No. 22-11299

In the

United States Court of Appeals
for the Eleventh Circuit

MARJORIE TAYLOR GREENE,
Plaintiff-Appellant,

v.

SECRETARY OF STATE FOR THE STATE OF GEORGIA, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division
No. 1:22-cv-01294-AT — Amy Totenberg, *Judge*

MOTION TO TAKE JUDICIAL NOTICE OF STATE APPELLEES

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

I hereby certify that the following persons and entities may have an interest in the outcome of this case:

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The undersigned counsel certifies that no publicly traded company or corporation has an interest in the outcome of this case or appeal.

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STATE APPELLEES' MOTION TO TAKE JUDICIAL NOTICE

The Georgia Secretary of State and Administrative Law Judge Beaudrot ("State Appellees") move this Court to take judicial notice of the final order of the Georgia Fulton County Superior Court affirming the Secretary's final determination that Marjorie Taylor Greene is qualified to run as a candidate for U.S. Representative for Georgia's 14th Congressional District in *Rowan et al. v. Raffensperger*, case no. 2022CV364778 ("Exhibit A"), pursuant to Federal Rule of Evidence 201. *See K.T. v. Royal Caribbean Cruises, Ltd.*, 931 F.3d 1041, 1048 (11th Cir. 2019). The Georgia state court order was unavailable at the time State Appellees filed their brief on the merits, and the judicial act of affirming the Secretary's determination that Greene is qualified further supports State Appellees' arguments that (1) this appeal is moot, (2) this Court should abstain under the *Colorado River* abstention doctrine, and (3) Greene cannot show irreparable harm to support a preliminary injunction.

ARGUMENT

The Federal Rules of Evidence allow federal courts to take judicial notice "at any stage of the proceeding," including on appeal. Fed. R. Evid. 201(d); *Royal Carribean Cruises,* 931 F. 3d at 1048 ("We may take judicial notice of matters that the district court did not."); *Thomas v. Sec'y, Fla. Dep't of Corr.*, 644 F. App'x. 887, 888 (11th Cir. 2016) (unpublished) ("We may take judicial notice on our own at any stage of a proceeding."). This Court has explained that it may take judicial notice of state court orders, albeit for the limited purposes of recognizing that a certain judicial act occurred. *United States v. Jones*, 29 F. 3d 1549, 1553 (11th Cir. 1994); *see also*, *Thomas*, 644 F. App'x at 888 ("We may take judicial notice of another court's order for the limited purposes of recognizing the judicial act that the order represents.").

In State Appellees' brief on the merits, they argued that this Court lacked jurisdiction, because this appeal is moot; this Court should otherwise abstain from exercising any possible jurisdiction under the *Colorado River* abstention doctrine; and that Greene could not show irreparable harm to support her request for a preliminary injunction. (Red Brief at 16-26). As it pertained to mootness and Greene's ability to show irreparable harm, the State

Appellees contended that there was no relief that this Court could grant Greene because none of the hypothetical harms Greene contended she faced should the Georgia challenge process continue occurred—i.e., the potential of having her name struck from the primary election ballot, having votes not count for her, or her supporters losing their right to vote for her in the primary election. Indeed, the exact opposite of what Greene argues has occurred. The State Appellees further argued that they have already fulfilled the duties that Greene seeks to stop, which cannot be undone and further supports mootness and Greene's inability to show irreparable harm—especially because State Appellees deemed Greene qualified. (*Id*. at 17-18, 26). With regards to abstention, the State Appellees explained that the pending appeal of the Secretary's decision in the Georgia state courts, which was part of a state proceeding that came first in time and where Greene has the opportunity to raise the exact same constitutional arguments she raises here in a competent forum, favored this Court's abstention under *Colorado River*. (*Id*. at 20-25).

Since the filing of State Appellees' merits-brief, the Superior Court of Fulton County affirmed the Secretary of State's decision declaring Greene qualified. (*See generally* Exhibit A). This final

order—principally the judicial act of affirming the Secretary's final decision—further solidifies the State Appellees' contentions that this case is moot and that Greene cannot show irreparable harm because all of the theoretical harms she claims to face have not come to fruition. The final order further supports the State Appellees' contentions that abstention by this Court is appropriate because the competent Georgia state courts are progressing at a much faster pace and this parallel federal litigation merely serves the purposes of wasting valuable judicial resources. Therefore, this Court should judicially notice the superior court's final order as support for State's Appellees arguments that this case is moot, abstention is appropriate, and Greene cannot show irreparable harm to support a preliminary injunction.

CONCLUSION

For the reasons set out above, this Court should take judicial notice of the Fulton County Superior Court final order in *Rowan et al. v. Raffensperger*, case no. 2022CV364778, affirming the Secretary's final decision.

Respectfully submitted, this 28th day of July, 2022.

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitation of Rule 27(d)(2)(A) of the Federal Rules of Appellate Procedure because it contains 746 words as counted by the word-processing system used to prepare the document. This brief also complies with the typeface and type-style requirements of Rule 32(a)(5) and (6) because it has been prepared in 14-point Century Schoolbook font.

/s/ *Charlene S. McGowan*
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CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2022, I served this brief by electronically filing it with this Court's ECF system, which constitutes service on all attorneys who have appeared in this case and are registered to use the ECF system.

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Fulton County Superior Court
EFILEDAC
Date: 7/25/2022 2:00 PM
Cathelene Robinson, Clerk

EXHIBIT 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

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[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:

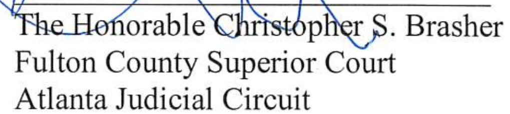
> "engage" includes overt actions, and in certain limited contexts, words used in furtherance of the insurrections and associated actions. "Merely disloyal statements or expressions" do not appear to be sufficient. But marching orders or instructions to capture a particular objective, or to disrupt or 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.



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