IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

David Rowan, Donald Guyatt, Robert Rasbury, Ruth Demeter, and **Daniel Cooper**, Petitioners, vs. **Brad Raffensperger**, Secretary of State of the State of Georgia Respondent, and **Marjorie Taylor Greene,** Intervenor Respondent	Case No. 2022CV364778 **Petitioners' Reply in Support of their Petition for Judicial Review**

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Petitioners David Rowan, Donald Guyatt, Robert Rasbury, Ruth Demeter, and Daniel Cooper respectfully submit this reply in support of their petition for judicial review. The respondents, Secretary of State Brad Raffensperger and United States Representative Marjorie Taylor Greene, essentially concede error here and call it "harmless." But nothing could be more harmful than permitting Representative Greene to appear on the ballot after violating her oath of office by engaging in the January 6th insurrection. That is not a policy judgment to be made on a case-by-case basis, but one enshrined for all time in the Constitution. This Court should reject the respondents' arguments for the reasons below.

I. This Court is bound by *Haynes.*

The Secretary first argues that the administrative law judge did not err when he shifted the burden of proof onto the petitioners despite the Georgia Supreme Court's unequivocal holding in *Haynes v. Wells,* 273 Ga. 106, 108-09 (2000), that "the entire burden is placed upon [a candidate] to affirmatively establish his eligibility for office." (Respondent's Br. 18-20.) He contends that the Georgia Supreme Court

was not referring to all qualifications for office but only to the "typical" ones. (*Id.* at 19.)

The Georgia Supreme Court, however, made no such distinction. "Entire" means entire. The Court held that Georgia law places the "entire burden" on the candidates because "the statutes place the affirmative obligation on [a candidate] to establish his qualification for office." 273 Ga. at 108. Those statutes do not limit this obligation to "typical" qualifications.

Although burden-shifting is permitted under the administrative rules, those rules do not override the decisions of the Georgia Supreme Court: "The decisions of the Supreme Court shall bind all other courts as precedents." Ga Const. art. 5, § 6, ¶VI. The administrative law judge was bound by *Haynes,* and so is this Court. Given the Supreme Court's rationale and broad language, it was error to depart from *Haynes* and this Court should remand the case to the administrative law judge for further proceedings on that basis alone.

The Secretary cites no authority to the contrary but argues that, even if it were error to disregard *Haynes,* the error was harmless "in

light of Greene's sworn testimony."[1] (Respondent's Br. 20-21.) The Secretary does not say, specifically, what testimony renders the burden-shifting harmless, but, in any event, the Secretary's argument is difficult to square with the administrative law judge's repeated emphasis on the petitioners' alleged failure "to meet their burden of proof." (Admin. R. Part 2, OSAH 02120, 02122.) Nowhere does the judge suggest that the outcome would have been the same even if Representative Greene had the burden of proof. Instead, the decision reveals that judge ultimately found against the petitioners *because of the burden of proof.* The Georgia Supreme Court has held, moreover, than an error of law "necessarily prejudiced" substantial rights in a challenge to a candidate's qualifications under O.C.G.A. § 21-2-5. *Handel v. Powell*, 284 Ga. 550, 553 n.3 (2008). Under these circumstances, the burden-shifting was prejudicial.

[1] The Court may reverse or modify the decision "if substantial rights of the appellant have been prejudiced" by an error. O.C.G.A. § 21-2-5(e). The Secretary concedes that the error here affects the petitioners' substantial rights under O.C.G.A. § 21-2-5(b). (Respondent's Br. 20-21.) He argues only that the error is not prejudicial (harmless).

II. Requiring a candidate to establish her eligibility for office does not offend due process.

Representative Greene defends the burden-shifting on a different ground. (Intervenor's Br. 6-14.) She contends that requiring her to bear the burden of establishing her eligibility for office would violate the Due Process Clause of the Fourteenth Amendment. It would not.

This defense requires the Court to apply the balancing test set forth in *Anderson v. Celebrezze,* 460 U.S. 780 (1983):

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

Bergland v. Harris, 767 F.2d 1551, 1553-54 (11th Cir. 1985) (paraphrasing *Anderson*, 460 U.S. at 789; *see also New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1282 (11th Cir. 2020) (holding that the *Anderson* test applies to due-process claims against election laws).

Under the *Anderson* test, the level of scrutiny varies on a sliding scale with the character and magnitude of the asserted injury. When, at the low end of the scale, the law "imposes only 'reasonable,

nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson*, 460 U.S. at 788, 788-89 n.9); *accord Rhoden v. Athens-Clarke Cnty. Bd. of Elections,* 310 Ga. 266, 272 (2020); *Cox v. Barber*, 275 Ga. 415, 418 (2002). But when the law places discriminatory or "severe" burdens on the rights of political parties, candidates, or voters, "the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Id*. at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1982)).

Here, Representative Greene asserts that requiring her to establish her eligibility to hold federal office burdens her right to "be[] a candidate." (Intervenors' Br. 11.) To support her argument, she relies mainly on *Speiser v. Randall*, 357 U.S. 513 (1958). The plaintiffs in *Speiser* were honorably discharged World War II veterans who sought to claim property tax exemptions under California law. *Id.* at 515–16. One of the forms required for the exemptions contained an oath:

> 'I do not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means, nor advocate the support

> of a foreign Government against the United States in event of hostilities.'

Id. at 515. Each of the plaintiffs claimed the exemption but refused to sign the oath. *Id.* Local tax assessors then denied the exemptions. *Id.* Although the Supreme Court took no position on the constitutional validity of the oath itself, it found that the application of the burden of proof on the taxpayer in these proceedings violated the taxpayers' due process rights.

The Supreme Court observed that "[w]hen the State undertakes to restrain unlawful advocacy it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights." *Id.* at 520–21. The Court determined that the tax exemption procedures were deficient because "[n]ot only does the initial burden of bringing forth proof of nonadvocacy rest on the taxpayer, but throughout the judicial and administrative proceedings the burden lies on the taxpayer of persuading the assessor, or the court, that he falls outside the class denied the tax exemption." *Id.* at 522. The Court emphasized that even though it is "familiar practice in the administration of a tax program for the taxpayer to carry the burden of introducing evidence to rebut the determination of the collector," this same procedure violates

due process "when the purported tax was shown to be in reality a penalty for a crime." *Id.* at 524–25. The Court explained that the "underlying rationale" for removing the burden from the taxpayer who seeks the exemption in this circumstance is that "where a person is to suffer a penalty for a crime he is entitled to greater procedural safeguards than when only the amount of his tax liability is in issue." *Id.* at 525. The Court emphasized,

> Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt.

Id. at 525–26. In other words, "[w]here the transcendent value of speech is involved, due process certainly requires in the circumstances of this case that the State bear the burden of persuasion to show that the appellants engaged in criminal speech." *Id.* at 526. Therefore, in the context of *Speiser*, the Court found that it violated due process to require the taxpayer to "sustain the burden of proving the negative." *Id.*

Representative Greene argues that here, just as in *Speiser*, it would be unconstitutional to require her to "prove a negative (i.e., that

she did not engage in 'insurrection')." (Intervenor's Br. 7.) But *Speiser* is distinguishable because a person's interest in being a candidate does not rise to the level of a fundamental right. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997); *Clements v. Fashing*, 457 U.S. 957, 963 (1982). It is not on par with a person's interest in avoiding potential criminal jeopardy based on unrelated political activity while applying for a tax credit. *Speiser* therefore does not mean that requiring a candidate to establish her eligibility for public office automatically imposes a heavy burden, and Representative Greene has identified no other practical burdens of doing so.

In any event, whatever minimal burdens the State's procedures might impose, they are justified by the state's interest in preventing ineligible candidates from appearing on its ballots. *Bullock v. Carter*, 405 U.S. 134, 145 (1972) ("a State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies"); *Hassan v. Colorado*, 495 F. App'x 947, 948 (10th Cir. 2012) (Gorsuch, J.) ("a state's legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude

from the ballot candidates who are constitutionally prohibited from assuming office”).

For these reasons, requiring Representative Greene to establish her eligibility for public office, as *Haynes* dictates, would not violate the Due Process Clause.

III. Denying discovery was not harmless.

The Secretary concedes, as he must, that the stated reason for quashing the petitioners’ notice to produce was not one of the four permissible reasons under the administrative rules. (Respondent’s Br. 21-22.) Instead, he argues that the petitioners had no right, “much less a ‘substantial right’” to any discovery and have shown no prejudice in any event. (*Id.* at 22-24.) Neither argument has any merit.

It simply cannot be that there is no right to discovery under the administrative rules. Not only is the right to serve a notice to produce on a party “to compel the production of documents” expressly provided in the duly-promulgated rules, but the rules also provide for the enforcement of such notices “through the imposition of civil penalties.” OSAH Rules 616-1-2-.19(1)(g) and (2). That right may be limited, but it

exists nonetheless.[2] A ruling here that there is no right to discovery in administrative proceedings in Georgia would undermine the state's system-wide administrative procedures for the sake of shielding one political candidate from discovery.

It is also obvious, given the administrative law judge's reasoning, that denying document discovery here was prejudicial. The judge found that there is "no evidence showing that . . . Rep. Greene communicated with or issued directives to persons who engaged in the Invasion" such as Anthony Aguero and Ali Alexander. (Admin. R. Part 2, OSAH 02118.) The judge went on:

> [T]he evidence does not show that Rep. Greene was in contact with, directed, or assisted these individuals, or indeed anyone, in the planning or execution of the Invasion. Rep. Greene denies any such contact or involvement and that denial stands unchallenged by other testimony *or documentary evidence.*

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[2] Representative Greene suggests that there is no right to discovery in an administrative proceeding because one of the rules provides that "[d]iscovery shall not be available in any proceeding before an Administrative Law Judge except to the extent specifically authorized by law." (Intervenor's Br. 15 (quoting OSAH Rule 616-1-2-.38).) But she reads too much into this rule, because the rule providing for notices to produce is an example of the kind of discovery that is specifically authorized by law.

Id. (emphasis added). The plaintiffs specifically asked for communications between Representative Greene and known insurrectionists such as Alexander and Aguero. (Admin. R. Part 1, OSAH 00144.) There was no documentary evidence of such communications because the judge quashed the petitioners' notice to produce. The prejudice is apparent.

Both the Secretary and Representative Greene suggest in passing that the judge *could have* quashed the notice to produce for a permissible reason because the notice might have been characterized as burdensome or unjust. (Respondent's Br. 22; Intervenor's Br. 16-17.) This argument is beside the point because the administrative law judge made no such finding. Nor could he. Representative Greene made no showing that the number of documents requested by the petitioners was voluminous. Did she have so many emails with Ali Alexander that producing them in the month available to her would have been difficult? She didn't say. And even if the judge thought that some of the document requests were out of bounds, he could have severed or narrowed the specific requests he considered inappropriate rather than quash the notice altogether. *Cf. State v. Bradshaw*, 145 Ga. App. 278, 278 (1978) (a trial court has

authority to modify, rather than quash, a notice to produce). The judge's failure to do so would have still been reversible error.

Representative Greene also points in passing to objections she made in the administrative proceeding as further reasons to uphold the judge's decision to quash. (Intervenor's Br. 19-20.) She refers to the 42-page brief she filed there in support of her motion to quash, and she asserts that this Court "must" sift through each of those objections it if otherwise decides that the judge quashed the notice in error. (*Id.* at 20.) Not so. Georgia courts rarely allow a litigant to incorporate arguments by reference to briefs in the courts below. *See Evans v. State*, 360 Ga. App. 596, 610 (2021); *Ellison v. Burger King Corp.*, 294 Ga. App. 814, 815 (2008). The Court should therefore disregard Representative Greene's many meritless objections below.[3]

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[3] The petitioners responded to those objections in their response to the motion to quash (Admin. R. Part 1, OSAH 00557-59), and, if the Court decides to entertain Representative Greene's objections in the administrative proceeding by incorporating her filing there, then the petitioners incorporate that entire brief here as well.

IV. The combination of legal errors here was particularly prejudicial.

Representative Greene wants to use the nature of this case as both a shield and a sword. She says that it was appropriate for the administrative law judge to shift the burden of proof onto the petitioners because this is not a "typical election challenge." (Intervenor's Br. 9 (quoting Admin. R. Part 1, OSAH 00755-56).) Yet she defends the judge's decision to deny all discovery because "[d]iscovery in OSAH proceedings is the exception, and not the rule." (Admin. R. Part 1, OSAH 00571-72.) She urges this Court to ignore the combined effect of the administrative law judge's decisions to shift the burden of proof onto the petitioners and to deny the petitioners all discovery. (Intervenor's Br. 17-19.) And she claims that the petitioners "exaggerate" the effect that these errors had on their case, given that Representative Greene was subject to live cross-examination at the hearing. (*Id.* at 18.) But that is not what the record shows.

Representative Greene's defense at the hearing rested almost entirely on her claimed lack of memory. She answered "I don't recall" or some version thereof more than 80 times during the hearing, even in response to the question of whether she had discussed calls for then-

President Trump to declare martial law to prevent the peaceful transition of power to President-Elect Biden. (Admin. R. Part 2, OSAH 01813-16.) Not even one business day passed before the press reported on text messages between Representative Greene and then-White House Chief of Staff Mark Meadows in which Representative Greene had raised the issue of martial law. (Admin. R. Part 1, OSAH 01148.) Those text messages would have been responsive to the petitioners' notice to produce, and they would have helped to undermine Representative Greene's credibility and to connect her to the events of January 6.

As this example illustrates, the combined effect of the judge's legal errors was particularly prejudicial. His decisions to shift the burden of proof and to deny all discovery made Representative Greene's stonewalling strategy possible, and it left the petitioners with two hands tied behind their backs. Because those decisions were highly prejudicial in combination, this Court should remand the case for further proceedings.

V. It is impossible to conclude from the judge's decision that he applied the proper legal standard for evaluating pre-oath conduct.

The Secretary and Representative Greene both contend that the administrative law judge did not fail to consider Representative Greene's conduct before she took the oath of office. (Respondent's Br. 25; Intervenor' Br. 20-26.) But that is not the issue. The question, for purposes of this petition, is whether the administrative law judge applied the correct legal standard to that evidence, and it is impossible to conclude from the judge's decision that he did.

The judged recited the correct standard: Representative Greene's pre-oath statements and conduct are relevant "to the extent they explain her conduct occurring *after* the taking of the oath." (Admin. R. Part 2, OSAH 02116.) But he held only that Representative Greene's pre-oath conduct "is not engaging in insurrection" without determining whether any of that conduct might explain either what she meant by her post-oath statements or how her followers might understand her post-oath statements.

For example, the record shows that Representative Greene made a pre-oath statement urging supporters to come to Washington on January

6 because "**You can't allow [Congress] to just transfer power peacefully like Joe Biden wants and allow him to become our President.**" (PX-66 (multimedia file)[4]; Admin. R. Part 2, OSAH 01789-91.) That statement supports an inference that Representative Greene's post-oath statement to her followers that tomorrow (January 6) would be "our 1776 moment" was either meant or understood as a call to engage in non-peaceful activity to prevent the transfer of power to President-Elect Biden. (PX 27 (multimedia file); Admin. R. Part 2, OSAH 01773-75.) Other pre-oath examples abound: urging supporters to "flood the Capitol" (Admin. R. Part 2, OSAH 02637); threatening violence and death against her political opponents (Admin. R. Part 2, OSAH 02279-84); telling a gun rights activist that freedom must be won "with the price of blood" (PX-6 (multimedia file); Admin R. Part 2, OSAH 01765-71). And so on. All of this pre-oath conduct supports an inference that Representative Greene's post-oath conduct was engaging in an insurrection.

[4] Multimedia files in the administrative record have been filed with the Court on a thumb drive.

To illustrate the point, consider a mafia boss who tells an associate in December that he might need to assassinate a rival in January. Then, in January, he tells the associate to "take care of business." In isolation, the January statement might seem ambiguous, inscrutable, or even benign. But in context, its meaning is clearer.

Representative Greene suggests that the administrative law judge found none of the petitioners' evidence persuasive. (Intervenor's Br. 26.) But this is sheer speculation. The judge's decision says nothing of the sort. He made no credibility determinations one way or the other. He did not even mention Greene's pre-oath statement exhorting her followers that they "can't allow [Congress] to just transfer power peacefully like Joe Biden wants and allow him to become our President." (PX-66 (multimedia file); Admin. R. Part 2, OSAH 01789-91.)

The Secretary points out that a judge need not comment on every piece of evidence, and that is certainly correct. (Respondent's Br. 25.) But it is impossible to discern from the judge's decision whether he did, in fact, consider Representative Greene's pre-oath conduct as context for her post-oath conduct as he was required to do. At a minimum, a remand is necessary and appropriate under these circumstances. *Cf. Morales v.*

Comm'r of Soc. Sec., 799 F. App'x 672, 675 (11th Cir. 2020) ("We will reverse if the Commissioner failed to apply the correct legal standards or provided an insufficient basis to determine whether proper legal principles have been followed."); *Wiggins v. Schweiker*, 679 F.2d 1387, 1390 (11th Cir.1982) (remanding for the ALJ to evaluate the weight given to treating doctor where the ALJ's opinion failed "to mention the ... treating physician and the weight, if any, the ALJ gave to the treating physician's evidence and opinion" and the court was unable "to determine whether the ALJ applied the proper legal standard" for weighing the doctor's opinions).

VI. It is impossible to conclude from the judge's decision that he applied the proper legal standard for "engaging" in insurrection.

A remand is likewise warranted here because it is impossible to tell from the administrative law judge's decision that he applied the correct legal standard for "engaging" in insurrection.

To be sure, the judge correctly identified the two governing cases: *United States v. Powell*, 65 N.C. 709 (1871) (defining "engage" as "a voluntary effort to assist the Insurrection . . . and to bring it to a successful [from insurrectionists' perspective] termination"); and *Worthy*

v. Barrett, 63 N.C. 199, 203 (1869) (defining "engage" as "[v]oluntarily aiding the rebellion by personal service or by contributions, other than charitable, of anything that was useful or necessary"). (Admin. R. Part 2, OSAH 02116.) He correctly observed that the *Worthy-Powell* standard appears to provide the only judicial construction of "engage" under the Disqualification Clause. (*Id.*) He also stated correctly that "it is not necessary that an individual personally commit an act of violence to have 'engaged' in insurrection," and that engagement does not "require previous conviction of a criminal offense." (*Id.* at 02116-17.)[5]

The judge also correctly summarized the law:

> On balance, therefore, it appears that "engage" includes overt actions and, in certain limited contexts, words used in furtherance of the insurrections and associated actions. "Merely disloyal sentiments or expressions" do not appear be sufficient. *Id.* But marching orders or instructions to capture a particular objective, or to disrupt or obstruct a particular government proceeding, would appear to constitute "engagement" under the *Worthy-Powell* standard. To the extent (if any) that an "overt act"

[5] On this last point the judge correctly cited *Powell*, 65 N.C. at 709 (defendant not charged with any prior crime); *Worthy*, 63 N.C. at 203 (defendant not charged with any crime); *In re Tate*, 63 N.C. 308 (1869) (defendant not charged with any crime); and Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comment. 87, 98–99 (2021) (in special congressional action in 1868 to enforce Section Three and remove Georgia legislators, none of the legislators had been charged criminally).

> may be needed, *see id.*, it would appear that in certain circumstances words can constitute an "overt act," just as words may constitute an "overt act" under the Treason Clause, *e.g., Chandler v. United States*, 171 F.2d 921, 938 (1st Cir. 1948) (enumerating examples, such as conveying military intelligence to the enemy), or for purposes of conspiracy law, *e.g.*, *United States v. Donner*, 497 F.2d 184, 192 (7th Cir. 1974) (even "constitutionally protected speech may nevertheless be an overt act in a conspiracy charge").

(*Id.* at 02117.)

The issue here is *not* whether the administrative law judge recited the correct standard. Neither the petitioners nor the Secretary nor Representative Greene have disputed that he did. (*See* Respondent's Br. 26; Intervenor's Br. 27.) The issue here is simply that, when it came time to *apply* this standard, the judge seems to have added an extra element not based in any prior precedent or historical source. He concluded, as a matter of law, that the petitioners had failed to establish that Greene had "engaged" in insurrection within the meaning of the Disqualification Clause because they had failed to show "months of planning and plotting to bring about the Invasion," a "months-long enterprise" culminating in "[a] call to arms for consummation of a pre-planned violent revolution." (Admin. R. Part 2, OSAH 02119.)

The respondents insist that the judge applied the correct standard and just found the evidence lacking. Maybe so. But neither the Secretary nor Representative Greene offer any coherent explanation for the judge's extra language. Was it gratuitous rhetoric? Or did the judge (incorrectly) believe that it was the petitioner's burden to show that Representative Greene's engagement in the insurrection extended over some period of time? Because it is impossible to tell which standard the judge applied, a remand is necessary and appropriate here. *Cf. Morales,* 799 F. App'x at 675 (reversing under similar circumstances); *Wiggins*, 679 F.2d at 1390 (same).

VII. Representative Greene's remaining arguments are procedurally barred and lack merit.

In addition to responding to the four issues raised by the petition for judicial review, Representative Greene offers five arguments in support of the proposition that Georgia's challenge statute and the entire administrative proceeding here violated the United States Constitution and federal law. (Intervenors' Br. 28-46.) Ordinarily, an appellee can defend a judgment on any ground, even if it was not a basis for the trial court's ruling. *Cf. City of Gainsville v. Dodd*, 275 Ga. 834, 835 (2002) (reciting the right-for-any-reason rule). And although Representative

Greene says in her conclusion that there is "no reason to reverse or modify the final decision" (Intervenor's Br. 46), her additional arguments seek exactly that—reversal or modification of the Secretary's decision. If this Court were to conclude, for example, that O.C.G.A. § 21-2-5 is unconstitutional—as Representative Greene argues that it is—then this Court would necessarily *vacate* the Secretary's decision rather than affirm it. As a result, her arguments are procedurally barred under O.C.G.A. § 21-2-5(e) because she did not appeal the Secretary's final decision within 10 days. *See Miller v. Real Est. Comm'n*, 136 Ga. App. 718, 718 (1975) (holding that failure to petition for judicial review within the statutory time set out governing the administrative process required dismissal of the asserted appellate claims)

The petitioners will nonetheless address them here.

A. O.C.G.A. § 21-2-5(b) provides a private right of action to challenge the qualifications of any candidate for federal or state office.

Representative Green first argues that the petitioners had no private right of action to enforce the Disqualification Clause. (Intervenor's Br. 28-29.) This argument is easily dismissed.

Georgia law expressly provides a private right of action to challenge the qualifications of any candidate for federal or state office. O.C.G.A. § 21-2-5(b). Nothing more is required. The challenge statute serves the State's interest in preventing unqualified candidates from appearing on the ballot and is well within the State's authority to regulate congressional elections under the Elections Clause of the United States Constitution, which gives states authority to regulate the time, place, and manner of congressional elections.

Representative Greene argues, however, that only Congress can create a cause of action to enforce the Disqualification Clause. (Intervenor's Br. 28-29.) She relies on *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320 (2015), to support her argument, but that reliance is misplaced. *Armstrong* is a case about enforcing the Medicaid Act against state officials, and it held only that there is no private right of action for individuals to do so under the Supremacy Clause or the Act itself. *Id.* at 324-32. *Armstrong* says nothing about whether or how a state may regulate access to the ballot in congressional elections.

Representative Greene also cites the trial court's decision in *Hansen v. Finchem*, No. CV 2022-004321 (Maricopa Cnty. Ariz. Super.

Ct. Apr. 21, 2022), for the proposition that only Congress can provide a right of action to enforce the Disqualification Clause. (Intervenor's Br. 29.) That case relied exclusively on *In re Griffin,* 11 F. Cas. 7, 26 (C.C.D. Va. 1869), which noted in dicta that procedures for enforcing the Disqualification Clause "can only be provided for by congress." But *Griffin* was decided when Virginia had no state government and was under direct federal rule. Much like Washington, D.C. today, all of its laws could "only be provided for by congress." *See* Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comment. 87, 130 & n. 91 (2021) (noting that *Griffin* "was not denying states the power to enforce Section Three on their own"). *Finchem* fails to mention this critical context and is therefore unpersuasive authority.[6]

Finally, even if congressional action were needed for petitioners to enforce the Disqualification Clause, Congress has so acted here. In 1868, Congress adopted legislation specifically requiring Georgia and several other identified states to apply the Disqualification Clause. 40 Cong. Ch.

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[6] The Supreme Court of Arizona has since affirmed the judgment in *Finchem*, but on entirely different state statutory grounds not relevant here. *See Hansen v. Finchem*, No. CV-22-0099-AP/EL, 2022 WL 1468157 at *1 (Ariz. May 9, 2022).

70, 15 Stat. 73 (1868) ("no person prohibited from holding office under the United States . . . by section three of the proposed amendment to the Constitution of the United States, known as article fourteen, shall be deemed eligible to any office in [any] of said States, unless relieved from disability as provided by said amendment"). That provision has never been repealed.

B. The terms of the Disqualification Clause do not prohibit States from ensuring that only qualified candidates appear on the ballot.

Representative Greene next argues that there is no way to determine whether she is disqualified under the Disqualification Clause until January 3, 2023, and that she therefore cannot lawfully be barred from the ballot in the meantime. (Intervenor's Br. 30-32.) Not so.

The Constitution does not require states to take a wait-and-see approach to unqualified candidates. As already discussed above, states have a legitimate interest in preventing ineligible candidates from appearing on its ballots. *Bullock*, 405 U.S. at 145 ("a State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies"); *Hassan*, 495 F. App'x at 948 ("a state's legitimate interest in protecting the integrity and practical

functioning of the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office"). In the absence of a clear constitutional command to the contrary, a state's interest in election integrity permits states like Georgia to regulate access to the ballot based on a candidate's *current* eligibility to hold office—not based on speculation that two-thirds of the members of Congress might remove a disability in the future.

Representative Greene's argument to the contrary rests on an obvious error. She asserts that "the Framers of the Fourteenth Amendment knew how to impose a disability" on candidates and simply chose not to. (Intervenor's Br. 31.) But this argument overlooks the fact that states did not use government-printed ballots in 1868. *See, e.g.,* Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. Rev. 1, 9-28 (2011) (discussing the evolution of state power over ballots). Political parties controlled the process. So without government-printed ballots, the Framers of the Fourteenth Amendment could not have chosen to prohibit disqualified candidates from appearing on a ballot. And as *Bullock* and *Hassan* (and many other cases) show, the lack of government-printed ballots in 1868

does not prevent states from preventing unqualified candidates from appearing on government-printed ballots today.

The better reading of the Disqualification Clause is that the disability attaches when it attaches—when a person engages in insurrection after taking an oath of office. And the disability is removed when it is removed—when two-thirds of each House of Congress removes it. Representative Greene's disability has not been removed, so Georgia can constitutionally remove her from the ballot if this proceeding determines that she engaged in an insurrection after taking her oath of office.

C. The Amnesty Act of 1872 does not grant prospective amnesty to all future insurrectionists.

Representative Greene next argues that the Disqualification Clause cannot lawfully be the basis for removing her from the ballot because the Amnesty Act of 1872 granted prospective amnesty to all future insurrectionists. (Intervenors' Br. 30-37.) It did not.

The Amnesty Act of 1872 provides in full as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each house concurring therein)*, That all political disabilities imposed by the third section of the fourteenth article of amendments of the Constitution of the United

> States are hereby removed from all persons whomsoever, except Senators and Representatives of the thirty-sixth and thirty-seventh Congresses, officers in the judicial, military, and naval service of the United States, heads of departments, and foreign ministers of the United States.

Act of May 22, 1872, ch. 193, 17 Stat. 142 (1872). Does that statute grant prospective amnesty? "To ask such a question is nearly to answer it." *Cawthorn v. Amalfi*, 35 F.4th 245, 248 (4th Cir. 2022). The Fourth Circuit recently concluded that the Act "removed the Fourteenth Amendment's eligibility bar only for those whose constitutionally wrongful acts occurred before its enactment." *Id.* This Court should follow the Fourth Circuit's persuasive analysis.

To begin with, Congress has no power to grant prospective amnesty. The Disqualification Clause gives Congress the power only to "remove" a disqualification. U.S. Const. amend. XIV, § 3. The word "remove" means to "take away or off"; "to get rid of"; or to "eliminate." *ACLU of Fla. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1219 (11th Cir. 2009); *Vurv Techn. LLC v. Kenexa Corp.*, 2009 WL 2171042, at * 5 (N.D. Ga. Jul. 20, 2009); *see also Dr. Webster's Complete Dictionary of the English Language* 1116 (Chauncey A. Goodrich & Noah Porter, eds., 1864) (defining "remove" when used as a verb: "To cause to change place;

to move away from the position occupied; to displace."). The text of the Disqualification Clause thus suggests that Congress lacks the power to remove something that does not yet exist. *Cf. Cawthorn*, 35 F.4th at 260 (stating that a prospective-amnesty reading of the Act "would raise potentially difficult questions about the outer limits of Congress's power under Section 3 of the Fourteenth Amendment").

Congress confirmed this understanding of its power under the Disqualification Clause in 1919 when it rejected a similar argument, based on the Amnesty Act of 1898, from Representative Victor Berger who had been convicted of espionage. After acknowledging that the Disqualification Clause authorizes Congress to remove disqualifications, the House concluded that "manifestly it could only remove disabilities incurred previously to the passage of the [1898 Amnesty] act, and Congress in the very nature of things would not have the power to remove any future disabilities." 6 Clarence Cannon, *Cannon's Precedents of the House of Representatives of the United States* 55 (2d ed. 1935). The history of the Clause thus also suggests that the Constitution does not give Congress the power to grant prospective amnesty.

This understanding of the power is consistent with constitutional limitations on that power. Under Article V, constitutional amendments require passage by two-third of both houses of Congress and ratification by three-fourths of the states. But Greene's position is essentially that "Congress had entirely repealed Section 3 of the Fourteenth Amendment through the mere passage of two statutes." *Greene v. Raffensperger,* No. 22-CV-1294-AT, 2022 WL 1136729, at *24 (N.D. Ga. Apr. 18, 2022). The power to grant amnesty cannot be read as an implied grant to bypass Article V.

But even if Congress had the power to grant prospective amnesty, the text and history of the Amnesty Act of 1872 suggest that Congress did not intend to do so. The Act uses the past participle "imposed" rather than "which may be imposed," or "which shall be imposed" or something similar, suggesting that it only applies to political disabilities that have already been imposed. "[T]he Act's operative clause refers to those 'political disabilities imposed' in the past tense rather than new disabilities that might arise in the future. The past tense is 'backward-looking'; it refers to things that have already happened, not those yet to come." *Cawthorn*, 35 F.4th at 258; *see also Gundy v. United States,* 139

S. Ct. 2116, 2127 (2019) (noting that the use of past tense indicates that a statute applies to pre-enactment conduct); *Carr v. United States,* 560 U.S. 438, 448 (2010) (observing that the Supreme Court has "frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach"); *Blair v. City of Chicago*, 201 U.S. 400, 465 (1906) ("This declaration is in the past tense, and can have no reference by any fair construction to future engagements."). The Act also uses the phrase "are hereby *removed*." As with the Disqualification Clause itself, the plain meaning of these phrases indicates that the Act takes away political disabilities that already exist. *See Cawthorn*, 35 F.4th at 258 ("In the mid-nineteenth century, as today, that word generally connoted taking away something that already exists rather than forestalling something yet to come.").

Representative Greene argues that the word "imposed," as used in the Act, is a participle modifying the word "disabilities" and is not a verb in the past tense. (Intervenor's Br. 33-34.) But as the Fourth Circuit noted in response to the same argument, "participles are a form of verbs—a form that comes in both 'past' and 'present' varieties." *Cawthorn*, 35 F.4th at 258. Representative Greene concedes that

"imposed" is a *past participle*, which, in the English language, is "[a] verb form indicating past or completed action or time that is used as a verbal adjective in phrases such as *baked beans* and *finished work*." *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.,* 554 U.S. 33, 39 (2008) (alteration in original) (quoting American Heritage Dictionary 1287 (4th ed. 2000)). In this instance, Congress used the past participle to convey its intent to remove only those political disabilities that had already been "imposed." *Cawthorn*, 35 F.4th at 258.

The history of the Act confirms the plain meaning of the text. *See Cawthorn*, 35 F.4th at 259; Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comment. 87, 111-20 (2021). Before the Act, Congress had been passing private bills to remove political disabilities from former Confederates. *See id.* at 112. That soon became cumbersome, with thousands of names in each bill. *Id.* Rather than pass another statute with a long list of names, Congress chose to use a general phrase to identify those former Confederates it was relieving of a political disability, with a few exceptions for some of the most prominent Confederate leaders. *Id.* at 116-20. It was thus a statute

designed to help low-level Confederates, not to grant amnesty to future insurrectionists.

Representative Greene also suggests that the 1898 Amnesty Act, which removed the disability from certain officeholders and military personnel who had not been covered by the 1872 Amnesty Act, shows that Congress meant for the 1872 Amnesty Act to apply prospectively. (Intervenor's Br. 34.) The 1898 Amnesty Act lifted, without exception, any "disability ... heretofore incurred" under the Disqualification Clause. *See* Act of June 6, 1898, ch. 389, 30 Stat. 432 (1898). But while the use of "heretofore" in 1898 more clearly limits the Act's effect to disabilities "incurred" before its enactment, the 1898 Amnesty Act sheds little light on what a different Congress meant in 1872.

Representative Greene's interpretation of the 1872 Amnesty Act is far-fetched at best. Indeed, it strains credulity to suggest that Congress intended to grant amnesty to insurrectionists whose misdeeds they could not even foresee. *See Cawthorn*, 35 F.4th at 260 ("Having specifically decided to withhold amnesty from the *actual* Jefferson Davis, the notion that the 1872 Congress simultaneously deemed any future Davis worthy of categorical advance forgiveness seems quite a stretch.")

Representative Greene offers no cases to support that reading, and the only federal appellate court to have considered similar arguments so far has rejected them. *See id.* at 257-61. Ultimately, Representative Greene's argument that the challenge statute, as applied to her, violates the Amnesty Act of 1872 lacks merit because the Act did not grant prospective amnesty to her or anyone else.

D. O.C.G.A. § 21-2-5 does not violate Representative Greene's First and Fourteenth Amendment rights.

Representative Greene next argues that O.C.G.A. § 21-2-5 is unconstitutional because it violates her rights under the First and Fourteenth Amendments to the United States Constitution. (Intervenor's Br. 37-44.) This defense requires the Court to apply the *Anderson* test described in Section II above.

Representative Greene claims that the challenge statute burdens her rights to run for office and to associate for the advancement of political beliefs by allowing a challenge to her candidacy based solely on a challenger's belief that she is not qualified to hold office. (*Id.* at 37.) And she contends here that the challenge statute burdens those rights in four separate ways. First, she contends that the challenge statute is presumptively unconstitutional on its face because it allows voters to

challenge her qualifications without first showing probable cause. (*Id.* at 38.) Second, she argues that the challenge statute burdens the voting rights of her supporters. (*Id.* at 39.) Third, she argues that the administrative process lacks the procedural safeguards that would be available in a civil or criminal proceeding. (*Id.* at 38-40.) Fourth, she argues that the timing of the challenge was a burden because the challenge could not be fully adjudicated, including all appeals, before primary ballots were printed. (*Id.* at 41-43.) Representative Greene argues that these burdens are so severe that "it is difficult to imagine a valid government interest that would justify" the burdens imposed by the challenge statute. (*Id.* at 43.)

The main problem for Representative Greene's argument is that she offers no evidence of an actual burden beyond the mere inconvenience of having to participate in the challenge proceeding. *See Greene v. Raffensperger,* No. 22-CV-1294-AT, 2022 WL 1136729, at *21 (N.D. Ga. Apr. 18, 2022) (addressing the same argument); *see also id.* at *25 (concluding that the challenge statute imposes only "minimal burdens"). The challenge process seems much less burdensome on its face than other burdens that courts have found not to be severe. In

Cowen v. Georgia Secretary of State, for example, the Eleventh Circuit found no severe burden from Georgia's ballot-access petition requirement that requires independent and third-party candidates for United States Representative to gather tens of thousands of signatures to appear on the ballot. 22 F.4th at 1230. Georgia's challenge process is not more burdensome than that.

Representative Greene cites only *Alexis, Inc. v. Pinellas Cnty., Fla.,* 194 F. Supp. 2d 1136, 1347 (S.D Fla. 2002), as authority for her argument that probable cause is required. But *Alexis* involved "arrests which resulted in formal criminal charges and convictions," *id.* at 1340, and it does not support the proposition that a state may not burden a citizen's First Amendment rights without first having probable cause to do so. Were that the rule, election administration in this state and nation would be impossible. *See, e.g.,* O.C.G.A. § 21-2-229 (authorizing any elector to make an unlimited number of challenges to the qualifications of any other elector in the challenger's county or municipality without any showing of probable cause). She also lacks authority for her assertion that the administrative process is severely

burdensome because it lacks pretrial defensive mechanisms such as "traditional discovery" and "summary judgment." (Intervenor's Br. 40.)

Representative Greene has thus failed to show that O.C.G.A. § 21-2-5 imposes a severe burden on her First Amendment rights. Under the *Anderson* test, the statute's minimal burdens need only be justified by the state's legitimate interests, and the state's legitimate interest in protecting the ballot from unqualified candidates is more than sufficient. *See Bullock*, 405 U.S. at 145; *Hassan*, 495 F. App'x at 948.

E. O.C.G.A. § 21-2-5 does not usurp Congress's authority to judge the qualifications of its members.

Representative Greene's final argument involves Article I, Section 5 of the United States Constitution, which provides that "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members." U.S. Const. art. I, § 5, cl. 1. She argues that this clause prohibits states from making any determination of a congressional candidate's constitutional qualifications. (Intervenor's Br. 44-46.) But that is not the law.

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

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

U.S. Const. art. I, § 4, cl. 1. With this authority, states may enact "numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *U.S. Term Limits v. Thornton*, 514 U.S. 779, 834 (1995) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)). *See also Storer v. Brown*, 415 U.S. 724, 730 (1974) ("[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos is to accompany the democratic processes."); *United States v. Classic*, 313 U.S. 299, 311 (1941) ("[T]he states are given, and in fact exercise, a wide discretion in the formulation of a system for the choice by the people of representatives in Congress.").

Relying on those broad powers, the Supreme Court has upheld an Indiana recount procedure against a claim that the process usurped a power that only the Senate could exercise. *Roudebush*, 405 U.S. at 25. The Court reasoned that "a recount can be said to 'usurp' the Senate's

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

So too here. The House of Representatives remains free to accept or reject Georgia's determination of Representative Greene's qualifications and can, if it so chooses, void the election and require a new one if it disagrees with a determination that Representative Greene is disqualified. Georgia's challenge process therefore does not usurp the House's power any more than Indiana's recount process usurped the Senate's. *Accord Cawthorn*, 35 F. 4th at 262-66 (Wynn, J., concurring) (rejecting an argument identical to Representative Greene's).

Federal appellate courts have also held that states have the power to exclude constitutionally unqualified candidates from the ballot. In *Hassan,* 495 F. App'x at 948, then-Judge Neil Gorsuch wrote for the Tenth Circuit, holding that Colorado could exclude the plaintiff from the

presidential ballot because he was a naturalized citizen and therefore constitutionally prohibited from assuming the office of President of the United States. The Court determined that "a state's legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office." *Id.* Similarly, in *Lindsay v. Bowen*, 750 F.3d 1061, 1064 (9th Cir. 2014), the Ninth Circuit held that California could exclude from the ballot a twenty-seven-year-old who was constitutionally ineligible to become president because of her age.

This conclusion also aligns with the practice of the states, most of which have constitutional provisions that parallel Article I, Section 5. Of the states that have addressed the question, all but one allow for pre-election verification of legislative candidates' constitutional eligibility,[7]

[7] *See e.g.*, Mo. Const. art. III, § 18 ("Each house . . . shall be sole judge of the qualifications, election and returns of its own members"); *State ex rel. Gralike v. Walsh*, 483 S.W.2d 70, 72 (Mo. 1972) (the state Qualifications Clause does not prevent a pre-election determination of eligibility for ballot access to the primary); *but see In re McGee*, 226 P.2d 1 (Cal. 1951) (the only exception).

including Georgia[8] and Alabama.[9] State courts have consistently recognized that "[m]embers of the Legislature are elected in general (or special) elections, not primaries; hence the Constitution granted the Legislature the right to hear legislative election contests *following* a general (or special) election." *Dillon v. Myers*, 227 So. 3d 923, 927 (Miss. 2017) (emphasis added).

Representative Greene's reliance on *Powell v. McCormack*, 395 U.S. 486, 542 (1969), is misplaced. That case involved whether states can impose *additional* qualifications for members of Congress, not whether states can enforce existing qualifications. Representative Greene cites no case holding that states may not exclude constitutionally ineligible candidates from the ballot, and any such rule would be absurd. An unregulated process would invite minors, out-of-state residents, or

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[8] *See, e.g., Russell v. Hudgens*, OSAH-ELE-CE-or18341-95-Gatto, (Ga. Office of State Admin. Hearings June 2, 2004), *available at* http://www.administrativelawreport.com/wp-content/uploads/gravity_forms/7-4290b068ac7052f5d7bce1ca986eb4ee/2014/07/Hudgens-0418341.doc (last accessed April 10, 2022).

[9] *See, e.g.*, *White v. Knight*, 424 So. 2d 566, 567–69 (Ala. 1982); *Hobbie v. Vance*, 294 So. 2d 743, 744–47 (Ala. 1974) (per curiam); *see also Butler v. Amos*, 292 So. 2d 645, 645–46 (Ala. 1974).

foreign nationals to run for Congress, and the states would be powerless to prevent that from happening.

Finally, Representative Greene's invocation of Alexander Hamilton's view that "the people should choose whom they please to govern them" is beside the point here. (Intervenor's Br. 45.) The purpose of the Constitution's Disqualification Clause is to ensure that the people cannot elect popular insurrectionists to public office. *See* Magliocca, *supra*, at 91-93. Letting the people decide Representative Greene's qualifications for office would frustrate that purpose.

VIII. Conclusion

This week, the nation saw through the work of the January 6th Committee that "Stop the Steal" organizer Ali Alexander told Trump supporters at a rally near the White House on January 5: "I want them to know that 1776 is always an option. These degenerates in the deep state are going to give us what we want or we are going to shut this country down." At the same rally, right-wing media personality Alex Jones led the crowd in a chant of "It's 1776, 1776, 1776, 1776." [10]

[10] U.S. House of Representatives, Select Comm. to Investigate the January 6th Attack on the U.S. Capitol, July 12, 2022, available at https://youtu.be/6I7hU6n5Wz8?t=7235; transcript available at

https://www.gpb.org/news/2022/07/12/heres-every-word-the-seventh-jan-6-committee-hearing-on-its-investigation.

At virtually the same time, Representative Marjorie Taylor Greene was asked in a televised interview how she and other Trump supporters would stop the election from being certified for Joe Biden on the following day. She responded that January 6 would be "our 1776 moment." (PX 27 (multimedia file); Admin. R. Part 2, OSAH 01773-75.)

How strong is the connection between these invocations of 1776? An ordinary person using reasoning and common sense to make deductions and reach conclusions would likely conclude that Representative Greene, Mr. Alexander, and Mr. Jones used the same reference to mean the same thing. But petitioners were denied an opportunity to make that case because the administrative law judge here improperly quashed discovery requests that sought communications between Representative Greene and those involved in the attack on the Capitol, including Mr. Alexander.

Because of that and the other errors discussed above, this Court should reverse the Secretary's decision or, at a minimum, vacate and

remand this case to the administrative law judge for further proceedings.

Respectfully submitted this 15th day of July, 2022.

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* Application for admission pro hac vice pending
** Application for admission pro hac vice forthcoming

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