No. 22-11299

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MARJORIE TAYLOR GREENE,

Plaintiff – Appellant,

v.

SECRETARY OF STATE FOR THE STATE OF GEORIGA, et al.

Defendants-Appellees

&

DAVID ROWAN et al.

Intervenor Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia
No. 1:22-cv-01294-AT

Brief of Professor Derek T. Muller as *amici curiae* in support of no party

Michael Francisco
Michael A. Brody
McGuireWoods, LLP
888 16th St. N.W., Ste. 500
Washington, DC 20006
mfrancisco@mcguirewoods.com
mbrody@mcguirewoods.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution and Statutes

Treatises

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

Derek T. Muller is the Bouma Fellow in Law and Professor of Law at University of Iowa College of Law. He teaches and writes about election law and federal courts, and he has an interest in the resolution of this case within the appropriate legal framework. Portions of this argument are drawn from his previous scholarship, including *Weaponizing the Ballot*, 48 FLA. ST. U. L. REV. 61 (2021); *Ballot Speech*, 58 ARIZ. L. REV. 693 (2016); and *Scrutinizing Federal Electoral Qualifications*, 90 IND. L.J. 559 (2015).[2]

STATEMENT OF THE ISSUES

1. Do the States have the authority to require congressional candidates demonstrate they meet constitutional qualifications

---

[1] The University of Iowa College of Law is not a signatory to the brief, and the views expressed here are those of *amicus curiae*. The University provides financial support for faculty members' research and scholarship activities, support that helped defray the costs of preparing this brief. Proposed *amicus* reached out to the parties to request their consent to the proposed filing. Plaintiffs-Appellant consented, while Defendant-Appellant did not. *See* attached motions filed with this brief.

[2] *Amicus* certify that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money intended to fund this brief, and no person other than *Amicus* contributed money intended to fund this brief.

before Election Day, when the Constitution does not require those qualifications to be shown before Election Day?

2. Do the States or the federal courts have the authority to review the qualifications of congressional candidates, or is that a power reserved to Congress alone?

SUMMARY OF ARGUMENT

Appellees present an issue that seeks something unprecedented: that this Court be the first federal appeals court in history to approve the State's power to disqualify a congressional candidate. But States lack the power to exclude a congressional candidate from the ballot over a qualification that a candidate might ultimately meet when she presents her credentials to Congress. The district court's decision should be reversed.

The State and the federal courts lack the power to adjudicate the qualifications of congressional candidates. That is particularly true in this case: even if Appellees are correct and Representative Marjorie Taylor Greene is presently ineligible, she may qualify before presenting her credentials to Congress.

There are many nuanced and complicated directions for this case to go. In the end, *amicus* offers the narrowest appropriate grounds for reversal: a State may not add qualifications to a candidate seeking office, which is what Intervenors propose to investigate.

ARGUMENT

I. States may not add qualifications to candidates seeking congressional office, and Intervenors' efforts are an additional qualification.

This case can most readily be resolved by asking one question: "If elected, is it possible that this congressional candidate will meet all the constitutional qualifications for office when she presents her credentials to Congress?" The answer is yes. And because it is yes, the State has no power to disqualify a candidate on those qualifications now.

States cannot add qualifications to congressional candidates seeking office. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 806 (1995). *Accord Powell v. McCormack*, 395 U.S. 486, 548 (1969). Even if Greene is presently disqualified, she may qualify to serve later. Intervenors' attempt to evaluate Greene's qualifications today—months before she submits her credentials to Congress—is an additional qualification.

A. If elected, Greene may meet all constitutional qualifications when she presents her credentials to Congress even if she does not meet them today.

At this moment, it is impossible for the State to determine whether Greene will be disqualified for "engag[ing] in insurrection or rebellion." U.S. CONST. amend. XIV, § 3. The Fourteenth Amendment provides, "No person shall be a Senator or Representative in Congress" who has engaged in insurrection or rebellion. But that Amendment also provides, "Congress may by a vote of two-thirds of each House, remove such disability."

If Greene engaged in insurrection or rebellion, Congress has the power to remove that disability. It may do so before Election Day. It may do so after Election Day. And if Greene is elected, it may even do so when Greene presents her credentials to Congress.

In other words, even if Intervenors' factual allegations and legal conclusions are entirely true, they are immaterial. Greene is still capable of meeting the qualifications by the time she presents her credentials to Congress—that is, at the time she "*shall be* a . . . Representative in Congress." U.S. CONST. amend. XIV, § 3 (emphasis added).

Even assuming the State has the power to evaluating qualifications of candidates—a contested proposition, see *infra*, Part II—it cannot add qualifications. Demanding that Greene meet a qualification today is an additional qualification. *See Schaefer v. Townsend*, 215 F.3d 1031, 1036 (9th Cir. 2000) ("This specific time at which the Constitution mandates residency bars the states from requiring residency before the election.").

The district court misunderstood the issue of additional qualifications. It acknowledged that "the Supreme Court has conclusively ruled that neither the states nor Congress have the power to impose additional qualifications for congressional membership that are not recognized in the Constitution's text." *Greene v. Raffensperger*, ___ F. Supp. 3d ___, 2022 WL 1136729, at *27 (N.D. Ga. Apr. 18, 2022). But it said that an evaluation of Greene's qualifications today is not an "additional" qualification because "Section 3 of the Fourteenth Amendment is an existing constitutional qualification rather than an additional one." *Id.* at *27 n.23. Respectfully, this misunderstands the issue. The Fourteenth Amendment is a constitutional qualification that candidates must meet. But requiring a candidate to demonstrate her qualifications *before* presenting her credentials to Congress when she may later meet the

qualifications *is* an additional qualification. *See Schaefer*, 215 F.3d at 1036.

B. Candidates who appear to be ineligible before Election Day may still run for office if they may meet qualifications later.

Candidates who are ineligible before Election Day routinely run for office and win elections. House precedent recognizes that "age and citizenship qualifications of the Constitution need not be met until the time membership actually commences." 2 DESCHLER'S PRECEDENTS ch. 7, § 10.1 (1977).

Consider age qualifications. A member of the House of Representatives must be at least 25 years of age, and a Senator must be at least 30 years of age. U.S. CONST. art. I, § 2, cl. 2; & § 3, cl. 3.

Prospective members of Congress who are underage on Election Day are still eligible as long as they are of age when they present their credentials when the House convenes. Consider Joe Biden. He first won election to the Senate on November 7, 1972, when he was just 29 years of age. But he turned 30 before he presented his credentials to Congress. Donald Janson, *Delaware Elects Youngest U.S. Senator*, N.Y. TIMES, Nov. 9, 1972.

Indeed, prospective members of Congress who are ineligible when a new session of Congress begins may *delay* presenting their credentials until they are of age. John Young Brown, for instance, earned a certificate of election in 1859 from Kentucky, but he was not sworn in until December 3, 1860, when he was twenty-five years of age. 2 DESCHLER'S PRECEDENTS ch. 7, § 10.2.

Or consider the qualification of where a candidate lives. Members of Congress must be an "inhabitant" of their state "when elected." U.S. CONST. art. I, § 2, cl 2; & § 3, cl. 3. Inhabitancy can only be ascertained on Election Day, not before. Courts have tossed attempts to adjudicate residency qualifications prematurely, including a recent challenge that alleged Senator Mary Landrieu had moved to Washington, D.C., was no longer an inhabitant of Louisiana, and was ineligible to stand for election. *See* Jeremy Alford, *Louisiana Judge Rejects Suit Over Landrieu's Residency*, N.Y. TIMES, Sept. 5, 2014.

Then there's citizenship. Candidates have delayed presenting their credentials to Congress until they meet the citizenship requirements. *See, e.g.*, 2 DESCHLER'S PRECEDENTS ch. 7, § 10.1 (noting that Henry Ellenbogen of Pennsylvania delayed presenting his credentials until the

second session of Congress in order to attain the seven-year citizenship requirement).

Congress has developed a robust body of precedent about how to construe these qualifications. *See generally* DESCHLER'S PRECEDENTS; HINDS' PRECEDENTS (1907); CANNON'S PRECEDENTS OF THE U.S. HOUSE OF REPRESENTATIVES (1936). Precedent allows candidates to withhold presentment of their credentials to Congress until they meet the requisite qualifications. *See* Muller, *Scrutinizing*, 90 IND. L.J. at 584.

This narrow ground avoids the district court's parade of horribles. *See Greene*, 2022 WL 1136729, at *27 ("In addition, as Defendants argue, such an 'unregulated process' could 'invite the possibility that fraudulent or unqualified candidates such as minors, out-of-state residents,[3] or

---

[3] The Constitution does not have a "residen[cy]" requirement, but an inhabitancy requirement. *See* U.S. CONST. art. I, § 2, cl. 2. *See also Schaefer*, 215 F.3d at 1036 (9th Cir. 2000); *Texas Democratic Party v. Benkiser*, 459 F.3d 582, 589 (5th Cir. 2006). The Constitution expressly provides that one may not serve as a Representatives who "shall not, *when elected*, be an inhabitant of that state." U.S. CONST. art. I, § 2, cl. 2 (emphasis added). It is a reason courts routinely dismiss challenges to candidates, such as Mary Landrieu of Louisiana in 2014, *supra*; William Higgs of New Mexico in 1968 and Jim McCrery of Louisiana in 2007, *infra*. Congress develops and applies the rules to determine whether someone is an inhabitant. *See, e.g.*, 1 HINDS' PRECEDENTS § 369 (determining that a Jennings Pigott was a "sojourner," not an

foreign nationals could be elected to Congress—and the state would be powerless to prevent it from happening.'").

Finally, Georgia's ballot access rules are hardly "unregulated." Georgia has adequate "manner" restrictions in place to prevent such imaginative scenarios. *See Burdick v. Takushi*, 504 U.S. 428, 439–40 (1992). One wonders, for instance, how children or foreign nationals would so easily organize campaigns to secure nominating petitions signed by 5% of the qualified voters in a district. *See, e.g.*, OFF. CODE OF GA. ANN. § 21-2-170(b); *Cowen v. Secretary of State of Georgia*, 22 F.4th 1227, 1232–34 (11th Cir. 2022). Ample alternatives exist for the State to ensure that the ballot remains a place for "major struggles." *Storer v. Brown*, 415 U.S. 724, 735 (1974).

II. States do not have the power to adjudicate the constitutional qualifications of prospective members of Congress

While this case can be decided on the narrow ground identified in Part I, it is worth framing a larger issue. States do not have any power to adjudicate the qualifications of prospective members of Congress.

"inhabitant," of North Carolina when elected in 1862). Courts and states neither develop nor apply those rules.

A. The Constitution grants Congress, not states or courts, the sole power to adjudicate qualifications.

The House of Representatives "is the sole judge of the qualifications of its members." *Jones v. Montague*, 194 U.S. 147, 153 (1904). *Accord Burton v. United States*, 202 U.S. 344, 366 (1906) (examining the Constitution and concluding that "the Senate is made by that instrument the sole judge of the qualifications of its members"); *Powell*, 395 U.S. at 552 (1969) (separate opinion of Douglas, J.) ("Contests may arise over whether an elected official meets the 'qualifications' of the Constitution, in which event the House is the sole judge.").

Then-Judge Antonin Scalia identified a textually-demonstrable commitment to Congress: "The provision states not merely that each House 'may judge' these matters, but that each House 'shall be *the* Judge' (emphasis added). The exclusion of others—and in particular of others who are judges—could not be more evident." *Morgan v. United States*, 801 F.2d 445, 447 (D.C. Cir. 1986).

Federal courts have routinely disclaimed any authority to review the qualifications of prospective members of Congress. *See, e.g.*, *Sevilla v. Elizalde*, 112 F.2d 29, 38 (D.C. Cir. 1940) ("We are cited to no cases, and

we find none, in which the Federal courts have even been asked to determine the qualifications of a member of Congress. Apparently it has been fully recognized that that power is lodged exclusively in the legislative branch. Under parallel provisions in state constitutions giving state legislatures the power to determine the qualifications of their members, it is ruled that the legislative power is exclusive—that the courts have no jurisdiction."); *Application of James*, 241 F. Supp. 858, 860 (S.D.N.Y. 1965) ("Accordingly, the federal courts have no jurisdiction to pass on the qualifications and the legality of the election of any member of the House of Representatives."); *Keogh v. Horner*, 8 F. Supp. 933, 935 (S.D. Ill. 1934) ("[T]he power of the respective Houses of Congress with reference to the qualifications and legality of the election of its members is supreme.").

Congress must remain independent of any other body in adjudicating its membership. Justice Joseph Story explained, "If lodged in any other, than the legislative body itself, its independence, its purity, and even its existence and action may be destroyed, or put into imminent danger. No other body, but itself, can have the same motives to preserve and perpetuate these attributes; no other body can be so perpetually watchful

to guard its own rights and privileges from infringement, to purify and vindicate its own character, and to preserve the rights, and sustain the free choice of its constituents." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 831 (1833).

The "free choice of its constituents" means that no court and no State may exclude candidates from the range of choices of the people on the basis of a premature adjudication of qualifications.

B. Even when Congress has concluded that a candidate is not qualified to serve, the State has not barred that candidate from running for election again.

Intervenors ask a federal court to reach the same conclusion as Congress might reach in a similarly-situated case and to rely on Congress's precedent in similarly-situated qualifications challenges. It is the paradigmatic example of why the State has no authority to prematurely reach an adjudication on Greene's qualifications. That is because Congress makes qualifications determinations that are not always intuitive to States or to courts. *See supra* Part I.B.

The Victor Berger case is a perfect example of the historical absence of State power to adjudicate qualifications. Berger was elected in 1918, and Congress in 1919 concluded that Berger was not qualified to serve. 6

CANON'S PRECEDENTS § 57–58. "Subsequently the Governor of Wisconsin called a special election to fill the vacancy thus created. At this election Victor L. Berger was again a candidate and received 24,350 votes, and Henry H. Bodenstab, the contestant, received 19,566." *Id.* at § 59. That is, even *after* Congress *expressly* held that a candidate was not qualified to serve, Wisconsin made no effort to exclude him, and the people again had free choice, electing him again.

There is no difference whether the State attempts to evaluate the qualifications of a candidate before or after the election. There is no constitutional basis for such a distinction. *See, e.g.*, *U.S. Term Limits*, 514 U.S. at 828–36 (rejecting notion that pre-election qualifications are permissible to regulate). Both pre- and post-election candidates are prospective members of Congress. At best, a post-election candidate who receives a certificate of election is presumptively entitled to be seated in Congress. Even then, Congress has judged the "elections, returns and qualifications" of people who are not seated—that is, who have not yet become "members." *See* Brian C. Kalt, *Swearing in the Phoenix: Toward a More Sensible System for Seating Members of the House of Representatives at Organization*, 105 MARQ. L. REV. 1 (2021).

C. No clause in the Constitution authorizes the State to evaluate qualifications of candidates.

Justice Story opined in his *Commentaries* that "states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the Constitution does not delegate to them." 2 STORY, COMMENTARIES § 626. States may not add qualifications to congressional candidates, for instance, because those qualifications are fixed by the Constitution. *Id.*

Therefore, any State power to regulate any facet of federal elections must spring from some provision of the Constitution. State power over the "manner" of regulating congressional elections comes from the Elections Clause. U.S. CONST. art. I, § 4, cl. 1; *see U.S. Term Limits*, 514 U.S. at 805.

The state legislature may prescribe the "manner of holding elections." These are procedural rules. It is a broad power, *see Smiley v. Holm*, 286 U.S. 355, 366 (1932), but it is not an unlimited power over elections, *see Cook v. Gralike*, 531 U.S. 510, 523–24 (2001); *U.S. Term Limits*, 514 U.S. at 828–36. When procedural rules relate to the ballot, they must be rules for "the integrity and reliability of the electoral process itself or they are

rules to require a preliminary showing of substantial support." Muller, *Weaponizing*, 48 FLA. ST. U. L. REV. at 118. *See also Anderson v. Celebrezze*, 460 U.S. 780, 788–89 n. 9 (1983).

The "integrity and reliability of the electoral process" includes the power to exclude "frivolous candidates"—frivolous, as those candidates lacking popular support. *See U.S. Term Limits*, 514 U.S. at 835 (explaining that legitimate "manner" rules excluding unserious candidates "did not involve measures that exclude candidates from the ballot without reference to the candidates' support in the electoral process"). It is not the State that adjudicates frivolity. It sets levels of public support for candidates to appear on the ballot or to advance to the next round.

States undoubtedly have a legitimate interest in excluding "frivolous" candidates from the ballot. Such cases are easy to find. *See, e.g.*, *Lubin v. Panish*, 415 U.S. 709, 715 (1974). But that *interest* is distinct from the state's *power* to do so. It is why Justice Story's understanding of the scope of state authority in federal elections is so crucial. Because state authority in federal elections is *created* by the federal Constitution, any exercise of state authority must be traced *back* to some source in the

federal Constitution. Appellees fail to identify an appropriate source of State authority to scrutinize qualifications.

The "manner of holding elections" does not include the power to adjudicate qualifications, because that power resides elsewhere in the Constitution. Consider Congress's powers under Article I, Section 5: "Each House shall be the judge of the elections, returns and qualifications of its own members." "Elections" and "qualifications" are separate categories. While the state legislature's power extends to determine the "manner" of "holding *elections*," that power does not extend "qualifications." The notion that "manner" includes the power to adjudicate qualifications (or, in Appellees' view, adjudicate *before* an election but not *after*, a distinction not found in the Constitution) has no basis in law.

In an analogous context, the Supreme Court has found that the "manner" power in the Elections Clause does not include the power to enforce standards relating to *voter* qualifications. The Constitution gives States the power to determine voter eligibility for congressional elections. U.S. CONST. art. I, § 2, cl. 1 & amend. XVII. "[T]he Elections Clause empowers Congress to regulate *how* federal elections are held, but not

who may vote in them." *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 16 (2013). "One cannot read the Elections Clause as treating implicitly what these other constitutional provisions regulate explicitly." *Id.* And because the power prescribing voter qualifications resides in another clause, it falls outside the scope of the "manner" clause. *Id.* at 17.

Furthermore, "the power to establish voting requirements is of little value without the power to enforce those requirements." *Id.* Therefore, "it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications." *Id.* The power to enforce—or to judge—qualifications exists within the qualifications clauses themselves.

The analogous structural argument applies to this case, too. The Constitution expressly sets forth qualifications for members of Congress. It includes an express mechanism for judging qualifications, which is vested in Congress. Therefore, the power to enforce those qualifications does not reside in the Elections Clause's "manner" provision.

D. States have historically lacked the ability to examine qualifications of candidates and exclude them from the ballot, because that power resided in Congress alone.

Appellees have not identified a single instance in which any other court has approved a state's decision to exclude a congressional candidate from the ballot. That suggests that the Constitution did not anticipate any State authority to review qualifications, which was a matter reserved to Congress alone. This conclusion is unsurprising for a couple of reasons.

First, States did not begin printing the ballot until 1888, and even then the practice was not universal. LIONEL E. FREDMAN, THE AUSTRALIAN BALLOT: THE STORY OF AN AMERICAN REFORM 2, 31 (1968). The "Australian ballot" was a state-printed ballot that increased secrecy and reduced voter fraud. *See id.* at 31. Before that, privacy was nearly impossible: voters brought their own ballots to the polling place, often ballots printed by the candidates or parties. *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 115 (2000).

For the first hundred years of federal elections, it was impossible for states to evaluate the qualifications of House candidates before the election. Voters voted by voice vote, wrote their votes on slips of paper, or

deposited party tickets into ballot boxes. *See* Muller, *Ballot Speech*, 58 ARIZ. L. REV. at 697–98. At no point did the State have any control over the content of the ballot.

Consider how elections in Georgia took place in this period. In 1882—nearly 100 years after the Constitution was ratified, and more than a decade after ratification of the Fourteenth Amendment—State law required votes to be "given by ballot." CODE OF THE STATE OF GEORGIA § 1288(1) (4th ed. 1882). (Section 1297 of the Code incorporates these rules for congressional elections.) Superintendents receive ballots and mark them with an identification number before they are deposited in the box. *Id.* § 1288(3). Superintendents then count ballots and issue certificates of the vote to the county. *Id.* § 1288(6)–(8). One finds no regulation of the content of the ballot or any power to restrict any candidacy. This is evidence that the power to adjudicate qualifications exclusively resided in Congress.

Second, when courts have faced a challenge to a candidate's constitutional eligibility, whether before or after an election, they have concluded that there is no authority to judge a candidate's qualifications. *See, e.g.*, *State ex rel. Chavez v. Evans*, 446 P.2d 445, 448 (N.M. 1968)

(holding that congressional candidate excluded from the ballot on the basis of inhabitancy must appear on the ballot); *Cox v. McCrery*, 2007 WL 97142, at *1 (W.D. La. Jan. 5, 2007) (rejecting power to adjudicate a member-elect's inhabitancy).

This reasoning is consistent with the Supreme Court's logic in *Roudebush v. Hartke*, 405 U.S. 15 (1972). In a close Senate race, Indiana authorized a recount, which was challenged as treading upon the Senate's power to be "the judge of the elections, returns and qualifications of its own members." U.S. CONST. art. I, § 5, cl. 1. The Supreme Court held that State law cannot "usurp" the function of Congress, which can occur if the law "frustrates" a house of congress's "ability to make an independent final judgment." *Roudebush*, 405 U.S. at 25. The Senate could still independently evaluate the election or conduct its own recount. *Id.* at 25–26. It was "speculation" to believe that the recount would result in the "accidental destruction of ballots" or something that would thwart Congress's ability to evaluate the election. *Id.* at 26.

Disqualifying a candidate, in contrast, usurps Congress's power to adjudicate that candidate's eligibility. Simply put, there is no ability to review that candidate's qualifications, because that candidate's

qualifications will never be presented to Congress—unlike the results of an election, including the initial count and the recount. It would be the same as if Indiana shredded its ballots after the election at issue in *Roudebush*: Congress would have no ability to "judge" the election or its returns.

Thus far, Appellees muster no other federal or state judicial opinion approving the exclusion of a congressional candidate from the ballot, except the district court's opinion—and even that opinion on this issue (unlike other issues in the case) includes a significant caveat. *See Greene*, 2022 WL 1136729, at *28 ("The parties devoted little time and few pages to the complicated questions inspired by this novel situation. Given the preliminary stage of the proceedings, the difficulty of the legal questions posed, and Plaintiff's failure to cite persuasive legal authority or even include a developed legal argument that the State of Georgia lacks the authority to enforce an existing constitutional provision, Plaintiff has not established a likelihood of success on the merits on Count III.").

E. A determination of qualifications of sitting members of Congress would usurp the existing power of Congress to determine of qualifications.

Greene is presently a member of Congress. Congress holds the power to evaluate the qualifications, elections, and returns of its members, even after those members have been seated. *See, e.g.*, 153 CONG. REC. 5–6 (2007) (allowing Representative Vernon Buchannan to be seated as Congress while an election contest under 2 U.S.C. § 382 was pending).

Not all congressional candidates are currently members of Congress, so this case involves a subset of qualifications cases: does a State or a federal court have the power to second-guess the judgment of Congress? The answer is resoundingly no.

Today, Intervenors could ask Congress to scrutinize Greene's qualifications. *See* 2 DESCHLER'S PRECEDENTS ch. 9, § 17.3 ("An investigation of the qualification of a Member-elect to be sworn and of his right to a seat was instituted by the filing of a memorial by an individual challenging his citizenship qualifications."); WILLIAM HOLMES BROWN, CHARLES W. JOHNSON, & JOHN V. SULLIVAN, HOUSE PRACTICE ch. 22, § 1, p. 482 (2011) ("An investigation of a challenged election has been initiated pursuant to . . . [a] petition filed by another person challenging

the qualifications of a Member-Elect."). And Congress has the power to judge the qualifications of sitting members.

The fact that Congress has not done so—and that Intervenors have apparently not asked Congress to do so—should counsel special hesitation. True, Congress has not adjudicated Greene's eligibility, and its silence is of limited probative value. But if ever there was "the potentiality of embarrassment from multifarious pronouncements by various departments on one question," *Baker v. Carr*, 369 U.S. 186, 217 (1962), this case presents it. Greene serves in Congress. Intervenors demand the State adjudicate Greene is ineligible to serve in Congress, where he presently serves. A judicial determination risks contradicting Congress's determination.

F. The Constitution grants greater leeway to review the qualifications of presidential candidates.

Federal courts have routinely been asked to weigh in on the eligibility of *presidential* candidates. *See, e.g.*, *Socialist Workers Party of Illinois v. Ogilvie*, 357 F. Supp. 109, 112 (N.D. Ill. 1972); *Hassan v. United States*, 2010 WL 9493338 (E.D.N.Y. June 15, 2010), *aff'd on other grounds*, 441 F. App'x 10 (2d Cir. 2011); *Hassan v. Iowa*, 2012 WL 12974068 (S.D. Iowa

Apr. 26, 2012), *aff'd*, 493 F. App'x 813 (8th Cir. 2012); *Hassan v. Colorado*, 870 F. Supp. 2d 1192 (D. Colo. 2012), *aff'd*, 495 F. App'x 947 (10th Cir. 2012); *Peace and Freedom Party v. Bowen*, 912 F. Supp. 2d 905 (E.D. Cal. 2012), *aff'd sub nom. Lindsay v. Bowen*, 750 F.3d 1061 (9th Cir. 2014).

It is worth noting that many of these cases do not expressly conclude that States have the power to exclude ineligible candidates from the ballot. In *Hassan v. Colorado*, for instance, plaintiff alleged that the Fourteenth Amendment implicitly repealed the "natural born citizen" requirement. In *Lindsay*, plaintiff alleged that excluding an underage candidate from the ballot offended the First Amendment, the Equal Protection Clause, and the Twentieth Amendment. Neither case addressed on the scope of the State's power or of Congress's power under Article II. Nevertheless, Article I and Article II offer stark contrasts in the scope of congressional power to adjudicate qualifications.

The Constitution's structure distinguishes who judges congressional and presidential qualifications. For members of Congress, "Each House shall be the judge of the elections, returns and qualifications of its own members . . . ." U.S. CONST. art. I, § 5, cl. 1. This is an exclusive, textually-

demonstrable commitment to Congress, not the States, to judge the qualifications of its members.

There is no similar exclusive congressional power in presidential elections. *Cf.* U.S. CONST. amend. XII (explaining that in presidential elections, "the votes shall then be counted" "in the presence of the Senate and House of Representatives); 167 CONG. REC., 117th, 1st Session, Jan. 6, 2021, at S20 (statement of Senator Mike Lee) ("Yes, we are the election judges when it comes to Members elected to our own body. And, yes, the House of Representatives are the judges of their own races there. . . . There is no corresponding authority with respect to Presidential elections—none whatsoever. It doesn't exist. Our job is to convene, to open the ballots, and to count them. That is it.").

Instead, in presidential elections, "Each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors . . . ." U.S. CONST. art. II, § 1, cl. 2. This power has been construed broadly, including the power to require presidential electors to support particular presidential candidates. *See, e.g.*, *Chiafalo v. Washington*, 140 S.Ct. 2316, 2324 (2020) (calling the State's power "far-reaching" and explaining that "the State's appointment power, barring some outside constraint, enables

the enforcement of a pledge like Washington's."); *McPherson v. Blacker*, 146 U.S. 1, 35 (1892) (". . . it is seen that from the formation of the government until now the practical construction of the clause has conceded plenary power to the state legislatures in the matter of the appointment of electors."). Because there is no textual commitment to Congress to evaluate the qualifications of presidential candidates, States are free to evaluate presidential candidates' qualifications as a part of their electoral appointment power.

Relatedly, while States may adjudicate qualifications for presidential candidates, it has been recognized that they may not add qualifications to presidential candidates. *See, e.g., Nat'l Comm. of the U.S. Taxpayers Party v. Garza*, 924 F. Supp. 71, 75 (W.D. Tex. 1996). *Accord Jones v. Bush*, 122 F. Supp. 2d 713, 718 (N.D. Tex. 2000) (holding plaintiffs failed to demonstrate a substantial likelihood of success on the merits of the claim that vice presidential candidate "will be on December 18, 2000, an inhabitant of the state of Texas"). When federal courts have approved exclusion of presidential candidates from the ballot, they have excluded candidates who can *never* meet the qualifications at any time during the president's term of office. *See Hassan v. Colorado,* 495 F. App'x at 948

(candidate was not a natural born citizen); *Lindsay*, 750 F.3d at 1063 (candidate was 27 years old).

Even if States hold the power to adjudicate the qualifications of presidential candidates, they cannot add qualifications, including premature adjudication of qualifications.

CONCLUSION

Amicus respectfully submits that the narrow qualification in dispute here functions as an additional qualification for a congressional candidate. On this basis, the judgment of the district court should be reversed.

May 12, 2022

Respectfully submitted,

/s/ *Michael Francisco*
Counsel for Amici

Michael Francisco
Michael A. Brody
McGuireWoods, LLP
888 16th St. N.W., Ste. 500
Washington, DC 20006
mfrancisco@mcguirewoods.com
mbrody@mcguirewoods.com

AMICI'S CERTIFICATE OF INTERESTED PERSONS

Proposed *Amicus* Professor Derek Muller, pursuant to Federal Rule of Appellate Procedure 26.1 and 11th Circuit Local Rule 26.1-1, certifies the following persons and entities have an interest in the outcome of this appeal:

Marjorie Taylor Greene

The State of Georgia

Bradley Raffensberger

David Rowan

Donald Guyatt

Robert Rasbury

Daniel O. Cooper

Ruth Demeter

Charles R. Beaudrot

James Bopp, Jr., Esq.

Christopher James Gardner, Esq.

Kurt R. Hilbert, Esq.

Melena Siebert, Esq.

Charlene S. McGowan, Esq.

Russell D. Willard, Esq.

Christopher Michael Carr, Esq.

Lee M. Stoy, Jr., Esq.

Elizabeth Wilson Vaughn, Esq.

McGuireWoods, LLP

Michael Francisco, Esq.

Michael A. Brody, Esq.

Jonathan S. Abady, Esq.

Andrew G. Celli, Jr., Esq.

Benjamin Horton, Esq.

Andrew K. Jondahl, Esq.

Samuel Shapiro, Esq.

Ronald Fein, Esq.

Bryan L. Selis, Esq.

The Hon. Amy Totenberg, Esq.

CERTIFICATE OF BAR MEMBERSHIP

I certify that I am a member of the U.S. Court of Appeals for the Eleventh Circuit.

May 12, 2022

/s/ *Michael Francisco*
Counsel for Amici

Michael Francisco
Michael A. Brody
McGuireWoods, LLP
888 16th St. N.W., Ste. 500
Washington, DC 20006
mfrancisco@mcguirewoods.com
mbrody@mcguirewoods.com

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), the type-style requirements of Fed. R. App. P. 32(a)(6), and the type-volume limitations of Fed. R. App. P. 29(a)(5). The brief is proportionally spaced, has a typeface of 14-point Century Schoolbook font, and contains 5,228 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

May 12, 2022

/s/ *Michael Francisco*
Counsel for Amici

Michael Francisco
Michael A. Brody
McGuireWoods, LLP
888 16th St. N.W., Ste. 500
Washington, DC 20006
mfrancisco@mcguirewoods.com
mbrody@mcguirewoods.com

CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2022, the foregoing was filed with the Clerk of the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system. The system will serve counsel of record.

/s/ *Michael Francisco*
Counsel for Amici