IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

ROQUE "ROCKY" DE LA FUENTE	**:**	
	:	
Plaintiff,	**:**	
	:	**Civil Action #19-cv-05323**
vs.	**:**	**Judge J.P. Boulee**
	:	
BRAD RAFFENSPERGER, in his official capacity as the Secretary of State of the State of Georgia	**:**	
	:	***Filed Electronically***
Defendant.	**:**	

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

I. INTRODUCTION

Plaintiff's complaint challenges state action in and pleads cognizable claims that the O.C.G.A. § 21-2-193 violates federal constitutional rights because it imposes an additional qualification on presidential candidates to obtain the permission of a state party executive committee to appear on Georgia's presidential primary ballot, devoid of any procedure or appeal in violation of Article II, §1, cl. 5 of the United States Constitution and the First and Fourteenth Amendment as the challenged statute has been exercised to exclude all challengers to the President for the Republican Party's 2020 presidential nomination to secure Georgia delegate to

the party's national nominating convention. Accordingly, Plaintiff's complaint state valid federal claims and Defendant's motion to dismiss should be denied.

II. LEGAL STANDARD

A motion to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure attacking the subject matter jurisdiction of the court requires the court to accept the sufficiency of the allegations as true. Fed. R. Civ. P. 12(b)(1); Fed. R. Civ. P. 12(b)(6). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct in office may suffice, for on a motion to dismiss [the court] 'presum[es] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (citations omitted). Defendant's allegation that the challenge statute does not implicate state action necessary to trigger federal subject matter jurisdiction under 42 U.S.C. § 1983 requires the court to presume that Plaintiff's allegations embrace those specific facts necessary to show that the challenged statute implicates state action. Plaintiff alleges that the challenged statute imposes an additional qualification in violation of the presidential Qualifications Clause of Article II, §1, cl. 5 and violates rights guaranteed to Plaintiff under the First and Fourteenth Amendments to the United States Constitution as an invalid ballot access restriction. The challenged statute delegates to the executive committees of the political parties the exclusive authority to qualify candidates for the presidential

primary ballot. Both the delegation of the state's sovereign authority to exclusively determine who shall appear on the state's presidential primary ballot and the requirement of the Secretary of the State accept the report, or some other filing from the executive committees of the political parties as to who shall appear on the state's presidential primary election ballot are specific components of state action that the court must presume are included in Plaintiff's allegations that the challenged statute imposes additional qualifications on candidates for the office of president.

A motion to dismiss brought under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of a complaint, which only requires "a short and plain statement of the claim showing that the pleader is not entitled to relief." Fed. R. Civ. P. 8(a). A complaint does not require detailed factual allegations; it simply must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

III. ARGUMENT

A. The Challenged Statute Implicates State Action.

Defendant argues that the decision of the executive committee of the Georgia Republican Party to exclude all presidential candidates except President Trump is not state action under 42 U.S.C. § 1983, because political parties are not state actors. Defendant ignores the fact that Plaintiff challenges the statute because

it prevents Defendant from placing presidential candidates on the Georgia presidential primary election ballot who have not been qualified by the executive committee of the candidate's political party. Defendant then argues that Plaintiff's complaint must be dismissed for lack of state action required under 42 U.S.C. § 1983.

As this Court is well aware, the United States Supreme Court has established that, "the mechanism[s] of such elections is the creature of state legislative choice and hence is 'state action' within the meaning of the Fourteenth Amendment." *Bullock v. Carter*, 405 U.S. 134, 140-41 (1972). Accordingly, the state's decision to delegate its authority to determine who shall qualify for the state's presidential primary ballot is itself state action under 42 U.S.C. § 1983, no matter who is making the decision. Furthermore, after the executive committee of a political party determines and communicates to Defendant who shall qualify for the party's presidential primary election ballot, it is Defendant who is required to take the official actions necessary to effectuate the decision in approving the ballots created by the counties.

Defendant's citation to *Duke v. Cleland,* 5 F.3d 1399 (11th Cir. 1993) (hereinafter "*Duke II*") neither contradicts the Supreme Court's decision in *Bullock*, nor directly supports Defendant's argument. In *Duke II*, the court was presented with far more official entanglement in the selection process than is

present in either this action or the electoral scheme reviewed by the Supreme Court in *Bullock*. The *Duke II* court merely explains that state official participation in the selection process to exclude presidential candidates clear implicates state action. *Duke II* 5 F.3d 1403. That obvious recognition does not, as Defendant argues, exclude from the ambit of state action legislative enactments from state action which delegates that authority to political parties, which, then must be effectuated by state officials in constructing the ballot. In fact, as Defendant glosses over in his brief (Def. Br. at p.7) he *Duke II* court recognized, consistent with the Supreme Court's decision in *Bullock* that state action is implicated where the statute grants them the discretion to decide who shall appear on the ballot." *Duke II*, 5 F.3d at 1403.

If Defendant's position were to be adopted, virtually all election law restrictions who be immunized from constitutional attack under 42 U.S.C. § 1983, because in all most (if not every) situation the role of Defendant is ministerial and the restrictions are imposed on those seeking to place candidates on the ballot, almost none of whom are officials of the state. In most ballot access schemes, volunteers or paid staffers collect signatures on petitions promulgated by the state necessary to demonstrate that a candidate has sufficient support in the community to secure ballot access – a circulation process subject to may rules and regulations imposed by the state statute as to who may circulate, sign and what must be done

to execute and file the petitions with a state official. The involvement of state officials is limited to the adoption of the statutory scheme imposing the requirements of ballot access and a state election official accepting such petitions for filing. Much litigation has challenged the constitutional validity of various aspects of these rules pursuant to 42 U.S.C. § 1983 and there has never been a question as to state action sufficient for plaintiffs in these actions to challenged ballot access rules pursuant to 42 U.S.C. § 1983.

Accordingly, Defendant's argument that Plaintiff's complaint fails to demonstrate state action necessary to invoke federal jurisdiction under 42 U.S.C. § 1983 must be rejected.

B. Plaintiff's Complaint State Cognizable Constitutional Claims.

1. Plaintiff's Claims that the Challenged Statute Violates the Presidential Qualifications Clause of Article II, §1, Clause 5 States a Valid Constitutional Claim.

The United States Supreme Court has established that States may not add to the qualifications established for federal office under the United States Constitution in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). In *U.S. Term Limits*, the Supreme Court struck down an Arkansas law that imposed term limits on Congressional candidates as a violation of the Qualifications Clause of Article I, section 2, clause 2 of the United States Constitution , which enumerates the exclusive list of qualifications for members of Congress. There seems to be

little or no doubt that the Supreme Court's decision in *U.S. Term Limits* applies with equal force in prohibiting the States from imposing additional qualifications on candidates seeking the Office of President beyond those set forth in the Qualifications Clause of Article II, section 1, clause 5 of the United States Constitution. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 798-805 (1995). Plaintiff does not believe that Defendant will argue to the contrary.

In addition, the United States Supreme Court has also established that the Qualifications Clauses of Article I is equally applicable to primary elections in precisely the same fashion that they apply to general congressional elections, such that the Presidential Qualifications Clause of Article II is also applicable to presidential primary elections. *Tashjian v. Republican Party of Connecticut*, 749 U.S. 208, 227 (1986). There is no authority to suggest that the rational of *Tashjian* extending the congressional qualifications clause to primary elections does not extend with equal force the presidential Qualifications Clause of Article II of the constitution to the conduct of Georgia's presidential primary election.

The Presidential Qualifications Clause of the Constitution sets forth the exclusive requirements for eligibility for the Office of President:

> No person except a natural born Citizen…shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

U.S. Const. art. II, § 1, cl. 5. The Framers intended the qualification clauses to "fix as exclusive the qualifications in the Constitution," *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 806 (1995), "thereby 'divest[ing]' States of any power to add qualifications…" *Id.* at 801. States thus do not "possess the power to supplement the exclusive qualifications set forth in the text of the Constitution," *id.* at 827, to bar candidates "who would otherwise qualify under the Qualifications Clause," *Schaefer v. Townsend*, 215 F.3d 1031, 1035 (9th Cir. 2000); *see also U.S. Term Limits*, 514 U.S. at 803 ("Representatives and Senators are as much officers of the entire Union as is the President. States thus 'have just as much right, and no more, to prescribe new qualifications for a representative, as they have for a president.'"). Moreover, States may not accomplish indirectly what the Qualifications Clause prohibits them from accomplishing by direct means. *See U.S. Term Limits*, 514 U.S. at 829-30; *see also Smith v. Allwright*, 321 U.S. 649, 664 (1944) ("Constitutional rights would be of little value if they could be …indirectly denied."). A state regulation thus is unconstitutional when it has "the likely effect of handicapping an otherwise qualified class of candidates." *Schafer*, 215 F.3d at 1035; *U.S. Term Limits*, 514 U.S. at 836.

Georgia Election Code, O.C.G.A. § 21-2-193 (2010) bars candidates from the primary election ballot if they fail to be first qualified by the executive committee of their respective political party. Georgia Election Code, O.C.G.A. §

21-2-193 (2010) therefore plainly "handicaps" the chance of election of any candidate that the executive committee of their party refuses to qualify to be placed on Georgia's taxpayer funded presidential primary election by prohibiting them from participating in an integral part of the election process, the nomination process. To be sure, such candidates could still qualify for the general election ballot by independent nomination or through a write-in candidacy, but these are plainly inadequate substitutes for participation in the presidential primary process. *See U.S. Term Limits*, 514 U.S. at 831 ("[T]here is no denying that the ballot restrictions will make it significantly more difficult for the barred candidate to win the election.").

The challenged Georgia statutory scheme places an even more severe handicap on candidates than the California statute invalidated by the Ninth Circuit in *Schafer*. In *Schafer*, the Ninth Circuit addressed California's requirement that candidates for federal office be registered voters, and therefore residents of the State of California, at the time they become candidates for the federal office for which they seek election. In *Schaefer*, California argued that the registration requirement was a mere ballot access restriction within its authority under the Elections Clause of Article I, section 4, clause 1 of the United States Constitution to regulate the times, places and manner of the holding of federal elections and that California had the power to adopt "generally-applicable and evenhanded

restrictions that protect the integrity and reliability of the electoral process itself." *Schaefer*, 215 F.3d at 1037, quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). The 9th Circuit explained in *Schaefer* that:

> Prior to *Term Limits*, when faced with a viable Elections Clause argument, the Supreme Court commonly employed a balancing test, weighing the state's interests against the rights of candidates and voters, to measure the constitutionality of a challenged ballot access provision. *Anderson*, 460 U.S. at 789 (outlining the balancing test); *see also Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992) (reaffirming *Anderson* and recognizing that severe restrictions on the rights of candidates and voters are subject to strict scrutiny); *Bates v. Jones*, 131 F.3d 843, 846 (9th Cir. 1997) (employing the *Anderson* test in upholding term limits for California state legislators). Accordingly, California invites us to balance its interests in maintaining the integrity of its ballot against the burden that its election laws place on nonresident candidates.
>
> The *Term Limits* Court rejected such a broad reading of the Elections Clause and held the balancing test inapplicable where the challenged provision supplemented the Qualifications Clause and did not regulate a procedural aspect of an election or require a candidate to show a minimum level of support before running. The Court noted that: "The provisions at issue in . . . our . . .Elections Clause cases were thus constitutional because they regulated election procedures and did not even arguably impose any substantive qualification rendering a class of potential candidates ineligible for [a] ballot position." *U.S. Term Limits* 514 U.S. at 835. The Court distinguished other Election Clause cases on the ground that "they did not involve measures that exclude candidates from the ballot without reference to the candidates' support in the electoral process." *Id*.
>
> Likewise, California's residency requirement falls outside the scope of Elections Clause cases because it neither regulates the procedural aspects of the election nor requires some initial showing of support.

Schaefer, 215 F.3d at 1037-1038. In *Schaefer*, the court held that in reviewing a ballot access regulation the court must determine whether it serves as an absolute bar and, "if not," it must determine whether the regulation has "the likely effect of handicapping an otherwise qualified class of candidates." *Schaefer*, 215 F.3d at 1035. O.C.G.A. § 21-2-193 (2010) clearly has "the likely effect of handicapping an otherwise qualified class of candidate." The challenged statute empowers a political party to staunch all opposition to a sitting president seeking re-nomination, the statute therefor, has the likely effect to handicap all otherwise qualified challengers to the re-nomination of a sitting president. Such a situation therefore, likely imposes an absolute bar on all otherwise qualified candidates seeking to challenge a sitting president for the nomination of their political party.

Unlike the Plaintiff in this action, the *Schaefer* plaintiff had the opportunity to relocate and become a resident of California to satisfy the unconstitutional additional qualification. Despite the fact that the plaintiff in *Schaefer* was able to comply with the challenged California residency requirement, and would eventually be required to become a California resident before the election, the Ninth Circuit considered the residency requirement at the time a federal candidate filed for ballot access to impose such a handicap on a class of candidates as to constitute an unconstitutional additional qualification. Unlike the plaintiff in

Schaefer, the challenged statute in this action placed Plaintiff in this action was at the complete mercy of Party insiders bent on preventing any challenge to the sitting President by denying all challengers to President Trump access to Georgia's 2020 Republican presidential primary election ballot. The challenged statute provides no other means to secure access to his party's presidential primary election ballot.

Defendant posits a slew of misdirected and unfocused arguments, unrelated and inapplicable to this case, in an attempt to argue to argue that the challenged statute does not impose an additional qualification in support of dismissal.

First, citing *Storer v.* Brown, 415 U.S. 724 (1974) Defendant argues that "a law dealing with primary election ballot access does not purport to make a candidate ineligible for the office sought *even if* the candidate is elected" (Def. Br. at p. 11) and is therefore immune from qualification clause attack. Defendant misuses *Storer* which merely stated that a party-disaffiliation and sore-loser law was not an additional qualification because the law did not prevent the candidate from taking the steps necessary to qualify for a ballot – a candidate seeking to run as an independent must merely disaffiliate from his/her party and not seek party nomination prior to running and securing access to the general election ballot as an independent. Unlike the facts presented in *Storer*, the challenged statute imposes a blanket bar to Plaintiff's party's presidential primary ballot in Georgia – Plaintiff's

chosen electoral path. The challenged statute requires that Republican candidates must secure the approval and permission of their party's executive committee to as a qualification precedent to appear on Georgia's 2020 presidential ballot – that is an additional qualification not imposed in the exclusive list of enumerated qualification to seek and hold the office of president under the presidential Qualifications Clause. In *Storer*, the candidate had the opportunity to appear on his party's primary ballot, chose not to do so and remained a member of the party beyond the disaffiliation date established under California law. The fact that Plaintiff could have appear on the California primary ballot for president for his party, refused to do so is what prevented the candidate from subsequently running as an independent candidate in the general election. Accordingly, the statute reviewed in *Storer* is directly opposite to the challenged statute which imposes an additional qualification of state party executive committee support as an absolute bar to ballot qualification.

Second, contrary to Defendant's argument (Def. Br. at p. 11) the challenged statute as both the "avowed purpose" and "obvious effect" of imposing an additional qualification. The statute creates the entire process of imposing the additional qualification and the resultant obvious effect of preventing any presidential primary candidate from appearing on the 2020 Georgia presidential primary ballot who does not receive the approval of their state party's executive

committee. Defendant seems to argue that because the Arkansas statute reviewed by the Supreme Court in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) contained a preamble which expressly spelled out the intended unconstitutional purpose that the challenged statute in this action lacks, that the Georgia statute is saved from further scrutiny by this court(Def Br. at pp. 11-12). The Supreme Court never imposed a requirement that the statute expressly lay bare the unconstitutional impact of the statute in order to be subjected to constitutional review under the relevant federal qualification clauses. In short, if the statute imposes an additional qualification to seek the office of president the statute is unconstitutional and this court has jurisdiction to set it aside.

Third, Defendant seems to suggest that because the challenged statute imposes a qualification to appear on the primary ballot rather than the general election ballot that the challenged statute is immune from further constitutional review (Def. Br. at p. 13). Defendant's argument is conclusively wrong. The United States Supreme Court has also established that the Qualifications Clauses of Article I is equally applicable to primary elections in precisely the same fashion that they apply to general congressional elections, such that the Presidential Qualifications Clause of Article II is also applicable to presidential primary elections. *Tashjian v. Republican Party of Connecticut*, 749 U.S. 208, 227 (1986). In *Tashjian*, the Court explained: "Where the state law has made the primary an

integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the requirements of [the qualifications clause]…apply to primaries as well as to general elections." *Tashjian*, 749 U.S. at 227. There is no authority to suggest that the rational of *Tashjian* extending the congressional qualifications clause to primary elections does not extend with equal force to the presidential Qualifications Clause of Article II of the constitution to the conduct of Georgia's presidential primary election, where the primary election is an "integral part of the procedure of choice." *Id*.

Fourth, Defendant attempts to argue that the challenged statute is an election procedure immune from constitutional qualification clause review (Def. Br. at pp. 13-14). All state imposed additional qualifications bar access to the ballot – that does not make the additional qualification an election procedure. The challenged statute is not an election procedure because it does not provide a direct route to ballot access. A ballot access scheme whereby a candidate must collect a certain number of valid signatures, on petitions of a certain size and form which must be filed by a certain date is a valid election procedure because they are rules necessary to protect the state's interest against a crowded ballot which may lead to voter confusion is the kind of process which is a valid election procedure. Conversely, the challenged statute's delegation of power to some other party, devoid of any rules, regulations or procedures to provide a direct means to secure ballot access is

not the kind of rule which is an election procedure. The challenged statute bears no relation to any of the procedural regulations the Supreme Court has identified as within the States' authority. *Cook v. Gralike*, 531 U.S. 510 (2001). In *Cook*, Missouri passed a law that required ballots to disclose whether candidates for the House and Senate supported Congressional term limits. *Cook*, 531 U.S. at 514. Missouri defended the law as a valid exercise of power regulating federal elections, arguing that it "merely regulates the manner in which elections are held by disclosing information about congressional candidates." The Supreme Court disagreed explaining that the law bore "no relation to the 'manner' of elections as we understand it." The Court further explained that it was "plainly designed to favor candidates" who expressed support for term limits. In the instant case, the challenged statute is "plainly designed to favor candidates" supported by political party leadership. Such a scheme implicates substantive favoritism to a certain class of candidates – in this action the sitting President of the United States, and is therefore beyond the scope of a mere election procedure. The challenged statute on its face is designed to discriminate against a certain class of candidates and is therefore not merely a neutral election procedure. Further, Defendants attempt to couple their election procedure argument with the argument that the challenged law merely requires a candidate to make a "minimum level of support" to secure ballot access. Plaintiff agrees that neutral elections regulations that require

candidates to make a showing of a minimum level of support in the electorate are valid election procedures. However, the challenged statute does not permit a presidential candidate to demonstrate broad public support to secure ballot access, rather it vests the sole authority in a small cadre of party leaders who do not directly represent, or speak for, the members of the party and who are most likely to support incumbent candidates to the exclusion of all challengers, as has been demonstrated in this case.

Accordingly, Plaintiff has stated a cognizable claim that the challenged statute violates the presidential Qualifications Clause of Article II, § 1, cl. 5 of the United States Constitution.

2. Plaintiff States Valid First and Fourteenth Amendment Claims.

Defendant's argument that "the right to associate is a right to associate with other willing participants" controls because the Republican party has decided not to associate themselves with Plaintiff is wholly off the mark (Def. Br. at pp.15-17). First, the challenged statute provides the sole mechanism to qualify for Georgia's taxpayer funded primary election ballot and does not provide a nexus to political party associational rights. There is no recognized associational right for the Republican Party to control who may appear on the State's presidential primary ballot as some sort of exercise of their rights under the First Amendment. If that were the case, dare say President Trump himself would have been barred from

securing the GOP's presidential nomination in 2016. Furthermore, the entire purpose of the development of the primary election process was to divest the candidate selection process of political parties from party leaders to the voters and is placed in direct jeopardy if Defendant's argument is adopted by this Court.

And, again, throughout this section of Defendant's brief, Defendant continues to attempt to cast Plaintiff's claims as a complaint about the Republican Party's exclusion of his name from the ballot. To restate the obvious, Defendant's spin in this regard is flatly wrong. Plaintiff complains that the challenged statute is unconstitutional because it both creates an unconstitutional additional qualifications which exceed what is necessary to protect the ballot from clutter and possible voter confusion. The fact that the Georgia GOP abused the unconstitutional authority delegated to it to create the harm necessary for Plaintiff to have Article III standing does not alter the underlying challenge to the constitutionality of the statute.

Defendant next argues that the Eleventh Circuit's recognition that states have an interest "in regulating the time, place and manner of election" and " in regulating ballot access. . .within manageable limits" and "the state has an interest in protecting the rights of political parties to define their membership" and thus provide "a mechanism for those interests to be furthered" does not support Defendant's motion to dismiss on the facts of this case.

As discussed above, the challenged statute is not a content neutral "time, place and manner" election regulation because it places control of ballot access in a presidential primary election in the exclusive hands of a small cadre of party leaders with the most direct and personal interests in maintaining the incumbent president and is not in any way merely establishing when and where and in what manner an election shall be held. Defendant's argument that the challenged statute is valid to protect a political party's ability to control its membership under *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 202 (2008) and to exclude persons unaffiliated with the party to participate in its decision making process under the rational of *Democratic Party of United States v. Wisconsin*, 450 U.S. 107, 122 (1981), are simply specious and flatly inapplicable arguments to precedent which bear no relation to the case at bar. Plaintiff is a registered Republican and the challenged statute has no role in excluding unaffiliated persons from participating in the party's decision making process.

Further, the challenged statute is not a party decision – it is a formula imposed by state statute. Defendants have advanced no evidence in their briefing or at the hearing in this case held on Tuesday, January 7, 2020, that the Republican or Democratic Parties have endorsed the challenged scheme. The mere fact that the political parties are compelled to forward a list of presidential candidates to Defendant to be included on the ballot is not a ratification of the system imposed

on the party by the state. Defendant has produced no affidavit, no testimony that the executive committees of either party view the candidate qualification process as one that is desired by either or both political party recognized in Georgia. It is entirely possible that the leadership of the executive committees would prefer to permit the party members to decide who shall appear on Georgia's presidential primary ballot. In fact, given the likely cronyism charges that would likely fly if the executive committees of either political party endorsed the challenged statute, it is likely that in discovery Plaintiff may be able to elicit evidence that is contrary to Defendant's argument made in their motion to dismiss. Accordingly, Defendant's arguments with respect to the party's right to select a candidate selection process are mere speculation at this stage of the litigation.

Plaintiff agrees that states have an interest in "regulating ballot access…within manageable limits." However, a scheme which imposes an additional qualification for presidential and other federal candidates is unconstitutional without regard to a state's right to manage ballot access. Further, a ballot access scheme which delegates authority to a political party executive committee empowering it to exclude all opposition to an incumbent office holder is not a ballot access regulation within manageable limits. The entire purpose of an election is to permit the party members (not just the leadership) to make their own selection of a nominee to represent their party.

Defendant's main argument derives almost entirely from *Duke v. Massey*, 87 F.3d 1226 (1996) under facts where the Plaintiff was a neo-Nazi who beliefs were contrary to the platform of the Republican Party. Accordingly, the rejection of Duke as a candidate implicated a decision to protect the underlying values of the Republican Party and not, as here, an exercise of delegated state power by a political party executive committee to simply protect the incumbent president from any opposition in a party primary. The underlying facts in this case and in *Duke v. Massey* are wholly at odds and distinguishable from the facts in this case where ***every challenger to President Trump has been excluded from Georgia's presidential primary ballot***. There is simply no allegation or plausible argument that the challenged statute protects political party interests when all challengers have been excluded under the statute. Under the challenged statute, liberal (Weld), moderate (Plaintiff) and conservative (Walsh) presidential candidates have been systematically excluded from Georgia presidential primary ballot showing that the exclusion of all challengers to President Trump was divorced from any consideration that the viewpoints of the candidates required exclusion from the ballot as a way to protect the GOP's platform. No Nazi's were excluded in 2020, just the entire spectrum of legitimate Republican viewpoints. *Duke v. Massey*, is a prime exhibit that bad facts make for bad law and every distinction in the instant case from *Duke* is relevant to the adjudication of this action.

The Eleventh Circuit's decision in *Duke v. Massey* has no impact in Plaintiff's claim that the challenged statute imposes an additional qualification in violation of the presidential Qualifications Clause as that issue was not raised by the Plaintiff in *Duke v. Massey* nor addressed by the Eleventh Circuit. And lastly, the statute reviewed by the Eleventh Circuit in *Duke v. Massey* provided for an appeal process not provided under the challenged statute and was process with rules and regulations more akin to a valid election process that the challenged statute at issue in this action.

Respectfully submitted,

Dated: January 9, 2020

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CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed the foregoing Brief in Opposition to Defendant's Motion to Dismiss with the Clerk of the Court using the CM/ECF system which will automatically send notification of such filing to the following counsel of record for Defendant via electronic notification:

Miles Christan Skedsvold

Russell D. Willard

Dated: January 9, 2020

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Plaintiff's Motion to File Out-of-Time Brief in Opposition to Defendant's Motion to Dismiss has been prepared in accordance with the font type and margin requirements of L.R. 5.1, using font type Times New Roman and a font size of 14 point.

Dated: January 7, 2020

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IN THE UNITED STATES DISTRICT COURT
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ROQUE "ROCKY" DE LA FUENTE	:	
	:	**Civil Acton #1:19-cv-5323**
Plaintiff,	:	
	:	
vs.	:	
	:	
BRAD RAFFENSPERGER, in his official capacity as the Secretary of State of the State of Georgia,	:	
	:	
Defendant.	:	

(PROPOSED) ORDER

This matter is before the Court on Defendant's Motion to Dismiss the above captioned action. For the reasons set forth in Plaintiff's complaint and Plaintiff's brief in opposition to Defendant's Motion to Dismiss, Defendant's MOTION is DENIED.

Defendant shall file an answer to Plaintiff's complaint no later than

__________ _____, 20____.

SO ORDERED this _____day of _______2020.

____
The Honorable J.P. Boulee
United States District Judge
Northern District of Georgia

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
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SO ORDERED this ______day of ________2020.

____
The Honorable J.P. Boulee
United States District Judge
Northern District of Georgia