No. S23D0071

IN THE
SUPREME COURT OF GEORGIA

DAVID ROWAN, DONALD GUYATT, ROBERT RASBURY, RUTH DEMETER, and DANIEL COOPER,

Applicants

v.

MR. BRAD RAFFENSPERGER,

Respondent, and

MARJORIE TAYLOR GREENE,

Intervenor-Respondent.

On Application for a Discretionary Appeal from the Fulton County Superior Court
Case No. 2022CV364778

Intervenor-Respondent's Response to Applicants' Application for Discretionary Appeal

David F. Guldenschuh
GA Bar No. 315175
David F. Guldenschuh P.C.
P.O. Box 3
Rome, Georgia 30162-0333
Telephone: 706-295-0333
Email: dfg@guldenschuhlaw.com
Local Counsel for Intervenor-Respondent Marjorie Taylor Greene

James Bopp, Jr.*
Melena S. Siebert*
THE BOPP LAW FIRM, PC
The National Building
1 South 6th Street
Terre Haute, Indiana 47807
Telephone: (812) 232-2434
Counsel for Intervenor-Respondent
**Admitted pro hac vice*

Table of Contents

Table of Authorities

Cases

Constitutions, Statutes, and Regulations

Other Authorities

Introduction

Applicants ("**Challengers**") seek a discretionary appeal in this matter, citing two reversible errors:

1. The administrative law judge improperly shifted the burden of proof to Challengers during the administrative hearings; and
2. The administrative law judge improperly quashed notices to produce.

Neither the burden shifting nor quashing the notices to produce constitute reversible error in this matter. This Court should deny this discretionary appeal because Challengers have not presented an applications sufficient to meet this Court's standards for accepting such an appeal.

Further, Rep. Greene has valid constitutional defenses to the Challengers' claims and against the Challenge Statute as applied here that were not considered during either the administrative proceeding or by the Fulton County Superior Court. If this Court grants this discretionary appeal, this Court should consider Rep. Greene's constitutional defenses.

Because the ALJ did not commit reversible error and Rep. Greene has valid constitutional defenses, if this Court grants Challengers' Application, it should nonetheless affirm the Fulton County Superior Court's decision.

Background

Rep. Greene currently serves as a Member of the U.S. House of Representatives, for Georgia's Fourteenth Congressional District. Admin. R. at 912, ¶ 5.[1] Rep. Greene filed her candidacy, for the upcoming midterm elections for Georgia's Fourteenth Congressional District on March 7, 2022 and amended that filing on March 10, 2022. *Id.* ¶ 10.

On March 24, 2022, several voters in Rep. Greene's congressional district ("**Challengers**") filed a Challenge against Rep. Greene under Georgia law. Admin. R. at 5, ¶ 1; O.C.G.A. § 21-2-5 ("**Challenge Statute**"). The Greene Challenge stated that Rep. Greene "does not meet the federal constitutional requirements for a Member of the U.S. House of Representatives and is therefore ineligible to be a candidate for such office." Admin. R. at 5, ¶ 1 ("**Greene Challenge**"). The Greene Challenge was based on claims that Rep. Greene "aided and engaged in insurrection to obstruct the peaceful transfer of presidential power, disqualifying her from serving as a Member of Congress under Section 3 of the Fourteenth Amendment ("**§ 3**") and rendering her ineligible under state and federal law to be a candidate for such office." *Id.*

[1] Citations to the Office of Administrative Hearing Records, docketed in the Fulton County Superior Court.

The Greene Challenge was referred by the Secretary of State for the State of Georgia ("**Sec. Raffensperger**") to the Office of State Administrative Hearings, State of Georgia ("**OSAH**"), which assigned the matter to Administrative Law Judge Charles Beaudrot ("**ALJ Beaudrot**"). Admin. R. at 2, 54.

ALJ Beaudrot placed the burden to the Challengers to prove Rep. Greene was disqualified pursuant to § 3. He noted that when a candidate's age or residency is at issue, "it is entirely appropriate that the burden of proof is on the candidate to establish these criteria are met (citing *Haynes v. Wells*, 273 Ga. 106 (2000)). Admin. R. at 776. However, ALJ Beaudrot recognized that "[j]ustice does not require Respondent to 'prove a negative' in the way Rep. Greene would have to do to 'prove' she did not aid or engage in an insurrection." *Id.* at 777.

Challengers filed a notice to take Rep. Greene's deposition and a notice to produce documents. Admin. R. at 130; 139. ALJ Beaudrot denied both of these motions after briefing by the parties. Admin. R. at 553; 571.

On April 22, 2022, ALJ Beaudrot held a nearly eight-hour hearing on this matter. Admin. R. at 1608-1890 (Hearing Transcript). As part of the OSAH hearing, Rep. Greene testified for several hours. *Id.* Counsel for both Challengers and for Rep. Greene submitted post-hearing briefs to ALJ Beaudrot on April 29, 2022. Admin. R. at 1206; 1279. In addition, Challengers filed a motion to

supplement the record, Admin. R. at 1137, which Rep. Greene opposed. Admin. R. at 1155.

On May 6, 2022, ALJ Beaudrot issued his Initial Decision, which held that Challengers failed to prove their case by a preponderance of the evidence. Admin. R. at 2122. ALJ Beaudrot found that Rep. Greene did not "engage" in the Invasion,[2] either as a direct participant or in its planning and execution, after taking her oath on January 3, 2021. Admin. R. at 2121. Sec. Raffensperger issued a Final Decision on May 6, 2022, which affirmed and adopted ALJ Beaudrot's Initial Decision and held that Rep. Greene was qualified to be a candidate for congressional office.

Rep. Greene won the Republican primary election, held on May 24, 2022, for her congressional district, receiving 69.54% of the votes cast.[3]

Challengers filed a petition for review of Sec. Raffensperger's Final Decision on May 16, 2022, with the Fulton County Superior Court. After briefing

---

[2] Because ALJ Beaudrot found that Rep. Greene did not "engage" in the events of January 6, 2021, he did not reach the question of whether the unlawful activity that occurred that day constituted an "insurrection" within the meaning of the Fourteenth Amendment, so he called it an "Invasion." Admin. R. at 2121.

[3] https://results.enr.clarityelections.com/GA/113667/web.285569/#/summary?category=C_1&subcategory=C_1_2

by all parties and oral argument, Judge Brasher affirmed Sec. Raffensperger's Final Decision on July 25, 2022. Judge Brasher addressed both of Challengers' claims of reversible error in this Final Decision.

Judge Brasher held that OSAH Rule 616-1-2.07(2) permitted ALJ Beaudrot to shift the burden of proof, recognizing that this Court did not address a § 3 Challenge in *Haynes*. Final Order at 3-4. Further, Judge Brasher found that even if ALJ Beaudrot improperly shifted the burden of proof, Rep. Greene's sworn testimony that she did not engage in an insurrection, but rather hoped to encourage peaceful protest was "sufficient to meet any burden of proof placed" on her. *Id.* at 4. Therefore, Judge Brasher held that Challengers' substantial rights had not been prejudiced. *Id.*

Judge Brasher also rejected Challengers' allegations that their substantial rights had been harmed when ALJ Beaudrot quashed their notice to produce. *Id.* at 5. First, Judge Brasher noted that the OSAH is not subject to the Georgia Civil Practice Act and its provisions regarding discovery. *Id.* Further, Judge Brasher held that Challengers' notice to produce was equivalent to a notice to produce evidence in O.C.G.A. § 24-13-27, not to pre-hearing discovery. For those reasons, Judge Brasher found that ALJ Beaudrot did not err when he quashed the notice to produce.

Standard of Review

An application for leave to appeal a final judgment in cases subject to appeal under O.C.G.A. § 5-6-35 shall be granted when:

(1) Reversible error appears to exist;
(2) The establishment of a precedent is desirable; or
(3) Further development of the common law is desirable.

Ga. Sup. Ct. R. 34.

Under the Challenge Statute, this Court "shall not substitute its judgment for that of the Secretary of State as to the weight of the evidence on questions of fact" and may only "reverse or modify the decision" of Sec. Raffensperger:

> if substantial rights of the [Challengers] have been prejudiced because the findings, inferences, conclusions, or decisions of the Secretary of State are:
> (1) In violation of the Constitution or laws of this state;
> (2) In excess of the statutory authority of the Secretary of State;
> (3) Made upon unlawful procedures;
> (4) Affected by other error of law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.

O.C.G.A. § 21-2-5(e).

Challengers cannot show that reversible error appears to exist, or that establishment of precedent or development of common law is desirable. Therefore, this Court should deny Challengers' Application.

Argument

I. ALJ Beaudrot properly shifted the burden from Rep. Greene to Challengers.

Challengers' claim that "[ALJ Beaudrot] improperly declined to follow this Court's unequivocal holding in *Haynes v. Wells*, 273 Ga. 106, 108-09 (2000)." Application at 11. Challengers ignore the fundamental differences between the type of Challenge this Court considered in *Haynes* and the § 3 Challenge at issue here.

In the case of a Challenge based upon residency or age, the proof a candidate must provide is relatively straightforward. Documents showing a change of address or date of birth could easily be provided by the candidate. The same is not true for a Challenge, as here, based on the "disqualification clause" of the Fourteenth Amendment. If the burden was on the Candidate, the Candidate would be required to prove by a preponderance of evidence that she didn't do something (e.g., prove that she didn't engage in "insurrection"). Such burden shifting is grossly unfair and unconstitutional under Due Process Clause of the Fourteenth Amendment.

When processes implicate free speech, "the operation and effect of the method by which speech is sought to be restrained must be subjected to close

analysis and critical judgment in the light of the particular circumstances to which it is applied." *Speiser v. Randall*, 357 U.S. 513, 520 (1958) (internal citations omitted). Thus, the United States Supreme Court held that the more important the rights at stake—like those implicating the First Amendment—the more important must be the procedural safeguards surrounding those rights. *Id.* at 520-21. When, throughout the judicial and administrative proceedings, the burden lies on the individual to prove she "falls outside" of the statutory framework at issue, such burden shifting violates the Due Process Clause of the Fourteenth Amendment. *Id.* at 522, 525-26. When the statutory framework violates due process, the person subject to such a statute is "not obliged to take the first step in such a procedure." *Id.* at 529.

Since appellate courts apply a deferential standard to the facts to a Challenge Appeal, O.C.G.A. § 21-2-5, it would further violate the Candidate's due process rights by deferring to factual conclusions arrived at by a process that itself violates those same rights. Thus, if the Challenge Statute required Rep. Greene to bear the burden of proving that she is not disqualified, the Challenge Statute would be unconstitutional as applied to a § 3 Challenge.

Accordingly, on April 11, Rep. Greene filed a Motion to Set Burden of Proof with Petitioners in the OSAH proceeding, because "[j]ustice" requires it

here, OSAH R. §616-1-2-.07(2), and because doing otherwise would be unconstitutional. Admin. R. at 437-468. Rep. Greene attached a transcript of the Secretary of State's argument in concurrent federal litigation, confirming that ALJ Beaudrot could shift the burden of proof under OSAH Rules. Admin. R. at 706-17. Challengers filed an Opposition. Admin. R. at 718. On April 13, ALJ Beaudrot granted Rep. Greene's motion and placed the burden on Challengers to prove their § 3 Challenge . Admin. R. at 755-56. In his Order, ALJ Beaudrot succinctly stated that "[j]ustice does not require Respondent to 'prove a negative' and that justice under a § 3 Challenge required the Challengers to have the burden of proof." Admin. R. at 755-56.

In the concurrent federal litigation on this matter, the district court discussed the due-process requirement articulated in *Speiser*, *see* Admin. R. at 883; *Greene v. Raffensperger*, 22-CV-1294-AT, 2022 WL 1136729, at *16-17 (N.D. Ga. Apr. 18, 2022), but noted that ALJ Beaudrot had already shifted the burden to the Challengers. While the district court's discussion of the constitutionality of the burden-shifting issue was thus dictum, it suggested a distinction of *Speiser*, 357 U.S. 513, on two erroneous grounds paralleling Challengers' arguments. Since the constitutionality of placing the burden of proof on Rep. Greene in a § 3 Challenge

is directly implicated here, the erroneous distinctions of *Speiser* are important to consider.

First, on factual grounds, the district court sought to diminish Rep. Greene's interest in running for office as not being a fundamental right or involving criminal jeopardy. Admin. R. at 82-83; 2022 WL 1136729, at *18. But such a factual distinction is meaningless as it does not take into account the seriousness of the burden that *does* exist. The district court quoted *Speiser's* requirements, "[w]hen the State undertakes to restrain unlawful advocacy it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights." Admin. R. at 881; 2022 WL 1136729, at *16-17 (quoting *Speiser*, 357 U.S. at 520-21). And there are constitutionally protected rights at issue here.

The core underlying issue is whether First Amendment protected speech by Rep. Greene can be used to make her culpable for the wrongful acts of certain other individuals who unlawfully entered the Capitol on January 6, 2021. Doing so would violate the holding in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1964), that persons engaged in First Amendment protected activity may not be punished for the actions of persons engaged in unlawful activity despite some association. *NAACP* involved First Amendment protected speech and association,

both of which are fundamental rights—being a candidate is also protected by free-speech and free-association rights under the First Amendment, both for Rep. Greene and for those who want to associate with her and hear her speech and vote for her for office. Their right to vote is fundamental. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964). So as in *Speiser*, the government must afford due process sufficient for the weighty constitutional rights at issue and thus may not place the burden of proof on Rep. Greene.

Second, the *Greene* district court cited Challengers' own suggestion that all Rep. Greene had to do to shift the burden back to Challengers would be to file "an affidavit stating under oath that she did not engage in an insurrection or addressing the allegations in the challenge that are focused on her own activities." Admin. R. at 883; 2022 WL 1136729, at *17. Although Challengers' Application seems to back away from their assertion they made to the district court about the adequacy of an affidavit, Judge Brasher agreed with this adequacy. He noted that "the record is replete with Representative Greene's sworn testimony that she was not engaged in an insurrection, but rather that she hoped to encourage peaceful protest at the capitol on January 6th." Final Order at 4. Per this approach, the burden also was properly moved to Challengers.

Justice and due process mandates require that Rep. Greene not be required to prove the core issue, i.e., that she did not engage in an insurrection. So, the superior court did not commit reversible error by affirming the burden shifting that took place at the OSAH proceeding. By denying Challengers' Application, this Court will make it clear that burden shifting under a § 3 Challenge is proper and properly distinguishable from this Court's holding in *Haynes*.

II. ALJ Beaudrot did not err by quashing Challenger's notice to produce.

Challengers claim ALJ Beaudrot improperly quashed their notice to produce "on the sole ground that it was 'impracticable and unrealistic to require Respondent to deliver a significant volume of material prior to the scheduled hearing date,'" Application at 16. Challengers' claim is without merit. In addition, this Court should affirm the ALJ's ruling on any basis found in the record, regardless of whether it was the basis of the ALJ's ruling.

A. Petitioners misstate the basis of the ALJ's ruling.

First, ALJ Beaudrot's Order does not rely, as Challengers suggest, Application at 15-16, on OSAH Rule 616-1-2-.19(2)(c)'s provisions to deny their Notice for Production—though on its face the Rule might well support denial. Under OSAH Rule 616-1-2-.38, "[d]iscovery shall not be available in any proceeding before an Administrative Law Judge except to the extent specifically

authorized by law." The Order describes, analyzes, and expressly relies on the limits on discovery and on the Notices to Produce and Subpoenas that are provided by OSAH Rule 616-1-2-.19. The Administrative Rules of Procedure are statutorily limited and are not the equivalent of or in parity with the Georgia Civil Practice Act, applicable to Georgia courts of record. As ALJ Beaudrot pointed out, in OSAH proceedings, Notices to Produce "do not serve the same function as they do under the Georgia Civil Practice Act and its extensive provisions pertaining to discovery." Admin. R. at 571, n. 1. The court in *Ga. State Bd. of Dental Exam'rs v. Daniels* put it more plainly: "Appellant/defendant contends that the Civil Practice Act is not applicable to proceedings under the Georgia Administrative Procedure Act. We agree." 137 Ga. App. 706, 709 (1976).

"The intent of the legislature [in creating the Georgia APA] was to provide an administrative procedure to resolve conflicts within the authority vested in administrative agencies and boards by statute *without resort to courts of record in the first instance.*" *Id*. at 709 (emphasis added). Proceedings under the APA are necessarily and expressly different in both substance and procedure from the proceedings in courts of record. Of particular importance here, as ALJ Beaudrot explained, "[d]iscovery in OSAH proceedings is the exception, and not the rule." Admin. R. at 571. The purpose of Notices to Produce in administrative

proceedings is to "ensure that documents which are in the possession of a party, and which will be used at the hearing by the requesting party, will be provided at the hearing. . . . not . . . as the basis for pre-hearing discovery." Admin. R. at 571-72. *See also Fulton County Bd. of Assessors v. Saks Fifth Avenue, Inc.*, 248 Ga. App. 836, 838-39, 547 S.E.2d 620 (2001) (noting that discovery under GCPA does not apply to proceedings under the Administrative Procedure Act, and did not authorize a county board of assessors to "require the wholesale production of copies of a taxpayer's documents for the purpose of an off-premise fishing expedition into the affairs of the taxpayer.").

In short, *given that Petitioners' Notice to Produce was statutorily limited to ensuring that documents be provided at an administrative hearing and not a vehicle of discovery*, ALJ Beaudrot concluded that using it to make "extensive pre-hearing discovery" requests—to locate and produce 24 categories of documents—within seven days—was "impracticable and unrealistic." Admin. R. at 572. On this basis, the superior court agreed that ALJ Beaudrot did not err when he quashed Challengers' notice to produce. Simply put, the Notice to Produce exceeded the limits placed on it by Georgia law, and quashing it was proper—not reversible error.

B. Quashing Challengers' notice to produce was not prejudicial.

At bottom, Challengers claim the fact that they weren't allowed the discovery afforded parties to proceedings before Georgia courts of record prejudiced their ability to meet their burden of proof. Application at 17-18. This argument fails because, as established *supra*, the civil procedure discovery rules are, as a matter of law, not applicable to the APA. But Challengers' claims on the prejudicial effect of this decision are also without merit.

First and most important, the Court must assume that the legislature knew that the limits on notices to produce in the APA context would result in these very sorts of limitations in administrative proceedings. Again, "the intent of the legislature [in creating the Georgia APA] was to provide an administrative procedure to resolve conflicts within the authority vested in administrative agencies and boards by statute *without resort to courts of record in the first instance.*" *Ga. State Bd. of Dental Exam'rs*, 137 Ga. App. at 709 (emphasis added). The legislature *intended* that administrative agencies would have more streamlined and less intrusive proceedings. Limiting notices to produce to exclude extended and intrusive searches for documents is manifestly in keeping with the intent of the legislature in creating the APA and does not make erroneous the ruling on burden-shifting.

And Challengers exaggerate the practical effect of ALJ Beaudrot's decision to quash their Notice to Produce on their case. ALJ Beaudrot ruled against Rep. Greene's motion to quash Petitioner's Subpoena, Admin. R. at 754, and on April 22, 2022, he conducted an adversarial hearing that went on for nearly seven hours at which Petitioners offered over 120 Exhibits, produced their own witness, and questioned Rep. Greene. Challengers could have called other witnesses to provide countervailing evidence if it existed (it doesn't). They did not do so. Rep. Greene is not responsible for Challengers' failed litigation strategy, nor is ALJ Beaudrot or the superior court. The actual conduct and course of the hearing—the central component of administrative proceedings—belies Challengers' claim that quashing their Notice to Produce deprived them of evidence or substantially disadvantaged them in making their case.

C. The Order should be upheld on the basis of the objections not considered by the ALJ in denying the Notice to Produce.

ALJ Beaudrot did not consider "the numerous other issues and objections raised in Respondent's Objection."[4] Admin. R. at 572. And "[u]nder the right for any reason rule, an appellate court may affirm a judgment if it is correct for any

[4] Rep. Greene's Objection to Notice to Produce and Motion to Strike and Incorporated Brief in Support (eFiled April 4, 2022) is at Admin. R. at 509 and provides further reasons to reject Challengers' arguments.

reason, even if that reason is different than the reason upon which the trial court relied." *Boca Petroco, Inc. v. Petroleum Realty II, LLC*, 292 Ga. App. 833, 839, 666 S.E.2d 12 (2008), *aff'd*, 285 Ga. 487, 678 S.E.2d 330 (2009). Accordingly, if this Court disagrees with ALJ Beaudrot's position on OSAH Rules and the superior court's affirmation of the same, it should affirm denial of the Notice of Production on the bases provided in Rep. Greene's Objection. There, Rep. Greene objected generally and specifically as follows: the discovery is unjustified, as the proceeding as a whole violates constitutional and federal law provisions, Admin. R. at 514-41; some of the material sought is absolutely privileged under the Speech and Debate Clause of the U.S. Constitution, Admin. R. at 541-43; the requests were overbroad and unduly burdensome as to timing and instructions, Admin. R. at 543-44; the requests invaded attorney client privilege and work-product doctrine, Admin. R. at 545-47; the Notice incorporated a time frame that swept in documents with legally immaterial information, Admin. R. at 547-48, and; the Notice was procedurally improper, Admin. R. at 548. If this Court decides that the Notice was wrongly denied on the basis provided in the Order, it must consider Rep. Greene's other objections and affirm it if it is correct for any other reason.

Because neither ALJ Beaudrot committed reversible error by shifting the burden of proof to Challengers or by quashing their Notice to Produce, this Court should deny Challengers' Application for a discretionary appeal.

III. The Challenge Statute and the administrative proceeding of Challengers' claim violated the U.S. Constitution and federal law.

This Court should deny Challengers appeal because Rep. Greene has federal and constitutional arguments that similarly foreclose Challengers' claims.

If this Court grants Challengers' Application, Rep. Greene has other defenses based in constitutional and federal law that this Court should consider. Rep. Greene has preserved and briefed these constitutional and federal law defenses in both the OSAH proceeding and in the superior court and incorporates them by reference here. Rep. Greene summarizes these defenses for the Court's convenience here.

A. Challengers had no private cause of action to enforce § 3 against Rep. Greene.

For Challengers to mount a § 3 candidacy challenge, Congress must provide a private right of action. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326, 135 S. Ct. 1378, 191 L. Ed. 2d 471 (2015) (rejecting mandatory private enforcement of the Supremacy Clause). This limitation prevents an individual from bringing a claim, as Challengers attempt to do, that attempts to enforce this

constitutional provision against Rep. Greene.[5]

Congress, however, has not created a private right of action to allow a citizen to enforce § 3 by having a state declare that a candidate is "not qualified" to hold public office. Admin. R. at 1210-13; *Hansen v. Finchem*, Case No. CV 2022-004321, slip op. at ¶¶ 7-21 (Superior Court of Arizona, Maricopa County April 21, 2022),[6] (finding procedures necessary for individualized determinations under § 3 "can only be provided for by congress," which it had not done; that only Congress can enforce, through legislation, § 3; and that a recent bill introduced providing for cause of action under § 3 would have been unnecessary if it already existed).

Therefore, no voter in Georgia has a private cause of action to seek to remove Rep. Greene from the ballot because she is disqualified under § 3, and ipso facto, Challengers can have no right conferred by state law to litigate their § 3

---

[5] This requirement does not prevent a court from providing equitable relief to prevent *state officials* from violating federal law. *Armstrong*, 575 U.S. at 327. So, the lack of a private right of action to enforce a constitutional provision does not prevent a citizen from seeking injunctive relief *from* a state's process that violates her rights under a provision of federal law or the U.S. Constitution, as Rep. Greene has done here in Count IV of her federal-court Complaint in *Greene*, No. 1:22-CV-1294-AT, 2022 WL 1136729.

[6] The *Hansen* slip opinion is included in the record, Admin. R. at 1206, as Exhibit A to Rep. Greene's Post-hearing Brief.

candidacy challenge.

B. Applying the § 3 disability to Rep. Greene, to challenge her candidacy for Congress violates § 3 and federal law.

Challengers brought their challenge under § 3, claiming that Rep. Greene is disqualified as a candidate since she is allegedly disqualified under § 3 from taking office. Section Three of the Fourteenth Amendment reads:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, *who, having previously taken an oath, as a member of Congress,* or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, *shall have engaged* in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

U.S. Const. amend. XIV, § 3 (emphasis added).

1. Rep. Greene's "disqualification" under § 3 cannot be determined prior to January 3, 2023.

Georgia law permits removal of candidates from the *ballot* based on prospective ineligibility to *take office*. But § 3 bars only office-holding, and that disability may be removed by Congress at *any time* before Rep. Greene is sworn in on January 3, 2023. Rep. Greene cannot be removed as a candidate now since it cannot be determined now that she will be ineligible to take office then.

Not only is § 3's disability aimed at holding *office* (who have "previously

taken an oath") and *office-holding* ("[n]o person shall be a . . . Representative"), but Congress may remove the disability at any time before the Congressman-elect presents herself to take the oath of office. Statutory construction requires giving effect to each word of a statute. A construction applying § 3 to a candidacy, way before it can be determined that the candidate is qualified to take office, renders its second sentence—one of only two—a nullity.

Thus, under the plain language of § 3, it cannot be determined at this time whether Rep. Greene will be disqualified under § 3 when she presents herself to take the oath of office on January 3, 2023. Thus, she is not disqualified now and cannot be removed from the ballot.

2. The Amnesty Act of 1872 removed any potential disability under § 3 from Rep. Greene.

The disqualification attempt by Challengers is based on § 3 barring one from assuming office (not *candidates*), who "having previously taken an oath . . . to support the Constitution . . . shall have engaged in insurrection or rebellion against the same . . . . But Congress may . . . remove such [§ 3] disability." Congress did just that when it passed The Amnesty Act of 1872 by the requisite two-thirds of both Houses of Congress. It reads,

> all political disabilities imposed by the third section of the fourteenth amendment to the Constitution of the United States are hereby removed

> from all persons whomsoever, except Senators and Representatives of the thirty-sixth and thirty-seventh Congresses, officers in the judicial, military, and naval service of the United States, heads of departments, and foreign ministers of the United States.

United States Statutes at Large, 42 Cong. Ch. 194, May 22, 1872, 17 Stat. 142 ("**1872 Act**"). By the plain language of this Act, the political disability was removed from any Representative other than those of the two enumerated Congresses. Rep. Greene is a Member of the 117th Session of Congress, so the 1872 Act removed any disability under § 3 from Rep. Greene.

Section 3 does not specify that Congress only has the power to remove past disabilities; it specifies Congress has the power to remove "such disability." Since "such disability" includes disability of persons who "shall have engaged in" insurrection, the disability under § 3 has both prospective and retroactive effect, as would any removal of § 3's disability. Thus, the 1872 Act removes any disability under § 3 from Rep. Greene.

The plain language of the 1872 Act removes this political consequence from any Representative other than those who served during the 36th and 37th Congresses. Rep. Greene is a Member of the 117th Session of Congress, so the 1872 Act removed the ability to apply § 3 to her. Since § 3 doesn't apply to her (or any Member holding office after the 37th Congress), the application of § 3 to her

is prohibited by federal law.

Accordingly, § 3 cannot be employed to disqualify Rep. Greene's candidacy and, in any event, the 1872 Act removed any disability from her.

C. The Challenge Statute's provision triggering a government investigation based solely on a challenger's "belief" that Rep. Greene is unqualified, and the subsequent administrative procedure, violated her First Amendment right to run for political office.

The Challenge Statute is effectively a ballot access requirement. "[C]andidate eligibility requirements implicate basic constitutional rights under the First and Fourteenth Amendments." *Green Party of Georgia v. Kemp,* 171 F. Supp. 3d 1340, 1351 (N.D. Ga. 2016), *aff'd,* 674 F. App'x 974 (11th Cir. 2017) (citing *Anderson v. Celebrezze,* 460 U.S. 780, 786 (1983)).

The Challenge Statute is a "candidate eligibility requirement" because it is, by design and effect, a barrier to the ballot that must be overcome by the candidate. It allows any elector to file a written complaint "giving the reasons why the elector believes the candidate is not qualified to seek or hold the public office [sought]," O.C.G.A. § 21-2-5(b), which triggers an administrative proceeding under an ALJ to conduct what amounts to a trial. O.C.G.A. §§ 50-13-13(a)(1)-(7).

The "character and magnitude" of the injury imposed on First Amendment rights, *Cowen v. Georgia Secretary of State,* 960 F.3d 1339, 1342 (11th Cir.

2020), by the Challenge Statute is significant because it *requires* the Secretary of State to refer a complaint for an administrative hearing. *See, e.g., Farrar v. Obama,* No.1215136-60-Malihi at *2 (Ga. Off. State Admin. Hearings (Feb. 3, 2012)). The complaint *must* be referred for hearing—without any consideration or requirement of any standard of proof whatsoever since it is based only on the voters' "belief." The Challenge Statute, by operation of law, erects an *ad hoc* "candidate eligibility requirement" that the candidate must clear at the *state* level to be "eligible" for the ballot to election to *federal* office.

The procedurally standardless Challenge Statute is inherently insufficient to justify its infringement on First Amendment and Due Process rights, and the substantial injury it inflicts is not justified by any cognizable interest of the State.

D. The Challenge Statute usurps the U.S. House of Representatives' power to make independent, final judgment on the qualifications of its members, so the state enforcement of § 3 violates Article I, § 5 of the U.S. Constitution.

> Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

U.S. Const. art. I, § 5, cl. 1.

Since the beginning of the Republic, the House has defended its right to be

the sole authority on the qualifications of its members. In 1807 when a question of eligibility arose about an elected Member's residence requirements under a Maryland statute that added qualifications in addition to those provided in Article I of the Constitution, the question was referred to the House Committee on Elections. *Powell v. McCormack,* 395 U.S. 486, 542 (1969) (citing 17 Annals of Cong. 871 (1807)). "The committee proceeded to examine the Constitution, with relation to the case submitted to them, and [found] that qualifications of members are therein determined, without reserving any authority to the State Legislatures to change, add to, or diminish those qualifications; and that, by that instrument, Congress is constituted the sole judge of the qualifications prescribed by it, and are obliged to decide agreeably to the Constitutional rules . . . ." *Powell,* 395 U.S. at 542 *(*quoting 17 Annals of Cong. 871 (1807)). The full House then voted to seat the Member. *Id.* at 543.

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

consistent with the Supreme Court's logic in *Roudebush v. Hartke.* 405 U.S. 15 (1972). *Roudebush* held that a recount doesn't usurp the Senate's function because it doesn't "frustrate the Senate's ability to make an independent final judgment." *Id.* at 25-26 (cleaned up). Here, the Challenge Statute permits the State of Georgia to make its own independent evaluation of whether a Candidate is constitutionally qualified to be a Member of the U.S. House of Representatives. O.C.G.A. § 21-2-5.

A fundamental principle of our representative democracy is, in Hamilton's words, "that the people should choose whom they please to govern them." 2 Elliot's Debates 257. "Both the intention of the Framers, to the extent it can be determined, and an examination of the basic principles of our democratic system persuade us that the Constitution does not vest in the Congress a discretionary power to deny membership by a majority vote." *Powell,* 395 U.S. at 548.

Surely, if the elected members of Congress can only prevent a member from being seated with two thirds vote, a state cannot adopt a law that allows a candidate for federal office to be stricken from the ballot administratively. Thus, the Challenge Statute usurps the U.S. House of Representatives' power to make an independent, final judgment on the qualifications of its Members, and so it violates Article 1, § 5 of the U.S. Constitution.

Conclusion

For the foregoing reasons, this Court should deny Challengers' Application for a discretionary appeal. If this Court grants Challengers' Application, it should nonetheless affirm the superior court's decision.

Dated: August 26, 2022

/s/ David F. Guldenschuh
David F. Guldenschuh
GA Bar No. 315175
David F. Guldenschuh P.C.
P.O. Box 3
Rome, Georgia 30162-0333
Telephone: 706-295-0333
Email: dfg@guldenschuhlaw.com
Local Counsel for Intervenor Respondent Marjorie Taylor Greene

Respectfully Submitted,

/s/ James Bopp, Jr.
James Bopp, Jr., Ind. Bar No. 2838-84*
Melena S. Siebert, Ind. Bar No. 35061-15*
THE BOPP LAW FIRM, PC
The National Building
1 South 6th Street
Terre Haute, Indiana 47807
Telephone: (812) 232-2434
Facsimile: (812) 235-3685
jboppjr@aol.com
msiebert@bopplaw.com
* Admitted *pro hac vice*
Attorneys for Intervenor-Respondent Marjorie Taylor Greene

Certificate of Service

I hereby certify that on August 26, 2022, I served the foregoing document by electronic mail on the following attorneys of record, all of whom have consented to electronic service:

Charlene S. McGowan: cmcgowan@law.ga.gov

Elizabeth Vaughan: evaughan@law.ga.gov

Bryan L. Sells: bryan@bryansellslaw.com

James Bopp, Jr.: jboppjr@aol.com

Melena S. Siebert: msiebert@bopplaw.com

/s/ David F. Guldenschuh
David F. Guldenschuh
GA Bar No. 315175
David F. Guldenschuh P.C.
P.O. Box 3
Rome, Georgia 30162-0333
Telephone: 706-295-0333
Email: dfg@guldenschuhlaw.com
Local Counsel for Intervenor Respondent Marjorie Taylor Greene