scott v. Bond*, 734 Fed. App'x. 188, 191 (4th Cir. 2018) (citing *Nat'l Ass'n for Advancement of Colored People v. New York*, 413 U.S. 345, 365-66 (1973); *Gould v. Alleco, Inc.*, 883 F.2d 281, 286 (4th Cir. 1989)). "District courts are accorded broad discretion in deciding the timeliness of a motion to intervene after assessing all the relevant circumstances." *Id.* A district court abuses its discretion *only* if its decision was guided by incorrect legals standards or rested upon a clearly erroneous factual finding. *Id.* (citing *Brown v. Nucor Corp.*, 576 F.3d 149, 161 (4th Cir. 2009).

The district court correctly noted that "timeliness is a central consideration when deciding a motion to intervene and a movant's failure to seek intervention in a timely manner is sufficient to justify denial of such motion." JA751 (quoting *Scott*, 743 F. App'x. at 191). In considering March Challengers' motion, the district court considered the following factors on timeliness "(1) how far the case

has progressed, (2) the prejudice to other parties caused by any tardiness in filing the motion, and (3) the reason for any tardiness." *Id.* (citing *Scott,* 734 F. App'x at 191). "The most important consideration in reviewing a motion to intervene is whether the existing parties will suffer prejudice if the motion is granted." *Id.*

Here, the district court discussed all three factors, giving substantial discussion to the prejudice to the parties. *See* JA751-52. First, the district court noted that "the case progressed to a final order on challenges by two of the proposed intervenors and to notices of appeal filed by one of the proposed intervenors." *Id.* In regards to prejudice, the court first noted that the challengers "contend that the question presented by their motion is solely to determine the extent to which they may maintain further proceedings in the Court of Appeals." *Id.* at 752. However, "[Cawthorn] has not litigated the merits of his claims with the movants at the district level and may be required to respond to 'new' arguments, unanticipated theories and possible re-litigation of issues already decided." *Id.* "Subjecting [Cawthorn] to an appeal brought by strangers to the case would unduly prejudice him by causing further unforeseen delay." *Id.*

The district court further found that March Challengers provided no reason for the tardiness. *Id.* The "[March Challengers] achieved standing in the case on March 2, 2022, and the court expedited the merits hearing to March 4, 2022."

JA752-53. "However, the court perceives no impediment to [March Challengers] ability to file a motion to intervene between March 2 and March 10, 2022." JA753. The district court noted "the January and March Challengers were represented by the same counsel, have a claimed substantial interest in this high-profile case, and were clearly aware of and watching this case, demonstrated by the notices of appeal filed March 9 and March 11, 2022." *Id.*

March Challengers erroneously equate both motions to intervene, seeming to say both should have been considered together. Appellants' Br., 25 ("The Challengers' *motions* were in no way tardy. They filed their *first* motion to intervene before the NCSBE made any substantive filing." (emphasis added)). Further "they moved to intervene shortly after Cawthorn filed this action, and they renewed that motion on the same day that this Court remanded." *Id.* at 26. The January Challengers challenge was voided by the NCSBE, since that challenged involved Cawthorn's candidacy in a different district then he was actually running in, JA749, and the March Challengers, who challenged Cawthorn's candidacy in the new district, never filed a motion to intervene in the district court, until instructed to do so by this Court on limited remand. JA750. Neither has any bearing on the other.

In attempt to excuse their tardy filling, March Challengers contradict their

own arguments. Here, they state that "[t]he divergence of interests between the Challengers and the NCSBE . . . did not become fully apparent until *after* the date that the NCSBE refused to join in the emergency stay motion, March 14, 2022." Appellant's Br., 25. Yet in the district court, they argue that any shared interests were "dissolved by this Court's order" on March 4, 2022. JA530. The district court even mentions this as part of the reasoning in its order. JA752, n.1 ("the movants argue their interests 'diverged' from the Defendants' interests upon this court's March 4, 2022 order."). Earlier in their brief, however, March Challengers claim the divergence occurred prior to March 14, 2022—stating that the district court recognized this divergence in "its judgment in its weighing of the hardship to the NCSBE arising from the judgment." *See* Appellants' Br., 24.

March Challengers argued below and now, that the divergence of interests were readily apparent after the district court's order from the bench on March 4, 2022 (or in the written judgment of March 10, 2022). But not even one page later, contradicts that argument in an attempt to excuse their tardiness to this Court by saying the divergence was not clear until March 14, 2022. *See* Appellants' Br., at 24-25.

March Challengers attempt to argue that because their first motion to intervene was "contemplated by this Court" that automatically makes it timely.

However, the remand only ordered "the district court to consider a new motion to intervene on an expedited basis." Order re Limited Remand, ECF No. 33. That does not mean that this Court is free to ignore all the factors required by Rule 24 and the case law when considering the question of whether the district court abused its discretion.

Next, March Challengers argue that the district court abused its discretion on the issue of prejudice by claiming that Cawthorn "may be required to respond to new arguments and unanticipated theories," while the district court had previously found that the January Challengers' arguments were substantially similar. Appellants' Br., 27. The district court responded to this argument in their order. In finding that Cawthorn "may be required to respond to 'new' arguments, unanticipated theories, and possible re-litigation of issues already decided," the court based these findings on Challengers own arguments. "As discussed below, the [Challengers] argue their interest 'diverged' from the Defendants' interests upon this court's March 4, 2022 order." JA752, n.1.

Finally, not noted by the district court below is that the March Challengers not only did not seek to intervene at all in the district court before this Court's remand, they filed a notice of appeal, which precluded filing any intervention at all in the district court. Though still untimely, an intervention for purposes of appeal

of the district court's injunction could have been filed, but was precluded by their own notice of appeal. Only this Court's remand gave the March Challengers this second bite at the apple. If the March Challengers' motion to intervene would have been untimely if not filed between March 2 to March 10, 2022, as the district court held, surely it was untimely when filed after filing a notice of appeal on March 17, 2022.

Thus, the district court did not abuse its discretion when it denied March Challengers intervention. Only if this Court find that the district court abused its discretion on the question of intervention, can it consider the merits of the injunction, if it first finds that the March Challengers have Article III standing to appeal the merits.

II. Challengers lack Article III Standing to Appeal the Merits of the District Court's Injunction.

A. All Challengers have is a "generalized grievance" insufficient for standing.

Article III of the Constitution confines the judicial power of federal courts to deciding actual "Cases" or "Controversies." *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013). "In other words, for a federal court to have authority under the Constitution to settle a dispute, the party before it must seek a remedy for a personal and tangible harm." *Id.*

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." *Id.* at 705 (citing *Already, LLC v. Nike, Inc.,* 568 U.S. 85, 89 (2013)). This requirement means that standing "must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Id.* (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997)).

"Although intervenors are considered parties entitled to appellate review . . . , an intervenor's right to continue 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." *Diamond v. Charles* 476 U.S. 54, 68 (1986). The Court recognized that intervenors who granted intervention as of right may have an "adequate interest" to justify the intervention, but, when the defendant does not appeal, the Court held that the intervenors must have Article III standing on their own. *Id.* at 69. So here, March Challengers must have a concrete and particularized injury sufficient to confer Article III standing.

In *Hollingsworth,* the court found that the intervenors did not have 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.

This was found despite the fact that the intervenors were the original proponents of Prop. 8 who ran and conducted the campaign to get Prop. 8 on the ballot and ultimately approved. *Id.* at 706-07 (Intervenors were responsible for collecting signatures and possessed sole control over the arguments in favor). Nevertheless, the Court held intervenors had "no personal stake in defending its enforcement that is distinguishable from the general interest of every citizen of California." *Id.* at 707. "[S]uch a 'generalized grievance,' no matter how sincere, is insufficient to confer standing." *Id.* at 706.

Similarly in *Diamond*, the state defendants did not appeal the decision of the district court. 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 form whose judgment the appeal is being taken shall be deemed parties in this Court." *Id.* Despite this, the Court required that the intervenors to have standing. *Id.* at 61-62. "Diamond's status as an intervenor below, whether permissive or as of right, does not confer standing sufficient to keep the case alive in the absence of the State on this appeal." *Id.* at 68.

All March Challengers have is a "generalized grievance," which is not enough to confer standing. They do not even attempt to argue that they have

standing, instead stating that the district court's order "bars them from proceeding the challenges they filed." Appellant's Brief at 23. However, that "injury" is not unique to March Challengers alone. Rather, it is felt by all voters of North Carolina.

March Challengers have no injury in fact. North Carolina law provides voters a process to file a challenge, but it does not guarantee a right to file a challenge on any particular basis. March Challengers aren't satisfied with not voting for Cawthorn, campaigning against him or supporting his opponent, or taking their candidacy challenge under § 3 to Congress, upon Cawthorn's reelection, which is the proper place for a § 3 challenge. Here, they want to prevent every other voter in his district from even having the opportunity to vote for him.

March Challengers' only "right" of any kind is authorization to file a candidate challenge under North Carolina state law. And they still have that "right," since the district court's order only enjoins the NCSBE from processing or hearing challenges based upon § 3, but does not prevent March Challengers from filing candidate challenges on other grounds.

All Challengers have is a "generalized grievance," which is "insufficient to confer standing."

B. Challengers have no protectable property interest in their Challenges.

Challengers claim that their "injury" is being barred from having this particular challenge heard. *See* Appellant's Brief at 23. In order for this to be true, they would need to have a "property" interest protected under the Fourteenth Amendment in their candidate challenge.

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 argue that the district court's order deprives them of "their right[], conferred by state law, to litigate a candidacy challenge." Appellant's Brief at 23. First, the district court's order held that only § 3 challenges are enjoined, so Challengers still have the right to litigate any non-enjoined challenge against Cawthorn. Second, Challengers have no right to an unlawful challenge, and the district court has held a § 3 challenge is unlawful. For instance, no court would recognize a disqualification challenge based upon race or sex—that would clearly be unlawful and a challenger could not claim a property interest in such a

challenge.

C. 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," Appellant's Br., 23, 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 Cawthorn.[3]

Congress, however, has not created a civil 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), attached Exhibit 1. *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,"

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[3]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 his rights under a provision of federal law or the U.S. Constitution, as Cawthorn has done here in Count IV of his Complaint.

which it had not done, *Hansen*, at ¶¶ 9-11 (citing *Griffin*, 11 F. Cas. at 26), (2) 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 North Carolina has a private cause of action to seek to remove Cawthorn from the ballot because he is disqualified under § 3, and, ipso facto, Challengers can have no "right[], conferred by state law, to litigate [their § 3] candidacy challenge." Appellant's Br., 23.

III. The District Court did not commit error in granting an injunction.

The district court based its decision to grant an injunction based on only one federal law claim made by Cawthorn: that, under the 1872 Amnesty Act, § 3 could not be lawfully applied to Cawthorn. JA513. The district court did so because, "[w]here, as here, a straight interpretation of the statutory text answers the question presented, this court will not reach the constitutional questions when it is not necessary to do so." JA509. If this Court rejects the district court's decision on

the statutory text, this Court must also reject the additional claims made by Cawthorn to overturn the induction. *N. Carolina Right to Life, Inc. v. Leake,* 344 F.3d 418, 435 (4th Cir. 2003), *cert. granted, judgment vacated,* 541 U.S. 1007 (2004).

A. The district court correctly held that § 3 cannot be applied to Cawthorn.

1. The 1872 Amnesty Act removed all § 3 disabilities.

The candidate disqualification attempt by Challengers is based on a provision barring *officeholders* (not *candidates*) who "[i] having previously taken an oath . . . to support the Constitution . . . , [ii] 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." U.S. Const. amend. XIV, § 3. Since disability under § 3 includes the disability of persons "who shall have engaged in" insurrection, § 3's disability is imposed both retroactively and prospectively. And when the 1872 Amnesty Act provided that "such disability" under § 3 "shall be removed," it also removed any prospective disability for all covered persons. JA511-12. ("The 1872 Act,[4] [which,] by its plain language, removed '*all political disabilities* imposed by [§ 3] *from all persons*

[4]*See* JA510 (full cites for 1872 and 1898 Acts).

whomsoever,'" "which includes current members of Congress like the Plaintiff." (emphasis in original)).

March Challengers say the 1872 Amnesty Act only has retroactive effect, because it uses "imposed" in the past tense. Appellants' Br., 33-34. But they err grammatically. "Imposed," as used in the 1872 Amnesty Act's "the disability imposed by [§ 3]," is used as a past *participle*[5]—*not* a "past tense" *verb*, which acts as an adjective to show *which* "disabilities"[6] are referred to. And those are disabilities imposed *by* § 3, not *based on* § 3, so the reference is to the *sort of legal* disability § 3 imposes, which is both retroactive and prospective, not the particular applications of § 3 to an individual. *Accord Impose* www.merriam-webster.com/dictionary/impose ("to establish or apply by authority"). Accordingly, "imposed" doesn't justify March Challengers' use of the phrase,

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[5] Participles are "a form of a verb that in some languages, such as English, can function independently as an adjective," as here, The Free Dictionary, Participle, https://www.thefreedictionary.com/participle.html, and 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.

[6] Political disabilities are also imposed in other contexts, such as as a result of a criminal conviction, so the 1872 Amnesty Act had to specify which political disabilities were being "removed," and those were the disabilities imposed only by § 3, not some other provision of law.

"disabilities *already* imposed," which of course the 1872 Amnesty Act does not say, to claim retrospective application. Thus, when the 1872 Amnesty Act says that particular legal disability created by § 3 is "hereby removed from all persons whomsoever," it meant "all persons" to apply prospectively too. *Accord* JA512 (language that would have indicated temporal limitation).

March Challengers' use of "removed" meets a similar fate. "Removed," as used in the 1872 Amnesty Act, describes what Congress is doing to those the disabilities imposed under § 3. Since, the 1872 Amnesty Act applies prospectively, Congress "removed" all prospective "disabilities imposed."

The only exception (Congress knew *how* to make exceptions) to 1872 Amnesty Act's removal of § 3 legal disability were some office-holders and military personnel. The 1898 Amnesty Act, however, removed their disability: "the disability imposed by [§ 3] *heretofore incurred* is hereby removed." (Emphasis added). "[H]eretofore" indicates retrospective application (Congress knew *how) and "*incurred" indicates application to particular persons—both unlike the 1872 Amnesty Act. As before "disability imposed by [§ 3]" is a past participle phrase indicating *which* legal disability is at issue. If "imposed by," in both the 1872 and the 1898 Amnesty Acts, had meant only prior application to particular persons, as Challengers claim, then there would have been no need for

"heretofore incurred," in the 1898 Amnesty Act, to make it only retroactive, violating construction canons.

March Challengers recite legislative history. Appellants' Br., 35-38. But since the 1872 Amnesty Act is "clear and unambiguous," "consideration of legislative history [i]s unnecessary and improper," though the argument thereon are "unpersuasive." JA510, n. 8 (citations omitted).

March Challengers claim Congress interpreted the 1872 Amnesty Act as retrospective only, citing the House's refusal to seat Berger. Appellants' Br., 39-42. 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). The House considered only the 1898 Amnesty Act, not the 1872 Act, as the State Defendants conceded in oral argument in the district court. JA512. So when the House said that the 1898 Amnesty Act's "heretofore" language removed previously incurred disabilities only, that was true of the 1898 Amnesty Act. The 1872 Amnesty Act, however, which the House did not consider, did not have this language and, in light of § 3 retroactive and prospective effect and the 1872 Act's definition of "disability," acted prospectively. The district court correctly rejected the Berger argument. JA512-13.

March Challengers say "[t]he 1872 Act must be construed to avoid unconstitutionality." Appellants' Br., 42. First, they say the district court's interpretation of the 1872 Amnesty Act amounts to repealing § 3. Appellants' Br., 43. But the plain language of § 3 gave Congress plenary power to remove any and all § 3 disabilities in the last sentence of § 3 ("But Congress may by a vote of two-thirds of each House, remove such disability."), and March Challengers identify no provision limiting the breadth of that power. Second, March Challengers liken the district court's interpretation to prospective pardons. *Id.* at 44. Cawthorn hasn't been criminally convicted, so § 3 can't be viewed as a propspective pardon, and § 3 refers to political, not criminal, consequences of "insurrection." The plain language of the 1872 Amnesty Act removes this political consequence from any Representative other than those who served during the 36th and 37th Congresses. Cawthorn is a member of the 117th Session of Congress, so the 1872 Amnesty Act removed the ability to apply § 3 to him. Since § 3 doesn't apply to him (or any Member holding office after the 37th Congress), the application of § 3 to him is prohibited by federal law.

2. A § 3 Challenge cannot be presently determined.

Even assuming *arguendo* future § 3 disability survives the 1872 Amnesty Act, its application to Cawthorn could not be determined until he presents himself

to take the oath of office upon reelection. First, it applies to *taking office*, not *candidacy*. For example, being underage for age-restricted offices doesn't bar candidacy, if an upcoming birthday qualifies the candidate to take the oath of office. So assuming disputed facts, § 3 would only disqualify Cawthorn from "be[ing] a . . . Representative," not a *candidate* for Representative. Until he presents himself to take the oath of office, any § 3 disability does not attach to him.

Second, § 3 authorizes Congress to "remove such disability" at any time, including immediately preceding Cawthorn taking his oath of office after his reelection. Thus, until then, it remains unknown if any disability that attaches to him will be removed at any point up to and including January 3, 2023, when Member-elect Cawthorn would take the oath of office for that session of Congress.

In sum, the NCSBE planned to apply § 3 to determine Cawthorn's *candidate* qualifications, but "this claimed power has been rendered ineffective by the 1872 Act," so "[s]ubjecting [him] to such a procedure would violate federal law," JA513, and, in any event, any disability that would arise under § 3 cannot be determined until Cawthorn presents himself to take the oath of office, since any such disability can be removed by Congress at any time before then. As a result, removing Cawthorn from the ballot, based upon a § 3 disability, violates federal

law and the U.S. Constitution.

B. Cawthorn's constitutional claims, which have not been reached and are preserved, have merit and justifies the district court's injunction.

In addition to the claim reached by the district court, that applying § 3 to Cawthorn is prohibited by the 1872 Amnesty Act (Count IV), Cawthorn also made three constitutional claims in Counts I, II and III in his Complaint which have merit and justify the district court's injunction. The district court didn't reach those Counts, but they must be considered by this Court if the district court's statutory language decision is rejected.

1. Counts I and II - First and Fourteenth Amendment Claims

Under the *Anderson/Burdick*[7] balancing test,"the court must balance the character and magnitude of the burdens imposed against the extent to which the regulations advance the state's interests in ensuring that order, rather than chaos, is to accompany the democratic processes." *Fusaro v. Howard*, 19 F.4th 357, 368–69 (4th Cir. 2021) (internal citations omitted). This Court highlighted that this test requires it to weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" (Step 1) against "the precise interests put forward by the State as

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

justifications for the burden imposed by its rule," (Step 2) taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.* (quoting *Burdick*, 504 U.S. at 434).

a. The character and magnitude of Cawthorn's First and Fourteenth Amendment injuries are severe.

When evaluating the burden, "however slight that burden may appear," the court must be satisfied that the burden is "justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Fusaro*, 19 F.4th at 368–69 (4th Cir. 2021) (quoting *Crawford v. Marion Cnty. Elec. Bd.*, 553 U.S. 181, 191 (2008)). Burdens that are properly viewed as "inconveniences" that impose only "reasonable, nondiscriminatory restrictions" upon voters' First Amendment rights are generally not sufficient to overcome a state's "important regulatory interests" that justify such restrictions. *Fusaro*, 19 F.4th at 369. But even the imposition of "moderate burdens" on voters could fail the *Anderson/Burdick* test if the corresponding state interest is minor in comparison. *Id.*

Even though this Court is not considering the rights of voters, the right to run for political office is a quintessential First Amendment activity, *Washington v. Finlay*, 664 F.2d 913, 927-28 (4th Cir. 1981). Because the right to run is rooted in

the First Amendment and due process rights are implicated by the Challenge Statute, the *Anderson/Burdick* test can apply here. The Challenge Statute fails the *Anderson/Burdick* test because its burden does not amount to a mere inconvenience, nor are its provisions applied reasonably in the context of a § 3 Challenge.

A § 3 Challenge differs fundamentally from a Challenge based upon a Candidate's age or inhabitancy. If Cawthorn had been challenged based upon his age, the burden on him to protect his First Amendment right to run for office would amount to a mere "inconvenience"—he could easily provide a birth certificate verifying his age. But the burden on Cawthorn in a § 3 Challenge is orders of magnitude higher.

First, the March Challengers were able to assert their § 3 Challenge against Cawthorn based upon a "reasonable suspicion." N.C.G.S. § 163-127.2(b); JA34-35. When the March Challengers filed their Challenge against Cawthorn, the NCSBE process for hearing the Challenge was automatically triggered. N.C.G.S. § 163-127.3; 127.4. Reasonable suspicion cannot support infringement upon a fundamental First Amendment right. *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, based on mere suspicion and without probable cause).

Under the Challenge Statute, Cawthorn's First Amendment right to be a candidate for office will be investigated based upon merely a "reasonable suspicion," violating the First Amendment. And simultaneously, Cawthorn must conduct a campaign for election during the primary and defend himself against baseless charges of insurrection—in no known universe could that burden on his First Amendment right to run be considered a mere inconvenience.

Second, this administrative procedure does not allow the panel appointed by the NCSBE nor the NCSBE as a whole to consider Cawthorn's constitutional and federal claims asserted here. JA91; see also N.C. Const. art IC, §§ 1,3. Until Cawthorn files a state court appeal, after being subjected to a hearing, found "guilty" of engaging in insurrection, and after being removed from the ballot, his constitutional and federal claims cannot be considered. *Id.* So Cawthorn is subject to all this, even if it is later found, as the district court did here, that it is unconstitutional or a violation of federal law for Cawthorn to be subject to the claim asserted here. This, in itself, is a substantial burden.

Third, Cawthorn also loses the protections of numerous procedures available through the North Carolina Rules of Civil Procedure. *See* N.C.G.S. § 150B-29 (allowing for an administrative law judge to expand the rules of evidence if "evidence not reasonably available under the rules to show relevant facts").

Because of the expedited nature of the procedure, he will not be able to litigate a Motion to Dismiss of any kind to test the legal sufficiency of the claim made against him before a hearing and he will be stripped of any adequate opportunity to do discovery that would normally be available under the Challenge Statute. *See* N.C.G.S. § 163-127.4. So Cawthorn goes into a hearing, with the burden of proof, with no advanced opportunity to protect himself against legally insufficient claims or to know the alleged evidence against him.

Fourth, the hearing process subjects Cawthorn to an enormous burden that violates his Fourteenth Amendment due process rights. JA36-37. The Challenge Statute shifts the burden of proof "upon the candidate, who must show by a preponderance of the evidence of the record as a whole that he or she is qualified to be a candidate for the office." N.C.G.S. § 163-127.5(a). However, when government processes infringe on free speech, "the operation and effect" of those processes "must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied," and this requires "the State (to) bear the burden of persuasion to show that (the defendant) engaged in criminal speech." *Speiser v. Randall*, 357 U.S. 513, 520, 529 (1958) (internal citations omitted). Again, if Cawthorn only bore the burden to prove his age or inhabitancy (both of which are easily provable with minimal documentation), the burden might

amount to an "inconvenience." But here, Cawthorn is required to "prove" that he did not engage in insurrection, which involve numerous serious and complex legal and factual issues. It is fundamental in our system of law that people are not required to prove negatives—within both criminal and civil contexts. A person accused of a crime walks into a trial innocent until proven guilty by the state. *Martin v. Ohio*, 480 U.S. 228, 230 (1987). A person accused of injuring another in an accident does not bear the burden of proof—the injured does. *In re A.H. Robins Co.*, 86 F.3d 1148 (4th Cir. 1996).

And the hearing procedures impose an additional substantial burden on Cawthorn, and a serious risk of an erroneous decision, because the hearing will not be governed by the North Carolina rules of evidence, N.C.G.S. § 150B-29, which will allow hearsay and unauthenticated "evidence" to be admitted against him to his serious detriment.

The timing and practical effect of the Challenge Statute's process burdens both candidates' and voters' rights in another way. The NCSBE confirms that the May 17 primary election has already begun. ECF No. 85 at 4. County boards of elections began distributing absentee ballots on March 28, 2022. *Id.* In-person early voting begins on April 28, 2022 and continues until May 14, 2022. *Id.* at 5. The NCSBE also acknowledges that the challenge process will take a number of

weeks to accomplish. *Id.* If Cawthorn is disqualified right before the primary, his name will be removed from the election day ballot and he will lose the election, even though he wins a subsequent appeal. There will be no redo of the primary election. And if, however, Cawthorn wins the primary election, but then is disqualified on the basis of this § 3 Challenge, thousands of votes will be cancelled and the Republican Party of North Carolina, not the voters of his district, will select a replacement nominee to appear on the ballot for the general election in November. N.C.G.S. § 163-114(a).

It is inconvenient to make a left-hand turn on a busy street without a traffic light, but sometimes we all need to make that turn in order to arrive at our destination. It would be inconvenient, but reasonable, to require Cawthorn to provide his birth certificate to prove he meets the age qualification to run for Congress. But to "prove" he didn't engage in insurrection so that he can exercise his First Amendment right to run for office? Calling that an inconvenience is absurd.

b. The state's interest does not outweigh Cawthorn's burden.

The March Challengers assert the "interests of the State, and more importantly, the voters, to ensure candidates for office meet the constitutional qualifications vastly outweigh any interest of a candidate to access the ballot."

Appellant Br., 51.

First, because the burdens inflicted are not "mere inconvenience" and 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 March Challengers cite hold that the state's interest is sufficiently compelling to justify anything like the severely burdensome Challenge Statute. The state's interest in "protecting the integrity of their political process from frivolous or fraudulent candidacies" is only described as "important" or "legitimate," not compelling. *See Clements v. Fashing*, 457 U.S. 957, 965 (1982); *Hassan v. Colorado*, 495 F. App'x 947, 948-49 (10th Cir. 2010) (Gorsuch, J.).

The Court in *Anderson* 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 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 these cases described the ballot protection interest as compelling and none found that it was sufficient to justify any regulation analogous to one as burdensome to the First Amendment right to run for office as the Challenge Statute.

Second, the burden-shifting provision of the Challenge Statute in particular is unconstitutional as applied under the Due Process Clause of the Fourteenth Amendment, because it requires Cawthorn to bear the burden of proof that he is *not* disqualified from office under § 3 and because it requires Cawthorn to prove a negative, that he did not "engage in insurrection or rebellion" against the United States. (Count II). *See* N.C.G.S. § 163-127.5(a); *see also* JA95-98; JA268. When government processes infringe on free speech, "the operation and effect" of those processes "must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied," and this requires "the State (to) bear the burden of persuasion to show that (the defendant) engaged in criminal speech." *Speiser v. Randall*, 357 U.S. 513, 520, 529 (1958) (internal citations omitted). The Challenge Statute's burden-shifting provision does not survive that analysis.

2. Count III - U.S. Const. Art. 1, § 5.

The Challenge Statute is also unconstitutional under Article 1, § 5 of the U.S. Constitution because Congress is the exclusive judge of the qualifications of its Members. The U.S. Supreme Court held that a recount doesn't usurp the Senate's authority, because it doesn't "frustrate the Senate's ability to make an independent final judgment (of a Member's qualifications)." *Roudebush v. Hartke*. 405 U.S. 15 (1972).

Here, the Challenge Statute permits the State of North Carolina to make its own judgment of whether a candidate is qualified to be a Member of the Congress and, if not, remove him from the ballot, thereby precluding his reelection. N.C.G.S. §§ 163-127.1, 127.2(b). Removal from the ballot means that Cawthorn cannot be re-elected and cannot present himself to Congress to take the oath of office, thereby usurping Congress' constitutional authority to judge Cawthorn's qualification themselves. Therefore, it violates Article 1, § 5 of the U.S. Constitution.

All of these constitutional claims have merit and each justifies the district court injunction.[8]

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[8]Since this is an appeal from a final judgment granting a permanent injunction, Appellants' Br., 1, it is irrelevant whether the district court's preliminary injunction met the other three preliminary injunction factors, which

Conclusion

For all the foregoing reasons, this Court should affirm the decision of the District Court.

Challengers claim. *See id*. at 45-54. As a result, Cawthorn does not respond to these arguments.

April 26, 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 9,536 words (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 26, 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 all parties and proposed-intervenors received notice of this filing through the CM/ECF system.

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

Addendum to Appellee'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
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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.

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