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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YUMA

MARK FINCHEM, in his personal
capacity; ANTHONY KERN, in his
personal capacity,

Plaintiffs,

v.

CHARLENE FERNANDEZ, in her
personal capacity;
Defendant.

Case No.

COMPLAINT

(Jury trial demanded)

Plaintiffs, Mark Finchem and Anthony Kern, by and through their undersigned attorneys, sue Charlene Fernandez, and state:

INTRODUCTION

1
2 1. Saul Alinsky, in his Rules for Radicals, counseled his followers to:
3 Pick the target, freeze it, personalize it, and polarize it. Cut off
4 the support network and isolate the target from sympathy. Go
5 after people and not institutions; people hurt faster than
6 institutions. (This is cruel, but very effective. Direct,
7 personalized criticism and ridicule works.)

8 2. The Defendant in this case picked her targets and followed the counsel of
9 Saul Alinsky quite well. Plaintiffs’ lawsuit is the result.

10 3. The purpose of the First Amendment is to facilitate and encourage robust
11 debate. Its purpose is not to encourage or facilitate baseless charges of criminal acts by
12 one’s political adversaries, for base political purposes. That is the stuff of banana
13 republics.

14 4. Here, Defendant baselessly accused Plaintiffs of the highest possible crimes
15 against the Government of the United States in a communication directed to the Acting
16 Attorney General of the United States and Acting Director of the Federal Bureau of
17 Investigation.

18 5. The malicious purpose of Defendant’s action was to chill debate, not
19 encourage it; to shut down any discussion of election fraud in the 2020 Presidential election
20 and of the larger question of election integrity in general; and, if possible, to criminally
21 punish Plaintiffs for exercising their First Amendment right to peacefully demonstrate and
22 petition the Government for redress of grievances.

23 6. This lawsuit follows.

PARTIES, JURISDICTION, AND VENUE

24
25 7. Plaintiff Mark Finchem is a natural person and resident of Arizona. He is a
26 former fireman and a retired law enforcement officer and currently a member of the
27 Arizona House of Representatives, representing Arizona District 11.

28 8. Plaintiff Anthony Kern is a natural person and resident of Arizona. He holds

1 peace officer certification in good standing and is a former member of the Arizona House
2 of Representatives for District 20.

3 9. Charlene Fernandez (“Defendant”) is a natural person and, upon information
4 and belief, a resident of Yuma County, Arizona.

5 10. This case is an action in tort.

6 11. This Court has jurisdiction over the matter pursuant to A.R.S. Const. Art. VI,
7 § 14 and other applicable law.

8 12. Venue is appropriate under A.R.S. § 12-401 and other applicable law.

9 **COUNT I - DEFAMATION**

10 13. Plaintiffs incorporate and reallege the preceding allegations.

11 **The 2020 Presidential Election**

12 14. The United States was founded on a proposition that was considered radical
13 for its time: that the legitimacy of government could only come from the consent of the
14 governed. Indeed, the term “republic” derives from the Latin “res publica” meaning “the
15 thing of the people.” Direction of the government by the people via the free and fair
16 election of their representatives is the core of our republican form of government.

17 15. In order to defend this principle of self-governance, Plaintiffs strongly
18 believe that protecting the integrity of our elections is crucial. Without confidence in the
19 process, voters can never feel assured that the persons governing them do so with their
20 consent, regardless of outcome.

21 16. As the campaign for the 2020 Presidential election unfolded, Plaintiffs began
22 to notice irregularities in polling, in the fact that mass mailing of ballots without adequate
23 signature verification and chain of custody controls was being implemented in key
24 battleground states, in the use of private funding for the administration of elections at the
25 county level in key battleground states, and in the way that social media companies were
26 quashing the circulation of news stories that they deemed harmful to the candidacy of Joe
27 Biden.

28 17. As an example of the latter phenomenon, Twitter and Facebook prevented

1 readers from circulating stories on the highly damaging contents of Hunter Biden’s laptop,
2 with the CEO of Twitter claiming in Congressional testimony that the materials violated
3 Twitter’s policy against circulating “hacked” material. Twitter’s reasoning was utter
4 nonsense, as Biden’s computer was not “hacked”; he had left it in the custody of a computer
5 repair shop, whose contract stipulated that the computer became the shop’s property if it
6 was abandoned.

7 18. Plaintiffs came to suspect that a concerted effort was underway to channel
8 the results of the election towards a preferred outcome. In this, Plaintiffs have already been
9 proven correct by reports in the media of just such a concerted effort – an effort that
10 included agreements with Facebook and Twitter, as well as concerted action to greatly
11 increase voting by mail.¹

12 19. Plaintiffs’ concerns about the integrity of mail-in voting were well-founded.
13 A bipartisan 2005 report of the Commission on Federal Election Reform, chaired by former
14 President Jimmy Carter and former Secretary of State James Baker, III, found that
15 “[a]bsentee ballots remain the largest source of potential voter fraud.”²

16 20. Plaintiffs were also aware of problems with the integrity of electronic voting
17 systems. In this, Plaintiffs were likewise far from alone. In December 2019, Democratic
18 United States Senators Elizabeth Warren, Amy Klobuchar, and Ron Wyden, as well as
19 Congressman Mark Pocan, sent letters to three investment firms to express their concern
20 that “our nation’s election systems and infrastructure are under serious threat.”³ (the
21 “Warren Letter”). The Warren Letter noted some troubling anecdotes:

22 In 2018 alone “voters in South Carolina [were] reporting
23 machines that switched their votes after they’d inputted them,

24
25 ¹ See Ball, Molly, “The Secret History of the Shadow Campaign That Saved the 2020 Election,” Time
26 Magazine (February 4, 2021) https://time.com/5936036/secret-2020-election-campaign/?utm_source=twitter&utm_medium=social&utm_campaign=editorial&utm_term=politics_2020-election&linkId=110717147

27 ² See Lott, John R., Jr., “Heed Jimmy Carter on the Danger of Mail-In Voting,” Wall Street Journal (April
28 10, 2020) <https://www.wsj.com/articles/heed-jimmy-carter-on-the-danger-of-mail-in-voting-11586557667>

³ See December 6, 2019 Letters to H.I.G. Capital, LLC, McCarthy Group, LLC, and Staple Street Capital Group, LLC, available online at:
<https://www.warren.senate.gov/imo/media/doc/H.I.G.%20McCarthy,%20%20Staple%20Street%20letters.pdf>

1 scanners [were] rejecting paper ballots in Missouri, and busted
2 machines [were] causing long lines in Indiana.” In addition,
3 researchers recently uncovered previously undisclosed
4 vulnerabilities in “nearly three dozen backend election systems
5 in 10 states....” And, just this year, after the Democratic
6 candidate’s electronic tally showed he received an improbable
7 164 votes out of 55,000 cast in a Pennsylvania state judicial
8 election in 2019, the county’s Republican Chairwoman said,
9 “[n]othing went right on Election Day. Everything went
10 wrong. That’s a problem.” These problems threaten the
11 integrity of our elections and demonstrate the importance of
12 election systems that are strong, durable, and not vulnerable to
13 attack.⁴

14 21. Among the articles cited in the Warren letter was an October 29, 2018 report
15 from the Associated Press that detailed multiple problems with the lack of hacking
16 protection for electronic voting systems.⁵ A July 2019 report from the Associated Press
17 pointed out that even new voting machines were vulnerable to hacking because they were
18 run using out-of-date software.⁶

19 22. Thus, Plaintiffs’ political opponents, including Defendant, cannot seriously
20 claim to have had no concerns about election integrity, or about the vulnerabilities of
21 electronic voting machines, prior to Election Day on Tuesday, November 3, 2020.

22 23. On Election Night, Plaintiffs and millions of others saw denominators
23 mysteriously change in swing states like Pennsylvania, Michigan, and Georgia. That
24 strongly suggested that that votes were being added to the system after the vote totals were
25 already set. At about the same time, Plaintiffs noticed what appeared to be a coordinated
26 stoppage of vote counting in multiple swing states.

27

⁴ *Id.* (footnotes omitted).

28 ⁵ See <https://apnews.com/article/f6876669cb6b4e4c9850844f8e015b4c>

⁶ See <https://apnews.com/article/e5e070c31f3c497fa9e6875f426ccde1>

1 24. It appeared that Plaintiffs’ concerns about coordinated action had been
2 vindicated. Again, those concerns have been as much as confirmed by a subsequent report
3 in Time Magazine.⁷

4 **The Election Challenge and The Events of January 6, 2021**

5 25. The response to the election results from Plaintiffs’ constituents was
6 immediate and overwhelming. The overwhelming majority of those who reached out to
7 Plaintiffs did not believe that Biden had actually won Arizona. They wanted to see not just
8 a recount, but a forensic audit of the voting machines, as well as ballots and ballot images.

9 26. After the election, Plaintiffs saw sufficient evidence, including a
10 mathematical analysis by Prof. Phil Evans and Dr. Shiva Ayyadurai, to persuade them that
11 ample grounds existed to challenge the results of the Presidential election.

12 27. As the Legislature released Arizona’s Electors despite the evidence of
13 irregularity in the vote, Plaintiff Finchem was invited to speak at a permitted event,
14 scheduled to take place at 1:00PM on January 6, 2021 – the date that members of Congress
15 were to object to or certify the vote of the Electoral College – in Washington, D.C. Plaintiff
16 Kern was likewise invited to speak, but spoke on January 5, not on the 6th.

17 28. Plaintiffs attended President Trump’s speech on January 6th near the White
18 House, which was scheduled to conclude before the rally at the Capitol where Plaintiff
19 Finchem was scheduled to speak.

20 29. After the President’s speech, which ran overtime, Plaintiffs walked toward
21 the Capitol, following the large crowd on Pennsylvania Avenue, and became separated.

22 30. Plaintiff Finchem arrived nearly an hour late for his speaking slot on the
23 Capitol grounds, and was told that his speaking engagement had been cancelled. He took
24 a few pictures of the area and left shortly afterward.

25 31. Plaintiff Finchem was never closer than what he perceived to be several
26 hundred yards from the Capitol building, and neither fomented nor witnessed any violent
27 activity. The area that was breached was out of his view, and he did not learn of the breach

28 ⁷ See, *supra*, fn. 1.

1 until later.

2 32. Before Plaintiff Kern reached the Capitol, he began to hear what sounded
3 like flash-bang grenades. In reaction, Plaintiff Kern left the area for at least an hour.

4 33. Plaintiff Kern saw news of the Capitol incursion while watching the news on
5 television.

6 34. Plaintiff Kern returned to the Capitol area around 4PM to try to see what was
7 going on, but from his vantage point on the east side of the Capitol, he was unable to see
8 anything other than a crowd on the steps.

9 35. Plaintiff Kern walked around to the west side of the Capitol, where he
10 witnessed some disorderly conduct by a number of protesters. However, he likewise did
11 not foment any disorderly or violent activity. Plaintiff Kern left the area around 5PM.

12 36. Plaintiffs, both of whom have backgrounds in law enforcement, were, like
13 everyone else, deeply troubled by the attack on the Capitol, and they condemn the actions
14 of the participants.

15 **Defendant Publishes Defamatory Statements Regarding Plaintiffs**

16 37. Plaintiffs' detractors in the media wasted no time publishing accusations,
17 without any evidence, that Plaintiffs had instigated an assault on the Capitol.

18 38. However, on January 7, 2021, Plaintiff Kern had published a tweet
19 expressing his agreement with a tweet by Representative Andy Biggs on January 6, in
20 which Rep. Biggs condemned the violence at the U.S. Capitol.⁸

21 39. On January 11, 2021, Plaintiff Finchem published a press release
22 categorically denying the press allegations, providing details regarding his movements and
23 his reasons for being present in Washington, D.C. on January 6.

24 40. Nevertheless, despite having been placed on notice of the fact that Plaintiffs
25 had nothing to do with the Capitol breach on January 6, in true Alinskyite fashion,
26 Defendant smeared Plaintiffs – both of whom have devoted their adult lives to public
27

28 ⁸ <https://twitter.com/anthonykernAZ/status/1347253509826220033?s=20>

1 service – as traitors to their nation: She co-authored, signed, and published a false and
2 misleading Criminal Referral Letter to the Acting Attorney General of the United States,
3 Jeffrey A. Rosen, and the Director of the FBI, Christopher Wray (the “Criminal Referral”),
4 alleging:

5 On Wednesday, January 6, an armed mob of domestic
6 terrorists breached the walls of the United States Capitol to
7 forcefully interfere with the certification of a free and fair
8 national election. The terrorists, intent on executing a coup,
9 threatened elected officials and staff, terrorized media
10 professionals, destroyed federal property, and ultimately
11 caused the death of five people, including a Capitol Police
12 officer who was bludgeoned to death with a fire extinguisher.
13 Many in the mob wore military or police tactical gear and
14 carried zip-tie restraints, signaling a high level of preparation
15 and coordination for the events that occurred.

16
17 This was an attack on our country. As the full extent of the
18 insurrection unfolds, we fervently urge you to investigate the
19 federal and state lawmakers directly involved, as well as those
20 who, through words and conduct, aided and abetted sedition,
21 treason or any other federal crimes.

22
23 The events of January 6 were not spontaneous, nor were they
24 the random acts of a diffuse handful of unconnected
25 individuals. **For weeks prior to the breach, a group of**
26 **Republican Arizona legislators and legislators-elect**
27 **publicly advocated for the overthrow of the election results**
28 **which encouraged precisely the kind of violent conduct that**

1 **we witnessed.** (emphasis added).

2 41. Defendant went on to allege in the Criminal Referral that Plaintiffs’ social
3 media posts “*strongly suggest*” that they and others “were present at the riot in Washington
4 D.C. on January 6 [2021] and *actively encouraged the mob, both before and during the*
5 *attack on the Capitol.*” Defendant alleged that “*there is evidence to indicate that*”
6 *Plaintiffs*, among others, “*encouraged, facilitated, participated and possibly helped plan*
7 *this anti-democratic insurrection on January 6.*” (emphasis added).

8 42. Defendant thus falsely accused Plaintiffs of being either directly involved in,
9 or of aiding and abetting, the crimes of terrorism, insurrection, treason, and sedition, of
10 conspiracy to commit same, and other federal crimes related to the January 6, 2021 assault
11 on the Capitol in Washington, D.C. Such crimes are punishable by death.

12 43. Defendant also falsely implied that Plaintiffs were responsible for the death
13 of Capitol Hill Police Officer Brian Sicknick.

14 44. Prior to publishing her defamatory comments, Defendant had a prior history
15 of making disparaging comments about Plaintiff Kern, including accusing him of being
16 vindictive for holding Democratic bills as rules chairman. In addition, Defendant had
17 previously called for his removal from that position.

18 45. In an act that further demonstrates her malice towards Plaintiffs, Defendant
19 simultaneously published, conspired to publish, or aided in publishing the Criminal
20 Referral to the media.

21 **Defendant’s Allegations Were Knowingly False or Were**
22 **Made in Reckless Disregard of Their Truth or Falsity**

23 46. In addition to ignoring Plaintiff Kern’s tweet of January 6 and Plaintiff
24 Finchem’s statement of January 11, which would have alerted a reasonable person to
25 doubts as to the truth of the allegations in the Criminal Referral that Defendant co-authored,
26 the Criminal Referral fails to cite to a single social media post by Plaintiff Finchem, and
27 moreover fails to cite to any “evidence,” whatsoever, of Plaintiffs’ alleged involvement in
28 the Capitol riot or their alleged incitement thereof. The referenced social media posts by

1 Plaintiff Kern could not be reasonably construed as showing anything other than his lawful
2 participation in activity protected by the First Amendment.

3 47. The Criminal Referral includes a link to a video by political activist Ali
4 Alexander, which Defendant characterized as supporting her allegations.⁹ However, in
5 that video, Mr. Alexander clearly states that the purpose of the protest on January 6 was to
6 “change the hearts and the minds of Republicans who were in [Congress], *hearing our loud*
7 *roar from outside.*” (emphasis added).

8 48. On the face of these comments, Mr. Alexander’s expressed intentions of
9 organizing a protest outside the Capitol in order to make the participants’ voices heard
10 amounts to nothing more nefarious than protected activity under the First Amendment.

11 49. Thus, the allegations in the Criminal Referral were published with actual
12 malice; that is, they were knowingly false when made, or were made with a conscious
13 disregard of their truth or falsity.

14 50. In the alternative, Defendant published her defamatory statements with a
15 negligent disregard for the truth. The publication of such statements via Criminal Referral,
16 even made about a public figure, when simultaneously released to the press, is neither the
17 sort of speech that the actual malice standard is intended to protect nor the type of speech
18 that warrants protection under the actual malice standard.

19 **Defendant’s Personal Animus Towards Plaintiff**

20 51. Defendant is a Democratic member of the Arizona State Legislature, and has
21 advocated for expanding vote by mail and other measures that render our State’s elections
22 more vulnerable to fraud.

23 52. Defendant has opposed and sought to defeat measures supported by Plaintiffs
24 to enhance election integrity in our State.

25 53. Defendant was not present in Washington, D.C. on January 6, 2021, and did
26 not personally witness the events that were the subject of the Criminal Referral.

27 _____
28 ⁹ https://twitter.com/jason_paladino/status/1347647000922230784?s=20

1 54. Defendant’s false and defamatory accusations against Plaintiffs were,
2 instead, motivated by animus and by a desire to shut down debate regarding the controversy
3 over election fraud in the 2020 Presidential election, as well as the larger topic of
4 preserving election integrity.

5 55. Defendant attempted to falsely portray the Criminal Referral to Messrs.
6 Rosen and Wray as an official act of the Arizona State Legislature, complete with the
7 official seal of the Great State of Arizona placed prominently on the letterhead. In fact,
8 however, the Criminal Referral was not an official act of the Arizona State Legislature, as
9 no resolution of either the House or the Senate, or any of their committees, authorized the
10 Criminal Referral. It was an act taken by Defendant beyond the scope of her legislative
11 duties undergirded by no authorization of any nature the Arizona State Legislature.

12 56. The Criminal Referral was thus unrelated to the discharge of any legislative
13 duty on Defendant’s part. It was instead a personal act that was maliciously intended to
14 take base political advantage of the reprehensible criminal conduct of those who rioted on
15 Capitol Hill and invaded the Capitol itself in Washington DC on January 6, 2021. The fact
16 that Defendant published the Criminal Referral to the media further illustrated her
17 malicious, base political motives.

18 57. Plaintiffs have suffered damages as a result.

19
20 WHEREFORE Plaintiffs, Mark Finchem and Anthony Kern, respectfully demand
21 judgment against Defendant, Charlene Fernandez, for an order requiring her to publish a
22 full retraction of the false and malicious allegations in the Criminal Referral, as well as an
23 award of damages to be determined at trial, attorneys’ fees and costs as may be allowed by
24 law, and for such further relief as the Court deems just.

1 RESPECTFULLY SUBMITTED this 26th day of February, 2021

2
3 By /s/Alexander Kolodin

4 Alexander Kolodin

5 Christopher Viskovic

6 Bryan Blehm

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