IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

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

RESPONDENT'S OBJECTION TO AND MOTION TO STAY PETITIONERS' MOTION TO TAKE PARTY DEPOSITION, OR ALTERNATIVELY, TO STRIKE PETITIONERS' MOTION WITH INCORPORATED BRIEF IN SUPPORT

NOW COMES, Respondent MARJORIE TAYLOR GREENE, by and through counsel, and hereby respectfully objects to Petitioners' David Rowan, Donald Guyatt, Robert Rasbury, Ruth Demeter, and Daniel Cooper joint Motion to Take Party Deposition served pursuant to OSAH Rule 616-1-2.16 and 616-1-2-.20. Respondent further moves to Stay the Motion, or Alternatively, to Strike the Motion for the following reasons, and incorporates its brief in support and states as follows:

1. Respondent filed a federal proceeding on or about April 1, 2022, in the U.S District Court for the Northern District of Georgia seeking injunctive relief against the entirety of these proceedings.
2. Pursuant to OSAH Rule 616-1-2-.22(3) that all Constitutional objections must be stated with specificity, Respondent Greene asserts the following

"**General Objections**" regarding the legality of the entire procedure to the Motion to Take Party Deposition. *See* Part I. Pursuant to these General Objections, a deposition of Rep. Greene in this administrative proceeding is improper as to Respondent because:

a. The Challenge Statute's provision triggering a government investigation based solely upon a Challenger's "belief" that Rep. Greene is unqualified violates her First Amendment right to run for political office. U.S. Const. amend. I.

b. The provision of the Challenge Statute which shifts the burden of proving a negative to the Candidate, as applied to any Challenge under Section Three of the Fourteenth Amendment, violates the Due Process Clause of the Fourteenth Amendment. U.S. Const. amend. XIV.

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

d. The Challenge Statute, as applied to Rep. Greene under Section Three of the Fourteenth Amendment, violates 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, para. 2.

3. In addition to the General Objections, Respondent Greene asserts the following "**Section Three Objections**" that Section Three of the Fourteenth Amendment is not violated or is limited by prior oath as a trigger. *See* Part II. A prima facie case must be made that there was an insurrection, that Respondent engaged in such insurrection—until that is made, Respondent objects to the Motion for Party Deposition as irrelevant.
    a. The January 6 events weren't an "insurrection";
    b. Respondent Greene didn't "engage" in insurrection; and
    c. Any deposition examination upon Respondent Greene regarding statements she made prior to January 3, 2020, are irrelevant to the Challenge and therefore not discoverable via deposition.
4. Respondent Greene asserts the following "**Privilege Objections**" (see Part III.) to the Motion for Party Deposition:
    a. Protected First Amendment activity and hearsay can't be used to support insurrection claims, so deposition testimony regarding the same is irrelevant;
    b. Petitioners' Motion to Take Party Deposition and any related oral discovery in this administrative proceeding is improper as to

Respondent Greene, a sitting Congresswoman, and any discovery request or inquiry upon her concerning activities in the course of her legislative duties is absolutely barred by the Speech & Debate Clause of the U.S. Constitution, Art. 1, § 6. (Per OSAH Rule 616-1-2-.22(3), all Constitutional objections must be stated with specificity).

5. In addition to the General and Privilege Objections, Respondent Greene asserts the following "**Specific Objections.**" Ordering Respondent Greene's deposition permits an impermissible "fishing expedition," which the APA does not allow. (see Part IV.).
6. Petitioners' seek a hearing on this Motion under OSAH 616-1-2-.16(5), but their Motion does not justify a hearing because the objections herein obviate the need for a hearing. In the event the Administrative Law Judge chooses to set a hearing, Respondent requests at least five (5) days' notice prior to the date set for hearing as set forth in the Rule. *Id.*

Legal Standard

Under OSAH 616-1-2-.38, "Discovery shall not be available in any proceeding before an Administrative Law Judge except to the extent specifically authorized by law. Nothing in this Rule is intended to limit the provisions of Article 4 of Chapter 18 of Title 50 or Rule 37." Under the Administrative Procedures Act

("APA") O.C.G.A. § 50-13-15 et seq., in contested cases, "Irrelevant, immaterial or unduly repetitious evidence shall be excluded."

The ALJ has further authority under OSAH 616-1-2-.22 to take action to "avoid unnecessary delay in the disposition of proceedings and shall conduct a fair and impartial hearing," including (b) "establish[ing] methods and procedures to be used in the development of the evidence," (g) "rule on, ... exclude or limit evidence," (h) "establish time for other written evidence and other submissions," and ultimately (o) "take any action not inconsistent with this Chapter or the APA to ... ensure an expeditious, fair and impartial hearing." Finally, "Procedural questions that are not addressed by the APA, other applicable law, or these Rules shall be resolved at the Administrative Law Judge's discretion, as justice requires." OSAH 616-1-2-.02(3).

Notably omitted from Petitioners' Motion is that depositions are not mandatory, but only by the tribunal's permission. OSAH 616-1-2-.20(1) provides that the Administrative Law Judge "***may***" order that testimony of a witness to be taken by deposition or in response to written[1] questions. Further, OSAH 616-1-2-.20(2) provides that the Administrative Law Judge "***may***" specify whether the "scope of the examination should be limited."

[1] Petitioners' Motion seeks oral examination only.

I. GENERAL OBJECTIONS

The following General Objections are based on constitutional and federal law claims. As such, a party deposition is improper, and Petitioners' Motion should be denied.

A. The Challenge Statute's Provision triggering a government investigation based solely upon a Challenger's "belief" that Rep. Greene is unqualified violates Rep. Greene's First Amendment right to run for political office.

The Challenge statute is effectively a ballot access requirement. "[C]andidate eligibility requirements implicate basic constitutional rights under the First and Fourteenth Amendments." *Green Party of Georgia v. Kemp*, 171 F. Supp. 3d 1340, 1351 (N.D. Ga. 2016), *aff'd*, 674 F. App'x 974 (11th Cir. 2017) (citing *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983)). 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 v. Celebrezze, 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 ("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), at which the burden is on the candidate to establish eligibility for office. *See Haynes v. Wells*, 273 Ga. 106, 108–09 (2000).

The "character and magnitude" of the injury imposed on First Amendment rights, *Cowen v. Georgia Sec'y of State*, 960 F.3d 1339, 1342 (11th Cir. 2020), by the Challenge Statute is significant because it *requires* the Secretary of State to refer a complaint for an administrative hearing *see, e.g.*, *Farrar v. Obama*, No.1215136-60-Malihi at *2 (Ga. Off. State Admin. Hearings (Feb. 3, 2012)). The complaint *must* be referred for hearing—without any consideration or requirement of any standard of proof whatsoever. The Challenge Statute, by operation of law, erects an *ad hoc* "candidate eligibility requirement" that the candidate must clear 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), "'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, 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 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 "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 rights, and the substantial injury it inflicts is not justified by any cognizable interest of the State.

B. The provision of the Challenge Statute which shifts the burden of proving a negative to the Candidate, as applied to any Challenge under Section Three of the Fourteenth Amendment, violates the Due Process Clause of the Fourteenth Amendment.

When a Candidate is subject to a Challenge, the ALJ will schedule a Challenge Hearing. In this Challenge Hearing, the "entire burden" is placed upon the Candidate "to affirmatively establish his eligibility for office." *Haynes v. Wells*, 273 Ga. 106, 108-09 (2000). In the case of a Challenge based upon residency or age, the proof the Candidate must provide is relatively straightforward. Documents showing a change of address or date of birth could easily be provided by the Candidate. The same is not true for a Challenge filed based on the "disqualification clause" of the Fourteenth Amendment. Under the Challenge provision, the Candidate is required to prove by a preponderance of evidence showing she didn't do something (e.g., prove that she didn't engage in "insurrection"). Such burden shifting is unconstitutional under Due Process Clause of the Fourteenth Amendment.

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

Since the appellate courts apply a deferential standard to the facts to a Challenge Appeal, O.C.G.A. § 21-2-5, it would further violate the Candidate's due process rights by deferring to factual conclusions arrived at by a process that itself violates those same rights. The Challenge Statute's burden shifting provision violates the Due Process Clause of the Fourteenth Amendment by requiring Rep. Greene prove a negative (i.e., that she did not engage in "insurrection").

C. 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 U.S. Const. 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. 542 (*quoting* 17

Annals of Cong. 871 1807)). The full House then voted to seat the Member. *Id.* at 543.

Voters have unfettered discretion in voting to independently evaluate whether federal candidates meet the constitutional qualifications for office. Derek T. Muller, *Scrutinizing Federal Electoral Qualifications*, 90 Ind. L.J. 559, 592 (2015) ("**Muller**") (citations omitted). But Congress has an exclusive role in judging the qualifications of its own members to determine if they are eligible to take a seat in Congress. *Id.* at 611 (collecting cases). This exclusive role is consistent with the Supreme Court's logic in *Roudebush v. Hartke*. 405 U.S. 15 (1972). 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 v. McCormack,* 395 U.S. 486, 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.

Indeed, it would have made little sense to prohibit former members of Congress who thereafter joined the Confederacy from again serving in Congress but leave the decision of who was disqualified to the same states that rebelled only a few years prior. Because the Challenge Statute directly usurps Congress' constitutional responsibilities, it violates Article 1, § 5 of the U.S. Constitution.

As the threshold question of "who decides" is a legal question not resolved by any fact finding, such a fact-finding effort through Petitioner's Motion to Take Party Deposition should be barred as this tribunal has no authority to conduct such an inquiry and "questioning" and it is a poor use of judicial resources that will result in the Respondent expending unnecessary and burdensome additional time and resources while concurrently attempting to fulfil her duties as a Congresswoman.

D. The Challenge Section, as applied to Rep. Greene under Section Three of the Fourteenth Amendment, violates federal law.

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). Of course, Congress does not have the power to "repeal" a constitutional Amendment, but the plain language of the Amendment itself gave Congress the power to remove the disability in Section Three.

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 Section Three from Rep. Greene.

Section Three does not specify Congress only has the power to remove past disabilities, it specifies Congress has the power to remove "such disability." "Such disability" refers to the disability of someone who has previously taken an oath as a member of Congress who "*shall have engaged*" in insurrection from taking office. "Shall have" followed by a past participle forms the future perfect tense and shows an action will occur before another action in the future.[1] The grammatical reading of Section Three means that Congress had the power to remove "such disability: for both Members who had incurred the disability and those who had not incurred such disability but could if they engaged in the applicable prohibitions in the future. A district court in the Fourth Circuit recently held that The Amnesty Act of 1872 does preclude a Challenge based in Section Three of the Fourteenth Amendment. *See Cawthorn v. Circosta, et al.*, Case No. 5:22-cv-00050-M, ECF No. 78, Ex. A.

Since Section Three does not apply to Rep. Greene (or any Member holding office after the 37th Congress), the application of Section Three to Rep. Greene is prohibited by federal law.

The Motion to Take Party Deposition should be stayed, stricken in its entirety or disallowed until these threshold legal issues are determined by the federal court and/or this tribunal. This discovery should be stayed until the federal court decides

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[1] Elizabeth O'Brian, *What is future perfect tense?*, GRAMMAR REVOLUTION, (Jan. 28, 2022, 2:08 PM), https://www.english-grammar-revolution.com/future-perfect-tense.html

whether to enjoin these proceedings. A Complaint was filed in the U.S. District Court for the Northern District of Georgia on or about April 1, 2022. Part of the relief sought in that court is to enjoin these proceedings, including enjoining the Administrative Law Judge from adjudicating the challenge to Respondent and making any findings of law and fact concerning any challenged matter as to Respondent.

II. SECTION THREE OBJECTIONS

Section Three of the Fourteenth Amendment was not violated or is limited by prior oath as a trigger for application. As such, a deposition of Rep. Greene is improper, and Petitioners' Motion should be denied.

No cognizable facts establish that Rep. Greene engaged in an insurrection.[2]

To disqualify Rep. Greene under the Disqualification Clause (U.S. Const. amend. XIV, § 3), Challengers must establish that she "engaged in insurrection or rebellion against the [Constitution], or g[ave] aid or comfort to the enemies thereof," *id.*

Challengers say the *insurrection* here was "a violent, coordinated effort to storm

[2]This Part assumes *arguendo* that the Disqualification Clause operates after the 1872 Act disabled it using § 3's plenary authority. *Supra* Part I.D. For conciseness, "**insurrection**" is used to include "rebellion" unless context indicates otherwise.

the Capitol" to prevent certifying Joe Biden as President. Notice ¶ 6.[3] 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.

Challengers focus on *engage in* (making "aid or comfort to . . . enemies" not an issue[4]) and say it comprises "'personal service'" in, or "'contribut[ing] . . . anything . . . useful'" to an insurrection. Notice ¶ 7. But that is too vague and overbroad a test where First Amendment[5] activity is impinged, as is the attempted application of it in ¶ 8. So, any "insurrection" involves only *illegal* activity and "engag[ing] in" it requires committing *unlawful* acts, not activity protected by the First Amendment.

Challengers allege facts they say make a prima facie case that Rep. Greene

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[3]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.

[4]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).

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

engaged in insurrection. *See, e.g.*, Notice ¶¶ 21-26, 37-61. Notably, none says she personally did illegal activities in the Capitol on January 6, so none even fits Challengers' own definition of the "insurrection." Notice ¶ 6. But Challengers again ignore that the First Amendment mandates bright-line, narrow, unambiguous tests for restrictions on the robust political speech, assembly, and petition that enable democracy, lest liberty be destroyed or chilled by political partisans in cases like this. Under such tests, no cognizable facts establish insurrection because: (**A**) January 6 events weren't an "insurrection, (**B**) Rep. Greene didn't "engage" in an insurrection, (**C**) any statements Rep. Greene made prior to January 3, 2020, are irrelevant and not discoverable.

A. January 6 events weren't an "insurrection."

A violation of the Fourteenth Amendment's § 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." Notice ¶ 6; *see also id.* ¶¶ 69-70.

The first of these "actions" *can* be an insurrection *if* properly cabined as the First Amendment requires, as described next. But there is no authority for the second and it 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.

Given the high First Amendment threshold that must exist before robust advocacy, assembly, and petition may be deemed incitement or unprotected under *NAACP*, 458 U.S. 886, Challenger's first definition is inadequate.[6] 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 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 *un*protected 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

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

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* II.A. Particularly, the restrictions on what constitutes "incitement" and the protections prescribed in *NAACP* control any effort to define "insurrection" or "engaging" in it. Moreover, other authorities have also cabined what constitutes an insurrection to actions such as:

- a "domestic war," *The Reconstruction Acts.*, 12 U.S. Op. Atty. Gen. 141, 160 (1867);
- "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, 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); and
- "an armed insurrection, too strong to be controlled by the civil authority," *Luther v. Borden*, 48 U.S. (7 How.) 1, 2 (1842).

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 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 "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,[7] and organization for First Amendment purposes can't be counted as insurrection. Few firearms are in evidence as would be expected for a planned insurrection,[8] certainly nothing close to the sort of armed insurrection that the Fourteenth Amendment's § 3 targeted, i.e., the Civil War, which vitiates any argument that there was any serious effort to overthrow the government. Rather, on January 6 there was First Amendment-protected speech, assembly, and petition that was *not* an insurrection and can't be deemed *part* of an insurrection, while on that day some people engaged in illegal activity in the Capitol. That illegal activity didn't rise to the level of an insurrection. So, there was no "insurrection" to invoke the Fourteenth Amendment's § 3 (were it operative) or for anyone to be "engaged" in as established next.

B. Rep. Greene didn't "engage" in an insurrection.

Even if the actions of those who performed illegal activities in the Capitol on

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[7]*See* Reuters, *FBI Finds Scant Evidence U.S. Capitol Attack Was Coordinated* (Aug. 20, 2021) (nearly 95% acted individually).

[8]In 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.

January 6 could be deemed an insurrection (they can't be), NAACP, 458 U.S. 886, says the actions of those persons can't be attributed to those engaging in First Amendment-protected activity. Challengers ignore *NAACP*, though its controlling analysis alone vindicates Rep. Greene.

Rather, 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.'" Notice ¶ 7 (citations omitted). And based on this vague and overbroad "definition," they allege "a prima facie" case that Rep. Greene engaged in an insurrection. Notice ¶¶ 8-13.

But even if the Fourteenth Amendment's § 3 remained operative (it doesn't) and 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 (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 too" 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," Notice ¶ 8, can't be taken

seriously in the First Amendment context where a demonstration is fully protected 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 Challengers say Rep. Greene said or did could constitutionally be deemed engaging in an insurrection. Some brief examples suffice. Any involvement she may have had with the Ellipse demonstration or with a march to the Capitol (short of illegal entry, though as a Representative any entry she made would have been legal), Notice ¶ 9, was fully protected First Amendment activity and can't be considered evidence of an insurrection or engaging in one. Similarly, any involvement in promoting that Ellipse demonstration, Notice ¶ 10-11, was fully protected by First Amendment and

useless to Challengers' claims. Challengers allegation that Rep. Greene "has a long history of advocating violence against her political opponents," Notice ¶ 22, relies on hearsay evidence (n.7), and the "hanging" and other similar language allegation can't be deemed incitement under controlling precedents and compared to Evers's protected statement that "[i]f we catch any of you going in any of them racist stores, we're gonna break your damn neck." *NAACP*, 458 U.S. at 902; *id.* at 926-29. So just as these can't be incitement, they can't constitute engaging in an insurrection given the First Amendment. Similarly, "'fight' for Trump," Notice ¶ 24, relies on hearsay evidence and is protected First Amendment speech that has no applicability to engaging in an insurrection. These examples suffice to show that others of the same sort are fully protected by the First Amendment and cannot establish that Rep. Greene engaged in an insurrection. She did not.

C. A deposition would be improper because any speech or action of Respondent made before January 3, 2021, is irrelevant to a Section Three Challenge.

Respondent was sworn in on January 3, 2021. Any speech or action that Respondent engaged in prior to her taking the oath of office to be a sitting Member of Congress is completely irrelevant to the instant Challenge, and therefore, no deposition testimony related to that time frame should be allowed.

The alleged "insurrection" took place on January 6, 2021, three (3) days after she was sworn into office. Section 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 period can be deemed relevant as a matter of law. Section 3 clearly provides,

> 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***...to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same...

U.S. Const. amend. XIV, § 3 (bolding and italics added.)

Any deposition seeking testimony on events or statements prior to January 3, 2021, is irrelevant and should not be allowed.

III. PRIVILEGE OBJECTIONS

A. Protected First Amendment activity and hearsay can't be used to support insurrection claims.

Protected First Amendment activity can't be used to support insurrection claims. Therefore, any deposition testimony sought regarding such protected speech should be disallowed.

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.[9] The Disqualification Clause doesn't use the term incitement and another provision restricted that 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), but how "incitement" is restricted is highly instructive here in interpreting "engaged in." And *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curium), precludes applying anything approximating the incitement exception here. *Brandenburg* says

[9]Such "inciters" must be "enemies" per § 3, *see supra,* but the focus here is incitement.

"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) (per curium), 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 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 or "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. Challengers' approach here must be repudiated because it defies *NAACP* and would require a different outcome there.

Similarly, speech protected by the Speech or Debate Clause, U.S. Const. art. I, § 6, cl. 1, can't be used to support insurrection claims. The Clause provides that, absent "Treason, Felony and Breach of the Peace," Representatives "shall not be questioned in any other Place." So, absent such charges (not brought), all speech or debate pursuant to legislative activity cannot be used against any Representative.

Relatedly, the evidentiary rule against hearsay precludes the use of purported statements attributed to a Representative (or another) from newspapers or the like for their purported truth. *See, e.g.*, Fed. R. Evid. 801(c) ("'Hearsay' means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement."). So, e.g., saying that a website news article says a Representative said something isn't evidence that the Representative said it, and such purported evidence cannot be used against the Representative. And all such purported hearsay

"evidence" of what Rep. Greene or others purportedly said must be excluded. *See, e.g.*, Notice ¶ 22.

B. A Deposition is by definition oral "Questioning" and is precluded against a sitting Congresswoman under the under the Speech and Debate Clause of the U.S. Constitution.

The Motion to Take Party Deposition and any related discovery in this administrative proceeding, is improper "questioning" and interference with Respondent's participation in the legislative processes, as she is a sitting Congresswoman. Any discovery request or inquiry about a sitting Congresswoman's participation in legislative proceedings is barred by the Speech or Debate Clause of the U.S. Constitution, Art. 1, § 6, and the controlling case law.

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 third=party civil discovery. *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

seeking this discovery, 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.

Respondent is afforded "absolute protection" from being questioned through oral or written deposition. Petitioners boldly state that "The Complaint identifies and describes in detail dozens of statements..." (Motion p. 2) and then cite to Respondent's alleged statements in their Motion. *Id.* All of the statements cited in the Motion were made during her service as a Congresswoman, and therefore are absolutely protected free speech under the First Amendment, as well as protected under the Speech or Debate Clause of the U.S. Constitution.

Moreover, it appears that Petitioners already have the hearsay statements, and any testimony from Respondent, if permissible, would be redundant and duplicative. O.C.G.A. § 50-13-15 expressly prohibits evidence that is unduly repetitious, irrelevant and/or immaterial.

The Complaint is drafted for no purpose other than to evoke scandalous headlines in the media. None of the named Petitioners in the filed challenge have personal knowledge of any of Respondent's alleged actions, or the actions of the rioters at the Capitol on January 6, 2021.[10] All of the statements set forth in the Complaint and in

[10] None of them have averred that they were physically present at the Capital or participated in the activities that took place that day in Washington, D.C.

the Motion are mere hearsay and intended to inflame the passions of the media, as well as the tribunal charged with making the hearing at issue fair and impartial. Even if an examination was constitutionally permissible (which it is assuredly not), conducting it at a hearing would suffice for the ministerial purpose of determining ballot access. Under these circumstances, a deposition is contrary to the expeditious resolution of whether Respondent has a right to be on the ballot. A deposition will be replete with objections, privilege arguments, form of question debates, and other privileges that will likely render it useless to the Administrative Law Judge. This matter is not being heard before a jury, and emotionally driven cross-examination in deposition would do little to expedite a conclusion to this matter.

Respondent's "state of mind" (Mot. p. 2) is not relevant to whether she was physically "engaged" in acts of purported "insurrection." Her understanding of "terminology" is also not relevant to the inquiry and is intended exclusively to harass her in violation of the Speech and Debate clause, which exists precisely to protect her right to engage in unfettered advocacy as a Member of the United States Congress. The undisputed facts show that Respondent was actively participating in the electoral count as a legislator on January 6, 2021, and was a personal victim of the unfortunate riots that took place. She decried the riot in a speech from the floor of Congress and condemned the violent conduct. Petitioners' bad faith in bringing this action is evidenced by their purposeful omission of these facts from their

Complaint and Motion. Nonetheless, whatever the facts might be, only the House of Representatives may determine whether Respondent—or any elected Member—is qualified to be seated. Petitioners have no business being here and have no right to obtain discovery on an issue that is not within the jurisdiction of this or any other tribunal.

None of this discovery is permissible under the Speech or Debate Clause, and Respondent objects to it, and requests that the ALJ strike the request.

IV. SPECIFIC OBJECTIONS

Ordering Respondent Greene's deposition permits an impermissible "fishing expedition," which the APA does not allow.

This is an administrative hearing to determine whether Respondent is qualified to be placed on a ballot for re-election. This is not a fishing expedition.

O.C.G.A. § 9-11-26(c) authorizes the trial court in which an action is pending, upon motion by a party or by the person from whom discovery is sought and for good cause shown, to make any order which justice requires to ***protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense***. The grant or denial of a motion for protective order generally lies within the sound discretion of the trial court, and the exercise of that discretion is reviewed on appeal for abuse. *Live Oak Consulting, Inc. v. Dep't of Cmty. Health*, 281 Ga. App. 791, 792, 637 S.E.2d 455, 456 (2006). A protective order, or some other limiting order,

is warranted in this administrative proceeding to preclude the deposition because Petitioners seek to depose Respondent, not for the legitimate purposes of ascertaining ballot eligibility, but to improperly use this tribunal as a discovery arm of other political inquiries.

For instance, despite the bar rules in Georgia (Rule 3.6 "Trial Publicity") prohibiting an "extrajudicial statement that a person would reasonably believe to be disseminated by means of public communication ... and the possibility of a substantial likelihood of materially prejudicing an adjudicative proceeding," Ron Fein, a proposed *pro hac vice* attorney in this matter, has already stated to the press:

"It's rare for any conspirator, let alone a member of Congress, to publicly admit that the goals of their actions are preventing a peaceful transfer of power and the death of the President-elect and Speaker of the House, but that's exactly what Marjorie Taylor Greene did," said Ron Fein, legal director of Free Speech for People, in a statement. "The ***Constitution disqualifies from public office any elected officials who aided the insurrection***, and ***we look forward to asking Representative Greene about her involvement under oath***."... "A candidate is then required to prove their eligibility, which the ***Free Speech for People statement indicated could include the group issuing a subpoena for Greene to give testimony in a deposition, something she has not done in relation to January 6***." Newsweek, *Marjorie Taylor Greene Unfit For Office, Suit Claims, Citing Jan. 6 Support, Aaron McDade,*

3/24/22 11:37 AM EDT (bolding added). Mr. Fein is not a Member of the U.S. House of Representatives, nor is he a registered Georgia voter in the 14th Congressional District, and as a matter of basic constitutional law, determining whether Congresswoman Greene is qualified to be seated in the House is none of his lawful business.

Petitioners surely know their Complaint is without legal merit, and that this tribunal lacks jurisdiction to contemplate their claims. But the Complaint was not filed to further a meritorious dispute. It was filed as an abuse of the judicial process to further a publicity stunt. They seek to malign a Congresswoman through an administrative proceeding, while simultaneously ignoring clear exculpatory evidence. The hyperbolic Complaint defines itself: "She poses precisely the type of ongoing threat to the Republic that the Disqualification Clause was written to guard against." *See Complaint.*

No deposition should be had by these Petitioners, and Respondent respectfully requests protection from further abusive conduct by Petitioners.

This 3rd day of April 2022.

Respectfully submitted,
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* Motions for pro hac vice admission forthcoming.

CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2022, I served the foregoing document on the Petitioners, via their legal counsel who have made entry of appearance, by electronic mail at the following address: bryan@bryansellslaw.com, and by first class U.S. Mail, postage prepaid, at the following address: the Law Office of Bryan L. Sells, LLC, P.O. Box 5493, Atlanta, Georgia 31107-0493.

Respectfully submitted,
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