IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

David Rowan, Donald Guyatt, Robert Rasbury, Ruth Demeter, and **Daniel Cooper**, Petitioners, v. **Brad Raffensperger**, Secretary of State of the State of Georgia Respondent, and **Marjorie Taylor Greene** Intervenor-Respondent.	Case No. 2022CV364778 Judge: Christopher S. Brasher

Intervenor-Respondent's Answer to Petitioner's Petition for Judicial Review

Proposed Intervenor-Respondent, Marjorie Taylor Greene ("Rep. Greene") answer the Petition for Judicial Review as set forth below. Unless expressly admitted, each allegation in the petition is denied, and the Proposed-Intervenor demand strict proof thereof.

Nature of the Case

1. Admitted.

Jurisdiction and Venue

2. Admitted.

3. Admitted.

4. Admitted.

Parties

5. Admitted.

6. Rep. Greene admits that Brad Raffensperger is the Secretary of State of the State of Georgia. Rep. Greene admits he is the chief election official of the State of Georgia. Rep. Greene admits he is empowered by statute to determine the qualifications of candidates for state offices. O.C.G.A. § 21-2-5. Rep. Greene denies that he is constitutionally empowered to determine the qualifications of candidates for the office of United States Representative or that he can disqualify a candidate for office under Section Three of the 14th Amendment ("**§ 3**").

Background

7. Admitted.

8. Admitted.

9. Rep. Greene admits that the statute requires the Secretary to refer any challenge to an administrative law judge of the Office of State Administrative

Hearings pursuant to Article 2 of Chapter 13 of Title 50. Rep. Greene denies any other allegations and averments in this paragraph.

10. Rep. Greene admits that the administrative law judge reports his or her findings to the Secretary of State. O.C.G.A. § 21-2-5(b). Rep. Greene denies that the statute characterizes the Secretary of State's subsequent determination as "initial." Rep. Greene denies any other allegations and averments in this paragraph.

11. Admit that Petitioners' candidate challenge was filed timely but deny that the Challenge Statute permits a candidate challenge based on § 3.

12. Denied that Petitioners quoted all the relevant parts of the Disqualification Clause. Rep. Greene admits that the Disqualification Clause reads, in whole, that "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."

13. Admitted.

14. Admitted.

15. Admitted.

16. Denied that cited reason is the sole ground for the ruling.

17. Denied that cited reason is the sole ground for the ruling.

18. Admitted.

19. Denied cited reason is the sole ground for the ruling.

20. Admitted, except Rep. Greene denies Professor Gerard Magliocca is an "expert" on the Disqualification Clause of the Fourteenth Amendment.

21. Denied.

22. Denied.

23. Denied.

24. Admitted, except deny that the record was closed on April 29.

25. Admitted.

26. Admitted.

Transmittal of Record

27. Admitted.

28. As Petitioners make no factual allegations or averments in paragraph 28, no response is required. To the extent this paragraph requires a response, Rep. Greene denies any allegations and averments.

29. Admitted.

30. Denied.

Issue One
The Secretary erred by shifting the burden from the candidate to the petitioners.

31. As paragraph 31 states legal conclusions, no response is required. To the extent this paragraph requires a response, Rep. Greene denies any allegations and averments.

32. As paragraph 32 states legal conclusions, no response is required. To the extent this paragraph requires a response, Rep. Greene denies any allegations and averments.

33. Admitted.

34. As paragraph 34 states legal conclusions, no response is required. To the extent this paragraph requires a response, Rep. Greene denies any allegations and averments.

35. As paragraph 35 states legal conclusions, no response is required. To the extent this paragraph requires a response, Rep. Greene denies any allegations and averments.

36. As paragraph 36 states legal conclusions, no response is required. To the extent this paragraph requires a response, Rep. Greene denies any allegations and averments.

37. As paragraph 37 states legal conclusions, no response is required. To the extent this paragraph requires a response, Rep. Greene denies any allegations and averments.

38. As paragraph 38 states legal conclusions, no response is required. To the extent this paragraph requires a response, Rep. Greene denies any allegations and averments.

Issue Two
The Secretary erred by quashing the petitioners' notice to produce.

39. Admitted.

40. Admitted that Petitioners issued a notice to produce to Rep. Greene on March 28 and remainder is denied.

41. Denied that cited reason is the sole ground for the ruling.

42. As paragraph 42 states legal conclusions, no response is required. To the extent this paragraph requires a response, Rep. Greene denies any allegations and averments.

43. As paragraph 43 states legal conclusions, no response is required. To the extent this paragraph requires a response, Rep. Greene denies any allegations and averments.

Issue Three
The Secretary erred by failing to properly consider Greene's conduct prior to taking the oath of office.

44. As paragraph 44 states legal conclusions, no response is required. To the extent this paragraph requires a response, Rep. Greene denies any allegations and averments.

45. As paragraph 45 states legal conclusions, no response is required. To the extent this paragraph requires a response, Rep. Greene denies any allegations and averments.

46. Denied.

47. Denied.

48. Denied.

49. Denied.

50. Denied.

51. As paragraph 51 states legal conclusions, no response is required. To the extent this paragraph requires a response, Rep. Greene denies any allegations and averments.

52. Denied.

53. As paragraph 53 states legal conclusions, no response is required. To the extent this paragraph requires a response, Rep. Greene denies any allegations and averments.

54. As paragraph 54 states legal conclusions, no response is required. To the extent this paragraph requires a response, Rep. Greene denies any allegations and averments.

Issue Four
The Secretary erred by applying the incorrect legal standard for "engaging" in insurrection.

55. Denied.

56. As paragraph 56 states legal conclusions, no response is required. To the extent this paragraph requires a response, Rep. Greene denies any allegations and averments.

57. As paragraph 57 states legal conclusions, no response is required. To the extent this paragraph requires a response, Rep. Greene denies any allegations and averments.

58. As paragraph 58 states legal conclusions, no response is required. To the extent this paragraph requires a response, Rep. Greene denies any allegations and averments.

59. As paragraph 59 states legal conclusions, no response is required. To the extent this paragraph requires a response, Rep. Greene denies any allegations and averments.

Request for Written Briefing and Oral Argument

60. Rep. Greene does not object to written briefing or oral argument on this matter.

Affirmative Defenses

1. The January 6 events were not an "insurrection."

A. Nothing like "an armed insurrection, too strong to be controlled by the civil authority" occurred in Washington, DC on or around January 6. The *only* thing that *even arguably* could constitute an insurrection would be the actions of those individuals who illegally entered the U.S. Capitol building.

B. And as to those who entered the U.S. Capitol building, there were illegal activities but there was no evidence of a "war" or "combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the marshals."

C. As a result, the Invasion of the Capitol on January 6th did not constitute an "insurrection" under § 3.

2. Proposed-Intervenor-Respondent Greene did not "engage" in an insurrection.

A. Challengers claim Rep. Greene "engage in" an insurrection on January 6th and say it comprises "'personal service' in, or 'contribut[ing] . . . anything . . . useful;'" to an insurrection. Notice of Candidacy Challenge at ¶ 7 ("**Candidacy Challenge**"). However, to "engage in" an insurrection requires conduct, not speech, by a direct overt act.

B. Challengers' definition is too vague and overbroad a test where First Amendment activity is impinged, as is the attempted application of it to her here. Any "insurrection" involves only *illegal* activity and "engag[ing] in" it requires committing *unlawful* acts, not activity protected by the First Amendment.

C. Since contesting or protesting an election using *lawful* means can't be insurrection, or evidence thereof, only those "stormers"—those who engaged in illegal activities in the Capitol, could even arguably be deemed insurrectionists.

C. Challengers, however, stipulated that "(a) group of people that did not include Respondent unlawfully entered the U.S. Capitol on January 6, 2021." Stipulation, ¶ 7. As Rep. Greene was not a "stormer," she did not engage in insurrection on January 6, 2022.

3. It violates the First Amendment to use Proposed-Intervenor-Respondent Greene's political speech to attempt to establish that she "engaged" in an insurrection.

A. Challengers' "evidence" was all irrelevant political speech protected by the First Amendment, which they misstated and misconstrued to use her speech against her. They preposterously claimed that words like "1776," "The Declaration of Independence," "The American Revolution," and advocacy of "The Second Amendment" were all just "code words" for engaging in an insurrection.

B. *Brandenburg v. Ohio,* 395 U.S. 444 (1969), precludes considering any speech which does not comply with its strict definition. *Brandenburg* says "incitement" requires speech "[I] directed to inciting or producing imminent lawless action [that] [ii] is likely to incite or produce such action." *Id.* at 447. Unless both elements are clearly present, speech can't be deemed incitement. The same applies to assembly. *Id.* at 449 n.4 ("must observe the

established distinctions between mere advocacy and incitement to imminent lawless action . . .” (citations omitted)).

C. None of Rep. Greene’s speech meets the *Brandenburg* test.

D. Rep. Greene’s First Amendment protected speech cannot be used as evidence of “engaging” in “insurrection,” unless the speech itself is an admission of conduct that would constitute “engaging in an insurrection,” after January 3rd, and there is none.

E. The Petitioners’ attempt to use Rep. Greene’s protected First Amendment speech and activity is unconstitutional.

4. There is no private cause of action for Challengers to enforce § 3 against Rep. Greene.

A. In order for Challengers to mount their § 3 Challenge, Congress must provide a private right of action. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326 (2015).

B. Congress, however, has not created a private right of action to allow a citizen to enforce § 3 by having a state declare that a candidate is “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), Ex. 1.

C. Petitioners' have no private cause of action to enforce § 3.

5. The Challenge Statute does not permit Challenges based upon the Disqualification Clause.

A. The Challenge Statute allows Georgia electors to Challenge the "qualifications of the candidate."

B. By its terms, the statute's scope is limited to challenges based upon "qualifications" and does not include the Disqualification Clause, a legal proscription *from* holding office.

C. The Challenge Statute does not permit consideration of a candidate challenge brought under § 3.

6. Consideration of Rep. Greene's speech and conduct prior to January 3rd cannot be considered in a § 3 Challenge.

A. By its plain language, § 3 does not apply to a Member of Congress until she has taken the oath of office and subsequently "engages" in "insurrection."

B. Any conduct or statements by Rep. Greene prior to January 3, 2021, are irrelevant to the Challenge, which requires competent evidence of a direct overt act of insurrection, after she took the oath of office on January 3, 2021.

C. Therefore, none of Rep. Greene's conduct or statements prior to January 3, 2021, can be used as evidence to prove she is disqualified under § 3, as § 3 did not apply to her until that date.

7. Some of the evidence considered during the OSAH was improperly admitted.

A. Only evidence admissible under the Georgia evidence code should have been considered during the OSAH hearing, which would have excluded hearsay evidence and non-authenticated documentary and video evidence, and evidence subject to other objections raised in Proposed-Intervenor-Respondent's motion in limine and pre-hearing objections.

B. Even under the expanded rules of evidence permitted in the OSAH, inadmissible evidence was considered.

C. Therefore, this Court should deny Petitioners' request that any admitted evidence, beyond that properly admitted under the Rules, should be considered.

Counterclaims and Cross-Claims

COUNT I:

The Challenge Statute's Provision triggering a government investigation based solely upon a Challenger's "belief" that Rep. Greene is unqualified, and the subsequent administrative procedure it triggers, violates Rep. Greene's First Amendment right to run for political office.
First Amendment Violation
U.S. Const. Amend. 1
(42 U.S.C. § 1983)

A. A Challenge may be issued by a qualified voter based upon a mere *belief* that a Candidate does not meet the constitutional or statutory qualifications for the office. O.C.G.A. § 21-2-5(c).

B. The Challenge Statute is effectively a ballot access requirement. "[C]andidate eligibility requirements implicate basic constitutional rights under the First and Fourteenth Amendments." *Green Party of Georgia v. Kemp,* 171 F. Supp. 3d 1340, 1351 (N.D. Ga. 2016), *aff'd,* 674 F. App'x 974 (11th Cir. 2017).

C. The filing of a Challenge based on mere belief *requires* the Secretary of State to refer a complaint for an administrative hearing and imposes an injury on First Amendment rights of "character and magnitude." *Cowen v. Georgia Secretary of State,* 960 F.3d 1339, 1342 (11th Cir. 2020).

D. A standard-less statute such as this (challenge based on mere "belief") cannot be sufficient to justify its infringement on First Amendment rights.

E. Therefore, the Challenge Statute's provision triggering a government investigation, with substantial burdens on Rep. Greene, based solely upon a Challenger's "belief" that Rep. Greene is unqualified, and the subsequent administrative procedure, violates Rep. Greene's First Amendment right to run for political office.

COUNT II:

Judicial enforcement of the provisions of the Challenge Statute which imposes substantial burdens on a candidate and, if Petitioners have their way, shifts the burden of proving a negative to the Candidate, as applied to any Challenge under § 3, violates the Due Process Clause of the Fourteenth Amendment.

Due Process Violation
U.S. Const. Amend. XIV
(42 U.S.C. § 1983)

A. The Challengers argue the "entire burden" is placed upon the Candidate "to affirmatively establish his eligibility for office." *Haynes v. Wells*, 273 Ga. 106, 108-09 (2000).

B. In the case of a Challenge based upon residency or age, the proof the Candidate must provide is relatively straightforward—documents showing a change of address or his or her date of birth could easily be provided by the Candidate.

C. The same is not true for the Challenge brought here under the Disqualification Clause, § 3. If Petitioners have their way, Rep. Greene, would be required to prove by a preponderance of evidence that she didn't "aide[ ] and engage[ ] in insurrection to obstruct the peaceful transfer of presidential power." Such burden shifting is unconstitutional under the Due Process Clause of the Fourteenth Amendment.

D. Furthermore, even if the burden of proof does not shift to Rep. Greene, the Challenge Statute imposes unconstitutional burdens on Rep. Greene by employing in an expedited administrative procedure that strip her of, or render impractical, the protections of normal rules of civil procedure, such as preliminary consideration of motions to dismiss and summary judgement, discovery, application of the Georgia Rules of Evidence in a hearing and adjudication of constitutional and federal law claims or defenses.

E. As applied to a § 3 Challenge, therefore, the Challenge Statute is unconstitutional under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

COUNT III

The Challenge Statute usurps the U.S. House of Representative's power to make an independent, final judgment on the qualifications of its Members, so it violates
U.S. Const. Art. 1, § 5 of the U.S. Constitution.
(42 U.S.C. § 1983)

A. Voters have unfettered discretion in ***voting*** to independently evaluate whether candidates meet the constitutional qualifications for office. Derek T. Muller, *Scrutinizing Federal Electoral Qualifications,* 90 Ind. L.J. 559, 592 (2015) **("Muller")** (citations omitted). But Congress has an exclusive role in ***judging*** the qualifications of its own members to determine if they are eligible to take a seat in Congress. *Id.* at 611 (collecting cases).

B. This exclusive role is consistent with the Supreme Court's logic in *Roudebush v. Hartke.* 405 U.S. 15 (1972). The *Roudebush* Court held that a recount doesn't usurp the Senate's function because it doesn't "frustrate the Senate's ability to make an independent final judgment." *Id.* at 25-26 (cleaned up).

C. Here, the Challenge Statute permits the State of Georgia to determine whether a candidate for Congress is constitutionally qualified to be a Member of the U.S. House of Representatives. O.C.G.A. § 21-2-5.

D. Therefore, the Challenge Statute violates Article 1, Section 5 of the U.S. Constitution.

COUNT IV

The Challenge Section, as applied to Rep. Greene under § 3, violates § 3.
Section Three of the Fourteenth Amendment
(42 U.S.C. § 1983)

A. Georgia law permits removal of candidates from the *ballot* based on prospective ineligibility to *take office*. But § 3 bars only office-holding, and that disability may be removed by Congress at *any time* before Rep. Greene is sworn in on January 3, 2023.

B. Rep. Greene cannot be removed as a candidate now for inability to take office, since it cannot be determined now that she will be ineligible to take office then.

C. Therefore, applying § 3 to disqualify Rep. Greene as a candidate for office violates § 3.

COUNT V

The Challenge Section, as applied to Rep. Greene under § 3, violates federal law.
42 Cong. Ch. 194, May 22, 1872, 17 Stat. 142
(42 U.S.C. § 1983)

A. The disqualification attempt by Challengers is based on § 3 barring one from assuming office (not *candidates*), who "having previously taken an

oath . . . to support the Constitution . . . shall have engaged in insurrection or rebellion against the same . . . . But Congress may . . . remove such [§ 3] disability."

B. Congress did just that when it passed The Amnesty Act of 1872 by the requisite two-thirds of both Houses of Congress.

C. By the plain language of this Act, the political disability was removed from any Representative other than those of the two enumerated Congresses. Rep. Greene is a Member of the 117th Session of Congress, so the 1872 Act removed any disability under § 3 from Rep. Greene.

Relief Requested

WHEREFORE, Proposed-Intervenor-Respondent prays for the relief set forth below:

1. Declare that the Challenge Statute is unconstitutional under the First Amendment because a Challenger's mere "belief" that a Candidate is disqualified, and the subsequent administrative procedure it triggers, violates Rep. Greene's First Amendment right to run for political office.

2. Declare that the burden shifting provision of, and the other burdens imposed by, the Challenge Statute render the Challenge Statute unconstitutional

under the Due Process Clause of the Fourteenth Amendment, as applied to any Challenge under § 3.

3. Declare that the Challenge Statute is also unconstitutional under Article 1, § 5 of the U.S. Constitution because it unconstitutionally invades the exclusive authority of Congress to judge of the qualifications of its Members.

4. Declare that the application of § 3 to Rep. Greene is prohibited by § 3.

5. Declare that the application of § 3 to Rep. Greene is prohibited by federal law, the Amnesty Act of 1872.

6. Preliminarily and permanently enjoin Defendants from enforcing the Challenge Statute against Rep. Greene and disqualifying her under § 3 from being a candidate for Congress in Georgia.

7. Deny Petitioners' Petition for Judicial Review;

8. Award Rep. Greene all her costs and expenses of bringing this action, including reasonable attorneys' fees, costs, and expenses under 42 U.S.C. § 1988 or other applicable law; and

8. Grant any other relief this Court deems appropriate.

Dated: June 13, 2022

Respectfully submitted,

/s/ David F. Guldenschuh
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* Motions for *pro hac vice* admission forthcoming
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Certificate of Service

I hereby certify that on June 13, 2022, I served the foregoing document and all attachments thereto with the Clerk of the Court via electronic filing system, which will provide notice and service to all parties of record via electronic notification.

/s/ David F. Guldenschuh
David F. Guldenschuh
GA Bar No. 315175
Local Counsel for Intervenor-Respondent

Exhibit 1
to
Intervenor-Respondent's Answer to Petitioner's Petition for Judicial Review

Hansen, et al. v. Finchem, et al., Case No. CV 2022-004321, Superior Court of Arizona, Maricopa County, Under Advisement Ruling

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

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-004321 04/21/2022

HONORABLE CHRISTOPHER COURY

CLERK OF THE COURT
L. Gilbert
Deputy

THOMAS HANSEN, et al.

JAMES E BARTON II

v.

MARK FINCHEM, et al.

JOHN DOUGLAS WILENCHIK

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

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-004321 04/21/2022

UNDER ADVISEMENT RULING

The Court has reviewed and considered the following:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-004321 04/21/2022

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

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

This Court has jurisdiction to consider the election challenge.

THE COURT FINDS as follows:

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

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

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

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

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-004321 04/21/2022

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

c) A balance of hardships favors himself; and

d) Public policy favors the injunction."

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

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

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

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

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-004321 04/21/2022

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

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

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

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

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

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

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

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

11. The court in *Griffin* then summarized how the Disqualification Clause was intended to operate: "Taking the [Disqualification Clause] then, in its completeness with this final clause, ***it seems to put beyond reasonable question the conclusion that the intention of the people of the United States, in adopting the fourteenth amendment***, was to create a disability, to be removed in proper cases by a two-thirds vote, ***and to be made operative in other cases by the legislation of congress in its ordinary course.***" *Id.* (emphasis added).

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

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

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

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

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-004321 04/21/2022

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.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-004321 04/21/2022

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.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-004321 04/21/2022

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

[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.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-004321 04/21/2022

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.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-004321 04/21/2022

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.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-004321 04/21/2022

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
_____
Christopher A. Coury
Superior Court Judge