IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

David Rowan, Donald Guyatt, Robert Rasbury, Ruth Demeter, and **Daniel Cooper**, Petitioners, v.	Case No. 2022CV364778
Brad Raffensperger, Secretary of State of the State of Georgia Respondent, and	Judge: Christopher S. Brasher
Marjorie Taylor Greene Intervenor-Respondent.	

Brief in Response to Petition for Judicial Review[1]

Introduction

"There is a 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open.'" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1964) (citation omitted). "[E]xpression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'" *Id.* (citation omitted). "'[S]peech concerning public affairs . . . is the essence of self-government.'" *Id.* (citation omitted). Accordingly, Charles

[1] Rep. Greene here responds to Petitioners' Petition for Judicial Review ("**Pet.**") per this Court's June 15, 2022 Order setting the "briefing schedule."

Evers' speech urging a boycott and saying, "If we catch any of you going in any of them racist stores, we're gonna break your damn neck," *id.* at 902, was held to be protected speech in *NAACP*. *Id.* at 928. And as "'concerted action' encompasses unlawful conspiracies and constitutionally protected assemblies," *id.* at 888, *NAACP* held the two must be carefully separated to protect those engaged in lawful First Amendment activity from punishment due illegal actors, *id.* at 906-34.

Yet Petitioners here would punish Rep. Greene for the illegal acts of others because she spoke of an alleged "code word" – "1776 moment." As established in her testimony, she was referring to lawful congressional activity of objecting at the Electoral College vote count. But Petitioners would spin those words into "engaging in an insurrection."[2] Their disrespect for free speech and association flies in the face of *NAACP* (which would yield a different result from what they claim) and in the face of the high protection for free speech and association. If Petitioners succeed, the robust speech and association essential to self-governance would be chilled for fear First Amendment activity would be twisted into "insurrection" based on such flimsy evidence and mind-reading. That should not be permitted.[3]

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[2] For brevity, "**insurrection**" includes "rebellion," *see* U.S. Const. amend. XIV, § 3, unless context indicates otherwise.

[3] *See also* OSAH 01184-88 (Rep. Greene's Post-Hearing Brief there provides further discussion of why First Amendment protected activity may not be considered as evidence of engaging in an insurrection).

Administrative Law Judge Beaudrot's Initial Decision (Pet. Ex. A) and Secretary Raffensperger's Final Decision (Pet. Ex. B) correctly rejected Petitioners' Challenge to Rep. Greene's candidacy. Nothing justifies reversing or modifying those decisions and the First Amendment requires not doing so. *See also* ASOH

Background

Rep. Greene currently serves as a Member of the U.S. House of Representatives, for Georgia's Fourteenth Congressional District. Stipulated Facts, OSAH 00912 ¶ 5. Rep. Greene filed her candidacy, for the upcoming midterm elections for Georgia's Fourteenth Congressional District on March 7, 2022 and amended that filing on March 10, 2022. *Id.* ¶ 10.

On March 24, 2022, several voters in Rep. Greene's congressional district ("**Challengers**") filed a Challenge against Rep. Greene under Georgia law. OSAH 00005 ¶ 1; O.C.G.A. § 21-2-5 ("**Challenge Statute**"). The Greene Challenge stated that Rep. Greene "does not meet the federal constitutional requirements for a Member of the U.S. House of Representatives and is therefore ineligible to be a candidate for such office." OSAH 00005 at ¶ 1 ("**Greene Challenge**"). The Greene Challenge was based on claims that Rep. Greene "aided and engaged in insurrection to obstruct the peaceful transfer of presidential power, disqualifying her from serving as a Member of Congress under Section 3 of the Fourteenth

Amendment ("**§ 3**") and rendering her ineligible under state and federal law to be a candidate for such office." *Id.*

The Greene Challenge was referred by the Secretary of State for the State of Georgia ("**Sec. Raffensperger**") to the Office of State Administrative Hearings, State of Georgia ("**OSAH**"), which assigned the matter to Administrative Law Judge Charles Beaudrot ("**ALJ Beaudrot**"). OSAH 00002; 00054. In addition to their Challenge, Challengers filed a notice to take Rep. Greene's deposition and a notice to produce documents. OSAH 00130; 00139. ALJ Beaudrot denied both of these motions after briefing by the parties. OSAH 00553; 00571.

On April 22, 2022, ALJ Beaudrot held a nearly eight-hour hearing on this matter. OSAH 01608-01890 (Hearing Transcript). As part of the OSAH hearing, Rep. Greene testified for several hours. *Id.* Counsel for both Challengers and for Rep. Greene submitted post-hearing briefs to ALJ Beaudrot on April 29, 2022. OSAH 01206; 01279. In addition, Challengers filed a motion to supplement the record, OSAH 01137, which Rep. Greene opposed, OSAH 01155.

On May 6, 2022, ALJ Beaudrot issued his Initial Decision, which held that Challengers failed to prove their case by a preponderance of the evidence. OSAH 02122. ALJ Beaudrot found that Rep. Greene did not "engage" in the Invasion,[4]

[4] Because ALJ Beaudrot found that Rep. Greene did not "engage" in the events

either as a direct participant or in its planning and execution, after taking her oath on January 3, 2021. OSAH 02121. Sec. Raffensperger issued a Final Decision on May 6, 2022, which affirmed and adopted ALJ Beaudrot's Initial Decision and held that Rep. Greene was qualified to be a candidate for congressional office.

Rep. Greene won the Republican primary election, held on May 24, 2022, for her congressional district, receiving 69.54% of the votes cast.[5]

Standard of Review

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

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

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of January 6, 2021, he did not reach the question of whether the unlawful activity that occurred that day constituted an "insurrection" within the meaning of the Fourteenth Amendment, so he called it an "Invasion." OSAH 02121.

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

O.C.G.A. § 21-2-5(e).

Challengers cannot show that Sec. Raffensperger prejudiced their substantial rights according to any of the legal standards set out in the Challenge Statute.

Argument

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

Challengers' Issue One claims "[t]he Secretary erred by shifting the burden from the candidate to the petitioners." Pet. 9. They say the "entire burden" is on Rep. Greene to "'affirmatively establish [her] eligibility for office.'" Pet. ¶ 31 (quoting *Haynes v. Wells*, 273 Ga. 106, 108-09 (2000)). But Challengers err.

In the case of a Challenge based upon residency or age, the proof a candidate must provide is relatively straightforward. Documents showing a change of address or date of birth could easily be provided by the candidate. The same is not true for a Challenge, as here, based on the "disqualification clause" of the Fourteenth Amendment. 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 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 as applied here by requiring Rep. Greene to prove a negative (i.e., that she did not engage in "insurrection").

At an April 8, 2022 hearing in the related federal-court case of *Greene v. Raffensperger*, No. 1:22-CV-1294-AT, 2022 WL 1136729 (N.D. GA 2022), *see* OSAH 00839 (slip Opinion and Order), counsel for the Secretary of State claimed that, because § 3 involved a "disqualification," rather than a "qualification," the ALJ could shift the burden of proof to the Challengers. OSAH 00713-16 (Tr. 35-37). Further, the Secretary of State claimed support for the burden of proof to be on the Challengers under Georgia Comprehensive Rules and Regulation § 616-1-2-.07, which states:

> (1) The agency shall bear the burden of proof in all matters except:
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> 1. a party challenging the issuance, revocation, suspension, amendment, or non-renewal of a license who is not the licensee shall bear the burden
> 2. an applicant for a license that has been denied shall bear the burden;
> 3. any licensee that appeals the conditions, requirements, or restrictions placed on a license shall bear the burden;
> 4. an applicant for, or recipient of, a public assistance benefit shall bear the burden unless the case involves an agency action reducing, suspending, or terminating a benefit; and
> 5. a party raising an affirmative defense shall bear the burden as to such affirmative defense.
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> (2) Prior to the commencement of the hearing, the Court may determine that law or justice requires a different placement of the burden of proof.

Accordingly, on April 11, Rep. Greene filed a Motion to Set Burden of Proof with Petitioners in the OSAH proceeding with the transcript of the Secretary's argument attached. OSAH 00706-17. Challengers filed an Opposition. OSAH 00718. On April

13, ALJ Beaudrot granted Rep. Greene's motion and placed the burden on Challengers. OSAH 00755-56. In his Order, ALJ Beaudrot succinctly stated his reasons:

> 3. Burden of Proof. On April 11, 2022, Respondent filed a Motion in Limine to Set Burden of Proof with Petitioners ("Burden of Proof Motion") to which Petitioners have responded. In the Burden of Proof Motion, Respondent requests that this Court determine where the burden of proof in this matter lies.
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> During the April 11 Conference, counsel for the parties stipulated that they agree that Respondent is a citizen, 25 years of age or older, and resides in her district. Counsel also agreed that the basis for Petitioners' challenge in this matter is whether Respondent is disqualified as a candidate for election to the United States House of Representatives by virtue of Section 3 of the 14th Amendment to United States Constitution because Respondent, "who [has] previously taken and oath as a member of Congress . . . to support the Constitution of the United States . . . engaged in insurrection or rebellion against the same, or [gave] aid or comfort to the enemies thereof."
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> OSAH Rule 616-1-2-.07 provides that, with certain exceptions that are inapplicable to this case, the burden of proof is on the agency (in this matter, the Secretary of State) unless "justice requires a different placement of the burden of proof." It should be noted that the Secretary of State is the referring agency and is not a party in the hearing in this matter. The Secretary of State is not appearing or participating in this matter.
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> In the typical election challenge case where an elector seeks to disqualify a candidate under Code Section 21-2-5, the issues are straightforward issues of a candidate's age, residency, or the like. In such cases, it is entirely appropriate that the burden of proof is on the candidate to establish these criteria are met. *Haynes v. Wells*, 273 Ga. 106 (2000).
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> This case is an entirely different matter. Here, there is no dispute as to Respondent's citizenship, age, or residency. The issue is whether Respondent is disqualified by the provisions of the 14th Amendment.
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> Justice does not require Respondent to "prove a negative." Justice in this setting requires that the burden of proof is on Petitioners to establish that Respondent is disqualified by showing by a preponderance of the evidence that Respondent, having "previously taken and oath as a member of Congress . . . to support the Constitution of the United States . . . engaged in insurrec-

> tion or rebellion against the same, or [gave] aid or comfort to the enemies thereof" under the 14th Amendment to the Constitution. Accordingly, Respondent's Burden of Proof Motion is granted and the burden of proof in the hearing in this matter is upon Petitioners.

OSAH 00755-56.

In the federal *Greene* Opinion and Order, OSAH 00839, the court discussed the due-process requirement articulated in *Speiser*, *see* OSAH 00883; *Greene*, No. 1:22-CV-1294-AT, 2022 WL 1136729, at *16-17, but noted that the burden shift had already occurred, so

> even if the burden of proof were to be deemed constitutionally problematic in this context, as Defendants' counsel noted, Georgia Regulations authorize the ALJ to shift the burden away from Plaintiff if it is necessary to do so in the interest of justice. *See* Ga. Comp. R. & Regs. § 616-1-2-.07(2) ("Prior to the commencement of the hearing, the Court may determine that law or justice requires a different placement of the burden of proof."). In fact, the ALJ overseeing Plaintiff's proceeding *has already done this* in his Prehearing Order, issued on April 13, 2022, by granting Plaintiff's motion *in limine* to shift the burden of proof to the challengers. (*See* Prehearing Order at 4–5.) Therefore, at least insofar as Plaintiff raises an as-applied challenge to her specific proceeding, any concerns about the constitutionality of the burden of proof are at this point [are] a nullity.

OSAH 00883; *Greene*, No. 1:22-CV-1294-AT, 2022 WL 1136729, at *18.

While the district court's discussion of the constitutionality of the burden-shifting issue was thus dictum, it suggested a distinction of *Speiser*, 357 U.S. 513, on two erroneous grounds paralleling Challengers' arguments.

First, on factual grounds it sought to diminish Rep. Greene's interest in running for office as not being a fundamental right or involving criminal jeopardy. OSAH 00082-83; 2022 WL 1136729, at *18. But such a factual distinction is meaningless as it does not take into account the seriousness of the burden that *does* exist. The district court set out what *Speiser* requires, OSAH 00881; 2022 WL 1136729, at *16-17, i.e., "When the State undertakes to restrain unlawful advocacy it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights," *Speiser*, 357 U.S. at 520-21. And there are constitutionally protected rights at issue here. The core underlying issue is whether First Amendment protected speech by Rep. Greene can be used to make her culpable for the wrongful acts of certain individuals who unlawfully entered the Capitol on January 6, 2021, in violation of the holding in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1964), that persons engaged in First Amendment protected activity may not be punished for the actions of persons engaged in unlawful activity despite some association. *NAACP* involved First Amendment protected speech and association, both of which are fundamental rights and are at the core of this case because Challengers would punish Rep. Greene for her speech and association because of the acts of persons illegally entering the Capitol. Being a candidate is also protected by free-speech and free-association rights under the

First Amendment, both for Rep. Greene and for those who want to associate with her and hear her speech and vote for her for office. Their right to vote is fundamental. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."). Other serious burdens and constitutional violations of imposing the procedure at issue here are developed in Part V.C. So as in *Speiser*, the government must afford due process sufficient for the weighty constitutional rights at issue and thus may not place the burden of proof on Rep. Greene.

Second, the *Greene* district court suggested that all Rep. Greene had to do to shift the burden back to Challengers would be to file "an affidavit stating under oath that she did not engage in an insurrection or addressing the allegations in the challenge that are focused on her own activities." OSAH 00883; 2022 WL 1136729, at *17. The district court cites Challengers' suggestion to that effect at oral argument, *id.*, but cites no authority for the proposition that filing an affidavit alters the requirements of a statute as to the burden of proof.[6] But if Challengers

[6] The district court didn't discuss any implications of such an approach, but if

claim such a statement under oath shifts the burden of proof, then the burden was properly shifted because in Rep Greene's sworn testimony (*see* OSAH 01389 (under oath)) she repeatedly stated the functional equivalent. *See, e.g.*, OSAH 01484 ("I've always said I'm against violence"); OSAH 01490 (in response to question about "plan" and "1776 moment," she said "I was talking about the courage to object"); OSAH 01495 (she never heard that, as opposing counsel claimed, "prior to January 6 that 1776 referred to an idea or a plan for people who were opposed to the certification of the electoral college vote to infiltrate and occupy buildings in DC"); OSAH 01495 (same); 01513 ("The only thing I was working on was objecting [to the electoral college count vote on the floor of Congress]"; OSAH 01527 (in response to question re discussing idea of flooding the Capitol with people: "No. Because the only thing I was working on [was] objecting and had no expectation of anything [that] could happen on January 6."); OSAH 01548-49 (her response to experiencing January 6 events in the Capitol: "I was shocked, shocked, absolutely shocked. Every time I said we're going to fight, it was all about object-

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an "oath of innocence" shifts the burden of proof then perhaps it should resolve the whole disqualification issue. But that seems too like medieval trial by oath with compurgators testifying that they believe the accused's oath of innocence. *See Compurgator*, Black's Law Dictionary (5th ed. 1979) (*compurgator* so defined). Today, statutes, rules, and constitutional requirements, along with court decisions interpreting and applying those, must establish such burdens.

ing and to me that was the most important process of the day and I had no idea what was going on and I just didn't want anyone to get hurt."); OSAH 01551 (affirmed she tweeted message that she "did not plan, cause and [do] denounce the January 6 attacks"). Per this approach, the burden also was properly moved to Challengers.

In sum, justice and due-process mandates require that Rep. Greene not be required to prove the core issue, i.e., that she did not engage in an insurrection. So ALJ Beaudrot and Secretary Raffensperger did not commit reversible error by giving Challengers the burden.

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

Challengers' Issue Two claims that ALJ Beaudrot "quashed the notice to Greene in its entirety . . . on the sole ground that it was 'impracticable and unrealistic to require Respondent to deliver a significant volume of material prior to the scheduled hearing date,'" Pet. ¶ 42. Challengers say this was erroneous "on its own" and "in combination with the . . . order shifting the burden of proof to petitioners." *Id.* ¶ 36 (suggesting that all the relevant evidence was in Greene's control). But their argument is unavailing. In addition, this Court should affirm the ALJ's ruling on any basis found in the record, regardless of whether it was the basis of the ALJ's ruling.

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

First, ALJ Beaudrot's Order does not rely, as Challengers suggest, Pet. ¶ 40, on OSAH Rule 616-1-2-.19(2)(c)'s provisions to deny their Notice for Production—though on its face the Rule might well support denial. Under OSAH 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." The Order describes, analyzes, and expressly relies on the limits on discovery and on the Notices to Produce and Subpoenas that are provided by OSAH Rule 616-1-2-.19. The Administrative Rules of Procedure are statutorily limited and are not the equivalent of or in parity with the rules of civil procedure applicable to Georgia courts of record. As ALJ Beaudrot pointed out, in OSAH proceedings, Notices to Produce "do not serve the same function as they do under the Georgia Civil Practice Act and its extensive provisions pertaining to discovery." OSAH 00571 (Order on Petitioners' Notice to Produce 1, n.1). The court in *Ga. State Bd. of Dental Exam'rs v. Daniels* put it more plainly: "Appellant/defendant contends that the Civil Practice Act is not applicable to proceedings under the Georgia Administrative Procedure Act. We agree." 137 Ga. App. 706, 709 (1976).

"The intent of the legislature [in creating the Georgia APA] was to provide an administrative procedure to resolve conflicts within the authority vested in admin-

istrative agencies and boards by statute *without resort to courts of record in the first instance.*" *Ga. State Bd. of Dental Exam'rs*, 137 Ga. App. at 709 (emphasis added). Proceedings under the APA are necessarily and expressly different in both substance and procedure from the proceedings in courts of record. Of particular importance here, as ALJ Beaudrot explained, "[d]iscovery in OSAH proceedings is the exception, and not the rule." OSAH 00571. The purpose of Notices to Produce in administrative proceedings is to "ensure that documents which are in the possession of a party, and which will be used at the hearing by the requesting party, will be provided at the hearing. . . . not . . . as the basis for pre-hearing discovery." OSAH 00571-72. *See also Fulton County Bd. of Assessors v. Saks Fifth Avenue, Inc.* 248 Ga.App. 836, 838-39 (noting that discovery under GCPA does not apply to proceedings under the Administrative Procedure Act, and did not authorize a county board of assessors to "require the wholesale production of copies of a taxpayer's documents for the purpose of an off-premise fishing expedition into the affairs of the taxpayer.").

In short, *given that Petitioners' Notice to Produce was statutorily limited to ensuring that documents be provided at an administrative hearing and not a vehicle of discovery*, ALJ Beaudrot concluded that using it to make "extensive pre-hearing discovery" requests—to locate and produce 24 categories of docu-

ments—within seven days—was "impracticable and unrealistic." OSAH 000572. The Notice to Produce exceeded the limits placed on it by Georgia law, and the Order on Petitioners' Notice to Produce should be upheld on that basis.

B. There was no separate error in both denying Petitioners' Notice of Production and shifting burden of proof to them.

At bottom, Challengers claim as error the fact that they weren't allowed the discovery afforded parties to proceedings before Georgia courts of record, Pet. ¶ 36.[7] This argument fails because, as established *supra*, the civil procedure discovery rules are, as a matter of law, not applicable to the APA. Challengers attempt to augment the argument by claiming that the denial of their Notice in conjunction with the ALJ's ruling shifting the burden of proof to them somehow left them without access to the evidence that they needed to fulfill their obligation of proof. *See* Pet. ¶ 36 ("all the relevant evidence was in Greene's control but the administrative law judge blocked the petitioners from all discovery"; "any of [the requests for documents] could have resulted in admissible evidence sufficient [to make Petitioners' case]"). Without further explanation, Petitioners claim this com-

[7] As Petitioners admit, the Notice to Produce "propounded 24 distinct requests for documents" seeking "admissible evidence sufficient to establish Greene's involvement in the insurrection, refresh her recollection, and/or impeach her credibility," Pet. ¶ 36. In short, Petitioners sought to conduct full-fledged discovery appropriate only in proceedings before a court of record.

bination of rulings "was made upon unlawful procedures and affected by other errors of law." Pet. ¶ 38.

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

And Petitioners exaggerate the practical effect on their case from the combination of ALJ's burden shifting and denying their Notice to Produce. ALJ Beaudrot ruled against Rep. Greene's motion to quash Petitioner's Subpoena, OSAH 00754 (Prehearing Order ¶ 2 (April 13, 2022)), and on April 22, 2022, he conducted an adversarial hearing that went on for nearly seven hours at which Petitioners offered over 120 Exhibits, produced their own witness, and questioned Rep. Greene.

So the actual conduct and course of the hearing—the central component of administrative proceedings—belies Petitioners' suggestion that either or both of the rulings deprived them of evidence or substantially disadvantaged them in making their case. The combination of rulings was not a separate legal error and Petitioners' unsupported claim that it was unlawful or erroneous because it bereaved them of "all the relevant evidence," Pet. ¶ 36, is unavailing.

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

ALJ Beaudrot did not consider "the numerous other issues and objections raised in Respondent's Objection."[8] OSAH 00572 (Order on Petitioners' Notice to Produce 2). And "[u]nder the right for any reason rule, an appellate court may affirm a judgment if it is correct for any reason, even if that reason is different than the reason upon which the trial court relied." *Boca Petroco, Inc. v. Petroleum Realty II, LLC*, 292 Ga. App. 833, 839 (2008), *aff'd*, 285 Ga. 487 (2009). Accordingly, if this Court disagrees with ALJ Beaudrot's position on OSAH Rule 616-1-2-.19 or his application of it here, it should affirm denial of the Notice of Production on the bases provided in Respondent's Objection. There, Rep. Greene ob-

[8] Respondent's Objection to Notice to Produce and Motion to Strike and Incorporated Brief in Support (eFiled April 4, 2022) ("**Respondent's Objection**") is at OSAH 00509 and provides further reasons to reject Challengers' arguments.

jected generally and specifically as follows: the discovery is unjustified, as the proceeding as a whole violates constitutional and federal law provisions, OSAH 00514-41, (Respondent's Objection 6-33); some of the material sought is absolutely privileged under the Speech and Debate Clause of the U.S. Constitution, OSAH 00541-43 (Respondent's Objection 33-35); the requests were overbroad and unduly burdensome as to timing and instructions, OSAH 00543-44 (Respondent's Objection 35-36); the requests invaded attorney client privilege and work-product doctrine, OSAH 00545-47 (Respondent's Objection 37-39); the Notice incorporated a time frame that swept in documents with legally immaterial information, OSAH 00547-48 (Respondent's Objection 39-40), and; the Notice was procedurally improper, OSAH 00548 (Respondent's Objection 40). If this Court decides that the Notice was wrongly denied on the basis provided in the Order, it must consider Respondent's other objections and affirm it if it is correct for any other reason.

III. ALJ Beaudrot did properly consider Rep. Greene's conduct prior to taking the oath of office.

Challengers's Issue Three says "[t]he Secretary erred by failing to properly consider Greene's conduct prior to taking the oath of office." Pet. 14. Challengers claim that ALJ Beaudrot said pre-oath conduct may be used to show post-oath

conduct was engaging in an insurrection and that Rep. Greene employed "heated rhetoric" pre-oath, Pet. ¶¶ 44-45, but don't produce ALJ Beaudrot's full statement, which was as follows:

> Challengers make a valiant effort to support inferences that Rep. Greene was an insurrectionist, but the evidence is lacking, and the Court is not persuaded. The evidence shows that prior to January 3, 2021, Rep. Greene engaged in months of heated political rhetoric clothed with strong 1st Amendment protections. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 908 (1964); *see also Brandenburg v. Ohio*, 395 U.S. 444 (1969). The evidence does not show Rep. Greene engaged in months of planning and plotting to bring about the Invasion and defeat the orderly transfer of power provided for in our Constitution. Her public statements and heated rhetoric may well have contributed to the environment that ultimately led to the Invasion. (*See* Sen. McConnell's Remarks, P-55). But expressing constitutionally-protected political views, no matter how aberrant they may be, prior to being sworn in as a Representative is not engaging in insurrection under the 14th Amendment.

Initial Decision 16. Of course, heated rhetoric is protected by the First Amendment, *cf. NAACP*, 458 U.S. at 902, 928 (Evers' neck-breaking promise not incitement), and thus not illegal activity. So ALJ Beaudrot indicates that he considered the evidence Challengers point to (discussed next) and expressly says it doesn't prove what Challengers want it to prove. He is the finder of fact, he considered the evidence, he found it lacking to prove Rep. Greene engaged in insurrection in the relevant time period (January 3-6, 2021). Having said he considered the evidence and saying what it does not show, he was not required to mention any particular

evidence he found lacking.

Challengers then cite "evidence" they say is "uncontroverted" but not mentioned by ALJ Beaudrot. Pet. ¶¶ 46-50. They note that ALJ Beaudrot decided that the only possible "engaging" evidence was a January 5, 2021, statement: "This is our 1776 moment." Pet. ¶ 51. ALJ Beaudrot deemed this statement "ambiguous," but Challengers say it was not, based on "Rep. Greene's pre-oath conduct." Pet. ¶ 52. Challengers deem this alleged failure to put that January 5 statement in that context "an error of law." Pet. ¶¶ 53-54.

But there was no legal error. Challengers don't dispute ALJ Beaudrot's decisions that "only conduct by Rep. Greene occurring after [her] oath on January 3, 2021, is relevant in determining whether the Disqualification Clause applies," and that "conduct prior to January 3 may not, standing alone, disqualify Rep. Greene, but may be used to show that conduct *after* January 3 amounted to 'engag[ing] in insurrection or rebellion.'" Initial Decision 13. So that was the legal standard applied, which Challengers don't dispute. Rather, they dispute the application of the this legal standard to the facts. But as shown next that involved no legal error but rather the failure of Challengers' evidence on the facts. And under the Challenge Statute, this Court "shall not substitute its judgment for that of the Secretary of State as to the weight of the evidence on questions of fact." O.C.G.A. § 21-2-5(e).

Challengers failed in their factual evidence. Challengers recite alleged evidence of Greene "urging her supporters to join her in Washington to 'flood the capitol building.'" Pet. ¶ 46. As the hearing transcript shows, the alleged quote was from "a CNN article entitled 2019 Marjorie Taylor Green told protestors to flood the Capitol, feel free to use violence," OSAH 1453, and so was inadmissible on its own as evidence because it was hearsay. At the hearing, Challenger's counsel asked Rep. Green about it in extended flood-the-capitol questioning. OSAH 01451-56. Before this CNN article exhibit was introduced, in response to whether she had in the past said a way to express displeasure with government "would be to flood the Capitol building with people," Rep. Greene noted that people come to talk to their representatives about issues. OSAH 01452. Regarding whether she "publicly expressed support for the idea that people should come to Washington to express their displeasure with their government by flooding the Capitol," she said "I don't remember." *Id.* According to Challengers' counsel, the CNN article with supposed quotes from Rep. Greene that she did not recall making was "in connection with the Fund the Wall demonstration of February of 2019." OSAH 01455-56. Of course, that was long before the relevant-evidence window of January 3-6, 2021, but ALJ Beaudrot had indicated he would consider such past evidence as support for relevant evidence. So when he didn't mention hearsay quotes from a

CNN article when he noted the absence of evidence, it simply meant he didn't credit CNN hearsay and the hearing questioning as credible, admissible evidence. Judging the weight of the evidence was within the statutory purview of ALJ Beaudrot and Sec. Raffensperger, and they weighed this purported "evidence" and found it lacking to support the notion that in the relevant time period (January 3-6, 2021) Rep. Greene engaged in insurrection. That was no error of law.

Next, Challengers cite "Greene 'liking' a Facebook post suggesting that a 'bullet to the head would be quicker' to remove House Speaker Nancy Pelosi from office for committing treason." Pet. ¶ 47. This was hearsay based on news reports, OSAH 01293, and Rep. Greene testified that she had "had many people manage [her] social media account over the years" and "ha[d] no idea who liked it." OSAH 01435. Moreover, if Charles Evers' speech urging a boycott and saying, "If we catch any of you going in any of them racist stores, we're gonna break your damn neck," was protected speech, 458 U.S. at 902, so was this statement and anyone liking it. Again, all things considered, ALJ Beaudrot considered this "evidence" and found it similarly lacking.

Next, Challengers cite Rep. Greene in a video telling a man in a t-shirt with a message that included the word "1776%" (not just "1776") "'that if anyone takes away your 'freedoms,'" the only way to get them back is "'with the price of

blood.'" Pet. ¶ 48. When asked about it, her sworn testimony was that "I've always said I'm against violence and I've always said I never want to see a war in this country" and that "[t]he price of blood is the unfortunate and tragic cost of war. And that's what happened in the Revolutionary War. And that's what I'm talking about." OSAH 01484. ALJ Beaudrot considered that evidence and found it similarly lacking.

Next, Challengers cite "Greene's statement after the 2020 election that 'You can't allow it to just transfer power 'peacefully' like Joe Biden wants and allow him to become our president." Pet. ¶ 49. In her testimony, when asked about the video statement, Rep. Greene said, "What I believe what I was referencing is we can't allow the electoral count to happen without objecting." OSAH 01514. ALJ Beaudrot considered that "evidence" and found it similarly lacking.

So the notion that "[t]his evidence was uncontroverted" is unsupported by the record evidence, and the fact that ALJ Beaudrot "failed to mention any of it" is readily explained by his authority to weigh the evidence on questions of fact. He weighed this "evidence" and found it lacking to support the notion that Rep. Greene engaged in insurrection during the relevant period.[9]

[9] *See also* OSAH 01189-1203 (Rep. Greene's Post-Hearing Brief establishes in greater detail why the evidence did not show that she engaged in insurrection, including evidence of her urging calm and peace *during* the unlawful events of Janu-

In sum, ALJ Beaudrot did properly consider the "evidence" Challengers recite and found it lacking as indicated. There was no requirement that he expressly say he considered each item, and Challengers recite no authority saying he must do so. His statement that he considered the evidence encompasses those recited items. So ALJ Beaudrot and Secretary Raffensperger did not commit reversible error here.

IV. ALJ Beaudrot did not err in his application of the legal standard for "engaging" in insurrection.

Challengers claim an error of law in the standard for "engaging" in insurrection. Pet. 16-17. Challengers insist that their "engagement" definition controls, without providing a citation, but that is incorrect as addressed below. But preliminarily, a precise focus on the alleged error readily shows there was none.

Challengers claim that ALJ Beaudrot employed as an "engaging" test the "requirement that the petitioners demonstrate that Greene had engaged in a 'months-long enterprise' and 'pre-planned revolution.'" Pet. ¶ 57. But ALJ Beaudrot wasn't establishing an "engaging" test when he wrote those words. Rather, he was, as he plainly said, stating what "[t]he evidence shows": "The evidence shows that prior to January 3, 2021, Rep. Greene engaged in months of heated political rhetoric clothed with strong 1st Amendment protections." Initial Decision 16. Challengers'

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ary 6, 2021 (OSAH 01202)).

attempt to convert this to ALJ Beaudrot's "engaging" test ignores both (i) what the text *says* (that it describes what Challengers' evidence shows) and (ii) the fact that ALJ Beaudrot expressly discussed the *actual* "engaging" test earlier in the Initial Decision. Initial Decision 13-14. After discussing what the word "engage" requires at length, ALJ Beaudrot concluded: "On balance, therefore, it appears that 'engage' includes overt actions and, in certain limited contexts, words used in furtherance of the insurrection and associated actions." Initial Decision 14. He then developed that test, his *actual* test, in a paragraph discussing various applications. *Id.* He then concluded that "*[w]hatever the exact parameters* of the meaning of 'engage' as used in the 14th Amendment, and assuming for these purposes that the Invasion was an insurrection, Challengers have produced insufficient evidence to show that Rep. Green 'engaged' in that insurrection after she took the oath of office on January 3, 2021." Initial Decision 15) (emphasis added). So even considering the various parameters of "engage," the evidence failed under any and all of them.[10]

[10] *See also* OSAH 01196-1203 (Rep. Greene's Post-Hearing Brief establishes in greater detail the required interpretation of what "engage" does not and does require, including what the First Amendment requires as to precise tests, and why the evidence did not show that she *engaged* in insurrection); *see also* OSAH 01251-78 (Greene's Post-hearing Brief Ex. C, which is the U.S. Attorney General's Opinion in 1867 interpreting requirements for being deemed to have engaged in insurrection).

In sum, what Challengers say was ALJ Beaudrot's "engaging" test was *not* his test, they ignore the test he *actually* stated, and they ignore his statement that *whatever* the various parameters possible, Challengers failed factually in their proof that Rep. Greene "engaged" in an insurrection. There was no error of law.

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

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

For Challengers to mount a § 3 candidacy challenge, Congress must provide a private right of action. *Armstrong v. Exceptional Child Ctr.*, 575 U.S. 320, 326 (2015) (rejecting mandatory private enforcement of the Supremacy Clause). This limitation prevents an individual from bringing a claim, as Challengers attempt to do, that attempts to enforce this constitutional provision against Rep. Greene.[11]

Congress, however, has not created a private right of action to allow a citizen to enforce § 3 by having a state declare that a candidate is "not qualified" to hold public office. OSAH 01210-13; *Hansen v. Finchem*, Case No. CV 2022-004321,

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

slip op. at ¶¶ 7-21 (Superior Court of Arizona, Maricopa County April 21, 2022),[12] *Hansen* relied primarily on three conclusions of law:

> (1) that the procedures necessary for the individualized determinations that a person violated § 3 "can only be provided for by congress," which it had not done. *Id.* at ¶¶ 9-11 (citing *In Re Griffin*, 11 F. Cas. 7, 26 (C.C.D. Va. 1869));
> (2) that Section 5 of the Fourteenth Amendment authorizes Congress to "enforce, by appropriate legislation, the provision[s] of this article," but Congress had not done so for § 3, *Hansen*, slip op. at ¶¶ 10-13, 16; and
> (3) that a recent bill introduced in Congress, which would have provided a cause of action "to remove and bar from holding office certain individuals who engage in insurrection or rebellion against the United States, and for other purposes" would have been unnecessary if such a cause of action already existed. *Id*. slip op. at ¶¶ 17 (citing 2021 Cong U.S. H.R. 1405, 117th Congress, 1st Session).

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

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

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

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[12] The *Hansen* slip opinion is included in the record, OSAH 01206, as Exhibit A to Rep. Greene's Post-hearing Brief.

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

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

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

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

Not only is § 3's disability aimed at holding *office* (who have "previously taken an oath") and *office-holding* ("[n]o person shall be a . . . Representative"), but Congress may remove the disability at any time before the Congressman-elect presents herself to take the oath of office. Statutory construction requires giving effect to each word of a statute. A construction applying § 3 to a candidacy, way before it can be determined that the candidate is qualified to take office, renders its

second sentence—one of only two—a nullity.

This likewise gives no effect to the whole first clause ("[n]o person *shall be*"—not "shall run for office to be"—"a Senator or Representative in Congress . . . " (emphasis added)); and its modifying phrase ("who, *having previously taken an oath* . . . " (emphasis added)); thus leaving us with only one modifying phrase ("shall have engaged in insurrection . . . ."), which standing alone is meaningless. Thus, state procedures purporting to block candidacy under § 3 not only ignore § 3's plain meaning, but also circumvent Congress' role in removing a disability, which it is authorized to do at any time, even up to the moment a Member-elect presents herself to take the oath of office. Whether such disability applies *then*, cannot be determined *now*.

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

Thus, under the plain language of § 3, it cannot be determined at this time

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

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

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

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

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

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

Challengers will no doubt argue that the 1872 Act only has retrospective effect, because it utilizes the purportedly "past tense" phrase 'all political disabilities *imposed* by the third section of the fourteenth article." But grammatically, that is not the case. "Imposed" is used here as a past *participle*[13]—*not* a "past tense" *verb*—in the participial phrase "imposed by [§ 3]," which acts as an adjective to show *which* "disabilities" are referenced. And those are disabilities imposed *by* § 3, not *based on* § 3, so the reference is to the *sort* of *legal* disability § 3 imposes, not particular applications of § 3 to individuals. *Accord Impose*, www.merriam-webster.com/dictionary/impose ("to establish or apply by authority"). Thus, when

[13] Participles are "verbals" (not verbs but based on verbs) that come in "past" ("imposed") and "present" ("imposing") versions. Purdue Online Writing Lab, Participles, https://owl.purdue.edu/owl/general_writing/mechanics/gerunds_participles_and_infinitives/participles.html. Use of the *present* participle ("imposing") in the 1872 Act to indicate the *sort* of disability at issue, i.e., "all political disabilities *imposing* by . . . ," would not comport with standard English usage, so the past participle was required to indicate which disability is at issue.

the 1872 Act says that particular legal disability created by § 3 is "hereby removed from all persons whomsoever," it meant "all" to apply prospectively too.

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

The *Greene* federal district court, in its preliminary injunction order, completely disregarded the difference between the two acts, stating that the differences don't matter and that Rep. Greene's sole argument for why the 1872 Act is prospective is that "Congress did not include the 'heretofore incurred' language that was later included in the 1898 Act." OSAH 00897; *Greene*, No. 1:22-CV-1294-AT, 2022 WL 1136729, at *23. That is wrong: the use of the 1898 Act is to show that Congress knew *how* to create retrospective application only. Standing alone, the 1872 Act is both prospective and retroactive. The "disability imposed [§ 3]" is a participial phrase indicating *which* legal disability is at issue. If "imposed by" had meant only prior application to particular persons, there would have been no need for "heretofore incurred" in the 1898 Act, violating construction cannons.

The federal district court also recites legislative history. OSAH 00894-95; *Greene*, No. 1:22-CV-1294-AT, 2022 WL 1136729, at *22-23. But since the 1872 Act is clear and unambiguous, consideration of legislative history [i]s unnecessary and improper. *See Tobib v. Radloff*, 501 U.S. 157, 162 (1991) (quoting *Blum v. Stenson*, 465 U.S. 886, 896 (1984)). Even so, that argument is unpersuasive.

The federal district court first discussed the numerous requests and calls for Amnesty following the Civil War. OSAH 00894-95; *Greene*, No. 1:22-CV-1294-AT, 2022 WL 1136729, at *22-23. However, none of that extraneous material confirms why the district court's declaration that the 1872 Act applies only retrospectively is correct. This is especially true considering the plain language of the 1872 Act removed the political consequence of § 3 from any Representative other than those who served during the 36th and 37th Congresses.

The federal district court next claimed that Congress interpreted the 1872 Act retrospectively, citing the House's refusal to seat Berger. OSAH 00897; *Greene*, No. 1:22-CV-1294-AT, 2022 WL 1136729, at *23-24. Berger's exclusion, after criticizing American involvement in World War I, predated modern First Amendment doctrine. *See* Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comment. 87, 130 (2021). Further, the House considered only the 1898 Act, not the 1872 Act, as the district court conceded: "In

Berger's defense, he argued . . . that he could not be disqualified by [§ 3] because [it] had been 'entirely repealed' by the 1898 Act." OSAH 00897; *Greene*, No. 1:22-CV-1294-AT, 2022 WL 1136729, at *22. Congress' determination regarding Berger has no bearing on this case, as it involved only "the 1898 Act," which by its terms had only retroactive application.

The federal district court also stated that the 1872 Act must be construed to avoid unconstitutionality, and that reading it as prospectively would render § 3 ineffective. OSAH 00901; *Greene*, No. 1:22-CV-1294-AT, 2022 WL 1136729, at *26. But the plain language of § 3 gave Congress plenary power to remove any and all § disabilities, which applied both retroactively and prospectively, and the district court identified no provision limiting the breadth of that power.

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

Accordingly, § 3 cannot be employed to disqualify Rep. Greene's candidacy

and, in any event, the 1872 Act removed any disability from her.

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

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

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

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

The Challenge Statute is a "candidate eligibility requirement" because it is, by

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

The "character and magnitude" of the injury imposed on First Amendment rights, *Cowen,* 960 F.3d at 1342, by the Challenge Statute is significant because it *requires* the Secretary of State to refer a complaint for an administrative hearing. *See, e.g., Farrar v. Obama,* No.1215136-60-Malihi at *2 (Ga. Off. State Admin. Hearings (Feb. 3, 2012)). The complaint *must* be referred for hearing—without any consideration or requirement of any standard of proof whatsoever since it is based only on the voters' "belief." The Challenge Statute, by operation of law, erects an *ad hoc* "candidate eligibility requirement" that the candidate must clear at the *state* level to be "eligible" for the ballot to election to *federal* office.

First, a standardless 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 standardless Challenge Statute, which constrains access to the ballot, is presumptively unconstitutional without probable cause as a procedural safeguard.

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

Third, the expedited procedure under the Challenge Statute actually increases the burden on cognizable rights since vital procedural protection, available in civil and criminal matters, are lacking or are inadequate. The Challenge Statute's pro-

cess is a *legal adjudication*—in this case, involving federal constitutional rights—without any of the practical and procedural protections ordinarily afforded defendants in legal adjudications. Under the Challenge Statute's process, defensive mechanisms ordinarily available pre-trial are available only after the trial. Rep. Greene could not halt the OSAH hearing on the basis of Challengers' standing, the legal indefensibility of their claims or any Constitutional or federal-law defenses; she is afforded no traditional discovery to test the authenticity of their factual assertions; and she cannot move for summary judgment. And here, Rep. Greene's motion to dismiss will not be resolved until after the hearing, and, in any event, the ALJ is not authorized to declare a Challenge Statute unconstitutional, a critical basis for Rep. Greene's motions.

As a result, the Challenge Statute's "process" required Rep. Greene to appear and respond in person in her accusers' "case"—no matter how factually farfetched, legally deficient, or constitutionally offensive it may be—in a hearing on a highly charged political issue that was live streamed. Her subpoena was like a subpoena from the Committee on Un-American Activities, summoning Rep. Greene to appear and testify under oath "about h[er] beliefs, expressions or associations," which "is [itself] a measure of governmental interference [with First Amendment freedoms]." *Watkins v. United States*, 354 U.S. 178, 197 (1957). The

burden from those subpoenas, as Rep. Greene received herein, was deemed severe enough to warrant protection from compulsory process. Since that subpoena could not be quashed, her only real protection from political smears is the Georgia Rules of Evidence, which should be applied.

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

After the hearing and the ALJ's recommendations, had the Secretary of State's decision disqualified Rep. Greene from candidacy, her name would have been withheld from or struck from printed ballots. O.C.G.A. § 21-2-5(c). It was only after the hearing, the ALJ's recommendation, and the Secretary of State's decision that Rep. Greene could raise constitutional defenses in an appeal to the Superior Court of Fulton County. *See* O.C.G.A. § 21-2-5(e). The Secretary of State's decision is, however, immediately effective. If there were insufficient time to strike her name or reprint ballots,[14] all polling places will have a prominent notice placed

[14] In the federal *Greene* case, Counsel for State Defendants had represented that the ballots are already printed with Rep. Greene's name on the ballot, "and that it will remain on the ballot, 'no ifs, ands, or buts about that.'" OSAH 00845 OSAH 00894-95; *Greene*, No. 1:22-CV-1294-AT, 2022 WL 1136729, at *3 (quoting TRO Hr'g Tr., (Doc. 39) at 29). It is unclear what State Defendants meant

noting her disqualification and all votes cast for her shall be void and shall not be counted.

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

Some absentee ballots (UOCAVA) went out beginning April 5, and regular absentee ballots started to be sent out on April 25. Advanced in-person voting began May 2. *See* Office of the Secretary of State/Elections Division, *2022 Scheduled Elections Calendar of Events*.[15] If her name had been struck when absentee ballots went out or were struck from the voting machines during advanced in-person voting (level two removal), voting for Rep. Greene would have been impossible and irrevocably lost. If her name was not struck, but the voter had been ad-

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by "remain on the ballot," but the plain language of the law presents two separate ways of amending the ballot—reprinting or striking the name. Ordinary rules of statutory construction lead to the conclusion that if the ballots contain Rep. Greene's name, if the Secretary of State decided in favor of Challengers and there was sufficient time, the name will be *struck from* the ballot, with the result that a vote for her *cannot* be recorded.

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

vised that a vote for Rep. Greene was void and would not be counted (level three removal), voting for Rep. Greene would have been suppressed and those votes would be irrevocably lost.[16] If Rep. Greene subsequently won an appeal in this Court—meaning her name was wrongly removed—those votes would still be lost.

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

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

flicts is not justified by any cognizable interest of the State.

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

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

U.S. Const. art. I, § 5, cl. 1.

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

17 Annals of Cong. 871 (1807)). The full House then voted to seat the Member. *Powell*, 395 U.S. at 543.

Voters have unfettered discretion in voting to independently evaluate whether federal candidates meet the constitutional qualifications for office. Derek T. Muller, *Scrutinizing Federal Electoral Qualifications,* 90 Ind. L.J. 559, 592 (2015) **("Muller")** (citations omitted). But Congress has an exclusive role in judging the qualifications of its own members to determine if they are eligible to take a seat in Congress. *Id.* at 611 (collecting cases). This exclusive role is consistent with the Supreme Court's logic in *Roudebush v. Hartke.* 405 U.S. 15 (1972). *Roudebush* held that a recount doesn't usurp the Senate's function because it doesn't "frustrate the Senate's ability to make an independent final judgment." *Id.* at 25-26 (cleaned up). Here, the Challenge Statute permits the State of Georgia to make its own independent evaluation of whether a Candidate is constitutionally qualified to be a Member of the U.S. House of Representatives. O.C.G.A. § 21-2-5.

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

power to deny membership by a majority vote." *Powell,* 395 U.S. at 548.

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

Conclusion

ALJ Beaudrot and Sec. Raffensperger made no errors of law and this Court "shall not substitute its judgment for that of the Secretary of State as to the weight of the evidence on questions of fact. " O.C.G.A. § 21-2-5(e). This Court may only "reverse or modify the decision" of Sec. Raffensperger "if substantial rights of the [Challengers] have been prejudiced . . . ." *Id.* As established above, no substantial rights of Challengers have been prejudiced. Rather, Challengers simply failed to make their case factually that Rep. Greene "engaged" in insurrection (even assuming *arguendo* there was an insurrection). Moreover, the Challenge Statute and the administrative proceeding of Challengers' claim violated the U.S. Constitution and federal law. Consequently, there was no cause to seek review and no reason to reverse or modify the final decision.

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Respectfully Submitted,

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Certificate of Service

I hereby certify that I have this day, June 24, 2022, served a copy of the within and foregoing Brief in Response to Petition for Judicial Review with the Clerk of the Court using the CM/ECF system, which will automatically send e-mail notification to all counsel of record.

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