Office of State Administrative Hearings
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BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

DAVID ROWAN, DONALD GUYATT, ROBERT RASBURY RUTH DEMETER, DANIEL COOPER, Petitioners, v. MARJORIE TAYLOR GREENE, Respondent.	: : : : : : : : : : :	DOCKET NUMBER: 2222582 2222582-OSAH-SECSTATE-CE-57-Beaudrot Agency Reference No.: 2222582

PETITIONERS' RESPONSE IN OPPOSITION TO THE RESPONDENT'S MOTION TO DISMISS

Petitioners David Rowan, Donald Guyatt, Robert Rasbury, Ruth Demeter, And Daniel Cooper, respectfully submit this response in opposition to Respondent Marjorie Taylor Greene's motion to dismiss or alternative motion for stay of proceedings, filed April 4, 2002. This Court should deny Greene's motion for the reasons discussed below.

BACKGROUND

This is an election contest. The Respondent is Marjorie Taylor Greene, the incumbent member of the United States House of Representatives from Georgia's Fourteenth Congressional District. The Petitioners are five of her constituents.

Georgia law requires every candidate for state or federal office to meet the constitutional and statutory requirements for holding the office they seek and provides for challenges to a candidate's qualifications by the Secretary of State or eligible voters. O.C.G.A. § 21-2-5. Greene is running for re-election, and the Petitioners filed a timely challenge to Greene's qualifications with the Secretary of State. The Petitioners allege that

Greene is disqualified from holding office by Section 3 of the Fourteenth Amendment to the United States Constitution. That provision, known as the Disqualification Clause, provides as follows:

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

U.S. Const. amend. XIV, § 3. The Petitioners allege that the Disqualification Clause makes Greene ineligible for the ballot because of Greene's involvement in the insurrection of January 6, 2021. (Compl. ¶ 1.)

As required by Georgia law, Secretary of State Brad Raffensperger referred the Petitioners' complaint to this Court for a hearing. O.C.G.A. § 21-2-5(b). That hearing is currently scheduled for Wednesday, April 13, 2022.

On April 4, Greene filed a motion to dismiss the Petitioners' complaint or, in the alternative, to stay these proceedings pending the outcome of a suit that she filed in federal court to enjoin these proceedings. Greene's motion raises ten arguments. First, she argues that Georgia's challenge statute puts an unjustified burden on her First Amendment and Fourteenth Amendment right to run for office. Second, she argues that Georgia's challenge procedures violate due process. Third, she argues that Georgia's challenge statute violates Article I, Section 5, Clause 1 of the United States Constitution, which empowers the House to judge the qualifications of its own members. Fourth, she argues that the Amnesty Act of 1872 granted her prospective amnesty under the Disqualification Clause for the insurrection of January 6, 2021. Fifth, she argues that the events of January 6 were not an insurrection.

Sixth, Greene argues that, even if they were, she did not engage in those events. Seventh, she argues that any statements that she made before she took the oath of office are irrelevant. Eighth, Greene argues that protected First Amendment activity and hearsay cannot be used to establish that she engaged in an insurrection. Ninth, she says that her alleged involvement in the insurrection is privileged under the Speech and Debate Clause of the United States Constitution. Tenth, Greene argues that only the House can determine whether she is qualified to hold office.

None of those arguments has any merit.

LEGAL STANDARDS

Motion to Dismiss: Under O.C.G.A. § 50-13-13(a)(6), an Administrative Law Judge may "dispose of motions to dismiss for lack of agency jurisdiction over the subject matter or parties or for any other ground." To grant a motion to dismiss, a court must find that "the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof." *Harrell v. City of Griffin*, 346 Ga. App. 635, 636 (2018). Pleadings must be construed in "the light most favorable to the plaintiff with any doubts resolved in the plaintiff's favor." *Id.*

Motion to Stay: "The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Austin v. Nagareddy*, 344 Ga. App. 636, 638 (2018) (quoting *Bloomfield v. Liggett & Myers*, 230 Ga. 484, 485 (1973) (Citations and punctuation omitted.)

ARGUMENT

1. First and Fourteenth Amendments

To determine whether Georgia's challenge statute violates the First and Fourteenth Amendments to the United States Constitution, this Court must apply the balancing test set forth in *Anderson v. Celebrezze*:

> First, a court must evaluate the character and magnitude of the asserted injury to rights protected by the First and Fourteenth Amendments. Second, it must identify the interests advanced by the State as justifications for the burdens imposed by the rules. Third, it must evaluate the legitimacy and strength of each asserted state interest and determine the extent to which those interests necessitate the burdening of the plaintiffs' rights.

Bergland v. Harris, 767 F.2d 1551, 1553-54 (11th Cir. 1985) (paraphrasing *Anderson*, 460 U.S. 780, 789 (1983); *accord*. *Cowen v. Ga. Sec'y of State*, 22 F. 4th 1227, 1231 (11th Cir. 2022).

Under the *Anderson* test, the level of scrutiny varies on a sliding scale with the extent of the asserted injury. When, at the low end of the scale, the law "imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson*, 460 U.S. at 788, 788-89 n.9). But when the law places "severe" burdens on the rights of political parties, candidates, or voters, "the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Id*. at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1982)).

Greene argues that Georgia's challenge statute imposes a severe burden on her right to run for office "because it requires the Secretary of State to refer a complaint for an administrative hearing … without any consideration or requirement of any standard of proof whatsoever." (Mot. at 17.) In other words, the challenge statute imposes a severe burden

because it requires her to defend her eligibility even though there has been no showing of probable cause that she is ineligible.

Greene offers no evidence to support her contention that the challenge process is burdensome, nor does she cite any cases that have assessed the burden of similar statutes. On its face, the challenge process is not unduly burdensome; it consists of a streamlined administrative hearing under Georgia's ordinary rules of administrative procedure. *See* O.C.G.A. § 21-2-5(b). The challenge process also is much less burdensome than other candidate eligibility requirements that courts have determined do not impose severe burdens. In *Cowan v. Georgia Secretary of State*, for example, the Eleventh Circuit recently held as a matter of law that Georgia's ballot-access requirements for independent and third-party candidates—which require such candidates for United States Representative to gather tens of thousands of signatures—do not impose severe burdens. *Cowen*, 22 F. 4th at 1233.

Because Greene has not established that the burden imposed by Georgia's challenge statute is severe, the state's "important regulatory interests" will be sufficient to justify it. *Anderson*, 460 U.S. at 788. "A State indisputably has a compelling interest in preserving the integrity of its election process." *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989). A State also has compelling interests in "maintaining the orderly administration of elections" and "avoiding confusion, deception, and even frustration of the democratic process." *Cowan*, 22 F. 4th. at 1234; *see also Lindsay v. Bowen*, 750 F.3d 1061, 1063-64 (9th Cir. 2014) (holding that various state interests justify the exclusion of an ineligible candidate from a presidential ballot); *Hassan v. Colorado*, 495 F. App'x 947, 947-48 (10th Cir. 2012) (Gorsuch, J.) ("a state's legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office"). Because Georgia's challenge

statute is a "rational way" to satisfy those interests, *Cowen*, 22 F. 4th at 1234, Greene has not established "with certainty" that the Petitioners' challenge to her qualifications must fail. *Harrell*, 346 Ga. App. at 636.

2. Due Process

Greene's due process claim under the Fourteenth Amendment fares no better. Under the law of the Eleventh Circuit, a procedural due process claim requires proof of three elements: (1) a deprivation of a constitutionally protected liberty or property interest; (2) state action; and (3) constitutionally inadequate process. *Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003).

Greene claims that the challenge statute provides constitutionally inadequate process because it requires her "to affirmatively establish [her] eligibility for office." (Mot. at 10 (quoting *Haynes v. Wells*, 538 S.E. 2d 430, 432-33 (Ga. 2000)). It is unconstitutional, in other words, for a state to put the burden on the candidate rather than the challenger. But no court has ever so held.

To determine what process is due, courts turn to the test from *Mathews v. Eldridge*, which requires the balancing of several factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

J.R. v. Hansen, 736 F.3d 959, 966 (11th Cir. 2013) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

Here, Greene does not identify the private interest that will be affected. Presumably, it is her interest in running for office.

The risk of an erroneous deprivation of that right through the challenge procedures is small. All the information needed to establish her eligibility for office is within Greene's control. She fails to explain why she could not meet her burden through her own testimony or documents within her control. *See, e.g.*, O.C.G.A. § 21-2-153(e) (candidates for party nomination are required to establish their eligibility for office in the first instance by filing an affidavit). Nor does she explain why placing the burden on a challenger to prove her ineligibility for office is less likely to lead to error.

Finally, the government interests here are compelling. As discussed in the preceding section, the State has compelling interests in preserving the integrity of the electoral process; in maintaining the orderly administration of elections; and in avoiding confusion, deception, and even frustration of the democratic process. Allowing ineligible candidates onto the ballot would undermine those interests, and relieving candidates of their burden to establish eligibility would radically disrupt the candidate qualification process. As a practical matter, it would force already-overworked election officials to confirm the qualifications of hundreds of candidates per election cycle without easy access to the information necessary to do that.

Under these circumstances, Greene has not established that Georgia's challenge process is constitutionally inadequate. She relies on the Supreme Court's decision in *Speiser v. Randall*, 357 U.S. 513 (1953), for the proposition that burden-shifting is unconstitutional whenever state processes "implicate free speech" (Mot. at 10), but Greene reads that case too broadly. In *Speiser*, the Court held that California had improperly shifted the burden of proof onto taxpayers to prove that they were not engaged in advocating the overthrow of the

federal government by unlawful means before being entitled to a tax exemption. In that decision, however, the Supreme Court recognized that

> [i]t is of course within the power of the State to regulate procedures under which its laws are carried out, *including the burden of producing evidence and the burden of persuasion*, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.

357 U.S. at 523 (cleaned up) (emphasis added). California's law, the Court concluded, did offend such fundamental principles of justice because it involved not only speech but also proof of criminal liability, where due process protection is strongest. *See id.* at 523-29. Later cases have observed that outside the context of the criminal law, "where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment." *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 58 (2005) (quoting *Lavine v. Milne*, 424 U.S. 577, 585 (1976)).

Here, requiring a candidate to establish her eligibility for office does not raise the same concerns as the California law at issue in *Speiser*. It offends no deeply rooted principle of justice. It is a sensible regulation designed to support the orderly administration of elections. The Disqualification Clause imposes no criminal or civil penalty but only an additional qualification for public office for individuals who have previously sworn to uphold the Constitution.

Greene therefore has not established "with certainty" that the Petitioners' challenge must fail. *Harrell*, 346 Ga. App. at 636.

3. Article I, Section 5, Clause 1

Greene's third argument involves Article I, Section 5, Clause 1 of the United States Constitution, which provides that "Each House shall be the Judge of the Elections, Returns

and Qualifications of its own Members." U.S. Const. art. I, § 5, cl. 1. Greene argues that this clause gives Congress "an exclusive role" in judging the qualifications of its own members and that states may not scrutinize the qualifications of house or senate candidates. (Mot. at 12.) But that is not the law.

The Constitution's Elections Clause gives the states broad authority to regulate congressional elections:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

U.S. Const. art. I, § 4, cl. 1; *see also Roudebush v. Hartke*, 405 U.S. 15, 25 (1972) (holding that Indiana's recount procedure was a valid exercise of state authority and did not usurp the Senate's power to judge elections). With this authority, states may enact "numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *U.S. Term Limits v. Thornton*, 514 U.S. 779, 834 (1995) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)). *See also Storer v. Brown*, 415 U.S. 724, 730 (1974) ("[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos is to accompany the democratic processes."); *United States v. Classic*, 313 U.S. 299, 311 (1941) ("[T]he states are given, and in fact exercise, a wide discretion in the formulation of a system for the choice by the people of representatives in Congress.").

In *Roudebush*, the Supreme Court upheld an Indiana recount procedure in a close Senate election as a valid exercise of the State's broad powers under the Elections Clause and rejected a claim that the process usurped a power that only the Senate could exercise. 405 U.S. at 24-26. The Court reasoned that "a recount can be said to 'usurp' the Senate's function

only if it frustrates the Senate's ability to make an independent final judgment." *Id.* at 25. Indiana's procedure did not frustrate the Senate's function, the Court explained, because the Senate remained "free to accept or reject the apparent winner in either count, and, if it so chooses, to conduct its own recount." *Id.* at 25-26 (footnotes omitted). As a result, the recount process did not violate Article 1, Section 5, Clause 1. *See id.* at 26.

So too here. The House remains free to accept or reject Georgia's determination of Greene's qualifications and can, if it so chooses, void the election and require a new one if it disagrees with a determination that Greene is disqualified. Georgia's challenge process therefore does not usurp the House's power any more than Indiana's recount process usurped the Senate's.

Greene nonetheless argues that Georgia violates the Constitution simply by making an "independent evaluation" of Greene's qualifications. (Mot. at 13.) She cites no case for that proposition, however, and such a rule would be absurd. Georgia would not, for example, violate the Constitution if it made an independent evaluation of a non-citizen or underage candidate's qualifications. Congress also has the final decision-making power in a similar setting—the counting of votes from the electoral college, *see* 3 U.S.C. § 15—and yet courts have held that States retain the ability to disqualify constitutionally ineligible presidential candidates under these circumstances. *See, e.g., Hassan*, 495 F. App'x at 948-49 (candidate not a natural-born citizen); *Lindsay*, 750 F.3d at 1065 (underage candidate).

Greene therefore has not established "with certainty" that this Court lacks jurisdiction to hear challenges to federal candidates. *Harrell*, 346 Ga. App. at 636.

4. The Amnesty Act of 1872

Greene next argues that, because the Amnesty Act of 1872 granted prospective amnesty to all future insurrectionists, the Disqualification Clause simply does not apply to her. (Mot. at 14-16.) But Greene's reading of both provisions is at odds with their text and history.

The Disqualification Clause provides in full as follows:

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

U.S. Const. amend. XIV, § 3 (emphasis added). Congress does not have the power to repeal the Disqualification Clause by statute, but it does have the power to "remove" a disqualification under this Clause.

Congress did just that by private legislation in the years immediately following the 1868 ratification of the Fourteenth Amendment. *See, e.g.*, Private Act of December 14, 1869, Ch. 1, 16 Stat. 607, 607-13. Then, in 1872, Congress adopted the Amnesty Act, which provides in part that

> all political disabilities imposed by the third section of the fourteenth article of amendments of the Constitution of the United States are hereby removed from all persons whomsoever, except Senators and Representatives of the thirty-sixth and thirty-seventh Congresses, officers in the judicial, military, and naval service of the United States, heads of departments, and foreign ministers of the United States.

Act of May 22, 1872, ch. 193, 17 Stat. 142 (1872) (the "Amnesty Act of 1872"). The issues here are whether Congress could, and did, remove disqualifications prospectively.

The word "remove" means to "take away or off"; "to get rid of"; or to "eliminate." *ACLU of Fla. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1219 (11th Cir. 2009); *Vurv Techn. LLC v. Kenexa Corp.*, 2009 WL 2171042, at * 5 (N.D. Ga. Jul. 20, 2009). It means to take away something already present. The plain meaning of the text of the Disqualification Clause therefore suggests that it does not empower Congress to grant prospective amnesty.

Congress confirmed this understanding of its power under the Disqualification Clause in 1919 when it rejected a similar argument, based on the Amnesty Act of 1898, from a Representative-elect who had been convicted of espionage. After acknowledging that the Clause authorizes Congress to remove disqualifications, the House concluded that "manifestly it could only remove disabilities incurred previously to the passage of the [1898 Amnesty] act, and Congress in the very nature of things would not have the power to remove any future disabilities." 6 Clarence Cannon, Cannon's Precedents of the House of Representatives of the United States, ch. 157, § 56-59 (1936).[1] The history of the Clause thus also suggests that it does not give Congress the power to grant prospective amnesty. Greene's interpretation, moreover, would mean that Congress effectively repealed the Disqualification Clause without the constitutionally required ratification by three fourths of the states.

But even if Congress had the power to do so, the text and history of the Amnesty Act of 1872 suggest that Congress did not intend to grant prospective amnesty. The Act uses the past tense "imposed" rather than "which may be imposed," suggesting that it only applies to disqualifications that have already been imposed. *See Gundy v. United States*, 139 S. Ct. 2116, 2127 (2019) (noting that the use of past tense indicates that a statute applies to pre-enactment conduct); *Carr v. United States*, 560 U.S. 438, 448 (2010) (observing that the

[1] Available at https://www.govinfo.gov/content/pkg/GPO-HPREC-CANNONS-V6/pdf/GPO-HPREC-CANNONS-V6.pdf#page=75.

Supreme Court has "frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach").

And the history of the statute confirms the plain meaning of the text. *See generally*, Gerard N. Magliocca, Amnesty and Section Three of the Fourteenth Amendment, 36 Const. Comment. 87, 111-20 (2021). Before the Act, Congress had been passing private bills to remove disqualifications from former Confederates. *See id*. at 112. That soon became cumbersome, with thousands of names in each bill. Id. Rather than pass another statute with a long list of names, Congress chose to use a general phrase to identify those former Confederates it was relieving of disqualification, with a few exceptions for some of the most prominent Confederate leaders. *Id.* at 116-20. It was not a statute designed to grant amnesty to potential future insurrectionists. Indeed, just nine days before passing the 1872 Amnesty Act, when Congress debated an earlier version that enumerated over seventeen thousand names, one Representative proposed adding the phrase "and all other persons" to the bill. Cong. Globe, 42d Cong., 2d sess. 3382 (May 13, 1872) (Rep. Perry). The bill's sponsor rejected that amendment precisely because it would suggest that those who had not (yet) committed insurrection would be the subjects of amnesty—as he quipped, "I do not want to be amnestied myself." (Rep. Butler). *Id.* That elicited laughter on the House floor, *id.*; in essence, Congress in May 1872 found the idea of amnesty for those who had not yet committed insurrection laughable.

Greene's argument to the contrary is exceedingly simple: "By the plain language of this Act, the political disability was removed from any Representative other than those of the two enumerated Congresses." (Mot. at 15.) But this merely assumes that one can "remove" something which does not already exist. And it ignores the plain meaning and history of the provisions at issue. As authority, Greene cites only a district court case from North Carolina

which recently adopted this textual argument (Mot. at 16), but that case is neither binding nor persuasive, and it remains pending on appeal.

Greene therefore has not shown "with certainty" that the Amnesty Act of 1872 granted her prospective amnesty for engaging in the insurrection of January 6, 2021. *Harrell*, 346 Ga. App. at 636.

5. "Insurrection or Rebellion"

Green next argues that the events of January 6 were not an insurrection or rebellion within the meaning of the Disqualification Clause. (Mot. at 18-23.) The Petitioners' complaint alleges, among other things,

- that the January 6 attack on the Capitol constituted an insurrection or rebellion within the meaning of the Disqualification Clause (Compl. ¶ 68);
- that those involved in it "defied the authority of the United States" (*id.* ¶ 69);
- that five people died and 150 people were injured (*id.*);
- that it took the combined efforts of the Capitol Police, federal agents, and the National Guard to defend the Capitol (*id.*);
- that the goal of the attack was "to overthrow the government or obstruct its core functions" by intimidating Vice President Pence to reject electoral votes for (now) President Biden so as to prevent the peaceful transfer of power (*id.* ¶ 70);
- that General Mark Milley, Chairman of the Joint Chiefs of Staff, described January 6 as "a planned, coordinated, synchronized attack on the very heart of American democracy, designed to overthrow the government" (*id.* ¶ 72);
- that Senator Mitch McConnell described January 6 as "a violent insurrection for the purpose of trying to prevent the peaceful transfer of power" (*id.* ¶ 74);
- that the Department of Justice has characterized January 6 as an insurrection in various court filings (*id.* ¶ 75);
- that bipartisan majorities of the House and Senate voted for articles of impeachment describing January 6 as an insurrection (*id.* ¶ 76);

- that President Trump's own attorney conceded that January 6 was a violent insurrection during the President's second impeachment trial (*id.*); and

- that Congress voted by unanimous consent to award a Congressional Gold Medal for Capitol Police officer Eugene Goodman for staving off the "insurrectionists" (*id.*).

For the purpose of a motion to dismiss, this Court must accept these allegations as true.

Greene denies that the events of January 6 were an insurrection, calling them instead "First Amendment protected activity." (Mot. at 21.) But she cites no authority for the proposition that armed protesters have a First Amendment right to attack Capitol police officers. Indeed, Greene concedes that the actions of those who "illegally entered the U.S. Capitol building" constitute insurrection within the meaning of the Fourteenth Amendment. (Mot. at 21.)

Greene therefore has not established "with certainty" that the Petitioners' complaint fails to allege the existence of an insurrection on January 6. *Harrell*, 346 Ga. App. at 636.

6. "Engage"

Greene further argues that, even if January 6 was an insurrection, she did not "engage" in it within the meaning of the Disqualification Clause. (Mot. at 23-27.) Among other things, the Petitioners' complaint alleges that Greene:

- posted on social media almost every day between the 2020 election and Janaury 6 falsely insisting that Trump had won the election and urging people to "fight" for him (Compl. ¶ 24);

- publicly supported the efforts to create alternate slates of electors for Trump, including in Georgia, to undermine the electors lawfully elected by the people (*id.* ¶ 33);

- participated in the planning of a "Save America" event in Washington D.C. on January 6, including a march to the Capitol, for the purpose of pressuring Vice President Pence to refuse to count electoral votes for Biden from States, like Georgia, where the results were close (*id.* ¶¶ 34-35, 37);

- promoted the January 6 event with a series of social media posts and urged her supporters to "hold the line on Jan 6" (*id.* ¶ 38);

- posted a video insisting, after urging her supporters to come to Washington on January 6, that "[w]e aren't a people that are going to go quietly into the night" (*id.* ¶ 38);

- posted another video explicitly rejecting the peaceful transfer of power and calling for President Biden and Nancy Pelosi to be executed for treason (*id.* ¶ 39);

- tweeted on January 5 that the following day would be "our 1776 moment"—a well-understood code phrase for violent revolution—and that the people "will remember the Patriots who stood for election integrity" (*id.* ¶ 42); and

- knew the coded meaning of "1776" and used it with the intent of signaling to her supporters that she was calling for violent resistance to the peaceful transfer of power from Trump to Biden (*id.* ¶ 45).

For the purpose of a motion to dismiss, this Court must accept these allegations as true.

Under the Disqualification Clause, to "engage" means "a voluntary effort to assist the Insurrection . . . and to bring it to a successful [from insurrectionists' perspective] termination" *United States v. Powell*, 65 N.C. 709 (C.C.D.N.C. 1871), or "[v]oluntarily aiding the rebellion, by personal service, or by contributions, other than charitable, of any thing that was useful or necessary," *Worthy v. Barrett*, 63 N.C. 199, 203 (1869). *See also* O.C.G.A. § 16-11-2(a) ("A person commits the offense of insurrection when he combines with others to overthrow or attempt to overthrow the representative and constitutional form of government of the state or any political subdivision thereof when the same is manifested by acts of violence.").

Greene argues without explanation that the allegations of the complaint do not constitute "a voluntary effort to assist" the January 6 insurrection within the meaning of *Powell*. (Mot. at 23-24.) But they plainly do. Taken as true, the allegations in the complaint allege that she posted videos and messages to social media signaling her support for a violent

uprising to take place in conjunction with the January 6 event that she helped to plan. That constitutes voluntary assistance.

Greene also argues that the phrases "personal service" and "any thing that was useful" in *Worthy* are unconstitutionally vague because they would chill First Amendment activity. (Mot. at 24-26.) The fatal flaw in Greene's argument, however, is that the void-for-vagueness doctrine upon which she relies applies to vague statutes—not to court decisions that use allegedly vague definitions. *See, e.g., Smallwood v. State*, 310 Ga. 445, 447 (2020) ("It is well established that the void for vagueness doctrine of the due process clause requires that a challenged statute or ordinance give a person of ordinary intelligence fair warning that specific conduct is forbidden or mandated and provide sufficient specificity so as not to encourage arbitrary and discriminatory enforcement.") Nor does it apply to the Fourteenth Amendment itself. There is no statute here for Greene to attack, and the allegations of the complaint add up to aid for the insurrection by contributions of useful things.

Greene therefore has not established "with certainty" that the Petitioners' complaint fails to allege that she "engaged" in the insurrection on January 6. *Harrell*, 346 Ga. App. at 636.

7. Speech Prior to January 3

Greene's seventh argument is that any speech or action she took before January 3, 2021, when she took her oath of office, is irrelevant under the Disqualification Clause. (Mot. at 28.) That, however, is beside the point. The Petitioners' complaint also alleges that Greene engaged in insurrection after her swearing-in (*see* Compl. ¶ 42), so this argument does not establish "with certainty" that the Petitioners' challenge must fail. *Harrell*, 346 Ga. App. at 636.

In any event, Greene's actions that pre-date her swearing-in are—at the very least—relevant because (i) they are probative of Greene's state of mind between January 3, 2021 and January 6, 2021; and (ii) they are probative of Greene's knowledge of the significance of the statements she made between January 3, 2021, and January 6, 2021. They are also relevant as direct evidence of her interaction in a scheme that was formed prior to her taking the oath and continued after.

First, Greene's pre-January 3, 2021, statements are relevant to establishing what she meant and intended to express in the statements she made after she was sworn in. Petitioners allege that Greene participated in an unlawful scheme to overthrow the results of the 2020 election that culminated in the January 6, 2021, insurrection. (*See* Compl. ¶¶ 32-45.) They allege that, prior to her swearing in, Greene promoted the events of January 6, tweeting, for example, that she was "planning a little something on January 6th," directing her supporters to "HOLD THE LINE on Jan. 6," and posting a video in which she said, "You can't allow it to just transfer power 'peacefully' like Joe Biden wants and allow him to become our president because he did not win this election." (*Id.* ¶¶ 37-39.) Petitioners also allege that Greene "has a long history of advocating for violence against her political opponents." (*Id.* ¶¶ 22-23.)

Greene's actions before she became a member of Congress are critical to understanding the context of her statements after she was sworn in. As a sitting member of Congress, Greene continued planning and promoting the events of January 6 and telling her supporters that they needed to be in Washington for "our 1776 moment" and that "the people will remember the Patriots who stood for election integrity." (*id.* ¶ 42.) A reasonable factfinder could and would look to Greene's prior statements to determine what she intended to convey in the statements she made as a member of Congress. Her references to "1776" and

"Patriots," for example, must be understood in the context of her history of advocating for violence, her involvement in the unlawful scheme to overthrow the results of the 2020 election, and what she knew about the violent intentions of the insurrectionists who stormed the Capitol.

Second, and relatedly, Greene's pre-January 3, 2021 statements are relevant to what she knew about how her supporters would interpret her post-swearing-in statements. 1776, for example, was used as a code word for violence by people who led the planning for the January 6 events. (*See id.* ¶¶ 43-44.) Enrique Tarrio, who has been indicted for his role in planning the January 6 insurrection, *see United States v. Tarrio*, No. 21-cv-175 (D.D.C.), even posted "1776" while the insurrectionists were inside the Capitol, *see United States v. Tarrio*, 22-mj-02369 (S.D. Fl.), Dkt. 14 at 4 (Detention Order finding that "Tarrio posted the message 'Don't fucking leave,' followed by the messages '1776' and 'Revolutionaries are now at the Rayburn building."). Greene's pre-January 3, 2021, actions show that, regardless of what she may claim she intended to convey, Greene knew her audience would interpret her use of the term "1776" as a call to commit acts of political violence.

Finally, Greene's actions before January 3 can show directly that she engaged in insurrection. The Petitioners allege that Greene was engaged in an unlawful scheme that *culminated* in an insurrection. *Cf. Eastman v. Thompson*, No. 22-cv-00099, 2022 WL 894256 (C.D. Cal. Mar. 28, 2022), (finding by a preponderance of the evidence the existence of a criminal conspiracy to defraud the United States by interfering with the election certification process, and obstruction of an official proceeding of Congress). The scheme in which Greene engaged includes activity both before and after January 3, 2021. Courts do not allow "crafty conspirators" to avoid liability by shifting elements of a single scheme before and after a statute of limitation. *Scherer v. Balkema*, 840 F.2d 4437, 442 (7th Cir. 1988); *cf. National*

R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002) (under Title VII, discrete discriminatory acts must fall into the statutory period, but evidence of a hostile work environment that continues into the statutory period can be introduced even if the evidence originated outside the statutory period). Greene cannot call on her supporters, days before she is sworn in, to resist the peaceful transfer of power and execute the Speaker of the House, then take the oath and continue to promote violence using coded language—then claim that her pre-oath activity is *completely irrelevant*.

Unsurprisingly, Greene cites no authority for her claim that pre-January 3 activity is irrelevant as a matter of law. No OSAH rule imposes the kind of limitation she seeks. And Georgia's rules of evidence define "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." O.C.G.A. § 24-4-401. Greene's pre-January 3, 2021, actions make it more likely that she engaged in insurrection on January 6 and are therefore relevant to this proceeding.

8. The First Amendment and Hearsay

Greene next argues that First Amendment activity and hearsay cannot be used to support insurrection claims. (Mot. at 29-33.) This argument misses its mark for several reasons.

First is that the Petitioners' complaint alleges that Greene participated in the planning of a "Save America" event in Washington D.C. on January 6, including a march to the Capitol, for the purpose of pressuring Vice President Pence to refuse to count electoral votes for Biden from States, like Georgia, where the results were close. (Compl. ¶¶ 34-35, 37.) Those planning activities go well beyond the protections of the First Amendment.

Second, hearsay is not a bar to admissibility in this Court. Under OSAH rules, an ALJ may consider certain hearsay evidence when "it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs." OSAH Rule 616-1-2-.18(1). Greene has not even attempted to demonstrate that any allegations in the complaint—which, in any event, must be taken as true at this stage—do not meet this standard.

Third, the First Amendment does not preclude disqualifying someone from Congress based on what would otherwise be First Amendment-protected speech. As the Supreme Court has made clear, the First Amendment does not override or limit other constitutional requirements. For example, while all Americans have a First Amendment right to refuse to swear an oath to protect the Constitution, the Constitution itself requires an elected member of Congress to take an oath to protect the Constitution before they can serve—a requirement the Supreme Court has had no difficulty upholding. *See Bond v. Floyd*, 385 U.S. 116, 132 (1966). First Amendment "compelled speech" analysis, which protects private citizens from compelled oaths, simply does not apply to an incoming member who refuses the oath. By the same token, there is no First Amendment right to serve in Congress for someone who, after taking the oath, engages in insurrection, even if the engagement included speech that would be protected under the First Amendment if made by a private citizen.

Like the oath of office requirement, the Disqualification Clause is a constitutional provision, equal in status with the First Amendment, and its narrow, defined provisions must take precedence over the broad and more generally applicable rules of the earlier-enacted First Amendment. The First Amendment applies generally to all government action with respect to all speech of all people under the jurisdiction of the United States. In contrast, the Disqualification Clause does not apply at all to private citizens' conduct; it applies only to persons who engage in insurrection *after* having taken the oath as a public official to defend

and uphold the Constitution. It does not impose a criminal or civil penalty, but rather the narrow and defined consequence of disqualification from future public office.

Under *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the First Amendment prohibits the government from imposing penalties via legislation, regulation, or common law, on private citizens for advocating violence to achieve political ends, unless the advocacy was intended and likely to incite "imminent lawless action." *Id.* at 447. Without the benefit of any legal authority, Greene seeks to apply *Brandenburg* to delimit the scope of the constitutional requirements of the Disqualification Clause. Not only is this contrary to clear principles of constitutional interpretation (and logic), but it would gut the Disqualification Clause and defeat its intended purpose. If advocacy in support of an insurrection cannot count as engaging in insurrection, only the foot soldiers would face possible disqualification. Greene suggests that anything beyond "donning a butternut uniform, loading one's musket, and joining the Confederate battle line"—or at least, "bearing arms in a war to overthrow the government"—cannot be engaging in an insurrection. (Mot. at 25-26.) The framers of the Fourteenth Amendment were not primarily concerned with disqualifying Confederate soldiers; they were primarily concerned with disqualifying the Confederate leaders. The primary way that leaders engage in insurrection is through their speech— their commands and their advocacy. Under Greene's theory, the vast majority of Confederate political leaders (including Jefferson Davis) were not disqualified by Section Three—most never fired a shot *or* gave a speech that met the *Brandenburg* definition of inciting "imminent lawless action." That Greene's engagement in the insurrection included oral advocacy does not immunize her from disqualification; to the contrary, it makes her exactly the sort of insurrectionist that the Disqualification Clause was intended for.

Moreover, even if the First Amendment did serve as a limitation on the Disqualification Clause, *Brandenburg* still would not apply. Even in the context of statutory requirements, the Supreme Court has recognized that there are situations in which governmental actors enjoy fewer First Amendment rights than private citizens. *See, e.g.*, *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006) (Public employees "often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions."); *Snepp v. United States*, 444 U.S. 507 (1980) (requiring CIA employees not to divulge classified information, or to publish information about agency without prior agency approval, does not violate First Amendment); *U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 564 (1973) (holding Hatch Act constitutional). And the Supreme Court has held that restrictions on elected officials, even ones that may force them to resign, should be viewed with less skepticism than restrictions on civil servants. *Clements v. Fashing*, 457 U.S. 957, 972 (1982).

But even if *Brandenburg* did somehow apply as a limit on the Disqualification Clause, the allegations in the Petitioners' complaint establish that Greene's advocacy, much of which occurred in the immediate period leading up to the insurrection, was intended to incite imminent lawless action and therefore would satisfy the *Brandenburg* standard. Whether speech that promotes violent attacks on others is protected by the First Amendment or not depends, to some extent, on the reaction to that speech. Greene quotes *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), in some detail (Mot. at 31-32), but omits a crucial holding: "[i]f that [heated] language had been followed by acts of violence, a substantial question would be presented whether Evers could be held liable for the consequences of that unlawful conduct." 458 U.S. at 928. In *Claiborne*, the court applied

Brandenburg and found the heated language lacked proximity to the violence, which happened "weeks or months" after the speech. *Id.* (In *Brandenburg*, no violence occurred *at all*.) To put it bluntly, in *Claiborne* the Supreme Court acknowledged that there are situations where "we're gonna break your damn neck" *can* create liability.

Here, Greene's "1776" comments occurred *one day* before the insurrection. They were said against a backdrop not just of heated and violent rhetoric, but of a specific plan to *overturn the results of a presidential election*. They had a clear meaning in the context they were spoken: highlighting the day to storm the Capitol and, as such, satisfy any requirement that the speech be directed toward inciting imminent lawless action. At minimum, this raises a triable issue of fact.

Greene's comments rejecting a peaceful transition of power and urging her supporters to come to the Capitol on January 6 were not the abstract advocacy of violence—a declaration in the woods that, at some undetermined point, "there might have to be some revengeance taken," *Brandenburg*, 447 U.S. at 446, nor were they "[s]trong and effective extemporaneous rhetoric," *Claiborne*, 458 U.S. at 928. They were a call to reject the peaceful transition of power on a particular date and place. They seem to have been pre-recorded before they were uploaded—Greene did not get carried away in front of a crowd; she was giving orders. At the very least, this raises a triable issue of fact.

Furthermore, the court in *Claiborne* held, "if there were other evidence of his authorization of wrongful conduct" the speech could be used to support a finding of liability. *Id.* at 929. Even if other statements were found to fail to meet the *Brandenburg* standard standing alone, there is no rule that speech that is otherwise protected cannot be used to supply context to show that other instances of speech are not constitutionally protected. Thus, there is at least a triable issue of fact as to whether the statements above, in conjunction with

statements that demonstrated her state of mind when she made those statements, show that those statements meet the *Brandenburg* standard.

Under these circumstances, Greene has not established "with certainty" that the Petitioners' complaint must fail. *Harrell*, 346 Ga. App. at 636.

9. The Speech and Debate Clause

Greene's ninth argument is that the Petitioners' claims are based on activity that is protected under the Speech and Debate Clause in Article 1, Section 6 of the United States Constitution. (Mot. at 33-36.) This argument also lacks merit.

The Speech and Debate Clause "prohibits inquiry only into those things generally said or done in the House or the Senate in the performance of official duties and into the motivation for those acts." *United States v. Brewster*, 408 U.S. 501, 512 (1972). It "enures only to legislators engaging in actions considered an integral part of the deliberative and communicative processes by which legislators participate in proceedings with respect to the consideration and passage or rejection of proposed legislation." *Bryant v. Jones*, 575 F.3d 1281, 1304–05 (11th Cir. 2009) (cleaned up).

Greene has not identified which allegations in the Complaint she contends are protected by the Speech and Debate Clause, and a quick review of the Complaint reveals no obvious candidates. On their face, none of the Petitioners' allegations has anything to do with any legislative activity, and Greene fails to articulate any such connection. They are not barred by the Speech and Debate Clause.

Accordingly, Greene has not established "with certainty" that the Petitioners' complaint must fail. *Harrell*, 346 Ga. App. at 636.

10. Enforcement of the Disqualification Clause

Greene's final argument is that Congress has not authorized any State to enforce the Disqualification Clause. (Mot. at 37-38.) Section 5 of the Fourteenth Amendment gives Congress the authority to enforce the amendment's other provisions, Greene argues, so Congress must have meant to reserve that power to itself.

This argument merely duplicates her third argument that Congress is the sole judge of its members' qualifications. But, as discussed above, the Constitution already gives the States broad discretion over the time, place, and manner of holding congressional elections, and that includes the power to ensure that prospective candidates are qualified to hold the offices they seek.

In addition, Congress *did* adopt such enforcement legislation. In 1868, Congress re-admitted Georgia to the Union on the express condition that the State ensure that no one disqualified under the Disqualification Clause would be deemed eligible to hold any office. *See* 15 Stat. 73, 74 (1868).

Greene therefore has not established "with certainty" that the Petitioners' challenge must fail. *Harrell*, 346 Ga. App. at 636.

CONCLUSION

The Court should deny Greene's motion to dismiss. The Court should also deny Greene's motion for a stay of these proceedings "until the federal court either renders a decision or affirmatively abstains from ruling."[2] (Mot. at 39.) Given the expedited nature of this matter, a stay is not warranted.

[2] During the hearing on Greene's motion for a preliminary injunction in federal court on Friday, April 8, Judge Totenberg indicated that she would endeavor to issue an order on the motion on Monday, April 11.

This 10th day of April, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2022, I served the foregoing document on the respondent by electronic mail at the following addresses: Marjorie@greene2020.com; msiebert@bopplaw.com; jboppjr@aol.com; khilburt@hilburtlaw.com; cgardner@hilbertlaw.com .

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