No. 22-11299-JJ

IN THE
United States Court of Appeals
FOR THE ELEVENTH CIRCUIT

MARJORIE TAYLOR GREENE, an individual,

Plaintiff-Appellant

v.

MR. BRAD RAFFENSPERGER, in his official capacity as Georgia Secretary of State, MR. CHARLES R. BEAUDROT, in his official capacity as an Administrative Law Judge for the Office of State Administrative Hearings for the State of Georgia,

Defendants-Appellees, and

DAVID ROWAN, *et al.*,

Intervenor-Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Georgia Atlanta Division

Appellant's Motion to take Judicial Notice of Intervenors' Discretionary Appeal

James Bopp, Jr.
Melena S. Siebert
THE BOPP LAW FIRM, PC
1 South 6th Street
Terre Haute, Indiana 47807
Telephone: (812) 232-2434

Counsel for Appellant

Docket No.: 22-11299 Greene v. Secretary of State for the State of Georgia, et al.

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CERTIFICATE OF INTERESTED PERSONS

AND CORPORATE DISCLOSURE STATEMENT (CIP)

Pursuant to FRAP 26.1 and Local Rule 26.1-1,

Greene, Marjorie Taylor

who is Appellant, makes the following disclosure:

1. Is party a publicly held corporation or other publicly held entity? No
2. Does party have any parent corporation? No
3. Is 10% or more of the stock of a party owned by a publicly held corporation or other publicly held entity? No
4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? No
5. Is party a trade association? No
6. Does this case arise out of a bankruptcy proceeding? No
7. Is this a criminal case in which there was an organizational victim? No

Signature: /s/ James Bopp, Jr. Date: 4/26/2022

Counsel for: Marjorie Taylor Greene, Plaintiff-Appellant

Introduction

The Georgia Secretary of State and Administrative Law Judge Beaudrot ("**State Appellees**") moved this Court to take judicial notice of the final order of the Georgia Fulton County Superior Court order affirming the Secretary's final determination that Appellant Marjorie Taylor Greene ("**Rep. Greene**") is qualified to run as a candidate for U.S. Representative for Georgia's 14th Congressional District. This Court granted State Appellees' Motion. Subsequent to State Appellees' motion, David Rowan, *et al.,* the Intervenors-Defendants-Appellees here ("**Challengers**"), filed a notice of appeal with the Georgia Supreme Court. Rep. Green moved this Court to take notice of this appeal, and this Court granted that motion. Rep. Greene moved this Court to take judicial notice that the Georgia Supreme Court dismissed the Challengers' direct appeal, which this Court granted. Now, Rep. Greene moves this Court to take judicial notice that the Challengers have filed an application for discretionary appeal with the Georgia Supreme Court. *See* Application, Exhibit A.

Pursuant to Federal Rule of Evidence 201, Appellant moves this court to take judicial notice of the Challengers' discretionary appeal. This discretionary appeal does not contradict Rep. Greene's position that: (1) this appeal is not moot; (2) this Court should not abstain; and (3) Rep. Greene can show irreparable harm

to support a preliminary injunction.

Argument

The State Appellees argue this case is moot and Rep. Greene cannot show irreparable harm because "none of the hypothetical harms Greene contended she faced should the Georgia challenge process continue occurred." State Mot. at 3. But the State errs because the Challengers seek a discretionary appeal, and if granted, the case will be considered and returned Georgia state officials. Then the injunction will play a vital role.

Under Georgia law, the decision of the Fulton Superior County Court can be appealed, O.C.G.A. § 21-2-5(e) ("**Challenge Statute**"). Though the Challenge Statute doesn't specify to whom any remand "for further proceedings" goes, it should first go to the Secretary, just as U.S. Supreme Court remands are to circuit courts not district courts, after which it could be remanded by the Secretary to the administrative judge if required. Even after an affirmance, the case should return to the Secretary. And as noted, court options are (i) affirmance, (ii) remand for further proceedings, (iii) reversal, and (iv) modification. And even if the Georgia Supreme Court affirms or modifies that "final decision," a holding by this Court that the Challenge Statute provides an unconstitutional process would affect any further proceedings because this case is not moot under an applicable exception.

As Rep. Greene argued in Appellant's Reply Brief and incorporated by reference herein, cases are not moot if they are capable of repetition yet evade review because there is inadequate time for full consideration and appellate review. *See* Appellant's Reply Br., 1-6; *see, e.g.*, *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 462-64 (2007). Under this exception to the mootness doctrine, Rep. Greene has standing. The evading-review prong is readily evidenced by Challenger's mootness argument, which (though erroneous) highlights that eventually (but not yet) the candidate challenge will be fully resolved, possibly before this Court rules. That is why election cases fit this exception. *See, e.g.*, *Florida Right to Life v. Lamar*, 273 F.3d 1318, 1324 n.6 (11th Cir. 2001). Here, the Challengers state in their Application for Discretionary Appeal that, "future challenges under the Disqualification Clause related to the January 6 attack on the United States Capitol seem possible, if not likely, in the years to come. Representative Greene herself could be challenged again if she runs for re-election in 2024." Application at 15. The Challengers own assertions to the Georgia Supreme Court confirm this case is capable of repetition yet evading review.

Since the preliminary-injunction motion sought relief against both the Secretary and the administrative judge "to enjoin them from enforcing the Challenge Statute, and since reversal and remand would make the Secretary's prior

"final decision" not controlling and put the case before those two officials again regarding enforcement of the same provision, a reversal of the denial of the preliminary-injunction motion would redress Rep. Greene's injuries of being subject to an unconstitutional process and disqualification as a candidate as set out in the preliminary-injunction motion and memorandum. So the case is not moot on that basis, and it also fits the mootness exception.

Abstention is also improper here. As this Court said in *Wexler v. Lepore*, 385 F.3d 1336, 1340 (11th Cir. 2004) (per curiam), "'generally, as between state and federal courts, the rule is that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.'" *Id.* (quoting *Ambrosia Coal & Constr. Co. v. Morales*, 368 F.3d 1320, 1328 (11th Cir.2004)). As Rep. Greene highlighted in her Appellant's Reply Brief and incorporated by reference herein, because this appeal concerns matter of federal and constitutional law, rather than state law, and because the administrative judge could not even consider Rep. Greene's constitutional arguments, both *Younger* and *Colorado River* abstention is unwarranted. *See* Appellant's Reply Br., 6-10.

Conclusion

For all the foregoing reasons this Court should take judicial notice of the

Challengers' discretionary appeal to the Georgia Supreme Court.

August 19, 2022

Respectfully submitted,

/s/ James Bopp, Jr.
James Bopp, Jr., Ind. Bar No. 2838-84
Melena S. Siebert, Ind. Bar No. 35061-15
THE BOPP LAW FIRM, PC
1 South 6th Street
Terre Haute, Indiana 47807
Telephone: (812) 232-2434
Facsimile: (812) 235-3685
jboppjr@aol.com
msiebert@bopplaw.com
Attorneys for Plaintiff-Appellee

Certificate of Compliance

I hereby certify that the foregoing document complies with the typeface requirements and the type-volume limitations of Federal Rules of Appellate Procedure 32(a)(7)(B) because it contains 868 words (calculated using the word count function of the word processing program used to draft the foregoing), excluding the parts of the motion exempted by Federal Rules of Appellate Procedure 32(f) and used Times New Roman, 14 point font.

/s/ James Bopp, Jr.
James Bopp, Jr.

Certificate of Service

I certify that on August 19, 2022, I caused the foregoing document and all attachments thereto to be electronically filed with the Clerk of Court for the U.S. Court of Appeals for the Fourth Circuit using the appellate CM/ECF system. Counsel for all parties and proposed-intervenors received notice of this filing through the CM/ECF system.

/s/ James Bopp, Jr.
James Bopp, Jr

 Exhibit A

No. _____

In the
Supreme Court of Georgia

DAVID ROWAN, DONALD GUYATT, ROBERT RASBURY, RUTH DEMETER, and DANIEL COOPER,

Applicants,

v.

BRAD RAFFENSPERGER,

Respondent.

On Application for a Discretionary Appeal from the Fulton County Superior Court - Case No. 2022CV364778

APPLICATION FOR A DISCRETIONARY APPEAL

Bryan L. Sells
Georgia Bar No. 635562
The Law Office of
Bryan L. Sells, LLC
Post Office Box 5493
Atlanta, Georgia 31107-0493
(404) 480-4212
bryan@bryansellslaw.com

Attorney for the Applicants

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Jurisdiction

This is an appeal from an election contest involving a challenge to the qualifications of a candidate. *See* O.C.G.A. § 21-2-5. On July 25, 2022, the Fulton County Superior Court entered a final order affirming the Secretary of State's adoption of an administrative law judge's decision that Representative Marjorie Taylor Greene is qualified to be a candidate for United States Representative for Georgia's Fourteenth Congressional District. App., *infra,* 1a. This Court has discretionary appellate jurisdiction under O.C.G.A. § 5-6-35(a)(1) and Article VI, Section VI, Paragraph II of the Georgia Constitution of 1983. *See Cook v. Bd. of Registrars of Randolph Cnty.*, 291 Ga. 67, 71 (2012).

Statement of the Case

Marjorie Taylor Greene is the United States Representative for Georgia's Fourteenth Congressional District. Two weeks after she filed to run for re-election to that office, five of Representative Greene's constituents—the applicants here—filed a challenge to her qualifications under O.C.G.A. § 21-2-5.

The challengers asserted that Representative Greene is ineligible to serve as a member of Congress because she "voluntarily aided and engaged in an insurrection to obstruct the peaceful transfer of presidential power." App., *infra,* 10a. The challenge was based on the Disqualification Clause of the Fourteenth Amendment, the relevant part of which provides: "No Person shall be a … Representative in Congress … who, having previously taken an oath, as a member of Congress … to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same." U.S. Const. amend. XIV, § 3.

The Secretary referred the challenge to the Office of State Administrative Hearings (OSAH) as required by law and requested an expedited hearing. An administrative law judge scheduled a hearing for April 13. App., *infra,* 10a.

On March 28, the challengers filed a notice to produce under OSAH Rule 616-1-2-.19(2) seeking certain documents in Representative Greene's possession, custody, or control. Admin. R.

at 139-49. The challengers also filed a motion for leave to take her deposition under OSAH Rule 616-1-2-.20. *Id.* at 130-38.

On April 4, the administrative law judge denied the motion for a deposition on the ground that it was "impracticable and unrealistic to require a deposition of [Representative Greene] prior to the scheduled hearing date." *Id.* at 553. Four days later, the administrative law judge quashed the notice to produce on the ground that it was "impracticable and unrealistic to require Respondent to deliver a significant volume of material prior to the scheduled hearing date." *Id.* at 572.

On April 11, counsel for the parties held an extended telephone conference with the administrative law judge to discuss various outstanding issues related to the hearing. During that conference, Representative Greene's counsel said that his client was unavailable on April 13, and the parties agreed to postpone the hearing to accommodate her schedule. The hearing was reset to April 22. App., *infra,* 11a.

Two days later, the administrative law judge issued a prehearing order addressing several pending matters. Among other

things, the administrative law judge granted Representative Greene's motion under OSAH Rule 616-1-2-.07(2) to shift the burden of proof onto the challengers, ruling that justice required the challengers to prove Representative Greene's ineligibility to hold office by a preponderance of the evidence. *Id.*; Admin. R. at 756.

The hearing went forward on April 22. Both sides were represented by counsel. There were two witnesses—Representative Greene and Professor Gerard Magliocca, an expert on the Disqualification Clause of the Fourteenth Amendment—and a substantial number of documentary and video exhibits admitted into the record. App., *infra,* 11a.

The challengers relied on evidence of the violent attack on the Capitol on January 6, 2021, including evidence that Congress, the Department of Justice, and the courts had determined that the attack on the Capitol was, in fact, an insurrection. The challengers also relied on evidence that Representative Greene voluntarily aided the insurrection by encouraging the attack on the Capitol and by defending those who carried out the attack. That evidence

included, among other things, Representative Greene's videotaped statement on January 5, 2021, when she was asked how they would stop the election from being certified for now-President Biden, that tomorrow (January 6) would be "our 1776 moment." *Id.* at 14a. In addition, substantial evidence showed that Representative Greene was in fact calling for her supporters to engage in violent resistance to the peaceful transfer of power, including: her earlier statements urging supporters to "flood the Capitol," Admin. R. at 2637; threatening violence and death against her political opponents, *id.* at 2279-84; telling a gun rights activist that freedom must be won "with the price of blood," *id.* at 1765-71; and, most significantly, declaring in a videotaped statement, after now-President Biden had been declared the winner of the election, that we "cannot allow" a "peaceful transfer of power," *id.* at 1789-91. Evidence also showed that Representative Greene defended those who personally and violently attacked the Capitol and referred to them as "patriots." *Id.* at 2723-25.

Representative Greene's defense rested almost entirely on her claimed lack of memory. She answered "I don't recall" or some

version thereof more than eighty times during the hearing. *Id.* at 1608-2103.

On May 6, the administrative law judge issued an initial decision concluding that the challengers "failed to prove their case by a preponderance of the evidence" and holding that Representative Greene is therefore qualified to be a candidate for United States Representative for Georgia's Fourteenth Congressional District. App., *infra,* 28a. The Secretary of State affirmed the administrative law judge's initial decision on the same day. *Id.* at 8a-9a.

Ten days later, the challengers appealed the Secretary's decision to the Fulton County Superior Court. Representative Greene intervened in the appeal. Following oral argument on the appeal, the superior court issued a final order on July 25.

The order affirms the decision of the Secretary of State and concludes that Representative Greene is qualified for the ballot. Among other things, the court held that the challengers had "failed to demonstrate that their substantial rights have been prejudiced as a result of the [administrative law judge's] decision to shift the

burden of proof" because Representative Greene's sworn testimony at the hearing would have been enough to meet the burden if she had it. *Id.* at 4a. The court also held that the administrative law judge did not err in when it denied all pre-hearing discovery because "petitioners' efforts to use a notice to produce to conduct pre-hearing discovery is improper." *Id.* at 5a. The court did not separately address the administrative law judge's order denying the challengers motion for a deposition.

Reasons for Granting the Application

The Court should hear this case for two reasons.

First, the administrative law judge improperly declined to follow this Court's unequivocal holding in 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." The judge created an exception where none currently exists. That constitutes reversible error. *See* Ga. Const. of 1983, Art. VI, Sec. VI, Par. VI ("The decisions of the Supreme Court shall bind all courts as precedent."). It also creates an ambiguity in the law that could

affect future candidate challenges, so the Court should also hear this matter to clarify the law.

Second, the administrative law judge improperly quashed the challengers' notice to produce. The Secretary conceded below that the judge's stated reason for quashing the challengers' notice to produce was not one of the four permissible reasons under the administrative rules. But he argued—and the superior court seems to have agreed—that there is simply no right to discovery in administrative proceedings. That ruling threatens broad consequences for the administrative state. This Court should therefore grant the application to correct the lower courts' errors and to clarify the discovery rules that apply to virtually all administrative proceedings in this state.

I. The Court should grant this application to clarify the scope of *Haynes*.

This Court has held that the burden of establishing one's eligibility to run for public office is on the candidate: "[a challenger] is not required to disprove anything regarding [candidate's]

eligibility to run for office, as the entire burden is placed upon [candidate] to affirmatively establish his eligibility for office." *Haynes*, 273 Ga. at 108-09. That holding is grounded in the Elections Code—particularly, O.C.G.A. § 21-2-153(e), which requires all would-be candidates to file an affidavit attesting that they are eligible to hold the office they are seeking. *See id.* at 108. And the logic of assigning the burden to a candidate in a challenge case, as *Haynes* and the Election Code require, is that the evidence necessary to establish eligibility for office is in the candidate's control.

Despite this Court's unequivocal holding in *Haynes*, the administrative law judge limited that ruling to "typical" cases. Admin. R. at 755. This 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. of 1983, Art. VI, Sec. VI, Par. VI. The administrative law judge was bound by *Haynes,* and so was the superior court. Given this Court's rationale and broad language, it was error to depart from *Haynes*.

The superior court nonetheless found that it was harmless error because Representative Greene's testimony would have been enough to meet the burden if it had remained on her. App., *infra,* 4a. But that conclusion is difficult to square with the administrative law judge's repeated emphasis on the challengers' alleged failure "to meet their burden of proof." *Id.* at 17a, 19a. Nowhere does the judge suggest that the outcome would have been the same even if Representative Greene had the burden of proof. Nowhere does the judge find that Representative Greene's testimony was credible. Instead, the decision reveals that judge ultimately found against the challengers *because of the burden of proof*. This Court has held, moreover, that 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 reversible error, and the Court should grant the application to correct it.

But even if it weren't reversible error, the decisions below create ambiguity about the scope of *Haynes* that could affect future candidate challenges. In fact, future challenges under the Disqualification Clause related to the January 6 attack on the United States Capitol seem possible, if not likely, in the years to come. Representative Greene herself could be challenged again if she runs for re-election in 2024. The Court should therefore grant the application to clarify the scope of *Haynes* so that future challengers will know in advance which side must bear the burden of proof.

II. The Court should grant this application to restore a limited right of discovery in administrative hearings.

OSAH Rule 616-1-2-.19(2)(c) permits an administrative law judge to quash a notice to produce under four circumstances: (1) if

the notice to produce is "unreasonable or oppressive"; (2) if material sought is "irrelevant, immaterial, or cumulative"; (3) if the material sought "is unnecessary to a party's preparation and presentation of its position at the hearing"; or (4) if "basic fairness" dictates that the notice should be quashed. The challengers here issued a notice to produce to Representative Greene on March 28—four weeks before the hearing date and more than a month before the close of the record—seeking her communications regarding the events of January 6, and particularly communications with specific individuals known to have been involved in those events. The administrative law judge here quashed the notice to Representative Greene in its entirety not for any of the reasons permitted by the rules but 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." Admin. R. at 572.

The Secretary conceded below that the stated reason for quashing the challengers' notice to produce was not one of the four permissible reasons under the administrative rules. He argued instead that the challengers simply had no right to discovery in an

administrative proceeding, and the superior court agreed, holding that "Petitioners' efforts to use a notice to produce to conduct pre-hearing discovery is improper." App., *infra,* 5a.

That cannot possibly be an accurate statement of the law. 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 OSAH rules, but the rules also provide for the enforcement of such notices "through the imposition of civil penalties." OSAH Rule 616-1-2-.19(1)(g) and (2). That right may be limited, but it exists nonetheless. The superior court's ruling that there is no right to request the production of documents in administrative proceedings undermines 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. App., *infra,* 24a. 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.*

Id. (emphasis added). The challengers specifically asked for communications between Representative Greene and known insurrectionists such as Alexander and Aguero. Admin. R. at 144. There was no documentary evidence of such communications because the judge quashed the challengers' notice to produce. The prejudice is apparent.

This Court should therefore grant the application to correct the error and to restore the right to document discovery in administrative proceedings in Georgia.

Conclusion

This Court should grant the application.

Respectfully submitted,

/s/ Bryan L. Sells

Bryan L. Sells
Georgia Bar No. 635562
The Law Office of Bryan L. Sells, LLC
Post Office Box 5493
Atlanta, Georgia 31107-0493
Telephone: (404) 480-4212
Email: bryan@bryansellslaw.com

Attorney for the Applicants

Certificate of Service

I hereby certify that on August 19, 2022, I served the foregoing document by electronic mail on these attorneys of record, all of whom have consented to electronic service:

Charlene S. McGowan: cmcgowan@law.ga.gov
Elizabeth Vaughan: evaughan@law.ga.gov
David F. Guldenschuh: dfg@guldenschuhlaw.com
James Bopp, Jr.: jboppjr@aol.com
Melena S. Siebert: msiebert@bopplaw.com

/s/ Bryan L. Sells
Bryan L. Sells
Georgia Bar No. 635562
The Law Office of Bryan L. Sells, LLC
Post Office Box 5493
Atlanta, Georgia 31107-0493
Telephone: (404) 480-4212
Email: bryan@bryansellslaw.com

Attorney for the Applicants

Appendix

Appendix A

IN THE SUPERIOR COURT OF FULTON COUNTY
ATLANTA JUDICIAL CIRCUIT
STATE OF GEORGIA

DAVID ROWAN, DONALD GUYOTT, ROBERT RASBURY, RUTH DEMETER, DANIEL COOPER,

Petitioner,

v.

BRAD RAFFENSPERGER, in his Official Capacity as Georgia Secretary of State,

Respondent,

And

MARJORIE TAYLOR GREENE.

Candidate

CIVIL ACTION FILE
NO. 2022CV364778

JUDGE BRASHER

FINAL ORDER

The above-styled case comes before the Court as a Petition for Judicial Review of the Secretary of State's adoption of the Administrative Law Judge's Initial Decision finding that Representative Marjorie Taylor Greene is qualified to be a candidate for Georgia's 14th Congressional District. Upon consideration of the record and the law, the Court AFFIRMS the decision of the Secretary as set forth herein.[1]

The Petitioners, as electors of Georgia's 14th Congressional District, challenged Representative Greene's qualifications to be a candidate pursuant to O.C.G.A. § 21-2-5(b). The stated reason for the challenge was the electors' belief that Representative Greene was disqualified pursuant to Section 3 of the Fourteenth Amendment to the United States

[1] In light of this decision, the Court does not reach the Constitutional arguments asserted by Representative Greene.

Constitution due to her actions surrounding the breach of the security of the United States Capitol building on January 6, 2021. Such Constitutional provision provides that:

> 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.

Id.

Pursuant to O.C.G.A. § 21-2-5(b), the Secretary of State referred the matter to an Administrative Law Judge of the Office of State Administrative Hearings. After a substantive hearing, at which evidence and argument was presented, the Administrative Law Judge issued an initial decision. See R.-2104 Such decision found, as a fact, that Representative Greene did not "engage in insurrection or rebellion" after taking her oath of office because there was insufficient evidence to demonstrate that Representative Greene participated in the Invasion or that communicated with or issued directives to persons who engaged in the Invasion.[2] *See* Initial Decision, p. 15, R-2118. The Administrative Law Judge provided this decision to the Secretary of State, who reviewed and adopted it pursuant to subsection (c). *See* Final Decision of the Secretary of State. The electors, dissatisfied with this decision, have appealed it to the Superior Court pursuant to O.C.G.A. § 21-2-5(e).

This Code section provides:

> (e) The elector filing the challenge or the candidate challenged shall have the right to appeal the decision of the Secretary of State by filing a petition in the Superior Court of Fulton County within ten days after the entry of the final decision by the

[2] The Administrative Law Judge did not reach the issue of whether the events of January 6, 2021 amounted to an insurrection, and instead consistently called it the "Invasion" in the initial decision.

> Secretary of State. The filing of the petition shall not itself stay the decision of the Secretary of State; however, the reviewing court may order a stay upon appropriate terms for good cause shown. As soon as possible after service of the petition, the Secretary of State shall transmit the original or a certified copy of the entire record of the proceedings under review to the reviewing court. The review shall be conducted by the court without a jury and shall be confined to the record. The court shall not substitute its judgment for that of the Secretary of State as to the weight of the evidence on questions of fact. The court may affirm the decision or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant 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.

Id. This standard of review is virtually identical to the standard of review set forth in the Administrative Procedures Act, such that the Court must determine whether any evidence supports the factual determinations of the Secretary of State, and then review the conclusions of law *de novo*. *See Handel v Powell*, 284 Ga. 550, 552 (2008); O.C.G.A. § 50-13-19(h); *see also*, *Georgia Professional Standards Comm. v. James*, 327 Ga. App. 810 (2014). Thus, the Secretary, not the Court, weighs the evidence and determines the credibility of witnesses. *Professional Standards Com'n v. Smith*, 257 Ga. App. 418, 420 (2002). With this standard in mind, the Court turns to the arguments presented by the Petitioners.

The Petitioners begin by asserting that the Administrative Law Judge improperly placed the burden of proof on the Petitioners, rather than Representative Greene, citing *Haynes v Wells*, 273 Ga. 106 (2000). It is well established that OSAH Rule 616-1-2.07(2) permits the Administrative Law Judge to determine that law or justice requires a different burden of proof.

Thus, Petitioners' challenge in this regard is to the rule directly – that is, that the Administrative Law Judge did not have the power to shift the burden of proof in light of *Haynes.* Upon consideration, the Court recognizes that the *Haynes* Court did not address the type of challenge in this case, and indeed, the Georgia Elections Code does not specifically contemplate this type of challenge, rather it contemplates challenges to issues such as age and residency. However, the Court need not reach the issue of whether the burden of proof was improperly shifted, or indeed, could have been shifted, because the record is replete with Representative Greene's sworn testimony that she was not engaged in an insurrection, but rather that she hoped to encourage peaceful protest at the capitol on January 6th, *See* Initial Decision, ¶ 40, R-2114, *see also*, R-1397, 1412, 1424, 1467. Obviously, the Petitioners dispute this contention, but this testimony is sufficient to meet any burden of proof placed on Representative Greene, which the Petitioners would then need to present sufficient evidence to rebut. Petitioners failed to do so. *See* Initial Decision, p. 15, R-2118, ("Rep. Greene denies any such contact or involvement [with individuals involved in the invasion] and that denial stands unchallenged by other testimony or documentary evidence."). Accordingly, the Petitioners have failed to demonstrate that their substantial rights have been prejudiced as a result of the decision to shift the burden of proof. *See Quigg v Georgia Professional Standards Commission,* 344 Ga. App. 142, 150 (2017) ("even if the Commission failed to follow the proper statutory procedures for conducting a preliminary investigation, there is no evidence that the procedural irregularity prejudiced any of Quigg's substantial rights so as to authorize the reversal or modification of the Commission's decision to sanction her.")

In an effort to overcome this determination, the Petitioners argue that they were harmed by the Administrative Law Judge's decision to deny "all discovery", when it quashed their notice to produce, and that, if such discovery had been permitted, they might have had more evidence to rebut Representative Greene's contentions. As an initial matter, the Court notes that the Office of State Administrative Hearings is not subject to the Georgia Civil Practice Act and its extensive provisions pertaining to discovery. *See Georgia State Bd. of Dental Examiners*, 137 Ga. App. 706, 709 (1976); *Fulton County Bd. of Tax Assessors v Saks Fifth Ave., Inc.,* 248 Ga. App. 836, 838-39 (2001). Indeed, the OSHA rule upon which Petitioners rely, 616-1-2.19(2) is more akin to O.C.G.A. § 24-13-27 than anything in the Civil Practice Act. *See Bergen v Cardiopul Medical, Inc.* 175 Ga. App. 700 (2005) (distinguishing between a notice to produce and a request for documents under the Civil Practice Act); *Gaffron v Metropolitan Atlanta Rapid Transit Authority*, 229 Ga. App. 426, 432 (1997) (recognizing that a notice to produce is not limited by the expiration of the discovery period). Viewed through this lens, Petitioners' efforts to use a notice to produce to conduct pre-hearing discovery is improper, and the Court does not find that the Administrative Law Judge erred in refusing to permit it. *See* R. 139, 571-2, OSAH Rule 616-1-2.19(2)(c); (1)(e).[3]

Petitioners next assert that the Administrative Law Judge failed to properly consider Representative Greene's conduct prior to her taking the oath of office on January 3, 2021. In making this argument, the Petitioners recognize that the Administrative Law Judge explicitly held that evidence of Greene's conduct before she took the oath of office could be used to explain her conduct after taking the oath, and that Representative Greene engaged in "months of

[3] It is worth noting that the Administrative Law Judge did compel Representative Greene to appear and testify, and that Petitioners also had an opportunity to present additional witnesses.

heated political rhetoric before taking office". *See* Initial Decision, p. 13, 16, R-2116, -9. Thus, although couched as a legal argument, in fact Petitioners argue that the Administrative Law Judge should have given their pre-oath evidence more weight, when compared with the other evidence in the case, and then concluded that Representative Greene engaged in an insurrection. This is precisely the type of reweighing of evidence that the Georgia law prohibits, and the Court declines to do so here. *See* O.C.G.A. § 21-2-5(e) ("[t]he court shall not substitute its judgment for that of the Secretary of State as to the weight of the evidence on questions of fact.")

Petitioners also assert that the Administrative Law Judge applied an incorrect legal standard for "engaging" in insurrection, asserting that he required them to show a "months-long enterprise" culminating in "a call for arms for consummation of a pre-planned violent revolution." As an initial matter, the Court does not find that the Petitioners have correctly stated the standard applied by the Administrative Law Judge. Rather, after reviewing multiple sources, including Court decisions, and an 1867 Opinion of the Attorney General, the Administrative Law Judge concluded that:

> "engage" includes overt actions, and in certain limited contexts, words used in furtherance of the insurrections and associated actions. "Merely disloyal statements or expressions" do not appear to be sufficient. 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" may be needed, 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.

Initial Decision, p. 14, R-2117. It is this standard that the Administrative Law Judge applied when he found that "there is no evidence to show that Rep. Greene participated in the invasion itself" and "there is no evidence showing that after January 3, 2021, Rep. Greene communicated with or issued directives to persons who engaged in the Invasion". Initial Decision, p. 15, R-

2118. Accordingly, the Court does not find that the Administrative Law Judge applied the wrong legal standard.

The decision of the Secretary is AFFIRMED.

This 25th day of July, 2022.

The Honorable Christopher S. Brasher
Fulton County Superior Court
Atlanta Judicial Circuit

IN THE OFFICE OF THE SECRETARY OF STATE
STATE OF GEORGIA

DAVID ROWAN, DONALD GUYATT, ROBERT RASBURY, RUTH DEMETER, and DANIEL COOPER,	)	
Petitioners,	)	**Docket Number: 2222582**
v.	)	**2222582-OSAH-SECSTATE-CE-57-Beaudrot**
MARJORIE TAYLOR-GREENE,	)	
Respondent.	)	

FINAL DECISION

Challengers, David Rowan, Donald Guyatt, Robert Rasbury, Ruth Demeter, and Daniel Cooper (hereinafter "Challengers") filed this candidate challenge pursuant to O.C.G.A. § 21-2-5(a) and Section Three of the Fourteenth Amendment to the United States Constitution contending that Respondent, Marjorie Taylor-Greene (hereinafter "Respondent"), does not meet the qualifications to be a candidate for U.S. Representative pursuant to Section Three of the 14th Amendment of U.S. Constitution. Typical candidate challenges submitted pursuant to O.C.G.A. § 21-2-5 raise questions as to a candidate's residency or whether they have paid all of their taxes. This challenge is different. In this case, Challengers assert that Representative Greene's political statements and actions disqualify her from office. That is rightfully a question for the voters of Georgia's 14th Congressional District. THEREFORE, Administrative Law Judge Charles R. Beaudrot's Initial Decision, Findings of Fact, and Conclusion of Law are hereby **AFFIRMED.**

On April 22, 2022, a hearing on the challenge was held before Judge Charles R. Beaudrot at the Office of State Administrative Hearings. Challengers were present and represented by counsel. Respondent was present and represented by counsel. Documentary evidence, including

certain video recordings and written records proffered by the parties, was admitted. Additional documentary evidence was admitted during the course of the hearing. The parties filed post-hearing briefs and various supporting exhibits on April 29, 2022, and the record was closed at that time.

Judge Beaudrot issued his Initial Decision on May 6, 2022, finding that Challengers have failed to prove their case by a preponderance of the evidence and that Respondent is qualified to be a candidate for Representative for Georgia's 14th Congressional District. Judge Beaudrot's Initial Decision and Findings of Fact and Conclusions of Law are hereby **ADOPTED**.

Therefore, **IT IS HEREBY DECIDED** that Respondent MARJORIE TAYLOR-GREENE is QUALIFIED to be a candidate for the office of United States Representative for Georgia's 14th Congressional District.

SO DECIDED, this 6th day of May, 2022.

Brad Raffensperger

Brad Raffensperger, Secretary of State

 Exhibit A

Appendix C

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

DAVID ROWAN, DONALD GUYATT, ROBERT RASBURY, RUTH DEMETER, and DANIEL COOPER,
Petitioners/Challengers,

v.

MARJORIE TAYLOR GREENE,
Respondent/Candidate.

Docket No.: 2222582
2222582-OSAH-SECSTATE-CE-57-Beaudrot

FILED
05-06-2022
OFFICE OF STATE ADMINISTRATIVE HEARINGS

INITIAL DECISION

I. Introduction

This matter arises from challenges brought by the Petitioners ("Challengers") to the qualifications of Respondent Marjorie Taylor Greene ("Rep. Greene") for office under O.C.G.A. § 21-2-5.

Specifically, Challengers allege 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 Form 1). They assert that Rep. Greene "voluntarily aided and engaged in an insurrection to obstruct the peaceful transfer of presidential power, disqualifying her from serving as a Member of Congress under Section 3 of the 14th Amendment . . . ." (*Id.*; Stipulated Facts ¶ 5).

Challengers filed their challenge to Rep. Greene's candidacy with the Secretary of State on March 24, 2022. When referring this matter to the Office of State Administrative Hearings ("OSAH"), the Secretary of State requested that it be heard on an expedited basis due to its time-sensitive nature. Accordingly, on March 24, 2022, the matter was docketed, and a notice of hearing was sent to the parties. The hearing initially was scheduled to be held April 13, 2022.

On April 1, 2022, Rep. Greene filed an action in the United States District Court for the Northern District of Georgia, styled *Greene v Raffensperger*, No. 1:22-cv-01294-AT, seeking to

enjoin the hearing in this matter and other relief (the "Federal Court Litigation").

On April 11, 2022, counsel for the parties and the Court participated in an extended telephone conference (the "April 11 Conference") to discuss a variety of pending motions and to address issues regarding the conduct of the hearing in this matter. During the April 11 Conference, the parties, through their respective counsel, agreed to postpone the hearing to accommodate Rep. Greene's schedule. The hearing then was rescheduled to Friday, April 22, 2022, at 9:30 a.m.

Following the April 11 Conference, the undersigned issued an Order on April 13, 2022, addressing pending matters and motions (the "April 13 Order"). In the April 13 Order, among other actions, the Court granted Rep. Greene's motion regarding burden of proof, ruling that the burden of proof in this matter rests upon Challengers.

In an Order entered on April 18, 2022, in the Federal Court Litigation (the "Federal Court Order"), Judge Amy Totenberg ruled as follows:

> After a thorough analysis of the evidentiary and legal issues presented in this complex matter involving unsettled questions of law, the Court finds Plaintiff [Respondent] has not carried her heavy burden to establish a strong likelihood of success on the legal merits in this case. Accordingly, the Court denies the Plaintiff's Motions for Temporary Restraining Order and Preliminary Injunction . . . . The state proceedings under the Challenge Statute [O.C.G.A. § 21-2-5] may therefore proceed.

The hearing in this matter was held on April 22, 2022, beginning at 9:30 a.m. At the hearing, Andrew G. Celli, Esq. and Ronald Fein, Esq. appeared for Challengers, and James Bopp, Esq. appeared for Rep. Greene. Witnesses at the hearing consisted of Rep. Greene and Gerard N. Magliocca, Professor of Law at Indiana University. Documentary evidence, including certain video recordings and written records proffered by the parties, reviewed by the Court in advance of the hearing and the subject of a telephone hearing with counsel on April 21, 2022, was admitted. Additional documentary evidence was admitted during the course of the hearing. The hearing was recorded using audio and video technology as well as stenographically by a court reporter.

The parties filed post-hearing briefs and various supporting exhibits on April 29, 2022, and the record was closed at that time. Included as an exhibit to Challengers' post-hearing brief is a rough transcript of the hearing. References to testimony at the hearing will refer to the page numbers used in this transcript.[1]

After review of evidence in this matter and the legal arguments and authorities presented at the hearing and in the parties' briefs, the Court concludes that the evidence in this matter is insufficient to establish that Rep. Greene, having "previously taken an 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" under the 14th Amendment to the Constitution.

As this is the sole basis for Challengers' suit, the Court concludes that Rep. Greene is qualified to be a candidate for Representative for Georgia's 14th Congressional District.

II. Issue for Decision

The issue for decision in this matter is whether Rep. Greene engaged in insurrection or rebellion against the United States and is therefore disqualified as a candidate for Representative for Georgia's 14th Congressional District by reason of Section 3 of the 14th Amendment to the Constitution. U.S. CONST. amend. XIV, § 3. This section of the 14th Amendment provides:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, 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

[1] In the interest of expediency, the Court cannot await the official transcript of the hearing, which is scheduled to be released May 9, 2022. In this Decision, the Court cites to the unofficial transcript only after concluding that the portion cited accurately reflects the undersigned's recollection of the proceedings.

may by a vote of two-thirds of each House, remove such disability.

Id.

III. Findings of Fact

1. Rep. Greene is over the age of 25, has been a United States citizen for more than seven years, and is an inhabitant of Georgia. (Stipulation ¶¶ 1-3).

2. Challengers are all registered voters in Georgia's 14th Congressional District. (Stipulation ¶ 4).

3. In the 2020 election, Rep. Greene successfully ran for, and was elected to, Congress as Representative from Georgia's 14th Congressional District. (Testimony of Rep. Greene; Exhibit P-65).

4. As a result of the 2020 presidential election, Joseph R. Biden obtained a majority of Electoral College votes. (Exhibit P-19, p. 21; Exhibit P-36).

5. President Trump did not accept the results of the 2020 election and initiated challenges to the election results. These efforts were conducted under the rubric of "Stop the Steal." (Exhibit P-19, p. 21; Exhibits P-2, P-18, P-54)

6. Rep. Greene actively supported President Trump's efforts to challenge the results of the 2020 presidential election. (Testimony of Rep. Greene, Tr. 91–93, 101; Exhibits P-1D, P-1E, P-1-F, P-1G, P-1K, P-1M).

7. As part of the Stop the Steal campaign, supporters of President Trump organized rallies and demonstrations, including the "Save America Rally" to be held at the White House Ellipse on January 6, 2021. (Exhibit P-19, p. 22; Exhibits P-2C, P-2D, P-68).

8. One purpose of the Save America Rally was to encourage members of Congress to oppose the certification of the election results of the Electoral College by objections and votes on the floor, and to encourage Vice President Pence to refuse to certify the results of the Electoral College if

those objections failed to result in President Trump being declared the winner of the 2020 presidential election. (Exhibit P-54; Exhibit P-18).

9. Rep. Greene encouraged supporters to be present in Washington, D.C. on January 6, 2021. (Testimony of Rep. Greene, Tr. 90–91; Exhibit P-2C).

10. On January 3, 2021, Rep. Greene took the oath of office to be a Member of the U.S. House of Representatives for the first time. (Stipulation ¶ 5; Exhibit P-65).

11. On January 5, 2021, Rep. Greene participated in a broadcast interview on Newsmax. In this interview (the "Newsmax Interview"), Rep. Greene discussed her plans to challenge the results of the 2020 presidential election by supporting challenges to the certification of Electoral College votes. When asked, "What is your plan tomorrow? What are you prepared for?" Rep. Greene answered, "Well, you know, I'll echo the words of many of my colleagues as we were just meeting together in our GOP conference meeting this morning. This is our 1776 moment." (Exhibit P-27; Tr. 167:1-4).

12. At or around 1:00 p.m. on January 6, 2021, a joint session of Congress was called to order for the purposes of opening, counting, and resolving any objections to the Electoral College vote of the 2020 presidential election, and certifying the results of the Electoral College vote. (Stipulation ¶ 6; Exhibit P-36).

13. Rep. Greene did not speak at or attend the Save America Rally. She was inside the Capitol building while the Save America Rally was occurring. (Testimony of Rep. Greene, Tr. 115:19-22, 120).

14. President Trump spoke at the Save America Rally. During his speech, President Trump encouraged the participants at the rally to go to the Capitol. (Exhibit P-54).

15. On January 6, 2021, a group of people that did not include Rep. Greene unlawfully entered the U.S. Capitol. (Stipulation ¶ 7). This unlawful incursion will be referred to in this Decision as

the "Invasion" and the participants will be referred to as "Rioters."

16. By 11:00 a.m. on January 6, 2021, the United States Capitol Police ("USCP") reported "large crowds around the Capitol building." (Exhibit P-19, p. 22). Some of the people gathering in Washington were "equipped with communication devices and donning reinforced vests, helmets, and goggles." (Exhibit P-44, p. 4).

17. President Trump began his address to the Save America Rally just before noon. *Id.* In his remarks, he encouraged his supporters to go to the Capitol. (Exhibit P-54, pp. 8–9). Before President Trump finished his address, "crowds began leaving the Ellipse for the Capitol." (*See* Exhibit P-19, p. 2).

18. By 12:45 p.m., crowds were forming around the Capitol. (Exhibit P-19, p. 22). At 12:53 p.m., the Rioters breached the outer security perimeter the USCP had established around the Capitol. (*Id.* at p. 23). At one point, individuals "picked up one of the metal bike racks that demarcated USCP's security perimeter and shoved it into the USCP officers standing guard." (*Id.*). Following this initial breach, crowds flooded into the Capitol's West Front grounds. (*Id.*). People "pressed towards the Capitol building—climbing the inaugural platform and scaling walls. The only remaining security perimeter consisted of the USCP officers positioned around the grounds, who were overwhelmed and outnumbered." (*Id.*).

19. Inside the Capitol, Congress was in session proceeding with its duties under the 12th Amendment. At approximately 1:15 p.m., the House and the Senate separated to debate objections to the certification of Arizona's Electoral College votes. (*See* Exhibit P-36, p. H77).

20. By 2:06 p.m., Rioters had reached the Rotunda steps, and by 2:08 p.m., they were at the House Plaza. (Exhibit P-19, p. 24). At 2:10 p.m., the barricades on the West Front and northwest side of the Capitol were breached. (*Id.*). Rioters smashed through first-floor windows on the Capitol's south side, making a hole big enough to climb through, and a stream of people entered,

with two individuals kicking open a nearby door to let others into the Capitol. (*Id.* at 24–25). On the east side of the Capitol, individuals "weaved through the restricted area in a military 'stack' formation with hands on shoulders and gear," and ultimately ascended the stairs on the Capitol's east side. (Exhibit P-16, ¶¶ 30–32). Some of these individuals were armed with bear spray and tactical gear and accompanied by an 82-pound German Shepherd. (Exhibit P-44, p. 5).

21. At 2:13 p.m., the Senate was forced to go into recess. (Exhibit P-36, p. S18). At 2:29 p.m., the House was forced to follow suit. (*Id.* at H85). One floor below the Senate chamber, just as the Senate was beginning its recess, Rioters chased a USCP officer up the stairs to the second floor, passing within 100 feet of Vice President Pence and his family. (*See* Exhibit P-73, at 3:08-3:50). Outside the Capitol, someone announced that Senators "just ran out of the session," and a number of Rioters cheered. (*Id.* at 4:15-4:31).

22. At 2:25 p.m., Rioters overran USCP officers in the crypt just below the Rotunda. (*Id.* at 6:35-6:45). At the same time, another group entered the Rotunda above from doors on the east side of the building. (*Id.* at 6:45-7:10). At 2:43 p.m., Rioters "broke the glass of a door to the Speaker's Lobby," a hallway that would have given them direct access to the House chamber. (Exhibit P-19, p. 25). When the Rioters attempted to lift Ashli Babbitt, one of their company, through the opening, "a USCP officer fatally shot her." (*Id.*). Less than ten minutes later, Rioters breached the Senate chamber. (*Id.* at 26). "In the House chamber, USCP officers barricaded the door with furniture and drew their weapons," trying to fend off people who were trying to enter the chamber. (*Id.*).

23. Inside and outside of the Capitol, Rioters announced their desire to find and kill lawmakers and to stop Congress from certifying the Electoral College votes. Recorded statements captured on video include: "We're here for you, Nancy," (Exhibit P-73 at 1:46); "Drag 'em out. Hang 'em out," (Exhibit P-73 at 8:07-8:10); "Can I speak to Pelosi? Yeah, we're coming bitch. Oh, Mike

Pence? Yeah, we're coming for you, too, you fucking traitor," (Exhibit P-72 at 4:27-4:32); "Hang Mike Pence! Hang Mike Pence!" (Exhibit P-72 at 4:32-4:36); "Start making a list and put all the names down and we start hunting them down one-by-one," (Exhibit P-72 at 4:47-4:55). The Rioters also set up gallows outside the Capitol building. (*See* Exhibit P-72 at 4:40-4:45).

24. Rioters attacked police officers as they made their way through the Capitol. In one police radio transmission, an officer sought help as he announced that he was "taking metal, sharpened objects, missiles, to include bottles and rocks and hand-thrown, chemical-grade fireworks." (Exhibit P-72 at 0:58-1:05). Video evidence shows Rioters trying to force their way into the Capitol through a barrage of police officers in riot gear. (Exhibit P-72 at 3:50-4:14). At one point, one Rioter forcibly tries to remove a police officer's gas mask. (*Id.*).

25. In response to the Invasion, the mayor of Washington, D.C. was forced to call the Secretary of the Army to seek National Guard support. (Exhibit P-19, p. 24). The USCP called the commanding general of the D.C. National Guard as well. (*Id.*). An announcement also went out over police radio asking for "all military and sworn officers" to come to the Capitol. (Exhibit P-73, at 9:18-9:39). A number of agencies and entities were needed to repel the Rioters, "including DHS; the FBI; the Bureau of Alcohol, Tobacco, Firearms and Explosives; the Montgomery County Police Department; the Arlington County Police Department; the Fairfax Police Department; and Virginia State Troopers." (Exhibit P-19, p. 26).

26. During the Invasion, Members of the House were held in a secret location, guarded by the USCP and the military. (Testimony of Rep. Greene, Tr. 231:12-15).

27. The Invasion caused significant injuries, damage, and death. Approximately 140 law enforcement officers reported injuries suffered during the attack. Some of the more serious injuries included brain injuries, cracked ribs, and smashed spinal discs. One officer was stabbed with a metal fence stake; another officer lost an eye. Another officer suffered a heart attack after being

attacked several times with a stun gun. Three officers lost their lives following the attack. USCP Officer Brian Sicknick was attacked with bear spray and died on January 7, 2021. Officer Howard Liebengood died on January 9. Officer Jeffrey Smith died on January 15. (Exhibit P-19, p. 29).

28. Besides the injuries and loss of life, the Invasion caused substantial property damage, "requiring the expenditure of more than $1.4 million dollars for repairs." (Exhibit 16, ¶ 40).

29. Numerous persons have been arrested in connection with the Invasion. (*See* Exhibits P-16, P-17).

30. Immediately after the Invasion, the U.S. Department of Justice characterized the events of January 6 as "a violent insurrection that attempted to overthrow the United States Government" in *United States v. Chansley*.[2]

31. Many of the prosecutions of Rioters are still pending trial. In some cases, individuals pleaded guilty to committing crimes and signed Statements of Offense in which they stipulated to facts they conceded the United States would be able to prove beyond a reasonable doubt. These stipulations included acknowledgements that one or more Rioters "entered the Capitol in part to hinder or delay the certification of President-Elect Joseph R. Biden as President of the United States," "intended to use force and did, in fact, use force in the Capitol and when engaging in physical altercations with law enforcement, in order to prevent, hinder, and delay the execution of the laws governing the transfer of power," and "intended to use force and did, in fact, use force to obstruct, impede, or interfere with the certification of the Electoral College vote, and did forcibly assault, resist, oppose, impede, intimidate, or interfere with, officers or employees of the United States." (Exhibit P-16, ¶¶ 32, 36; Exhibit P-17, ¶ 42).

32. Congress has characterized the Invasion as an insurrection. In Public Law 117-32, which

[2] Government's Brief in Support of Detention at 1, *United States v. Chansley*, No. 2:21-MJ-05000-DMF (D. Ariz. Jan. 14, 2021), ECF No. 5.

the House passed by a 406-21 majority, and the Senate passed unanimously, Congress declared, "On January 6, 2021, a mob of insurrectionists forced its way into the U.S. Capitol building and congressional office buildings and engaged in acts of vandalism, looting, and violently attacked Capitol Police officers." (Exhibit P-22 § 1(2)).

33. On February 13, 2021, Senator Mitch McConnell stated on the floor of the Senate that the people who entered the Capitol on January 6 had "attacked their own government." (Exhibit P-55, p. S735). "They used terrorism to try to stop a specific piece of domestic business they did not like," he continued. *Id.* "Fellow Americans beat and bloodied our own police. They stormed the Senate floor. They tried to hunt down the Speaker of the House. They built a gallows and chanted about murdering the Vice President." *Id.*

34. The January 6, 2021, joint session of Congress was suspended during the Invasion, and the members of Congress took shelter. The Senate did not reconvene until 8:06 p.m. (*See* P-36 at S18). The House reconvened at 9:02 p.m. (*See id.* at p. H85.) Congress did not certify the Electoral College votes until 3:40 a.m.

35. During the Invasion, Rep. Greene took shelter in a secure location in the Capitol with other members of Congress. While sheltering in the cloak room inside the House Chamber, Rep. Greene recorded and transmitted a video, a copy of which was admitted into evidence as Exhibit R-1, and a transcript of which was admitted as Exhibit R-4. In this video, Rep. Greene stated:

> Hi, everyone. This is Congresswoman Marjorie Taylor Greene. I am putting out a message to you all just letting you know for all the great people, wonderful Americans who support President Trump that are here in Washington, D.C. today, today is a time to support your President; and just know that we're fighting for you here in the Capitol in Congress, fighting for your vote and fighting for President Trump.
>
> So I urge you to remain calm. I urge you to have a peaceful protest. Make sure that everyone is safe and protected, and let's do this in a — in a peaceful manner. This is — this is not a time for violence. This is a time to support President Trump, support our election integrity, and support this important process that we're going through in Congress where we're allowed to object.

> So this is — this is very important, so I urge you to stay calm. Be the great American people that — that I know you are, and just know that we're — we're in here fighting for you.

(Exhibits R-1, R-4; Testimony of Rep. Greene, Tr. 222:17-24).

36. After order was restored in the Capitol, Congress reconvened and ultimately certified the results of the Electoral College vote at approximately 3:40 a.m. on January 7, 2021. (Stipulation ¶ 9; Exhibit P-36).

37. Rep. Greene filed her candidacy for the upcoming midterm elections for Georgia's 14th Congressional District on March 7, 2022. She filed an amended notice of candidacy on March 10, 2022. (Stipulation ¶ 10).

38. Two weeks later, on March 24, 2022, Challengers filed an official challenge to Rep. Greene's qualifications to serve as a member of Congress with the Georgia Secretary of State's office pursuant to O.C.G.A. § 21-2-5.

39. The parties acknowledge that the ballots for the May primary at issue in this matter have been printed. Rep. Greene's name is on the printed ballot.[3]

40. In her testimony at the hearing of this matter, Rep. Greene denied having advance knowledge of the Invasion, or that she was in any way involved in its planning or execution. (Testimony of Rep. Greene, Tr. 142, 170:15-17, 171:10-11, 180–82, 204–07, 209, 226–27). She testified that she was unaware of activities by certain persons involved in the Invasion. (*Id.*, Tr. 142, 170:15-17, 171:10-11, 180–82, 204–06). She testified that she did not know that "1776" was being used by some of the persons who invaded the Capitol as a "code word" for a violent attempt to stop the Congress from proceeding with certification of the results of the 2020 presidential election. (*Id.* Tr. 168:11-12, 170:15-17, 171:10-11). She testified that her references to "1776" or "this is our 1776 moment" in the Newsmax Interview or other statements made after taking the

[3] *See Greene v. Raffensperger*, No. 22-cv-1294-AT, 2022 U.S. Dist. LEXIS 70961, at *8 (N.D. Ga. Apr. 18, 2022).

oath were references to her efforts to lawfully challenge electoral votes on January 6, 2021. (*Id.*, Tr. 168:11-12). Her calls for supporters to come to Washington, D.C., she asserted, were intended to invite them to attend peaceful demonstrations, and not meant to induce them to engage in violent behavior. (Testimony of Rep. Greene, Tr. 91:16-20).

IV. Conclusions of Law

A. The Burden of Proof

In the April 13 Order, the undersigned ruled that the burden of proof in this matter must be placed upon Challengers, noting that, in the interests of justice, Rep. Greene should not be required to "prove a negative" and affirmatively establish she did not engage in an insurrection. Ga. Comp. R. & Regs. 616-1-2-.07(2). Therefore, Challengers had the burden of establishing that Rep. Greene is disqualified. To do so, they were required to prove, by a preponderance of the evidence, that Rep. Greene, having "previously taken an 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" under the 14th Amendment to the Constitution. Ga. Comp. R. & Regs. 616-1-2-.21(4).

B. Elements of the Disqualification Clause

To prove that the Disqualification Clause bars Rep. Greene's candidacy, Challengers must show that:

(i) *after* Rep. Greene took *an oath* to defend the Constitution

(ii) she *engaged*

(iii) in *insurrection* against the Constitution.

See U.S. CONST. amend. XIV, § 3.

C. The Oath

The parties have stipulated that the first time Rep. Greene took an oath to defend the

Constitution was January 3, 2021, when she was sworn in as a member of Congress. Therefore, only conduct by Rep. Greene occurring after taking that oath on January 3, 2021, is relevant in determining whether the Disqualification Clause applies. *See* U.S. CONST. amend. XIV, § 3. Similarly, statements made by Rep. Greene and actions taken by her prior to her taking of the oath on January 3, 2021, are only relevant, and can only be considered, to the extent they explain her conduct occurring *after* the taking of the oath. In other words, 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."

D. "Engage"

There appear to be two judicial opinions that have considered the meaning of the word "engage" as used in the Disqualification Clause. *See 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");[4] *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").[5]

It appears that it is not necessary that an individual personally commit an act of violence to have "engaged" in insurrection. *See Powell*, 65 N.C. at 709 (defendant paid to *avoid* serving in Confederate Army); *Worthy*, 63 N.C. at 203 (defendant simply served as county sheriff). Nor does "engagement" require previous conviction of a criminal offense. *See, e.g.*, *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); Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 CONST. COMMENT. 87,

[4] *See also United States v. Powell*, 27 F. Cas. 605, 607 (C.C.D.N.C. 1871).
[5] The *Worthy-Powell* standard appears to provide the only judicial construction of "engage" under the Disqualification Clause. *See also In re Tate*, 63 N.C. 308 (1869) (applying *Worthy*).

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).[6]

Rep. Greene points to the use of word "engage" in a similarly-worded 1867 statute with more severe consequences (disenfranchisement) than the Disqualification Clause. The then Attorney General construed that statute to require "some direct overt act, done with the intent to further the rebellion." 12 Op. Att'y Gen. 141, 164 (1867). The authority does not indicate that a prior criminal conviction is necessary to trigger the Disqualification Clause.

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" 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").

Challengers argue that Rep. Greene's speeches, texts, tweets, and appearances evidence a long-term plan to foment an insurrection on January 6 in order to prevent Congress from completing its Constitutional duties in certifying the election of President Biden. Under Challengers' view of the evidence, Rep. Greene was planning and furthering insurrection long

[6] Rather than require a criminal conviction as a prerequisite to a civil action to disqualify an officeholder, Congress did the reverse and imposed criminal penalties for those who held office in defiance of the Disqualification Clause. *See* Act of May 31, 1870, ch. 114, § 15, 16 Stat. 140, 143.

before she took office. This plan, they contend, began as soon as it was clear that President Trump would lose the 2020 election. Under Challengers' view of the evidence, the January 6 Invasion was "Plan B," to be triggered when efforts to object to the Electoral College votes and to persuade Vice President Pence to refuse the certification of President Biden failed. Petitioners' Post-Hearing Brief, pp. 11-16; Tr. 273.

The difficulty with Challengers' theory is the lack of evidence. Whatever 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. Greene "engaged" in that insurrection after she took the oath of office on January 3, 2021. In short, even assuming, arguendo, that the Invasion was an insurrection, Challengers presented no persuasive evidence Rep. Greene took *any* action—direct physical efforts, contribution of personal services or capital, issuance of directives or marching orders, transmissions of intelligence, or even statements of encouragement—in furtherance thereof on or after January 3, 2021.

There is no evidence to show that Rep. Greene participated in the Invasion itself. To the contrary, the evidence shows that she was inside the Capitol building at the time, and unaware of the Invasion until proceedings were suspended at approximately 2:29 p.m. on January 6, 2021.

Further, there is no evidence showing that after January 3, 2021, Rep. Greene communicated with or issued directives to persons who engaged in the Invasion. Challengers point to Rep. Greene's apparent prior contact with certain persons, such as Anthony Aguero. They point to postings from various persons, such as Ali Alexander. But the 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.

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.

Challengers point to Rep. Greene's statement during the Newsmax Interview on January 5, 2021, as a literal call to arms to storm the Capitol. Petitioners' Post-Hearing Brief, pp. 11-12. The Court finds this to be the only conduct that could even possibly be interpreted as triggering the Disqualification Clause. If this statement was in fact a coded message from Rep. Greene to her co-conspirators to go forward with a previously planned incursion into the Capitol, it might constitute an overt act and one that occurred after she took her oath as Representative. Based on the evidence, the Court is unpersuaded that Rep. Greene's ambiguous statement that "[t]his is our 1776 moment" was a coded call to violent insurrection on January 6, 2021. Heated political rhetoric? Yes. Encouragement to supporters of efforts to prevent certification of the election of President Biden? Yes. Encouragement to attend the Save America Rally or other rallies and to demonstrate against the certification of the election results? Yes. A call to arms for consummation of a pre-planned violent revolution? No. It is impossible for the Court to conclude from this vague, ambiguous statement that Rep. Greene was complicit in a months-long enterprise to

obstruct the peaceful transfer of presidential power without making an enormous unsubstantiated leap.

This case, like all cases in all legal proceedings, must be decided based upon the evidence adduced at the hearing. It is true that absence of evidence is not evidence of absence. But the absence of evidence supporting Challengers' case means that they have failed to meet their burden of proof and establish that Rep. Greene engaged in insurrection at some time after taking her oath on January 3, 2021. This matter must be decided based upon a preponderance of admissible evidence. One ambiguous statement on January 5, 2021, which appears to be the only direct post-oath evidence supporting Challengers' case, is simply not enough. Challengers have failed to meet their burden of proof.

E. Insurrection

The parties and the Court agree that the actions of the participants in the Invasion were despicable. The parties strongly disagree, however, as to whether the Invasion constituted an "insurrection" within the meaning of the 14th Amendment. They proffer competing definitions of the meaning of the term "insurrection" as used in the 14th Amendment and whether the events of the Invasion meet those definitions.

The events that occurred on January 6, 2021, are truly tragic. Multiple lives were lost, including those of law enforcement officers who died defending the Capitol. Many sustained injuries, some of them permanent and life-changing. The citadel of democracy, the U.S. Capitol, was violently breached in the most serious incursion in 200 years. Members of Congress, including Rep. Greene, were forced to take shelter for several hours to avoid the wrath of the invaders. Congress was unable to perform its obligations under the 12th Amendment to the Constitution. It is among the saddest and most tragic days in the history of our American Republic. The well documented images of the events of the day are painful in the extreme.

Whether the Invasion of January 6 amounted to an insurrection is an issue of tremendous importance to all Americans and one that may yet be addressed. However, it is not a question for this Court to answer at this time. Because the Court finds Rep. Greene did not "engage" in the Invasion, either as a direct participant or in its planning and execution, after taking her oath on January 3, 2021, it is not necessary to address the question of whether the events of January 6 constituted an "insurrection" within the meaning of the 14th Amendment.[7]

F. Constitutional and Other Issues

1. Constitutional Claims

The Constitution, including the 14th Amendment, is the Supreme Law of this country and is binding on every court and every government agency. Likewise, acts of Congress, including the Amnesty Act of 1872, are the law of the land by virtue of the Supremacy Clause. Like any court, OSAH judges are required to follow and apply the Constitution and applicable Federal law, and regularly do so in their decisions. If a Georgia statute or regulation is inconsistent with the Constitution, the OSAH judge may make findings of fact to that effect.

An OSAH judge is not permitted to invalidate or decline to follow a statute based upon a finding that it is unconstitutional. An OSAH judge is, however, permitted to develop the record as to relevant issues of constitutional validity and make findings of facts as to those issues. Ga. Comp. R. & Regs. 616-1-2-.22(3). Any constitutional objections that cannot be addressed by the undersigned are preserved and may be considered by the Secretary of State in his decision to accept or reject this Initial Decision, and by reviewing courts on appeal.

Rep. Greene has made and properly preserved various objections, including constitutional

[7] *See, e.g.*, *Manning v. Upjohn Co.,* 862 F.2d 545, 547 (5th Cir. 1989) ("Principles of judicial restraint dictate that if resolution of an issue effectively disposes of a case, we should resolve the case on that basis without reaching any other issues that might be presented.")*; Sunbelt Plastic Extrusions v. Paguia*, 360 Ga. App. 894, 899 (2021) ("When 'we are able to decide [a] case on a narrower basis, we do not reach the broader issues.'" (quoting *Crenshaw v. Crenshaw*, 267 Ga. 20 (1996))).

objections, to this proceeding and the conduct of the hearing. These were initially identified in her "Motion to Dismiss" filed on April 1, 2022, renewed in her "Motion to Request Ruling on Constitutional Objections and Incorporated Brief in Support" filed on April 11, 2022, and enumerated again in her post-hearing brief filed on April 29, 2022. Rep. Greene's objections are noted, have been properly raised, and have been preserved for appeal.

2. The Amnesty Act of 1872

Because the Court has determined the Disqualification Clause does not apply, it is not necessary to address Rep. Greene's arguments concerning the 1872 Amnesty Act.[8]

V. Decision

The burden of proof in this matter is on Challengers. Challengers have failed to prove their case by a preponderance of the evidence. The evidence in this matter is insufficient to establish that Rep. Greene, having "previously taken an 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" under the 14th Amendment to the Constitution.

Therefore, the Court holds that Respondent is qualified to be a candidate for Representative for Georgia's 14th Congressional District.

SO ORDERED, this 6th day of May, 2022.

Charles R. Beaudrot
Administrative Law Judge

[8] *See* FN 6, *supra*.

 Exhibit A

From:	Devin Hamilton
To:	"Sam Shapiro"; "Bryan Sells"; dfg@ guldenschuhlaw.com; James Bopp Jr; acelli@ecbawm.com
Cc:	"Kurt Hilbert"; "cgardner@hilbertlaw.com"; "trevis@hilbertlaw.com"; "Hilbert Law"; "Melena Siebert"; "Andrew Jondahl"; "Ron Fein"; Ellis, Steven
Subject:	RE: Taylor Greene v. Cooper, Demeter, Rasbury, Guyatt, and Rowan 2222582
Date:	Friday, May 06, 2022 2:02:00 PM
Attachments:	2222582.pdf 2222582 Transcript.pdf image001.png

Good afternoon,

Please find attached Judge Beaudrot's Initial Decision. I have also included the official transcript of the hearing. Thank you.

Best,

Devin Hamilton
Legal Assistant
Office of State Administrative Hearings

Phone: 404-657-3337
Fax: 404-657-3337
Email: devinh@osah.ga.gov

225 Peachtree Street NE
Suite 400
Atlanta, GA 30303

Go to www.osah.ga.gov for hearing dates, procedures, and other helpful information.

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From: Devin Hamilton
Sent: Wednesday, April 27, 2022 4:39 PM
To: Sam Shapiro <sshapiro@ecbawm.com>; Bryan Sells <bryan@bryansellslaw.com>
Cc: Kurt Hilbert <khilbert@hilbertlaw.com>; cgardner@hilbertlaw.com; trevis@hilbertlaw.com; Hilbert Law <info@hilbertlaw.com>; Melena Siebert <MSiebert@bopplaw.com>; James Bopp Jr