STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

STATE OF NEW MEXICO, *ex rel*.,
MARCO WHITE, MARK MITCHELL,
and LESLIE LAKIND,

Plaintiffs,

vs.

Case No. D-101-CV-2022-00473

COUY GRIFFIN,

Defendant

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**BRIEF OF AMICI CURIAE FLOYD ABRAMS, ERWIN CHEMERINSKY, MARTHA MINOW, LAURENCE H. TRIBE, MARYAM AHRANJANI, LYNNE HINTON, AND NATIONAL COUNCIL OF JEWISH WOMEN IN SUPPORT OF THE PLAINTIFFS' ACTION FOR *QUO WARRANTO* RELIEF**

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## I. STATEMENT OF INTEREST[1]

The first five amici curiae listed below (Mr. Abrams and Professors Chemerinsky, Minow, Tribe, and Ahranjani) are Constitutional and First Amendment scholars and practitioners who have an interest in protecting democracy against the exercise of state power by individuals who, by engaging in violent insurrection against the United States, have violated their oath to uphold the Constitution. The final two listed amici curiae (Rev. Lynne Hinton and the National Council of Jewish Women) are, respectively, the director of an ecumenical Christian organization and a Jewish women's civic organization, both of which oppose the misuse of the First Amendment's free-exercise clause as a cover for insurrectionist violence.

**Floyd Abrams** is Senior Counsel at Cahill Gordon & Reindel LLP in New York and a Visiting Lecturer at Yale Law School, and has been a Lecturer in Law at Columbia Law School. For 15 years he taught as well at the Columbia Graduate School of Journalism as the William J. Brennan Jr. Visiting Lecturer in First Amendment law. For the last half century he has been counsel or co-counsel in numerous First Amendment cases of note including, among others, *N.Y. Times Co. v. United States (Pentagon Papers Case)*, 403 U.S. 713 (1971); *Landmark Commc'ns Inc. v. Va.*, 435 U.S. 829 (1978); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979); *Herbert v. Lando*, 441 U.S. 153 (1979); *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003); and *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010). He has written three books about the First Amendment—*Speaking Freely: Trials of the First Amendment* (2005); *Friend of the Court: On the Front Lines with the First Amendmen*t (2013); and *The Soul of the First Amendment* (2017). He has published numerous articles about the First Amendment and received numerous awards for his work in the area.

**Erwin Chemerinsky** is the Dean of the University of California Berkeley School of Law, where he holds the title of Jesse H. Choper Distinguished Professor of Law. He frequently

[1] No party's counsel authored this brief in whole or in part; and no person, party, or party's counsel contributed money that was intended to fund preparing or submitting this brief, which was prepared on a *pro bono* basis.

argues appellate cases, including in the United States Supreme Court. He is the author of 14 books, including leading casebooks and treatises about constitutional law, criminal procedure, and federal jurisdiction, and has authored over 200 law-review articles. His most recent books are *Presumed Guilty: How the Supreme Court Empowered the Police and Subverted Civil Rights* (2021), and *The Religion Clauses: The Case for Separating Church and State* (2020) (with Howard Gillman). In 2017, *National Jurist* magazine again named Dean Chemerinsky as the most influential person in legal education in the United States. In 2016, he was named a fellow of the American Academy of Arts and Sciences.

**Martha Minow** is the 300th Anniversary University Professor at Harvard University and former dean of Harvard Law School. She is the author or editor of 18 books and has authored over 200 law-review articles. Her most recent books are *Saving the News: Why the Constitution Calls for Government Action to Preserve Freedom of Expression* (2021) and *When Should Law Forgive?* (2019). Her many public lectures include the 2017 Alexander Meikeljohn Lecture on the First Amendment at Brown University. A fellow of the American Academy of Arts and Sciences and a fellow of the American Philosophical Society, she has received nine honorary degrees from universities in three nations as well as numerous awards, including the Sacks-Freund Award for Excellence in Teaching, Harvard Law School. She currently serves on the board of public media entity GBH, and previously served on the board of the CBS Corporation.

**Laurence H. Tribe** is the Carl M. Loeb University Professor and Professor of Constitutional Law *Emeritus* at Harvard. He has written over 115 articles and books, including his treatise, *American Constitutional Law*, cited more than any other legal text since 1950. He has prevailed in numerous cases that he argued in the U.S. Supreme Court, including the following First Amendment cases: *United States v. United Foods*, 533 U.S. 405 (2001) (First Amendment precludes forcing mushroom growers to pay for generic advertising campaign unrelated to substantive regulation of mushroom market); *Sable Commc'ns of Ca., Inc. v. FCC*, 492 U.S. 115 (1989) (Congress may not abolish non-obscene "dial-a-porn" services where methods of keeping children from accessing such services are not shown to be unavailable); *Bd.*

*of Ed. of Okla. City v. Nat'l Gay Task Force*, 470 U.S. 903 (1985) (First Amendment protects gay-rights advocacy in public schools); *Richmond Newspapers v. Va.*, 448 U.S. 555 (1980) (press and public have right to attend criminal trials). He also prevailed without argument in *Boston v. Anderson*, 439 U.S. 951, 1389 (1978) (state court may not prohibit free speech by municipality on referendum issue pending before the people in statewide election). Professor Tribe helped write the constitutions of South Africa, the Czech Republic, and the Marshall Islands. He was elected to the American Academy of Arts and Sciences in 1980 and was elected to the American Philosophical Society in 2010. He holds 11 honorary degrees.

**Maryam Ahranjani** is a Professor of Law at the University of New Mexico. Professor Ahranjani teaches and writes in the areas of constitutional rights, criminal law and procedure, and education law and directs the UNM chapter of the Marshall-Brennan Constitutional Literacy Project. A Fellow of the American Bar Foundation, she has published and spoken widely about numerous subjects, including students' constitutional rights and the First Amendment arguments against mask mandates. Professor Ahranjani appeared on a C-SPAN special with Mary Beth Tinker and Joseph Frederick (respondent in the "Bong Hits 4 Jesus" case) to discuss the impact of *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 US 503 (1969), on First Amendment jurisprudence. She recently contributed a chapter on the First Amendment and out-of-school speech to the international text *Constitutional Knowledge and Its Impact on Citizenship Exercise in a Networked Society*. Professor Ahranjani has received national and local awards for her scholarship, teaching, and service.

**Rev. Lynne Hinton** is the Conference Director of the New Mexico Conference of Churches. This ecumenical organization works in building relationships among denominations with partners in ministry and interfaith networks across the state of New Mexico. For more than 50 years the New Mexico Conference of Churches has identified areas of need in the state; has joined in advocacy for the poor; and has developed and supported programs to offer justice, protect human rights, and create educational opportunities and community building among religious bodies. Conference member churches include most mainline Protestant churches as

well as the Archdioceses of Santa Fe, Gallup, and Las Cruces of the Roman Catholic Church. Rev. Hinton is ordained in the United Church of Christ and is a graduate of Pacific School of Religion. She lives in Albuquerque, New Mexico.

**National Council of Jewish Women (NCJW)** is a grassroots organization of more than 200,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW upholds the fundamental principle that religious liberty and the separation of religion and state are constitutional principles that must be protected and preserved in order to maintain our democratic society. Consistent with our Principles and Resolutions, NCJW joins this brief.

## II. INTRODUCTION[2]

Amici constitutional-law scholars and practitioners submit this brief to help the Court evaluate defendant Couy Griffin's anticipated defense that Section Three of the Fourteenth Amendment ("the Disqualification Clause") violates his First Amendment rights to free speech, to free religious exercise, and to seek and hold public office.

Griffin is mistaken. It "remains fundamental that while the state may not criminalize the expression of views—even including the view that violent overthrow of the government is desirable it may nonetheless outlaw encouragement, inducement, or conspiracy to take violent action." *United States v. Rahman*, 189 F.3d 88, 114–15 (2d Cir. 1999). *A fortiori*, the people of the United States may, without infringing upon any First Amendment rights, amend the Constitution to ban oath-breaking insurrectionists from seeking or holding office; and a court may—indeed, *must*—enforce that constitutional mandate against those, like Griffin, who flout that ban.

More specifically, the Court should reject Griffin's First Amendment defense for two reasons.

[2] Throughout this brief, unless otherwise indicated, emphases were added to quotations and internal citations, footnotes, brackets, and ellipses were omitted from them.

***First***, this case does not involve a mere statute or regulation. Instead, it concerns a *constitutional command* that officials who swore to support the Constitution, yet engaged in insurrection or rebellion against the United States, do not get a second chance to violate their oath unless and until they are rehabilitated by an act of Congress. Griffin's argument effectively asks the Court to hold that the Disqualification Clause, though a part of the Constitution, is itself unconstitutional in whole or in part because it intrudes upon his First Amendment free-speech and free-exercise rights and right to hold office. But Griffin ignores the fact that the drafters of the Clause possessed full knowledge of the First Amendment, yet provided no First Amendment defense to disqualification. Moreover, his "unconstitutional constitutional amendment" theory has never succeeded in American courts and was specifically rejected by the Clause's drafters. That theory has gained a foothold in some foreign jurisdictions where the legislature possesses plenary power to undermine or even replace the national constitution through repeated amendment. But in the United States, the arduous Article V amendment process historically has provided sufficient protection against constitutional death-by-a-thousand-amendments.

***Second***, even if a constitutional amendment could be deemed unconstitutional—an inherently implausible theory—the Disqualification Clause poses no threat to speech or expression protected by the First Amendment. As a threshold matter, any effect that the Disqualification Clause could have on First Amendment rights would be self-limiting, as the Clause applies only to a unique category of persons who assumed their positions voluntarily—namely, current and former officeholders who violated their oath—and it directly affects only their limited and qualified right to hold office. More important, any speech capable of triggering constitutional disqualification also is likely to fall within the long-established First Amendment exception for "speech integral to illegal conduct"—more specifically, speech that encourages, induces, furthers a conspiracy to take, or credibly threatens to take, violent action. Such speech has never enjoyed First Amendment protection.

For all these reasons, as explained below, the Court should reject Griffin's First Amendment defense.

## III. GRIFFIN HAS NO FIRST AMENDMENT DEFENSE TO CONSTITUTIONAL DISQUALIFICATION FROM HOLDING OR SEEKING OFFICE

The Disqualification Clause—Clause Three of the Fourteenth Amendment—bars any current or former federal or state officeholders from seeking or continuing to hold office if they previously swore to support the Constitution, but then either engaged in insurrection or rebellion against the United States or gave aid and comfort to its enemies. The ban continues unless and until the oath-breaker is rehabilitated by an act of Congress.

With clarifying line-spacing and subheadings added, the Clause provides, in full:

> **[Which offices are barred]** 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,
>
> **[The oath-taking predicate]** 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,
>
> **[The constitutionally disqualifying conduct]** shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof.
>
> **[Congressional rehabilitation]** But Congress may by a vote of two-thirds of each House, remove such disability.

"After the Civil War," a recent article about the Clause explains, "Congress recognized that its losers would continue to fight—if not on the battlefield, then in the political arena. So one condition for readmission into the Union was that confederate states needed to ratify the Fourteenth Amendment." Myles S. Lynch, *Disloyalty and Disqualification: Reconstructing Section 3 of the Fourteenth Amendment*, 30 WILLIAM & MARY BILL OF RIGHTS J. 153, 155 (2021) [hereinafter *Disloyalty*]. "*The oath to support the Constitution is the test*. The idea being that one who had taken an oath to support the Constitution and violated it, ought to be excluded from taking it again, until relieved by Congress." *Worthy v. Barrett*, 63 N.C. 199, 204, *appeal*

*dismissed sub nom. Worthy v. Comm'rs*, 76 U.S. 611 (1869) (emphasis in original).[3]

Although nearly forgotten until recently, the Disqualification Clause was one of the "most heavily debated" provisions of the Fourteenth Amendment during the Thirty-Ninth Congress. *Id*. In the course of that debate, "what began as a temporary disenfranchisement of every disloyal Southerner eventually became permanent disqualification from holding public office for those who betray their oath to uphold the Constitution of the United States." *Id*.; *see also* Mark A. Graber, *Their Fourteenth Amendment and Ours*, JUST SECURITY (Feb. 16, 2021), available at https://www.justsecurity.org/74739/their-fourteenth-amendment-section-3-and-ours/ [hereinafter *Their Fourteenth Amendment and Ours*]. Thus, Congress deliberately broadened the Clause's scope from its immediate Civil War context to cover future oath-breaking insurrectionists like Griffin.

Here, the allegations against Griffin tick every box for imposing constitutional disqualification: As a New Mexico County Commissioner, Griffin is (1) an "officer" of the state of New Mexico who (2) took an oath to "support the Constitution of the United States" but (3) "engaged in insurrection or rebellion against" the United States by inciting and participating in the mob attack against the Capitol on January 6, 2021, with the intent of halting the transition of presidential power. He is therefore *constitutionally barred* from holding the executive office that he now unlawfully purports to occupy, or any other federal or state office.

According to plaintiffs' complaint, Griffin allegedly engaged in a course of conduct, some of which involved protected speech,[4] but which taken as a whole evinced his intent to

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[3] *See also* CONG. GLOBE, 39th Cong., 1st Sess. 2532 (1866) (statement of Rep. Banks) ("An enemy to the Government, a man who avows himself an enemy of its policies and measures, who has made war against the Government, would not seem to have any absolute right to share political power equally with other men who have never been otherwise than friends of the Government.").

[4] *E.g*., Griffin stated that "the only good Democrat is a dead Democrat"; participated in pro-Trump rallies where demonstrators "showed off their firearms" and "spouted unsubstantiated theories of voter fraud"; used an organization that he co-founded ("Cowboys for Trump") to amplify the Big Lie that the 2020 presidential election had been stolen and to promote the January 6 insurrection; and brought a videographer with him on January 6 to record his illegal activities for future dissemination on the internet.

encourage, promote, and participate in violent insurrection. Allegedly, Griffin:

- breached the restricted area, then used an upended barrier as a ladder to illegally gain access first to the West Front of the Capitol steps where he told another participant "we should all be armed";
- then climbed to the inauguration stage, from which he issued threats (e.g., "People are ready for fair and legal elections, or this is what you're going to get, you're going to get more of it"; "We're not gonna take no for an answer"; "Anything to get our country back") while the crowd rioted behind him;
- posted a video online the next day documenting and celebrating the attack and promising that Joe Biden would never become president, that Kamala Harris would never become vice president, that January 6 was merely the beginning of a "revolution," and that he and other insurrectionists would use guns and violence to accomplish their goals, possibly culminating in "blood running out" of the Capitol; and
- returned to Washington, D.C. in January of 2021 with the announced intent to violently disrupt the inauguration. His arrest on that day is what put a stop to his insurrectionist activities.

Doubtless recognizing that his case lands on the very bulls-eye of the Disqualification Clause, Griffin hopes to defeat plaintiffs' *quo warranto* action on the ground that applying the Clause to him violates his First Amendment rights. Based on his filings in a related case, Griffin is expected to invoke his First Amendment rights to free speech, to free religious exercise (based on his failed attempt to lead the January 6 protestors in prayer), and to seek and hold public office. As a matter of law, for all the reasons set forth below, his First Amendment defense is meritless.

### A. The Court should reject Griffin's facially implausible argument that the Disqualification Clause, though a part of the Constitution, is itself unconstitutional.

Griffin's First Amendment defense hinges on portraying the Disqualification Clause as an unconstitutional constitutional amendment. That facially implausible argument has never been

accepted by American courts and was specifically rejected by the Clause's congressional drafters. This Court should reject it, too.

Whether invoking his First Amendment rights to free speech, to free religious exercise, or to seek and hold public office, the linchpin of Griffin's First Amendment defense is his implicit contention that one part of the Constitution (the First Amendment) renders a later-enacted and more specific part of the Constitution (the Disqualification Clause) unconstitutional—at least as applied here, to him. But Griffin does not suggest when, if ever, the Clause *could* be constitutionally applied. He identifies no special facts that make a First Amendment defense viable in his case but not in every other constitutional disqualification of an oath-breaking insurrectionist.[5] He offers no harmonizing interpretation of the two Amendments that would give the Disqualification Clause any space in which to operate. He merely asserts that *his* disqualification violates the First Amendment, full stop.

The inescapable implication of Griffin's argument is that the Disqualification Clause, though a part of the Constitution, is itself facially unconstitutional in whole or in part, or at least so constrained in its scope of operation as to be rendered almost meaningless.[6] Thus framed, the argument hinges on a theory that has never succeeded in American courts. "Whether on procedural or substantive grounds, the Supreme Court has rejected all claims that a duly passed constitutional amendment can be unconstitutional under the United States Constitution." Richard Albert, *American Exceptionalism in Constitutional Amendment*, 69 ARK. L. REV. 217, 243 (2016) [hereinafter *American Exceptionalism*]; *see also id*. at 243–45 (discussing those rulings). Instead, the Supreme Court has explained that "[t]he Constitution must be regarded as one instrument, all of whose provisions are to be deemed of equal validity." *Prout v. Starr,* 188 U.S.

[5] Although Griffin argues that his attempt to lead the mob in prayer over a bullhorn makes his case special, that argument fails as a matter of law. Praying in the midst of a violent insurrection does not transform one's promotion and incitement of that insurrection into constitutionally protected activity. *See* Part II.B.2.a., below (discussing the *Rahman* case).

[6] If Griffin has a more nuanced First Amendment argument that leaves some room in which the Disqualification Clause could operate, he has not presented it in his trial brief and thus has forfeited it.

537, 543 (1903). In other words, "provisions of the constitution are equally obligatory, and are to be equally respected." *Cohens v. State of Va.*, 19 U.S. 264, 393 (1821).

Thus, in *Leser v. Garnett*, 258 U.S. 130 (1922), opponents of women's suffrage argued that the Nineteenth Amendment granting women the right to vote—an Amendment that Maryland had not voted to ratify—would cause "so great an addition to the electorate, if made without the state's consent," as to "destroy" the state's "autonomy as a political body." *Id*. at 136. But the Supreme Court rejected that argument, reasoning that "[t]his amendment is in character and phraseology precisely similar to the Fifteenth [Amendment granting Black people the right to vote]" and "[f]or each *the same method of adoption was pursued*. One cannot be valid and the other invalid." *Id*. In other words: An amendment that makes it through the Article V process is as valid as any other such Amendment.

Likewise, an opponent of national Prohibition argued that the Eighteenth Amendment was "not germane to the powers granted to the United States by the Constitution, nor to those prohibited by it to the states"; that it "tend[ed] to the destruction of the several states in respect to governmental powers expressly reserved to them"; and that it was "an attempt to effect a fundamental change through the exercise of legislative power, which deals solely with the conduct of private individuals"—all of which, the plaintiff maintained, was "so inconsistent with *the fundamental principles and spirit of the Constitution* as to be prohibited by necessary implication." *Christian Feigenspan, Inc., v. Bodine*, 264 F. 186, 190 (D.N.J.), *aff'd sub nom. State of R.I. v. Palmer*, 253 U.S. 350 (1920). The district court rejected the argument, expressing shock at its "startling" implication that there was no way to insert Prohibition into the nation's fundamental law "except through revolution." 264 F. at 189–90. The Supreme Court agreed, writing: "The prohibition of the manufacture, sale, transportation, importation and exportation of intoxicating liquors for beverage purposes, as embodied in the Eighteenth Amendment, is within the power to amend reserved by article 5 of the Constitution. . . . "That amendment, by lawful proposal and ratification, has become a part of the Constitution, and must be respected and given effect the same as other provisions of that instrument." *State of R.I. v. Palmer*, 253 U.S. 350, 386

(1920). Likewise, the Twenty-First Amendment, repealing the Eighteenth, showed that a later amendment can abolish an earlier one.

Indeed, the argument that a constitutional amendment can itself be unconstitutional was considered and soundly rejected by the congressional drafters and proponents of the Disqualification Clause itself. Opponents of the Clause (Democrats and the most conservative Republicans in Congress) argued that, although the Clause was designed to become part of the Constitution, it was *itself* an unconstitutional bill of attainder.[7] "Their arguments anticipated what has become known as the basic structure doctrine. Contemporary courts in India and Germany ha[ve] declared that constitutional amendments are valid only when consistent with the fundamental principles of the constitution. White supremacists made the same argument in 1866." *Their Fourteenth Amendment and Ours*. Leading Democrats similarly maintained that "the constitutional commitment to procedural justice forbade Americans from passing a constitutional amendment that authorized bills of attainder," even if that amendment was properly passed using the Article V amendment procedures. *Id*.

But Republicans "rejected the notion of unconstitutional amendments." *Id*. Missouri Senator John Henderson "pointed out that nothing in the Constitution prohibited Americans from ratifying amendments making exceptions to the Constitution's ban on bills of attainder and ex post facto laws.[8] He asserted, 'They tell us that it is a bill of attainder. Suppose it were: are the people in their sovereign capacity prohibited from passing a bill of attainder? . . . It is said that

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[7] The Constitution bars Congress from passing a bill of attainder. *See* U.S. Const. art. I, § 9, cl. 3. Bills of attainder are a form of "legislative punishment, of any form or severity, of specifically designated persons or groups." *United States v. Brown*, 381 U.S. 437, 447 (1965). Put another way, a bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468 (1977).

[8] He was right: "[T]he one unexpired substantive limit stated in the text of Article V" is its "final clause providing that no amendment shall deprive a state of 'equal Suffrage' in the Senate without its consent." David E. Pozen & Thomas P. Schmidt, *The Puzzles and Possibilities of Article V*, 121 COLUM. L. REV. 2317, 2333 (2021). "The other substantive limit stated in the text of Article V ('no Amendment which may be made prior to [1808] shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article') has been a legal nullity since 1808." *Id*. at 2333 n.61.

the law is ex post facto in its character; what if it is? Have not the people the right, by a constitutional amendment, to enact such a law?'" *Id*.

One reason why American courts reject the theory that amendments can be unconstitutional if they violate the Constitution's "basic structure" is that this safeguard against constitutional erosion simply isn't needed here, where the Constitution is so difficult to amend. The "basic structure" theory has gained a foothold in some countries where the parliament holds such broad power to amend the national constitution that it can seriously erode or even effectively repeal the constitution through repeated amendment.[9] In the United States, by contrast, Article V's arduous amendment process historically has provided sufficient protection against constitutional death-by-a-thousand-amendments. As the district court observed in the *National Prohibition Cases*: "The manifest purpose of the limitation upon the power to amend is to prevent hasty action in altering the organic or fundamental law of the nation, and to insure ample time and careful and deliberate consideration before a change can be effected. The checks provided in requiring two-thirds of each house of Congress and the Legislatures of three-fourths of the states to concur before any alteration can be made, have hitherto proved sufficient for such purpose[.]" 264 F. at 193. A commentator likewise explains that, in this country, "[t]o deny the people their power of constitutional amendment . . . by holding unconstitutional ex post a constitutional amendment that has successfully navigated the labyrinthine procedures of Article V . . . is inconsistent with the architecture of constitutional law and politics under the United States Constitution." *American Exceptionalism* at 252.[10]

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[9] *See, e.g., David Ndii et al. v Attorney General* (2021) KEHL 9746 (KLR) (Kenya) ¶ 469 (concluding that "Kenyans intended to protect the Basic Structure of the Constitution they bequeathed to themselves in 2010 from destruction through gradual amendments"); *see generally* Yaniv Roznai, *Unconstitutional Constitutional Amendments—the Migration and Success of a Constitutional Idea,* 61 AM. J. COMP. L. 657, 670–73 (2013); *American Exceptionalism* at 245–46.

[10] *See also Fullilove v. U. S. Cas. Co. of N. Y.*, 129 So. 2d 816, 826 (La. Ct. App. 1961) ("What the people, by their constitution, have given, they, by a change in that document, may take away. No constitutional provision has such sanctity that the people may not, by a subsequent amendment, change, modify, or delete that provision"; interpreting state constitution).

Accordingly, the United States has no doctrine of "unconstitutional constitutional amendments." But even this principle may have its limits. As one of the amici has written: "It may well be that some properly adopted formal amendments could themselves be deemed 'unconstitutional' because of their radical departure from premises too deeply embedded to be repudiated without a full-blown revolution"—e.g., amendments repealing the republican form of government or repudiating the rule of law itself. LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION 33–34 (2008). But the Disqualification Clause comes nowhere close to meeting that criterion—if anything, it *protects* the republican form of government and the rule of law from those who have sought to destroy them by supporting a violent insurrection.

Because Griffin appears to be arguing that any application of the Disqualification Clause violates the First Amendment—that the Clause is, in effect, an unconstitutional constitutional amendment—his purported First Amendment defense invokes a theory that has never succeeded in American courts and that was specifically rejected by the congressional drafters and proponents of the Clause itself. The values undergirding the Clause are too vital to preserving democratic government to be tossed aside based on a legal theory that makes little sense in the American context and that the Supreme Court and the Clause's own drafters have rejected. In the wake of a civil war that nearly terminated the American experiment, the drafters of the Disqualification Clause concluded that insurrectionists who had violated their oath to uphold the Constitution should be denied any opportunity to do so again; and the nation ratified that judgment, enshrining it in the Constitution itself. It is fruitless to assert that one part of the Constitution somehow nullifies another provision that protects our democracy from the continued or resumed exercise of state power by individuals who, through acts of violent insurrection, violated their oath to uphold that very Constitution. Merely articulating Griffin's implausible theory should be enough to discredit it.

### B. Even if a constitutional amendment could be deemed unconstitutional, the Disqualification Clause poses no threat to speech or expression protected by the First Amendment.

Enforcing the Disqualification Clause to defend democracy poses no threat to protected

speech or expression because the Clause is narrowly targeted, directly affects only the limited and inherently qualified right to hold public office, and closely tracks well-established exceptions to First Amendment coverage.

To be sure, a court applying the Disqualification Clause after a 150-year hiatus in its use may reasonably wonder whether the Clause would intrude upon First Amendment rights recognized in the modern era. Two fairly extreme cases arose in the Reconstruction-era Fortieth Congress (the one immediately following the Congress that approved the Fourteenth Amendment).[11] In one case, "an inflammatory letter to a newspaper was all that was needed as evidence to bar a Representative-Elect from sitting in the Fortieth Congress"; and in another "it was said that 'aid and comfort may be given to an enemy by words of encouragement, or the expression of an opinion, from one occupying an influential position." *Disloyalty* at 171–72.

Those Congressional judgments—which do not appear to have been tested judicially—may cause the Court to wonder (for example): Would reviving this Clause make it necessary to disqualify a candidate or officeholder who merely tweets out her support for the ex-president's "Stop the Steal" movement or expresses sympathy with a Black Lives Matter protest that resulted in damage to a federal courthouse?

The answer, fortunately, is "no." For reasons discussed below, even assuming that a constitutional amendment could itself be deemed unconstitutional, nothing in the First Amendment would prevent this Court from carrying out its constitutional mandate to bar oath-breaking insurrectionists from returning to, or continuing to exercise, official power.

### 1. The Disqualification Clause is narrowly targeted and directly affects only the limited and qualified right to hold office.

As a threshold matter, the Disqualification Clause is so narrow in its scope of application, and the First Amendment right that it directly affects is itself so qualified and limited, that the Clause poses no broad threat to protected speech and expression and would not disqualify either

[11] The Fortieth Congress met in Washington, D.C. from March 4, 1867, to March 4, 1869, during the third and fourth years of Andrew Johnson's presidency.

of the hypothetical candidates or officeholders cited in the examples above (i.e., the "Stop the Steal" and BLM-protest advocates).

The scope of the Clause is limited to persons who (1) "previously [took] an oath" as an officeholder "to support the Constitution of the United States," but instead either (2) "engaged in insurrection or rebellion against" the United States or gave aid or comfort to its enemies. This category of persons is so circumscribed that, between the end of Reconstruction and 2021, the Clause was successfully invoked only once; and it is, moreover, a category of persons who have chosen their status voluntarily—first by seeking and obtaining office, second by taking an oath to support the Constitution, and third by violating that oath.[12]

Moreover, the "right" to seek and hold office is and always has been a qualified one. Candidacy is not a fundamental constitutional right[13] and has always been limited by qualifications—including age, citizenship, and residency qualifications that the Constitution itself imposes on the President and members of Congress.[14] The Disqualification Clause is nothing more or less than an additional constitutional qualification for officeholding. *See Griffin v. White*, No. 22-0362 KG/GJF, 2022 WL 2315980, at *12 (D.N.M. June 28, 2022) ("Section

[12] "Since [Reconstruction], . . . only one person's qualifications have been challenged: a Congressman at the outbreak of the First World War." *Disloyalty* at 155; *see also id*. at 210–214 (discussing the 1918 disqualification of Minnesota Representative-elect Victor Berger).

[13] "Candidacy itself is not a fundamental [constitutional] right which is comparable to the right to vote; therefore, burdens inflicted upon candidates are not to be measured by the same yardstick applied to burdens affecting voters." *Thournir v. Meyer*, 909 F.2d 408, 412 (10th Cir. 1990); *accord Clements v. Fashing*, 457 U.S. 957, 963 (1982); *Am. Const. L. Found., Inc. v. Meyer*, 120 F.3d 1092, 1101 (10th Cir. 1997), *aff'd*, 525 U.S. 182 (1999); *Carver v. Dennis*, 104 F.3d 847, 850–51 (6th Cir. 1997); *Greene v. Raffensperger*, 2022 WL 1136729, *16 (N.D. Ga. Apr. 18, 2022).

[14] *See* U.S. CONST., art. I, § 2, cl. 2 ("No person shall be a representative who shall not have attained to the age of twenty five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen."); *id*., § 3, cl. 3 ("No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen."); *id*., art. 2, § 1, cl. 5 ("No person except a natural born citizen . . . shall be eligible to the Office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty five years, and been fourteen years a resident within the United States."); *Disloyalty* at 153 (referring to the Disqualification Clause as "the other qualifier" for "holding any public office under the United States or any state").

Three of the Fourteenth Amendment narrows the First Amendment right to run for office[.]").

On this point, the drafters' debate over whether the Clause was a "bill of attainder" is once again illuminating. Republicans "vigorously rejected" claims that the Disqualification Clause was a bill of attainder, arguing that such laws "imposed *punishments*," whereas the Disqualification Clause "merely changed the *qualifications* for public office." *Their Fourteenth Amendment and Ours*. Illinois Senator Lyman Trumbull "pointed out that preexisting constitutional bans on officeholding were not punishments. 'Does, then, every person living in this land who does not happen to have been born within its jurisdiction undergo pains and penalties and punishment all his life,' he queried, 'because by the Constitution he is ineligible to the Presidency?'" *Id*. And West Virginia Senator Waitman T. Willey characterized the Clause as being not "penal" but "precautionary" and oriented "wholly to the future"—a "measure of self-defense" against future treason that might be committed not only by former Confederate supporters but by any future insurrectionists. *Id*.

The Disqualification Clause thus has too narrow a scope of operation, and affects too limited and qualified a right, to impair protected speech or expression.

**2. Under the "speech integral to illegal conduct" exception, the First Amendment does not protect any speech capable of triggering constitutional disqualification.**

Perhaps the surest answer to any lingering First Amendment concern is to recognize that courts are obligated by United States Supreme Court precedent to harmonize conflicting constitutional provisions, giving effect to each whenever possible. Accordingly, this Court is not stuck with the broadest interpretation that the Clause's language could possibly support. Instead, case law instructs the Court to harmonize the Disqualification Clause with the First Amendment as it is presently understood. And that is easy to do, because the Clause is narrowly targeted and because all or nearly all speech capable of triggering constitutional disqualification is "speech integral to illegal conduct," an umbrella term embracing several historically recognized categories of speech excluded from First Amendment protection.

The obligation to harmonize constitutional provisions is well established. To resolve

conflicts between constitutional provisions, "the United States Supreme Court and state courts have resorted to a number of canons of statutory and constitutional interpretation, including the tenets that the courts must harmonize conflicting constitutional provisions and must value specific rules over general ones."[15] Accordingly, where two constitutional provisions are in genuine "tension" with each other, the Supreme Court "attempts to strike a balance between the values implicated by the two clauses," *United States v. Woodley*, 751 F.2d 1008, 1020–21 (9th Cir. 1985) (en banc) (Norris, J., concurring), with the objective of "harmonizing constitutional provisions which appear, separately considered, to be conflicting." *Reid v. Covert*, 354 U.S. 1, 54 (1957). Because "[i]t cannot be presumed that any clause in the constitution is intended to be without effect," *Marbury v. Madison*, 5 U.S. 137, 174 (1803), the court's duty is "to construe the constitution as to give effect to both provisions, as far as it is possible to reconcile them, and not to permit their seeming repugnancy to destroy each other." *Cohens*, 19 U.S. at 393; *see also State v. Sandoval*, 620 P.2d 1279, 1281 (N.M. 1980) (holding that Constitution's Extradition Clause and Sixth Amendment "should be read together and harmonized in their application" when determining impact of alleged speedy-trial violation on a state's extradition demand).

Two well-known interpretive canons may assist the Court in harmonizing the Disqualification Clause and the First Amendment. The canon that specific provisions prevail over conflicting general ones[16] should give the Court additional comfort that no First

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[15] Recent Case, *Constitutional Interpretation—Nevada Supreme Court Sets Aside a Constitutional Amendment Requiring a Two-Thirds Majority for Passing a Tax Increase Because It Conflicts with a Substantive Constitutional Right—Guinn v. Legislature of Nev., 71 P.3D 1269*, 117 HARV. L. REV. 972 (2004).

[16] *See, e.g., City of Albuquerque v. N.M. State Corp. Comm'n*, 605 P.2d 227, 229 (N.M. 1979) ("Where, as here, [state constitutional] provisions cannot be harmonized, the specific section governs over the general regardless of priority of enactment."); *People v. Richardson*, 751 N.E.2d 1104, 1108 (Ill. 2001) ("[W]hile one clause will not be allowed to defeat another if by any reasonable construction the two can be made to stand together, a specific [state] constitutional provision will prevail over a general section if the two are incompatible."); *Greene v. Marin Cnty. Flood Control & Water Conservation Dist*., 231 P.3d 350, 358 (Cal. 2010) ("As a means of avoiding conflict, a recent, specific [state constitutional] provision is deemed to carve out an exception to and thereby limit an older, general provision."); *People v. W. Air Lines*, 268 P.2d 723, 42 Cal. 2d 621, 637 (Cal. 1954) ("Under familiar rules of construction, if it is impossible to harmonize or reconcile portions of a [state] constitution, special provisions control more general provisions, and the general and special provisions operate together, neither working

Amendment violation will flow from applying the Disqualification Clause to an officeholder like Griffin whose conduct falls squarely within the Clause's highly specific and narrowly targeted scope of operation. Likewise, the canon that a later-enacted provision prevails over a conflicting earlier one applies here: The Disqualification Clause was drafted long after, and in the shadow of, the First Amendment; yet the drafters provided no First Amendment defense to disqualification.[17]

Interpretive canons aside, harmonizing the Disqualification Clause with modern First Amendment doctrine presents no difficulty because, for two reasons, little genuine tension exists between them.

***First***, the First Amendment and the Disqualification Clause share the common goal of fostering democracy—the former by ensuring that "debate on public issues" remains

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the repeal of the other."); *Clouse ex rel. Clouse v. State*, 16 P.3d 757, 760 (Ariz. 2001) ("It is an established axiom of constitutional law that where there are both general and specific constitutional provisions relating to the same subject, the specific provision will control."); *Kadan v. Bd. of Supervisors of Elections of Baltimore Cty*., 329 A.2d 702, 707 (Md. 1974) ("It is an elementary rule of interpretation that effect should be given, if possible, to every section and clause of a written Constitution; and where there is a special provision in conflict with a general provision, the special provision should be given effect to the extent of its scope, leaving the general provision to control in cases where the special provision does not apply."); *Lemon v. Bossier Par. Sch. Bd*., 240 F. Supp. 743, 744 (W.D. La. 1965) ("Particular [state-constitutional provisions, and statutes *in pari materia* with them,] shall prevail over those of a general nature.").

[17] *See Parker v. Energy Dev. Co.,* 691 P.2d 981, 986 (Wyo. 1984) ("If [constitutional] provisions cannot be reconciled, then the subsequent provision shall prevail over the prior provision—even if only a partial repeal by implication is necessary"; interpreting state constitution); *Ward v. Priest*, 86 S.W.3d 884, 898 (Ark. 2002) ("The later [state constitutional] amendment would govern to the extent that it was repugnant to or in conflict with the provisions of the former one."); *Allison v. City of Phoenix*, 33 P.2d 927, 932 (Ariz. 1934) ("It is the universal rule of constitutional and statutory construction, so well known as to need no citations in support thereof, that a later enactment prevails over any earlier one of equal rank, in so far as the two are in conflict"; interpreting state constitution); *Macon v. Costa*, 437 So. 2d 806, 810 (La. 1983) ("[L]ater constitutional provisions, or amendments, prevail over earlier constitutional provisions in conflict."); *Fullilove*, 129 So. 2d at 826 ("An amendment to a constitution, . . . is to be considered as . . . altering or rescinding the original to the extent that the original may conflict with the amendment, and is to be treated as superior to, and superseding, the original or earlier provisions to the extent of such conflict"; interpreting state constitution).

"uninhibited, robust, and wide-open," *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964),[18] and the latter by preventing oath-breakers with a proven hostility to Constitutional government from holding the reins of state power.

***Second***, any speech affected by the Disqualification Clause also is likely to fall within the long-recognized First Amendment exception for "speech integral to illegal conduct" ("the integral-speech exception"). Under that exception, broadly speaking, a defendant cannot raise a First Amendment defense merely because committing his allegedly illegal acts required him to speak. In keeping with that exception, the Court should hold that the First Amendment categorically does not protect speech "integral to" the types of conduct that the Disqualification Clause identifies as grounds for exclusion from public office, because such speech also is integral to numerous federal crimes effectively outlawing speech that encourages, induces, or furthers a conspiracy to take, violent action (*see* Part III.B.2.a., below), and also is likely to constitute incitement of "imminent lawless action" or the making of "true threats," neither of which enjoy First Amendment protection (*see* Part III.B.2.b., below).[19]

The principle underlying the integral-speech exception is that the First Amendment's protections "are not absolute" and that "the government may regulate certain categories of

[18] *See also Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018) (observing that First Amendment is "essential to our democratic form of government" and "furthers the search for truth.").

[19] An alternative to the categorical exceptions urged here would involve applying the *O'Brien* intermediate-scrutiny test. Under that framework, one would first have to establish that the Disqualification Clause is "content neutral" and then show that it withstands First Amendment scrutiny because it (1) is "within the constitutional power of the Government" and (2) "furthers an important or substantial governmental interest" that is (3) "unrelated to the suppression of free expression" and that (4) "the incidental restriction on alleged First Amendment freedoms is not greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). Here, the Disqualification Clause is part of the Constitution itself, making any application of *O'Brien* irrelevant if not nonsensical (yes, a constitutional amendment is "within the constitutional power of the Government"). Moreover, viewed as an ordinary speech regulation, the Disqualification Clause arguably affects only oath-breaking or insurrectionist speech by public officials and therefore is not "content neutral." *See City of Austin, Tex. v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1471 (2022) ("A regulation of speech is facially content based under the First Amendment if it targets speech based on its communicative content—that is, if it applies to particular speech because of the topic discussed or the idea or message expressed.").

expression" that "are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *Va. v. Black*, 538 U.S. at 358–59 (quoting *Chaplinsky v. N.H.,* 315 U.S. 568, 571–72 (1942)). These "content-based restrictions on speech have been permitted, as a general matter, only when confined to the few historic and traditional categories of expression long familiar to the bar. Among these categories are . . . speech integral to criminal conduct." *United States v. Alvarez*, 567 U.S. 709, 717 (2012).

The leading case on the integral-speech exception to First Amendment coverage is *Giboney v. Empire Storage & Ice Co*., 336 U.S. 490 (1949). In an often-cited opinion, the Supreme Court rejected "the contention that conduct [that is] otherwise unlawful is always immune from state regulation [merely] because an integral part of that conduct is carried on by" means of speech. *Id*. at 498.

Following *Giboney*, courts repeatedly have held that making a "course of conduct" illegal "has never been deemed an abridgment of freedom of speech . . . merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Cox v. L.A.*, 379 U.S. 559, 563 (1965) (quoting *Giboney*, 336 U.S. at 502)). Thus, "[i]t rarely has been suggested that the constitutional freedom for speech . . . extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." *N.Y. v. Ferber*, 458 U.S. 747, 761–62 (1982) (quoting *Giboney*, 336 U.S. at 498). "Put another way, speech is not protected by the First Amendment when it is the very vehicle of the crime itself." *United States v. Rowlee*, 899 F.2d 1275, 1278 (2d Cir. 1990). The exception applies not only to speech integral to proscribed criminal conduct but also to speech integral to civilly actionable conduct. *See Rumsfeld v. FAIR*, 547 U.S 47, 62 (2006).

Examples abound of well-established crimes and torts committed in whole or in part through the use of speech. In the United States, a person may be guilty of a crime if he or she, for example, (1) agrees with or offers to agree with another to commit, requests another to commit, orders another to commit, threatens harm unless another commits, or otherwise induces another

to commit, a crime; (2) by means of threat puts another in fear of imminent serious injury; (3) participates in a criminal endeavor by communicating—for example, by telling thieving friends the combination of the employer's safe; (4) warns a criminal how to escape from the police; (5) threatens harm if someone does not turn over his or her wallet, submit to intercourse, or perform some other act that he or she is free not to perform; (6) offers to bribe someone or offers to receive a bribe for performing an act that should be performed, if at all, free of inducements; (7) successfully encourages someone to commit suicide; (8) entices a child from custody; (9) perjures himself or engages in other falsehoods with respect to officials; (10) acquires property or some other material advantage by deception; or (11) falsely pretends to hold a position in public service with the aim of getting someone else to submit to pretended authority or act otherwise to his or her prejudice. 1 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 10.35, at 10-42.30–10-42.31 (2021) (citing KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 6–7 (1989)). Speech is likewise integral to many recognized torts. A person may commit an actionable tort by making fraudulent representations with the intent that they be relied upon, by defaming someone, by inducing a contracting party to break their contract, by making statements that intentionally inflict severe emotional distress, and by many other means.

Of course, the integral-speech exception could be carried too far. Courts and commentators alike have observed that it would be "fatally circular"—and destructive of First Amendment protections—to hold that speech is unprotected merely *because* some law pronounces it illegal, thereby making it "integral" to a crime or tort. *United States v. Weiss*, 475 F. Supp. 3d 1015, 1033 (N.D. Cal. 2020); *see also Matter of Welfare of A. J. B.*, 929 N.W.2d 840, 853 (Minn. 2019); *State v. Shackelford*, 825 S.E.2d 689, 703 (N.C. App. 2019) (Murphy, J., concurring). In other words, the integral-speech exception "can't justify treating speech as 'integral to illegal conduct,'" and thus unprotected, "simply because the speech is illegal under the law that is being challenged. That should be obvious, since the whole point of modern First Amendment doctrine is to protect speech against many laws that make such speech illegal."

Eugene Volokh, *The Speech Integral to Criminal Conduct Exception*, 101 CORNELL L. REV. 981, 987 (2016) [hereinafter *Speech Integral*]. This conclusion flows ineluctably from the fact that "[t]he First Amendment limits Congress; Congress does not limit the First Amendment." *United States v. Weiss*, 475 F. Supp. 3d 1015, 1035 n.9 (N.D. Cal. 2020).

Avoiding this circularity problem, writes Professor Volokh, requires the following understanding of the integral-speech exception: "When speech tends to cause, attempts to cause, or makes a threat to cause some illegal conduct . . . *other than the speech itself*," such as "murder, fights, restraint of trade, child sexual abuse, discriminatory refusal to hire, and the like," this "opens the door to possible restrictions on such speech." *Speech Integral* at 986–87. In this view, the integral-speech exception "should be seen less as a single exception than as a guide to generating other exceptions" which themselves must be defined "separately and narrowly, to protect potentially valuable speech." *Id*. at 987.

Thus, even if the Disqualification Clause were analyzed counterfactually as a statute, any speech that it proscribes is speech that "tends to cause, attempts to cause, or makes a threat to cause some illegal conduct . . . other than the speech itself"—namely, an insurrection or rebellion against the United States. *Id*. As applied here, the integral-speech exception therefore "opens the door" to considering other narrowly defined and historically recognized First Amendment exceptions that represent "special cases" of the overarching integral-speech exception. *See Speech Integral* at 1011, ¶ 3. Three of those exceptions are (1) speech integral to federal laws that criminalize encouraging, inducing, or furthering a conspiracy to take, violent action (*see* Part III.B.2.a., below); (2) speech likely to incite "imminent lawless action" (*see* Part III.B.2.b., below); and (3) "true threats" (*see id*.).

**a. The First Amendment does not protect speech that—like any speech capable of triggering constitutional disqualification—is integral to federal crimes prohibiting the solicitation or encouragement of violence.**

Any speech capable of triggering constitutional disqualification also is likely to violate a variety of federal criminal statutes outlawing speech that encourages, induces, or furthers a

conspiracy to take, violent action.[20] Such speech garners no First Amendment protection, as demonstrated by the fact that courts have upheld federal criminal-conspiracy and criminal-solicitation statutes against First Amendment challenges similar to Griffin's. *See, e.g., United States v. Rahman*, 189 F.3d 88, 114–15 (2d Cir. 1999); *United States v. Lebron*, 222 F.2d 531, 536 (2d Cir. 1955). As the Second Circuit observed in *Rahman*, "it remains fundamental that while the state may not criminalize the expression of views—even including the view that violent overthrow of the government is desirable—it may nonetheless outlaw encouragement, inducement, or conspiracy to take violent action." 189 F.3d at 115.

In *Rahman*, blind Islamic scholar and cleric Ahmed Rahman led a seditious conspiracy to wage a "jihad" against the United States and other perceived enemies of Islam. Although his role in the conspiracy generally was limited to overall supervision and direction of the members, he dispensed religious opinions on the holiness of an action to members, approving proposed actions and advising whether those actions would further the jihad. *Id*. at 104. Among other things, Rahman told one conspirator that he "should make up with God" by assassinating Egyptian President Hosni Mubarak; told another that it was his religious "duty" to bomb the United Nations headquarters in New York; and told yet another that he should find a way to bomb the American Army. *Id*. at 117.

Rahman was convicted of seditious conspiracy in violation of 18 U.S.C. § 2384 and of soliciting violent crimes in violation of 18 U.S.C. § 373(a). *See* 189 F.3d at 114, 117. Like Griffin, whose First Amendment defense relies in part on his attempt to lead the January 6 mob in prayer, Rahman claimed on appeal that his conviction violated his First Amendment rights, including his right of religious expression. The Second Circuit made short work of that claim, observing that "freedom of speech and of religion do not extend so far as to bar prosecution of one who uses a public speech or a religious ministry to commit crimes." *Id*. at 116–17. The court

[20] *Cf. Speech Integral* at 986–87 (opining that integral-speech exception should be limited to situations where "speech tends to cause, attempts to cause, or makes a threat to cause some illegal conduct . . . other than the speech itself").

noted that "[n]umerous crimes under the federal criminal code are, or can be, committed by speech alone," adding: "Notwithstanding that political speech and religious exercise are among the activities most jealously guarded by the First Amendment, one is not immunized from prosecution for such speech-based offenses merely because one commits them through the medium of political speech or religious preaching. Of course, courts must be vigilant to [e]nsure that prosecutions are not improperly based on the mere expression of unpopular ideas. But if the evidence shows that the speeches crossed the line into criminal solicitation, procurement of criminal activity, or conspiracy to violate the laws, the prosecution is permissible." *Id*. at 117. After reviewing a number of Supreme Court and other appellate precedents,[21] the court discerned "a line . . . between expressions of belief, which are protected by the First Amendment, and threatened or actual uses of force, which are not." *Id*. at 115. "Words of this nature—ones that instruct, solicit, or persuade others to commit crimes of violence—violate the law and may be properly prosecuted regardless of whether they are uttered in private, or in a public speech, or in administering the duties of a religious ministry." *Id*. at 117.

As the *Rahman* court observed, many federal criminal offenses pass muster under the First Amendment despite being "characteristically committed through speech," *Rahman*, 189 F.3d at 117, including the use of "conspiratorial or exhortatory words" to facilitate "preparatory steps towards criminal action." *Id*. at 116. The *Rahman* court cited all the following examples of federal crimes that do not facially violate the First Amendment although they target speech that solicits or encourages violence:

- 18 U.S.C. § 2(a) makes it an offense to counsel, command, induce, or procure the commission of an offense against the United States.

[21] The *Rahman* opinion cites, *inter alia*, to*, Wis. v. Mitchell,* 508 U.S. 476, 484 (1993) ("A physical assault is not . . . expressive conduct protected by the First Amendment"); *R.A.V. v. City of St. Paul,* 505 U.S. 377, 388 (1992) ("[T]hreats of violence are outside the First Amendment"); *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 916 (1982) ("The First Amendment does not protect violence"); *Watts v. United States,* 394 U.S. 705, 707 (1969) (Congress may outlaw threats against President, provided that "[w]hat is a threat [is] distinguished from what is constitutionally protected speech.").

- 18 U.S.C. § 371 makes it a crime to conspire to commit any offense against the United States.
- 18 U.S.C. § 372 makes it a crime to conspire to "prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof, or to induce by like means any officer of the United States to leave the place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office[.]"[22]
- 18 U.S.C. § 373(a) punishes anyone who clearly intends to, and does, persuade another to commit a felony involving the illegal use of physical force against property or against a person.
- 18 U.S.C. § 2384 criminalizes seditious conspiracies to "overthrow, put down, or to destroy by force the Government of the United States, . . . or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof[.]"[23]
- Other statutes criminalize conspiracies with specified objectives. *See, e.g.*, 18 U.S.C. § 1751(d) (conspiracy to kidnap); 18 U.S.C. § 1951 (conspiracy to interfere with commerce through robbery, extortion, or violence); 21 U.S.C. § 846 (conspiracy to violate drug laws).

[22] *Rahman* did not cite to 18 U.S.C. § 372, but it could have; and the statute's relevance here is clear, as the January 6 insurrection tried to "prevent, by force, intimidation, or threat" the Vice President and members of Congress from "discharging [the election-certification] duties" of their federal offices; and the insurrection arguably also tried to "induce" the same persons "by like means" "to leave the place"—i.e., the Capitol—where those duties are "required to be performed" and to "injure [them] in [their] person or property" on account of their "lawful discharge" of those duties.

[23] The Disqualification Clause is more demanding than § 2384 insofar as the Clause applies only to person who have sworn to uphold the Constitution, while seditious conspiracy "includes no requirement that the defendant owe allegiance to the United States." *Rahman*, 189 F.3d at 113.

Griffin's conduct is of a type that easily falls within the proscribed category of speech that encourages, induces, or furthers a conspiracy to take, violent action. Not only did he physically participate in a violent and premeditated attack that he had helped to publicize and encourage, he also shot a video promoting that attack and issuing threats of further violence from his illegally obtained perch atop the inauguration stage. The next day, he posted a video online, urging in spoken commentary that his fellow Stop-the-Steal proponents engage in additional and even-more-violent insurrectionist attacks, including violent disruption of the presidential inauguration with the possible result that blood would run out of the Capitol. Only his arrest prevented him from continuing his violent insurrectionist campaign. His speech and conduct thus belong to the category of "threatened or actual uses of force, which are not" protected by the First Amendment and indeed are likely illegal under multiple federal statutes. *Rahman*, 189 F.3d at 115.

Because his speech—and any speech arguably affected by the Disqualification Clause—is likely to be speech integral to one or more federal crimes of established constitutionality, the First Amendment never comes into play, and Griffin has no First Amendment defense.

**b. The First Amendment does not protect speech that—like any speech that could trigger constitutional disqualification—is integral to inciting imminent lawless action or making "true threats."**

Any speech capable of triggering constitutional disqualification also is likely to constitute incitement of "imminent lawless action" or the making of "true threats"—neither of which enjoy First Amendment protection.

Under *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), the First Amendment does not protect speech that is both "directed to inciting or producing imminent lawless action" and "likely to incite or produce such action." But "the mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." *Id*. at 448. Thus, "[a] *statute* which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth

Amendments" because "[i]t sweeps within its condemnation speech which our Constitution has immunized from governmental control." *Id*. Conversely, "[t]he cloak of the First Amendment . . . lends no protection to speech which urges the listeners to commit violations of current law." *Rice v. Paladin Enters., Inc*., 128 F.3d 233, 246 (4th Cir. 1997).

Properly interpreted, the Disqualification Clause—which, again, is not a mere *statute* but a constitutional provision—clearly would fall on the acceptable side of the line drawn in *Brandenburg* even if the Clause were hypothetically accorded the inferior status of a statute. There is a nearly exact congruence between the types of insurrectionist speech potentially affected by the Clause and the types of verbal incitement denied protection under *Brandenburg*. To the extent that their oath-breaking takes the form of speech, oath-breakers who "engage[] in insurrection or rebellion" against the United States represent the paradigmatic case of a speaker who incites or helps to produce "lawless action"—action that is not merely "*imminent*" or "*likely*" to occur but that actually *did* occur, in the form of an insurrection or rebellion. Speech that could trigger disqualification also may fall within the "true threat" exception, which denies First Amendment protection to "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Va. v. Black*, 538 U.S. 343, 359–60 (2003).

Under this interpretation of the Clause, Griffin's disqualifying conduct—to the extent that it involved speech at all[24]—garners no First Amendment protection. Griffin did not engage in "the mere abstract teaching of the moral propriety or even moral necessity for a resort to force

[24] Much of Griffin's disqualifying conduct consisted of nonverbal acts that constitutionally may be regulated by reasonable time, place, and manner restrictions. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Griffin does not (and cannot plausibly) argue that his First Amendment rights were unreasonably restricted by the barriers erected around the Capitol or by the restrictions imposed on public access to the building on the day of the election certification. Yet he breached barricades at the Capitol, used part of a broken barricade as a ladder to illegally enter the restricted area below the inauguration stage, climbed onto the inauguration stage, and remained there illegally for about an hour and a half—conduct for which he was criminally convicted.

and violence";[25] rather, his speech as described in the complaint was both "directed to inciting or producing imminent lawless action" and was "likely to incite or produce such action." *Brandenburg*, 395 U.S. at 447. And his online threat to return to Washington with firearms and make blood run out of the Capitol, especially viewed together with his prior statement that "the only good Democrat is a dead Democrat," left no doubt that he "mean[t] to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals"[26]—namely, that he intended at a minimum to join with others to intimidate, through threats of violence, any legislator who had voted to certify the presidential election. In view of the events of January 6, legislators "who hear[d] or read the threat [could] reasonably consider that an actual threat ha[d] been made." *United States v. Wheeler*, 776 F.3d 736, 743 (10th Cir. 2015). Thus, Griffin's speech falls easily within the "true threat" exception to First Amendment protection, whether or not he actually "intended to or had the ability to actually carry out the threat." *Id*.

In sum: Nothing in the First Amendment should inhibit this Court from carrying out its constitutional mandate to disqualify Griffin from seeking or holding any office for the rest of his life, unless and until Congress affirmatively rehabilitates him.

## IV. CONCLUSION

In the aftermath of the Civil War, the drafters of the Fourteenth Amendment considered limiting constitutional disqualification to officials who had sided with the Confederacy. Instead, they looked to the future, when a different insurrection might again lure opportunistic officeholders into forsaking their oath to support the Constitution. The drafters made provision for that future in the Amendment's Disqualification Clause; and the people, through their legislatures, ratified the drafters' judgment.

Now it is time for this Court to protect our democracy from any further exercise of state

[25] *Brandenburg*, 395 U.S. at 448.

[26] *Va. v. Black*, 538 U.S. at 359–60.

power by an official who betrayed his oath when he encouraged, promoted, and participated in the violent January 6, 2021 insurrection. For all the reasons stated above, the Court should hold that Couy Griffin has no First Amendment defense to constitutionally mandated disqualification from seeking or holding any public office until such time as Congress sees fit to rehabilitate him.

Respectfully submitted,

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Dated: August 1, 2022

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I hereby certify that a true and correct copy of the foregoing was served upon all parties and counsel of record via this Court's Odyssey electronic file and serve system this 1st day of August, 2022.

*/s/ Ray M. Vargas, II*