IN 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

Respondent Marjorie Taylor Greene's Post-Hearing Brief

If you need a code breaker or a decoder ring to determine if a Member of Congress engaged in insurrection—she didn't. If accusers need to assign ill motives to a Member of Congress by using a quote from the sci-if movie Independence Day, those accusers might be engaging in entertaining political theater, but they don't have proof the candidate engaged in insurrection. If virtually your entire case is based upon news reports and opinion pieces, tweets made by the accused over a two-year period (before being elected to Congress), tweets *other* people tweeted over that same period, and accusations that references to the year this country was founded were *really* calls to violence—then your bid

to remove a candidate from the ballot, in an effort to prevent citizens from voting for a candidate you don't agree with—has failed.

Instead what the evidence shows is that, on the day of the attack on the Capitol, the alleged act of insurrection, the accused, Rep. Marjorie Taylor Greene ("**Rep. Greene**"), was on the floor of the United States House of Representatives performing her constitutional duties. Instead of a perpetrator of the despicable attack, she was one of its victims. She was sequestered for hours, she was scared and confused, and she and her family feared for her life. And rather that participating in the attack, she was trying to stop it. In tweets and a video while she was sequestered, she urged people to "Stay peaceful. Obey the laws." She urged people "to have a peaceful protest. . . in a peaceful manner. . . . and obey the laws." And, as if there can be any doubt, a few days later she "DENOUNCE(D) the Jan. 6 attack."

So one of the victims of the attack is now the victim of a political smear of the most vicious kind, insurrection against the United States, by the Challengers who have hijacked this proceeding, ruthlessly exploiting this Court's relaxed rules of evidence and this Court's gracious accommodations, to advance a political smear campaign against members of the Republican Party throughout the nation. This is reprehensible and needs to be brought to a halt here and now.

This action seeks to deny Rep. Greene her First Amendment right to be a

candidate for office and to deny the voters of Georgia's 14th congressional district their First Amendment right to vote for the candidate of their choosing, by claiming that Rep. Greene is disqualified to be a candidate for Congress under Section Three of the Fourteenth Amendment ("**§ 3**"). This claim, and the hearing procedure in which this claim is litigated, O.C.G.A. § 21-2-5 ("**Challenge Statute**"), raise serious questions under the federal constitution, federal law, and state law.

First, in Part I. Constitutional and Federal Law Claims, Rep. Greene argues that this administrative proceeding, and the litigation of this claim, violates the United States Constitution and federal law in the following respects:

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

B. Applying the § 3 disability to Rep. Greene, to challenge her candidacy for Congress, violates § 3 and federal law. 42 Cong. Ch. 194, May 22, 1872, 17 Stat. 142. Therefore, the Challenge Statute, as applied here, is unconstitutional under the Supremacy Clause. U.S. Const. art. VI, cl. 2.

C. The Challenge Statute's provision triggering a government investigation based solely upon a Challenger's "belief" that Rep. Greene is unqualified, and the subsequent administrative procedure,

violates her First Amendment right to run for political office, and her Due Process rights under the Fourteenth Amendment.

D. The Challenge Statute usurps the U.S. House of Representative's power to make independent, final judgment on the qualifications of its Members, so the state enforcement of § 3 violates U.S. Const. Art. 1, § 5.

Second, in Part II. Evaluation of the Evidence Submitted at the Hearing, Rep. Greene argues that, in evaluating the "evidence" presented at the hearing, the Court should only consider evidence that meets the standards of the Georgia Rules of Evidence, that is relevant to the claim, and that do not violate United States Constitutional protections.

A. Due to the serious nature of the claim, and consequences of a finding against Rep. Greene, only competent and relevant evidence, admissible under the Georgia Rules of Evidence, should be used to determine if she engaged in insurrection or rebellion against the United States of America.

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

C. Protected First Amendment speech and activity can't be used to support a claim that Rep. Greene engaged in an insurrection.

D. Any answer of Rep. Greene, based on a question concerning activities in the course of her legislative duties, cannot be used to support a claim that Rep. Greene engaged in insurrection, since its use is absolutely barred by the Speech & Debate Clause of the U.S. Constitution, Art. 1, § 6.

Third, in Part III. The Evidence Fails to Prove that Rep. Greene Is Disqualified Under § 3, Rep. Greene argues that the evidence presented at the hearing showed that Challengers did not meet their burden of proof that Rep. Greene violated Section Three of the Fourteenth Amendment, that she is disqualified from "holding the office being sought," O.C.G.A. § 21-2-5(a), and that she should, therefore, be removed from the ballot.

A. The January 6 events were not an "insurrection;"

B. Respondent Greene did not "engage" in an insurrection.

As a result, this Court should report its factual findings and conclusions of law to the Secretary of State and recommend that the Secretary of State find that Rep. Greene is qualified "to seeking and hold the public office for which such candidate is offering." O.C.G.A. § 21-2-5(b).

I. Constitutional and Federal Law Claims

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

In order for Challengers to mount their § 3 candidacy challenge, Congress must provide a private right of action. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326 (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.[1]

Congress, however, has not created a private right of action to allow a citizen to enforce § 3 by having a state declare that a candidate is "not qualified" to hold public office. *Hansen, et al. v. Finchem, et al.*, Case No. CV 2022-004321, slip op. at ¶¶ 7-21 (Superior Court of Arizona, Maricopa County April 21, 2022), Ex. A. *Hansen* relied primarily on three conclusions of law:

> (1) that the procedures necessary for the individualized determinations that a person violated § 3 "can only be provided for by congress," which it had not done. *Id.* at ¶¶ 9-11 (citing *In Re Griffin*, 11 F. Cas. 7, 26 (C.C.D. Va.

[1]This requirement does not prevent a court from providing equitable relief in order 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 Complaint.

1869));

(2) that Section 5 of the Fourteenth Amendment authorizes Congress to "enforce, by appropriate legislation, the provision[s] of this article," but Congress had not done so for § 3, *Hansen*, slip op. at ¶¶ 10-13, 16; and

(3) that a recent bill introduced in Congress, which would have provided a cause of action "to remove and bar from holding office certain individuals who engage in insurrection or rebellion against the United States, and for other purposes" would have been unnecessary if such a cause of action already existed. *Id*. slip op. at ¶¶ 17 (citing 2021 Cong U.S. H.R. 1405, 117th Congress, 1st Session).

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 candidacy challenge.

B. The Challenge Section, as applied to Rep. Greene under § 3, violates § 3 and federal law.

Challengers brought their challenge under § 3, claiming that Rep. Greene is disqualified as a candidate, since she is 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 their *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.

This likewise gives no effect to the whole first clause ("[n]o person *shall be*"—not "shall run for office to be"—"a Senator or Representative in

Congress . . . " (emphasis added)); and its modifying phrase ("who, *having previously taken an oath* . . . " (emphasis added)); thus leaving us with only one modifying phrase ("shall have engaged in insurrection . . . .") which, standing alone, is meaningless. Thus, state procedures purporting to block candidacy under § 3 not only ignore § 3's plain meaning, but also circumvent Congress' role in removing a disability, which it is authorized to do at any time, even up to the moment a Member-elect presents herself to take the oath of office. Whether such disability applies *then*, cannot be determined *now*.

Constitutional comparison confirms this. Article I, Section 2 of the Constitution provides, "No Person shall be a Representative who . . . shall not, *when elected*, be an Inhabitant of that State . . . ." Article I, Section 3, contains the same language for Senators. It is no mere oversight, then, that § 3 does not apply to disqualify a person as a candidate, only when taking office. The framers knew how to impose a disability at either time. In the case of § 3, they chose to impose the disability *only* upon those who had *already* been elected.

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 1972 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.

§ 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. *See Cawthorn v. Circosta, et al.,* Case No. 5:22-cv-00050-M, ECF No. 78, Ex. B ("**Inj. Order**").

Challengers will no doubt argue here, as Challenges have argued in federal court, *Greene v. Raffensperger, et al.*, Case No. 1:22-cv-01294-AT, ECF No. 30 at 19-21, that the 1872 Act only has retrospective effect, because it "utilizes only the past tense phrase that 'all political disabilities *imposed* by the third section of the fourteenth article,'" as the district court held. Inj. Order at 58.

But grammatically, that is not the case. "Imposed" is used here as a past *participle*[2]*—not* a "past tense" *verb*—in the participial phrase "imposed by [§ 3]," which acts as an adjective to show *which* "disabilities" are referenced. And those are disabilities imposed *by* § 3, not *based on* § 3, so the reference is to the *sort* of *legal* disability § 3 imposes, not particular applications of § 3 to individuals. *Accord Impose* www.merriam-webster.com/dictionary/impose ("to establish or apply by authority"). Thus, when the 1872 Act says that particular legal disability created by § 3 is "hereby removed from all persons whomsoever," it meant "all" to apply prospectively too.

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[2] Participles are "verbals" (not verbs but based on verbs) that come in "past" ("imposed") and "present" ("imposing") versions. Purdue Online Writing Lab, Participles, https://owl.purdue.edu/owl/general_writing/mechanics/gerunds_participles_and_infinitives/participles.html.

The only exception (Congress knew *how* to make exceptions) to 1872 Act's removal of § 3 legal disability were some office-holders and military personnel. The 1898 Act removed their disability: "the disability imposed by [§ 3] *heretofore incurred* is hereby removed. (Emphasis added)." "[H]eretofore" indicates retroactive application (Congress knew *how to do this*) and "incurred" indicates application to particular persons—both unlike the 1872 Act.

The district court, in its preliminary injunction order, completely disregarded the difference between the two acts, stating that the differences don't matter and that Rep. Greene's sole argument for why the 1872 Act is prospective is that "Congress did not include the 'heretofore incurred' language that was later included in the 1898 Act." Inj. Order at 59. That is false: the use of the 1898 Act is to show that Congress knew *how* to create retrospective application only. Standing alone, the 1872 Act is both prospective and retroactive. The "disability imposed [§ 3]" is a participial phrase indicating *which* legal disability is at issue. If "imposed by" had meant only prior application to particular persons, there would have been no need for "heretofore incurred" in the 1898 Act, violating construction cannons.

The district court also recites legislative history. Inj. Order at 56-57. But since the 1872 Act is clear and unambiguous, consideration of legislative history [i]s unnecessary and improper. *See Tobib v. Radloff*, 501 U.S. 157, 162 (1991) (quoting *Blum v. Stenson*, 465 U.S. 886, 896 (1984)). Even so, that argument is

unpersuasive.

The district court first discussed the numerous requests and calls for Amnesty following the Civil War. Inj. Order at 56-57. However, none of that extraneous material confirms why the district court's declaration that the 1872 Act applies only retrospectively is correct. This is especially true considering the plain language of the 1872 Act removed the political consequence of § 3 from any Representative other than those who served during the 36th and 37th Congresses.

The district court next claimed that Congress interpreted the 1872 Act retrospectively, citing the House's refusal to seat Berger. Inj. Order at 59. Berger's exclusion, after criticizing American involvement in World War I, predated modern First Amendment doctrine. *See* Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comment. 87, 130 (2021). Further, the House considered only the 1898 Act, not the 1872 Act, as the District Court conceded. "In Berger's defense, he argued . . . that he could not be disqualified by [§ 3] because [it] had been 'entirely repealed' by the 1898 Act." Inj. Order at 59. Congress' determination regarding Berger has no bearing on this case, as it involved only "the 1898 Act," which by its terms had only retroactive application.

The district court also stated that the 1872 Act must be construed to avoid unconstitutionality, and that reading it as prospectively would render § 3

ineffective. *Id.* at 63. But the plain language of § 3 gave Congress plenary power to remove any and all § disabilities, which applied both retroactively and prospectively, and the district court identifies no provision limiting the breadth of that power.

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 upon a Challenger's "belief" that Rep. Greene is unqualified and the subsequent burden of the administrative procedure violates Rep. Greene's First Amendment right to run for political office and Due Process rights under the 14th Amendment.

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)). Restricting access to a

ballot

> "place[s] burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms."

Anderson, 460 U.S. at 787 (quoting *Williams v. Rhodes,* 393 U.S. 23, 30-31 (1968)); *see also Cowen v. Georgia Secretary of State,* 960 F.3d 1339, 1342 (11th Cir. 2020) ("The Supreme Court has recognized the unique 'impact of candidate eligibility requirements on voters,' which implicates the 'basic constitutional rights of both voters and candidates under the First and Fourteenth Amendments.'" (quoting *Anderson,* 460 U.S. at 786)).

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,* 960 F.3d at 1342, 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 in order to be "eligible" for the ballot to election to *federal* office.

First, a standard-less statute such as this cannot be sufficient to justify its infringement on First Amendment rights. A challenged candidate is barred from the ballot unless and until she succeeds at a hearing in which she must defend herself in formal process—indeed, must affirmatively overcome challenger's claims—without the critical procedural safeguard of this legal gauntlet being constrained by probable cause or any other standard. Government action against nude dancing—which "falls only within the outer ambit of the First Amendment's protection," *City of Erie v. Pap's A.M,* 529 U.S. 277, 289 (2000), and which "'avoids constitutional infirmity only if it takes place under procedural safeguard [of probable cause,] designed to obviate the dangers of [infringement of free speech]." *Alexis, Inc. v. Pinellas Cty., Fla.,* 194 F. Supp. 2d 1336, 1347 (M.D. Fla. 2002) (quoting *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 558 (1975)). *A fortiori,* the standard-less Challenge Statute, which constrains access to the ballot, is presumptively unconstitutional without probable cause as a procedural safeguard.

Second, is voter right infringement. The Challenge Statute is a restriction on both ballot access and voting rights, *Cowen*, 960 F.3d at 1342 ("candidate eligibility requirements . . . implicate[ ] the basic constitutional rights of both voters and candidates under the First and Fourteenth Amendments." (cleaned up)), and injuries to rights of voters and candidates are cognizable in either sort of case. *See Burdick v. Takushi*, 504 U.S. 428, 438, n. 8 (1992) ("[i]ndeed, voters as well as candidates, have participated in the so-called ballot access cases").

Third, the expedited procedure under the Challenge Statute actually increases the burden on cognizable rights since vital procedural protection, available in civil and criminal matters, are lacking or are inadequate. The Challenge Statute's process is a *legal adjudication*—in this case, involving federal constitutional rights—without any of the practical and procedural protections ordinarily afforded defendants in legal adjudications. Under the Challenge Statute's process, defensive mechanisms ordinarily available pre-trial are available only after the trial. Rep. Greene cannot halt the OSAH hearing on the basis of Challengers' standing, the legal indefenceability of their claims or any Constitutional or federal law defenses; she is afforded no traditional discovery to test the authenticity of their factual assertions; and she cannot move for summary judgment. And here, Rep. Greene's motion to dismiss will not be resolved until after the hearing, and, in any event, the ALJ is not authorized to declare a

Challenge Statute unconstitutional, a critical basis for Rep. Greene's motions.

As a result, the Challenge Statute's "process" requires Rep. Greene to appear and respond in person in her accusers' "case"—no matter how factually far-fetched, legally deficient, or constitutionally offensive it may be, in a hearing on a highly charged political issue that was live streamed. Her subpoena was like a subpoena from the Committee on Un-American Activities, summoning Rep. Greene to appear and testify under oath "about h[er] beliefs, expressions or associations," which "is [itself] a measure of governmental interference [with First Amendment freedoms]." *Watkins v. United States*, 354 U.S. 178, 197 (1957). The burden from those subpoenas, as Rep. Greene received herein, was deemed severe enough to warrant protection from compulsory process. Since that subpoena could not be quashed, her only real protection from political smears is the Georgia Rules of Evidence, which should be applied.

Fourth, the timing and practical effect of the Challenge Statute's process burden both candidates' and voters' rights in another way. That ballots have already been printed including Rep. Greene's name and the question is whether the votes cast for her on those ballots will ultimately be counted.

After the hearing and the ALJ's recommendations, if the Secretary of State's decision disqualifies Rep. Greene from candidacy, her name will be withheld from or struck from printed ballots. O.G.C.A. § 21-2-5(c). It is only after the hearing,

the ALJ's recommendation, and the Secretary of State's decision that Rep. Greene may raise constitutional defenses in an appeal to the Superior Court of Fulton County. *See* O.C.G.A. § 21-2-5(e). The Secretary of State's decision is, however, immediately effective. If there is insufficient time to strike her name or reprint ballots,[3] all polling places will have a prominent notice placed noting her disqualification and all votes cast for her shall be void and shall not be counted.

There are three "levels" of "removal," the first of which—ballots on which Rep. Greene's name *never* appeared. The second level is a ballot on which Rep. Greene's name is "struck" or never appears. The third level is a ballot on which Rep. Greene's name appears, "unstruck," but a prominent sign advises voters that votes for Rep. Greene "shall be void and shall not be counted."

Some absentee ballots (UOCAVA) have gone out since April 5, and regular absentee ballots started to be sent out on April 25. Advanced in-person voting begins May 2. *See* Office of the Secretary of State/Elections Division, *2022*

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[3]Counsel for State Defendants has represented that the ballots are already printed with Rep. Greene's name on the ballot, "and that it will remain on the ballot, 'no ifs, ands, or buts about that.'" Inj. Order 7 (quoting TRO Hr'g Tr., (Doc. 39) at 29). It is unclear what State Defendants mean by "remain on the ballot," but the plain language of the law presents two separate ways of amending the ballot—reprinting or striking the name. Ordinary rules of statutory construction lead to the conclusion that if the ballots contain Rep. Greene's name, if the Secretary of State decides in favor of Challengers and there is sufficient time, the name will be *struck from* the ballot, with the result that a vote for her *cannot* be recorded.

Scheduled Elections Calendar of Events.[4] If her name is struck when absentee ballots go out or are struck from the voting machines during advanced in-person voting (level two removal), voting for Rep. Greene is impossible and irrevocably lost. If her name is not struck, but the voter has been advised that a vote for Rep. Greene is void and will not be counted (level three removal), voting for Rep. Greene will be suppressed and those votes will be irrevocably lost.[5] And, if Rep. Greene subsequently wins an appeal in the Superior Court of Fulton County—meaning that her name was wrongly removed—those votes will still be lost.

Fifth, it is difficult to imagine a valid government interest that would justify the First Amendment burden imposed by the Challenge Statute. It is Congress, and not the State, which holds the interest in evaluating the qualifications of its Members. The "character and magnitude" of the injury imposed on First Amendment and Due Process rights by the Challenge Statute is severe, while no cognizable state interest is furthered. *See Green v. Mortham,* 155 F.3d 1332, 1335 (11th Cir. 1998) (listing cognizable states' "important and compelling interests" as

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[4]Available at https://sos.ga.gov/sites/default/files/forms/2022%20State%20Scheduled%20Elections%20Short%20Calendar.pdf

[5]Ostensibly, if those voters are advised that an appeal could reverse the disqualification, then some who would vote for her will do so, perhaps preserving some votes for recovery. Publicizing this information by her would be a substantial burden in itself.

"regulating the election process" and "maintaining fairness, honesty, and order," "minimizing frivolous candidacies," and "'avoiding confusion, deception, and even frustration of the democratic process.'" (internal citations omitted)). The procedurally standard-less 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 Representative's power to make an independent, final judgment on the qualifications of its Members, so it violates Art. 1, § 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. *Powell*, 395 U.S. 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). The *Roudebush* Court held that a recount doesn't usurp the Senate's function because it doesn't "frustrate the Senate's ability to make an independent final judgment." *Id.* at 25-26 (cleaned up). 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, Challenge Statute usurps the U.S. House of Representative's power to make an independent, final judgment on the qualifications of its Members, so it violates U.S. Const. Art. 1, § 5 of the U.S. Constitution.

II. Evaluation of the Evidence Submitted at the Hearing

A. Only competent and relevant evidence admissible under the Georgia Rules of Evidence should be considered.

As discussed throughout, the § 3 claim has very serious consequences to candidates and voters, First Amendment protected speech and assembly, the constitutional right to vote and to run for office, and ultimately our democracy. It also states a federal criminal offense. 18 U.S.C.A. § 2383 ("Whosoever . . . engages in any rebellion or insurrection . . . (commits a felony)"). As Rep. Greene has argued, Response and Objections to Petitioner's Exhibit List ("**Objections to Petitioner's Exhibit List**"), the Georgia Rules of Evidence, O.C.G.A. § 24-8-101,

et seq. would exclude the vast majority of Petitioners' tendered exhibits.

O.C.G.A. § 616-1-2-.18(1) gives this Court "the discretion" to admit evidence that would be excluded under the Georgia Rules of Evidence, "when necessary to ascertain facts not reasonably susceptible of proof under such rules, consider evidence not otherwise admissible thereunder, if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs." O.C.G.A. § 616-1-2-.18(1). Some evidence was admitted under this provision, but this Court still has the discretion on whether to "consider" such otherwise inadmissible evidence. This Court should exercise that discretion and not do so.

The Challenge Statute is a "candidate eligibility requirement" with distinct, recognized burdens and with a substantial risk of irreparable harm. *Green Party of Georgia v. Kemp*, 171 F. Supp. 3d1340, 1351 (N.D. Ga. 2016), *aff'd*, 674 F. App'x 974 (11th Cir. 2017). Those burdens are severe as explained in Part I(C), so this Court should act now to reduce the chance of an erroneous ruling by refusing to consider inadmissible evidence, as Rep. Greene has argued.

B. Any statements by Rep. Greene before or after January 6, 2021 should not be considered unless it is competent evidence of a direct overt act of insurrection on January 6, 2021.

Rep. Greene was sworn in on January 3, 2021. Any speech or action that Rep. Greene engaged in prior to her taking the oath of office to be a sitting Member of Congress is completely irrelevant to the instant Challenge, except to

the limited extent that the evidence is an admission of her intent to engage in a direct overt act of insurrection after January 3rd or that she did so. The bulk of Challengers' evidence fails to meet this test and this Court should not consider such evidence.

The alleged "insurrection" took place on January 6, 2021, three days after Rep. Greene was sworn into office. § 3 does not countenance anything done or said by a person who has not taken an oath of office to support the Constitution of the United States, and nothing prior to the time of taking such oath can be deemed relevant as a matter of law.

C. Protected First Amendment activity can't be used to support an engage in insurrection claim.

Protected First Amendment activity can't be used to support an engage in insurrection claim. Almost all of Challengers' evidence is based upon protected First Amendment activity, which Rep. Greene objected to. *See* Objections to Petitioners' Exhibit List.

The First Amendment provides powerful protections for free expression, assembly, and petition. Those liberties must prevail over political partisans assaulting political foes for exercising those fundamental rights absent some clear exception to First Amendment protection. *See, e.g., NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 908 (1964) ("There are, of course, some activities, legal if engaged in by one, yet illegal if performed in concert with others, *but*

political expression is not one of them." (emphasis added)); *see also id.* at 926 ("To the extent that [Charles] Evers caused respondents to suffer business losses through his organization of the boycott [of racist white business], his emotional and persuasive appeals for unity in the joint effort, or his 'threats' of vilification or social ostracism, Evers' conduct is constitutionally protected and beyond the reach of a damages award."); *see also id.* at 931-32 ("The rights of political association are fragile enough without adding the additional threat of destruction by lawsuit. We have not been slow to recognize that the protection of the First Amendment bars subtle, as well as obvious, devices by which political association might be stifled.").

"Incitement" is a relevant exception to First Amendment protection here because the gravamen of Challengers' claim is that Rep. Greene "incited" an insurrection. The Disqualification Clause doesn't use the term "incitement" and another federal statute that does so uses it as *distinct from* "engage in," showing they mean different things, Act of July 17, 1862, ch. CXCV, § 2 (felony to "incite, set on foot, assist, or engage in any rebellion or insurrection") (current version codified at 18 U.S.C. § 2383), so even if Rep. Greene "incited" an insurrection, which she did not, she would still not have "engaged in" an insurrection, which require conduct, not speech by a direct overt act of insurrection. But how "incitement" is restricted by the First Amendment is highly instructive here in

interpreting "engaged in."

Brandenburg v. Ohio, 395 U.S. 444 (1969), precludes considering any speech which does not comply with its strict definition. *Brandenburg* says "incitement" requires speech "[i] directed to inciting or producing imminent lawless action [that] [ii] is likely to incite or produce such action." *Id.* at 447. Unless both elements are clearly present, speech can't be deemed incitement. The same applies to assembly. *Id.* at 449 n.4 ("must observe the established distinctions between mere advocacy and incitement to imminent lawless action . . ." (citations omitted)). Accordingly, the speech of a Ku Klux Klan leader "'advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform,'" *id.* at 444-45 (citation omitted), was "mere advocacy," not incitement, *id.* at 449, and punishing his speech "purport[ed] to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action." *Id.*

Hess v. Indiana, 414 U.S. 105 (1973), is to the same effect. There, a Vietnam War protestor was convicted for disorderly conduct after police cleared a street of demonstrators and Hess said from the sidewalk, "We'll take the fucking street again." *Id.* at 107. But the Court held this wasn't incitement under *Brandenburg. Id.* at 108-09.

NAACP also held, 458 U.S. at 928, that *robust* advocacy by Charles Evers (NAACP Field Secretary in Mississippi) was protected speech, i.e., not incitement as narrowly defined in *Brandenburg:*

> Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech. To rule otherwise would ignore the "profound national commitment" that "debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan,* 376 U.S. [254,] 270 [(1964)].

And this protected, non-inciting speech included Evers saying, "If we catch any of you going in any of them racist stores, we're gonna break your damn neck." *Id.* at 902; *id.* at 926-29. So, any speech that doesn't contain the two *Brandenberg* elements, clearly established, is privileged First Amendment activity, not incitement, and ipso facto, cannot be engaging in an insurrection.

Moreover, *NAACP,* 458 U.S. 886, mandates that unlawful acts by some may not be attributed to others engaged in robust but lawful speech, assembly, and petition: "The right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected," *id.* at 908. *NAACP* is particularly instructive here as there was constitutionally protected speech, association, and petition, *id.* at 911, designed "to influence governmental action," *id.* at 914, along

with illegal actions by the few. *Id.* at 926. But acts of the latter didn't strip the others of their First Amendment rights, *id.* at 908, where the government failed to prove that "the NAACP authorized— either actually or apparently—or ratified unlawful conduct," for doing so "would impermissibly burden the rights of political association that are protected by the First Amendment." *Id.* at 931. And the required proof of "authorization" or "ratification" is "heavy," *id.* at 933-34, because "[a] court must be wary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless freestanding trees." *Id.* at 934. Much of Challengers' preferred evidence here must not be considered by this Court, because it defies *NAACP*.

D. Challengers' preferred evidence that is based upon activity privileged and protected under the Speech and Debate Clause of the U.S. Constitution should not be considered by this Court.

Challengers may not interfere with Rep. Greene's participation in the legislative processes, as she is a sitting Congresswoman. Any inquiry into her participation in legislative proceedings is barred by the Speech or Debate Clause of the U.S. Constitution, Art. 1, § 6, and may not be considered by this Court.

Article I, § 6, cl. 1, provides that Senators and Representatives shall not be questioned in court or by the President for any speech or debate they give or participate in on the floor of the Senate or the House. *Id.* The clause provides "absolute protection" to legislative materials, including speeches and documents,

from being questioned, including in this proceeding. *Brown & Williamson Tobacco Corp. v. Williams,* 62 F.3d 408, 418-21 (D.C. Cir. 1995). A key purpose of the privilege is to prevent intrusions in the legislative process, and that the legislative process is disrupted by the disclosure of legislative material and other material in both civil and criminal proceedings, regardless of the intended use to which the disclosed materials are put. *U.S. v. Rayburn House Office Bldg.,* 497 F.3d 654, 659 (D.C. Cir. 2007). Merely by asking such a question, Petitioners, as a matter of constitutional law, are interfering and interrupting Respondent's ability to perform her duties as a Congresswoman and to participate in the legislative process. Rep. Greene has objected to pertinent exhibits, *see* Objections to Petitioner's Exhibit List, and this Court should not consider such evidence.

III. The Evidence Fails to Prove that Rep. Greene Is Disqualified Under § 3.

No cognizable facts establish that Rep. Greene engaged in an insurrection.[6] To disqualify Rep. Greene under § 3, Challengers must establish that she "engaged in insurrection or rebellion against the [Constitution], or g[ave] aid or comfort to the enemies thereof."

Challengers focus on *engage in* (making "aid or comfort to . . . enemies" not

[6]For conciseness, "insurrection" is used to include "rebellion" unless context indicates otherwise.

an issue[7]) and say it comprises "'personal service' in, or 'contribut[ing] . . . anything . . . useful;'" to an insurrection. Notice of Candidacy Challenge at ¶ 7 ("**Candidacy Challenge**"). But that is too vague and overbroad a test where First Amendment[8] activity is impinged, as is the attempted application of it. So, any "insurrection" involves only *illegal* activity and "engag[ing] in" it requires committing *unlawful* acts, not activity protected by the First Amendment.

Challengers seem to agree when they say the *insurrection* here was "a violent, coordinated effort to storm the Capitol" to prevent certifying Joe Biden as President. Candidacy Challenge at ¶ 6.[9] Since contesting or protesting an election using *lawful* means can't be insurrection, or evidence thereof, only those "stormers," those who engaged in illegal activities in the Capitol, could even arguably be deemed insurrectionists. However, Challengers have stipulated that "(a) group of people that did not include Respondent unlawfully entered the U.S.

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[7]Anyway, that applies to "foreign wars," not involved here. *The Reconstruction Acts,* 12 U.S. Op. Atty. Gen. 141, 160 (1867). *Accord* Charles Warren, *What Is Giving Aid and Comfort to the Enemy,* 27 Yale L.J. 331, 333 (1918).

[8]As relevant, the First Amendment protects freedom of speech, assembly, and petition. U.S. Const. amend. I.

[9]Here and elsewhere Challengers label various things as "illegal" or "illegitimate" without establishing that they are. For example, it is perfectly legal to contest elections, which is done often by all sides. So, contesting an election using lawful means to "overturn an election," even if coordinated, cannot be evidence of any insurrection.

Capitol on January 6, 2021." Stipulation, ¶ 7. As Rep. Greene was not a "stormer," ipso facto, she did not engage in insurrection on January 6, 2022, by the Challengers own admission. Furthermore, Rep. Greene denies that she engaged in any illegal activity in the Capitol on January 6, and Challengers present no evidence at all that she did. So under the Challengers own test, Rep. Greene did not engage in insurrection on January 6th.

Furthermore, under the proper legal tests, the Challengers presented no facts that establish that: (A) January 6 events were an "insurrection," or (B) Rep. Greene "engaged" in an insurrection on that day.

A. January 6th events did not constitute an "insurrection."

A violation of § 3 requires an "insurrection." There was none in America on or around January 6, 2021.

Challengers say "[a]n 'insurrection' or 'rebellion' under the Disqualification Clause includes actions against the United States with [I] the intent to overthrow the government of the United States or [ii] obstruct an essential constitutional function." Candidacy Challenge at ¶ 6; *see also id.* at ¶¶ 69-70.

The first of these "actions" *can* be an insurrection *if properly* cabined as these words were understood at the time and as the First Amendment requires. But there is absolutely no authority for the second leg, intent to "(ii) obstruct an essential constitutional function," and the Challengers fail to cite any. In any

event, the second leg must be rejected for being too vague and overbroad for the First Amendment context, e.g., it would encompass protestors in the Senate gallery or at judicial confirmation hearings. And establishing such intent will be impossible where the intent can also be to engage in protected First Amendment activity.

First, the meaning of "insurrection"should be understood as those at the time understood it to mean. Contemporary authorities to the adoption of the 14th Amendment cabined what constitutes an insurrection to actions such as:

- a "domestic war," *The Reconstruction Acts.,* 12 U.S. Op. Atty. Gen. 141, 160 (1867) Ex. C at 20;
- "combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the marshals," Act of Feb. 28, 1795, ch. 36, § 2, 1 Stat. 424 ("1795 Militia Act");
- a "rising . . . so formidable as for the time being to defy the authority of the United States. . . . in such force that the civil authorities are inadequate to put them down, and a considerable military force is needed to accomplish that result," *In re Charge to Grand Jury,* 62 F. 828, 830 (N.D. Ill. 1894);
- "'A rising against civil or political authority; the open and active opposition of a number of persons to the execution of law in a city or state; a rebellion; a revolt," *Allegheny Cty. v. Gibson,* 90 Pa. 397, 417 (1849) (citation

omitted);

- "an organized and armed uprising against authority or operations of government," 77 C.J.S. Riot § 36 (citing *United States v. Fries,* 3 U.S. 515 (C.C.D. Pa. 1799)), and
- "an armed insurrection, too strong to be controlled by the civil authority," *Luther v. Borden,* 48 U.S. (7 How.) 1, 2 (1842).

And a riot is not an insurrection: "while crimes growing out of mob violence, however serious they may be and however numerous the participants, are simply unlawful acts in disturbance of the peace which do not threaten the stability of the government or the existence of political society," 77 C.J.S. Riot § 36 (citing *United States v. Fries,* 3 U.S. 515 (C.C.D. Pa. 1799)).

Second, given the high threshold, under modern First Amendment jurisprudence, that must exist before robust advocacy, assembly, and petition may be deemed unprotected by the First Amendment, *see, e.g.*, *NAACP,* 458 U.S. 886, Challenger's definition of insurrection is totally inadequate.[10] It lacks the constitutional rigor mandated by the First Amendment's robust protections. It risks turning protected speech and demonstrations into insurrections. Just as "one man's

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[10]Citation of *insurance-case* "insurrection" descriptions don't suffice in this *First Amendment* context. Candidacy Challenge at ¶ 70 (citing *Pan Am. World Airways v. Aetna Cas. & Sur. Co.,* 505 F.2d 989, 1005 (2d Cir. 1974), and *Home Ins. Co. of NY. v. Davila,* 212 F.2d 731, 736 (1st Cir. 1954)).

vulgarity is another's lyric," *Cohen v. California,* 403 U.S. 15, 25 (1971), so one man's demonstration is another man's insurrection. Only the high standards of the First Amendment protect all—on the ideological left and right—who *do not* engage in activity unprotected by the First Amendment (e.g., riots) from (I) being painted with the broad brush of illegal actors, (ii) having their speech, association, and petition rights squelched by political foes, or (iii) being stripped of candidacy rights for engaging in protected expression. Consequently, what constitutes insurrection must be cabined, lest it swallow protected First Amendment activity and tar the innocent with the illegal activities of others though their own activities are protected First Amendment activity. And such cabining has already occurred.

Foremost in this cabining, neither insurrection, nor evidence purporting to prove insurrection, can be defined constitutionally absent the overarching First Amendment protections outlined above. *Supra* I.C and II.C. Particularly, the restrictions on what constitutes "incitement" and the protections prescribed in *NAACP* control any effort to define "insurrection" or "engaging" in it.

Nothing like "an armed insurrection, too strong to be controlled by the civil authority" occurred in Washington, DC on or around January 6. The *only* thing that *even arguably* could constitute an insurrection would be the actions of those individuals who illegally entered the U.S. Capitol building. Assembly and speeches on the Ellipse were all First Amendment-protected peaceful activity that

can't constitute an insurrection. And as to those who entered the U.S. Capitol building, there were illegal activities but there was no evidence of a "war" or "combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the marshals." In "the ordinary course of judicial proceedings" processing these illegal activities, no one has been charged with insurrection under 18 U.S.C. § 2383 ("Whoever incites . . . or engages in any . . . insurrection . . . , or gives aid or comfort thereto" commits felony.). Little if any organization is in evidence, let alone for the purpose of overthrowing the government, and organizing for First Amendment purposes can"t be counted as insurrection. And there was no evidence of firearms, as would be expected for a planned insurrection,[11] certainly nothing close to the sort of armed insurrection that the Fourteenth Amendment's § 3 targeted, i.e., the Civil War, and no evidence of any serious effort to overthrow the government. Rather, the evidence shows that, on January 6, there was First Amendment-protected peaceful rally at the Ellipse where there was speech, assembly, and petition, but no illegal activity and certainly no insurrection. Nor can the Rally be deemed *part* of an insurrection,

[11] 1n 2021 any real effort to overthrow the government would be with firearms as in any modern coup effort, e.g., the Cuban Revolution (1959). In 1859, John Brown understood that to lead his abolitionists in a successful effort to free slaves and establish an independent stronghold for them he needed to first raid the Harpers Ferry arsenal. *See, e.g., Harpers Ferry Raid,* https ://www. britannica.com/event/Harpers-Ferry-Raid.

because on that day some people engaged in illegal activity in the Capitol. And there is no evidence that illegal activity rose to the level of an insurrection. So, there was no "insurrection" to invoke § 3 or for anyone to be "engaged" in it, as established next.

B. Rep. Greene did not "engage" in an insurrection.

The most persuasive authority of what "engage" means is the Opinion of United States Attorney General in 1867, interpreting the phrase "engaged in insurrection or rebellion" in a recently enacted federal statute. Ex. C. The Attorney General opines on many aspects of this phrase and particularly what "engage" means.

First, the Attorney General gives a definition "I am of opinion that some direct overt act, done with the intent to further the rebellion, is necessary to bring the party within the purviews and meaning of the law." *Id*. at 24. And to make it absolutely clear how narrow "some direct overt act" is, the Attorney General said that it requires "active rather than passive conduct and voluntary rather than compulsory action," *id*. at 21, in "what amounts to individual participation in the rebellion." *Id*. at 22. And, directly pertinent here, "[merely disloyal sentiments or expressions are not sufficient." *Id*. at 24. So, it is conduct, not speech, that is

required by "engage."[12] And, of course, there is not a scintilla of evidence that Rep. Greene committed any direct overt act in attacking the Capitol on January 6th, and all Challengers can point to is speech, which is irrelevant, since speech cannot constitute engagement.

However, Challengers say *engaging* in an insurrection "merely requires 'a voluntary effort to assist the Insurrection,'" "'by personal service, or by contributions, other than charitable, of any thing that was useful or necessary.'" Candidacy Challenge at ¶ 7 (citations omitted). And based on this vague and overbroad "definition," they allege that Rep. Greene engaged in an insurrection. Candidacy Challenge at ¶ 8-13.

But even if there were an "insurrection" on January 6 (there wasn't), Rep Green didn't "engage" in an insurrection. Challengers say "engaged in" means (I) giving anything of value to assist an insurrection or (ii) personal service. These are addressed seriatim.

Regarding giving anything of value to assist an insurrection, this formulation is too vague and overbroad to define any restricted activity where First Amendment activity is involved. Parallel language had to be construed narrowly to avoid violating the First Amendment in *Buckley v. Valeo,* 424 U.S. 1

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[12] The modern definition of "engage" is the same: "[t]o become involved with, do, or take part in something." The Free Legal Dictionary, Engage https://legal-dictionary.thefreedictionary.com/engage.

(1976). The provision at issue was a limit on contributions "relative to a clearly identified candidate," *id.* at 39, which was challenged as unconstitutionally vague and which the Court held required "[c]lose examination of the specificity . . . in an area permeated by First Amendment interests," *id.* at 39-41 (citations omitted), because "[p]recision of regulation . . . must the touchstone in an area so closely touching on our most precious freedoms." *Id.* at 41 (citing *NAACP v. Button,* 371 U.S. 413, 438 (1963) (holding activities of NAACP in funding litigation was protected by the First Amendment and could not be restricted under state authority to regulate legal profession)).

The problem with such "vague laws" is that they "trap the innocent" and "inhibit protected speech by inducing citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Id.* at 41 n.58 (cleaned up). In other words, "[w]hether words intended and designed to fall short of invitation would miss such a mark is a question both of intent and effect," so that "[n]o speaker, in such circumstances, safely could assume that anything he might say upon the general subject would be understood by some as an invitation," thereby chilling speech and "compel[ling] the speaker to hedge and trim," because there is "no security for free discussion." *Id.* at 50 (cleaned up). That is a clear risk here where Challengers' vague notion of "engaged in" will trap the innocent and squelch protected speech.

The solution in *Buckley,* was to assure that the words "relative to" didn't sweep in issue advocacy (protected speech) and to narrowly confine the speech that could be regulated by the "express advocacy" test. *Id.* at 43 & n.51. The Court also imposed the express-advocacy test on the words "'for the purpose of . . . influencing' the nomination or election of candidates for federal office'" to avoid the unconstitutional overbreadth and vagueness and their consequent chill on First Amendment expressive activity. *Id.* at 76-78. If that degree of specificity is required for political contribution restrictions to protect robust speech on the issues of the day, *a fortiori* activities deemed to be engaging in insurrection must be similarly cabined to protect free speech, association, and petition. Challengers' engaged-in-by-contribution definition is not so cabined to avoid chilling First Amendment activity, compounded by the vague and overbroad words "any thing that was useful or necessary," so it fails the First Amendment's mandates.

Regarding personal service, the same specificity is required because free speech, association, and petition are involved. Clearly, donning a butternut uniform, loading one's musket, and joining the Confederate battle line was deemed personal service in the Civil War. But beyond bearing arms in a war to overthrow the government, the notion of "personal service" becomes too vague and overbroad to protect robust speech, assembly, and petition from charges of "personal service" in an insurrection. Without significant narrowing, which

Challengers don't offer, and no court has imposed authoritatively, this test fails the First Amendment in this context. So, for example, the notion that planning "a demonstration . . . that the planner knows is substantially likely to (and does) result in insurrection," Candidacy Challenge at ¶ 8, can't be taken seriously in the First Amendment context where a demonstration is fully protected peaceful speech, assembly, and petition and *NAACP* counsels that the illegal actions of a few can't be attributed to the lawful many.

If law-abiding advocates must avoid core political speech because of the possibility that some others might not abide by the law, then free speech, assembly, and petition are squelched and chilled. Democracy can't function without those activities operating robustly. So, Challengers' assertion, like the candidacy challenge, is fundamentally and profoundly undemocratic. Allowing it would be akin to authorizing a heckler's veto on the First Amendment activities of political opponents. *Cf. Hill v. Colorado,* 530 U.S. 703, 734 (2000) (speech-zone restriction not a "heckler's veto" because speech not stopped); *Reno v. ACLU,* 521 U.S. 844, 880 (1997) ("would confer broad powers of censorship, in the form of a `heckler's veto,' upon any opponent of indecent speech").

Under the foregoing, controlling, First Amendment analysis, nothing that Rep. Greene said or did could constitutionally be deemed engaging in an insurrection. Some brief examples suffice. The evidence shows that Rep. Greene

did not organize or even attend the Rally that day or did anything other than perform her official duties as a member of Congress. Challengers argue that Rep. Greene "has a long history of advocating violence against her political opponents," but fail to prove it, relying on hearsay evidence and vague and ambiguous statements of Rep. Greene that can't even be deemed incitement, and, in any event, involve speech not conduct, "a direct overt act," which is required for "engaging in an insurrection."

Challengers' "evidence" is all irrelevant speech where they misstate and misconstrue Rep. Greene's words to try to use her speech against her. They preposterously claim that words like "1776," "The Declaration of Independence," "The American Revolution," and advocacy of "The Second Amendment" are all just "code words" for engaging in an insurrection. And it went from the sublime to the ridiculous when Challengers claimed that Rep. Greene's use of the phrase "we won't go silently into the night," which came from a scene in the famous movie "Independence Day," was just another example of such code words.[13]

But actually, the origin of those words, which she paraphrased, is Dylan Thomas' famous poem, "Do not go gentle into that good night," American Academy of American Poets, Poem, Do not go gentle into that good night,

[13]Petitioners' counsel repeatedly accused Rep. Greene of using such "code words" as a masked call to violence. Rep. Greene's counsel did not have the time nor resources to review the audio recording in order to cite to all of the times Petitioners used such "evidence." However, Rep. Greene's counsel will be happy to provide such citations once the transcript of the hearing is received.

https://poets.org/poem/do-not-go-gentle-good-night, which was not about war or insurrection, but instead "[t]he phrase conveys a powerful message that, when death approaches, one needs to know what made his life meaningful, and he should never fear death." Academy of American Poets, Literary Devises, Do not go gentle into that good night, https://literarydevices.net/do-not-go-gentle-into-that-good-night/. Unfortunately, this example is typical of the "evidence" presented against her and how Challengers misconstrue such evidence.

Rep. Greene was not a participant in the January 6th violence—she was a victim. R-5, Christopher Wray testimony to Congress (acknowledging Members were victims). In fact, the evidence on the record shows that Rep. Greene tried to urge calm and peace *during* the unlawful events of January 6, 2021:

> Hi, everyone. this is Congresswoman Marjorie Taylor Greene. I am putting out a message to you all just letting you know for all the great people, wonderful Americans who support President Trump that are here in Washington, D.C. today, today is a time to support your President; and just know that we're fighting for you here in the Capitol in Congress, fighting for your vote and fighting for President Trump.
>
> So I urge you to remain calm. I urge you to have a peaceful protest. Make sure that everyone is safe and protected, and let's do this in a - - in a peaceful manner. This is - - this is not a time for violence. This is a time to support President Trump, support our election integrity, and support this important process that we're going through in Congress where we're allowed to object.
>
> So this is – this is very important, so I urge you to stay calm. Be the great American people that - - that I know you are, and just know that we're - - we're in here fighting for you.

So God bless everyone. Be careful. Be safe, and be smart; and -- and obey the laws. Thank you very much.

R-4, Transcript of Marjorie Taylor Greene recorded in the Republican cloakroom on January 6, 2021, as people were unlawfully entering the Capitol.

In sum, there is absolutely no evidence that Rep. Greene committed any direct overt act of insurrection, and her speech was not conduct, but even so, it did not even amount to incitement. Many of her statements in evidence are either wholly irrelevant to her conduct of January 6 and/or fully protected by the First Amendment and cannot establish that Rep. Greene engaged in insurrection. She did not.

WHEREFORE, Respondent Marjorie Taylor Greene respectfully requests the Court, based upon its finding of facts and conclusions of law, to find that Rep. Greene is not disqualified under § 3 to be a member of Congress and is qualified "to seek[ ] and hold the public office for which such candidate is offering."

Dated: April 29, 2022

Respectfully Submitted,

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Certificate of Service

I hereby certify that on April 29, 2022, I served the foregoing document on the Petitioners and Respondent, via their legal counsel who have made entry of appearance, by electronic mail at the following addresses: bryan@bryansellslaw.com, rfein@freespeechforpeople.org; jabady@ecbawm.com; acelli@ecbawm.com; jboppjr@aol.com; msiebert@bopplaw.com.

Respectfully submitted,
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