No. 22-11299

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 Reply Brief

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

Table of Contents

Argument 1

I. This appeal is not moot. 1

II. This Court should not abstain. 6

III. The district court erred in denying the preliminary injunction because Rep. Greene is likely to succeed on the merits. 10

A. Challengers have no private cause of action to assert a § 3 Challenge. 10

B. The district court erred in its analysis of Rep. Greene's First and Fourteenth Amendment claims [Counts I and II]. 11

C. The district court erred in its analysis of Rep. Greene's Article 1, Section 5 claim [Count III]. 15

D. The district court erred in holding that § 3 could be applied to disqualify Rep. Greene (Count IV). 16

1. Rep. Greene's "disqualification" under § 3 cannot be determined prior to January 3, 2023. 16

2. The district court erred in its holding that it did not have jurisdiction over Rep. Greene's 1872 Act claim. 17

3. The district court erred in its analysis of the 1872 Act. 20

Conclusion 24

Table of Authorities

Cases

**Ambrosia Coal & Constr. Co. v. Morales*, 368 F.3d 1320 (11th Cir.2004) 7

**Anderson v. Celebrezze*, 460 U.S. 780 (1983) 11

**Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320 (2015) 10

Blum v. Stenson, 465 U.S. 886 (1984) 22

**Burdick v. Takushi*, 504 U.S. 428 (1992). 11, 15

Burke v. Liberty Cnt'y Bd. of Elections, 291 Ga. 802 (2012) 14

**Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) 7, 10

Common Cause Ga. v. Kemp, 347 F.Supp.3d 1270 (N.D. Ga. 2018) 11

Common Cause/Georgia v. Billups, 554 F.3d 1340 (11th Cir. 2009) 13

Cowen v. Georgia Secretary of Sate, 960 F.3d 1339 (11th Cir. 2020) 11, 13

**Crawford v. Marion County Election Board*, 553 U.S. 181 (2008) 12

**FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) 3

**Florida Right to Life v. Lamar*, 273 F.3d 1318 (11th Cir. 2001) 4

**Gold-Fogel v. Fogel*, 16 F.4th 790 (2021) 6-9

Gonzaga Univ. v. Doe, 536 U.S. 273 (2002) 19

**Majors v. Abell*, 317 F.3d 719 (7th Cir. 2003) 4

*_NAACP v. Claiborne Hardware Co._, 458 U.S. 886 (1964) 5

Roe v. Wade, 410 U.S. 113 (1973) 4

Roudebush v. Hartke, 405 U.S. 15 (1972) 15

*_Sprint Communications v. Jacobs_, 571 U.S. 69 (2013) 6

Swift v. Tyson, 41 U.S. 1 (1842) 19

Tobib v. Radloff, 501 U.S. 157 (1991 22

*_Wexler v. Lepore_, 385 F.3d 1336 (11th Cir. 2004) 7

Younger v. Harris, 401 U.S. 37 (1971) 6

Constitutions, Statutes, and Regulations

28 U.S.C. § 1257 15

42 U.S.C. § 1983 18

Fed. R. Civ. P. 8. 18

*O.C.G.A. § 21-2-5 . . . . . 2, 5, 16

U.S. Const. amend. XIV, § 5 10

Other Authorities

Gerard N. Magliocca, _Amnesty and Section Three of the Fourteenth Amendment_, 36 Const. Comment. 87 (2021) 23

Derek T. Muller, _Scrutinizing Federal Electoral Qualifications_, 90 Ind. L.J. 559 (2015) 16

Argument

I. This appeal is not moot.[1]

The State says Rep. "Greene's appeal is moot because there is no remedy . . . that would redress her asserted injuries." State Appellees' Br. ("**State's Br.**") at 29.[2] This is supposedly so because "the Secretary and Judge Beaudrot have already fulfilled their duties under the Challenge Statute," with the judge issuing an initial decision and the Secretary issuing a final decision "that Rep. Greene is a qualified candidate," *id.* at 30. So, says the State, it's "simply too late." *Id.* Now, the State does acknowledge that "the Secretary's final decision that Greene is a qualified candidate could be reversed on appeal in state court," but it claims no injunction could provide relief after the Secretary's current decision.

But the State errs because that appeal is underway and the case will return to one or both of these two officials. Then the injunction will play a vital role.

State law provides for judicial review of the Secretary's final decision thus: "The elector filing the challenge or the candidate challenged shall have the right to

[1] State Appellants assert that Rep. Greene "cannot show irreparable harm for the same reason her appeal is moot." State's Br. at 38. For the same reasons this appeal is not moot, Rep. Greene can show irreparable harm.

[2] All page numbers refer to the page number created by this Court's electronic filing system, displayed in the header of each filing.

appeal the decision of the Secretary . . . by filing a petition in the Superior Court of Fulton County within ten days after the final decision of the Secretary . . . ." O.C.G.A. § 21-2-5(e). "The review . . . shall be confined to the record" and "[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." *Id.* "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 . . . ." *Id.*

Though the 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.

On June 16, Challengers filed a Petition for Judicial Review in the Superior Court of Fulton County Georgia (No. 2022CV364778), asking that the court (inter alia) "reverse the Secretary's decision and conclude that Greene is not qualified to be a candidate for United States Representative . . . ; or, in the alternative, vacate the Secretary's decision and remand the case to the administrative judge for further proceedings . . . ," *id.* at 18. But as discussed in the prior paragraph, any re-

mand should go to the Secretary first, not directly to the administrative judge.

So if the state appeals court remands for further proceedings, the case will go back to the Secretary, who has the authority under Georgia law to make the qualification determination. At that point, the Secretary could disqualify Greene or send it back to the administrative law judge for further adjudication (depending on the state court's reasoning for the reversal). In either situation, a holding by this Court regarding the unconstitutional procedures in the Challenge Statute would control those further proceedings. Similarly, if the court reverses, the case goes back to the Secretary for implementation. In either case the prior "final determination" of the Secretary would no longer control and this Court's holdings regarding procedures would control. And even if the trial 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, discussed next.

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, 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 ar-

gument, 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).

The capable-of-repetition prong is readily evidenced by two things. One is that Rep. Greene is a candidate for reelection, which indicates her ongoing political-career intent and "in an election case the court will not keep interrogating the plaintiff to assess the likely trajectory of h[er] political career." *Majors v. Abell*, 317 F.3d 719, 723 (7th Cir. 2003) (rejecting mootness argument based on Majors not running for public office in the following election). And while some "statements of the exception . . . require that the dispute giving rise to the case be capable of repetition *by the same plaintiff*, the courts, perhaps to avoid complicating lawsuits with incessant interruptions to assure the continued existence of a live controversy, do not interpret the requirement literally, at least in abortion and election cases. *Id.* (emphasis in original) (citations omitted). The classic example is *Roe v. Wade*, 410 U.S. 113 (1973), where there was no evidence regarding the capable-of-repetition prong but she was held to have standing. The other "repetition" evidence is the use of the Challenge Statute to contest candidacy in this and similar cases, with a key target being former-President Donald Trump. *See, e.g.*,

Marc Elias, *Naming the Insurrection*, Democracy Docket (Jan. 11, 2022), https://www.democracydocket.com/news/naming-the-insurrection/. Crucially, Elias and others make repetition likely because their arguments ignore the holding of *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1964), that those engaged in protected First Amendment protected activity may not be punished for the illegal actions of others, even if there has been some association—which makes it likely that candidates who engage in First Amendment protected activity will have their candidacy challenged whenever others engage in illegal activity and an "insurrection" claim and some alleged connection can be manufactured.

Since the preliminary-injunction motion sought relief against both the Secretary and the administrative judge "to enjoin them from enforcing O.C.G.A. § 21-2-5 ("**Challenge Statute**"), (Vol I: 5 at 191),[3] 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 disqualifica-

[3] Citations to the Appellant's Corrected Appendix are to the volume, document number, and page number (e.g., Vol I:3-1 at 57). 11th Cir. R. 28-5. The page number refers to the number in the header of the Appendix generated by this Court's electronic filing system.

tion 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.

II. This Court should not abstain.

The State says this Court should abstain, while noting that the district court rejected abstention. State's Br. at 32-33. That court established at length that abstention under *Younger v. Harris*, 401 U.S. 37 (1971), is improper. (Vol. III:52 at 162-76.) It noted that *Younger*'s domain was narrowed in *Sprint Communications v. Jacobs*, 571 U.S. 69 (2013), to three categories that didn't apply and that absent such application, *Younger* abstention was inappropriate. (App. Vol. III:52 at 164.)

The State here again argues *Younger* abstention. State's Br. at 33. It mentions the *Sprint* category for a "'civil proceeding involving certain orders that are uniquely in furtherance of the state court's ability to perform their judicial functions,'" *id.* (citation omitted), claiming "[t]his is especially true now that the Secretary's final decision is the subject of judicial review in the state court," *id.* But the district court held that category inapplicable, (App. Vol III: 52 at 176), and the State doesn't show that it erred or how state-court review alters the district court's analysis. It doesn't. Crucially, the State doesn't even argue that the district court abused its discretion, *Gold-Fogel v. Fogel*, 16 F.4th 790, 796 (2021) (standard of review), implicitly conceding it didn't. So the "remaining factors in the *Younger*

analysis" the State cites cannot be reached and *Younger* abstention is improper.

The district court's Opinion and Order nowhere mentions abstention under *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976),[4] but the State argues it here. State's Br. at 33-36. *Colorado River* 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)). "'Federal courts have a 'virtually unflagging obligation . . . to exercise the jurisdiction given them.'" *Ambrosia Coal*, 368 F.3d at 1328 (quoting *Colorado River*, 424 U.S. at 817). "The circumstances where [*Colorado River* abstention] may be appropriate are 'considerably . . . limited' and 'exceptional.'" *Gold-Fogel*, 16 F.4th at 800 (quoting *Colorado River*, 424 U.S. at 817). The State block-quotes some *Colorado River* factors. State's Br. at 22 (quoting *Gold-Fogel*, 16 F.4th at 800). These factors cut against the State.

[4] The State did not raise *Colorado River* in preliminary-injunction briefing, first raising it in a district-court stay-motion response. (State's Supp. App'x. 68 at 72) (filed June 3, 2022, after the district court's April 18 order denying preliminary injunction and the Secretary's May 6 Final Decision).

Preliminarily, the State primarily says such abstention is appropriate because the actions are "parallel" and "involve the same parties and substantially the same issues." State's Br. at 35. But those are *not* the *Colorado River* factors, only the setting for considering the factors. Generally, such parallels don't warrant abstention.

Regarding actual factors, the State first argues the fourth one, "the order in which the fora obtained jurisdiction," *Gold-Fogel*, 16 F.4th at 800, of which the State says "[t]he state court proceeding began first and is progressing much faster than the federal proceeding . . . ," State's Br. at 35. But as *Colorado River* says immediately after reciting that factor, "[n]o one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counseling against that exercise is required." 424 U.S. at 818-19. And "'the primary factors' of 'traditional concepts of federalism, efficiency, and comity' drive the decision." *Gold-Fogel*, 16 F.4th at 798 (citation omitted). Applying such primary factors, *Gold-Fogel* noted that the case turned on state, not federal law, *id.*, while the opposite is true here. *Gold-Fogel* noted that "states traditionally have substantial interests in domestic matters and generally enjoy more experience than federal courts in dealing with domestic disputes" at issue there, *id.*, but there are no such special state interests at issue

here and federal courts have the greater experience on the issues here. Given that "'the balance [is] heavily weighted in favor of jurisdiction," *id.* at 800 (citation omitted), and the State thus hasn't met its burden with this argument to prove that this case is "an 'exceptional' one" that warrants abstention, *id.* at 801 (citation omitted), abstention is unwarranted based on the State's first factor.

Second, the State says "the state court is just as competent to hear Greene's constitutional arguments on judicial review," *id.*, referencing somewhat the sixth factor, "the adequacy of the state court to protect the parties' rights," *Gold-Fogel*, 16 F.4th at 800. But the administrative judge wasn't even allowed to consider constitutional arguments when deciding whether Rep. Green was disqualified under federal constitutional and statutory provisions, which is why the State here says that is possible "*on judicial review*." And though state *courts* can hear federal claims, factor five is "whether state or federal law will be applied," *id.*, and federal law is applied here and federal courts have much greater experience in applying federal constitutional and statutory law. These factors cut against abstention.

Moreover, factor seven involves "the vexatious . . . nature of . . . the state litigation." *Gold-Fogel*, 16 F.4th at 800. That is clearly the case here where a Challenge Statute designed to screen for simple qualifications like a candidate's age is being used to decide profound federal and statutory disqualification issues in an admin-

istrative court that can't consider constitutional issues and doesn't have usual due-process safeguards. And the first factor is "whether one of the courts has assumed jurisdiction over property." *Gold-Fogel*, 16 F.4th at 800. The State ignores this factor though *Colorado River* cases regularly involve property. For example, *Gold-Fogel* involved life-insurance proceeds, *id.* at 793-94, and *Colorado River* involved water rights, 424 U.S. at 803. Though there may be cases applying *Colorado River* abstention where no property is involved, leading cases involve property and none is at issue here. These factors also cut against abstention.

In sum, both *Younger* and *Colorado River* abstention is unwarranted.

III. The district court erred in denying the preliminary injunction because Rep. Greene is likely to succeed on the merits.

A. Challengers have no private cause of action to assert a § 3 Challenge.

Challengers filed their Challenge against Rep. Greene pursuant to Georgia's Challenge Statute. (Vol. I:3-1 at 57.) Their Challenge attempts to enforce a constitutional provision, § 3 of the Fourteenth Amendment, against Rep. Greene. Congress is authorized to "enforce, by appropriate legislation, the provision[s] of this article." U.S. Const. amend. XIV, § 5. Congress has provided no such legislation for enforcement of § 3 by private individuals. *See Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326 (2015) (rejecting private enforcement of Supremacy

Clause). Therefore, no voter in Georgia has a private cause of action to seek enforcement of § 3 against Rep. Greene, and Challengers have no right to litigate their § 3 Challenge under Georgia law.

B. The district court erred in its analysis of Rep. Greene's First and Fourteenth Amendment claims [Counts I and II].

Rules such as the Challenge Statute are a restriction on both ballot access and voting rights, *Cowen v. Georgia Secretary of Sate*, 960 F.3d 1339, 1342 (11th Cir. 2020) ("candidate eligibility requirements . . . implicate[ ] the basic constitutional rights of both voters and candidates under the First and Fourteenth Amendments." (cleaned up)), and injuries to rights of voters and candidates are cognizable in either sort of case. When such rights are at stake,"the court must weigh the character and magnitude of the burden the State's rule imposes on those rights [Step 1] against the interests the State contends justif[ies] that burden, and consider the extent to which the State's concerns make the burden necessary [Step 2]." *Common Cause Ga. v. Kemp*, 347 F.Supp.3d 1270, 1292 (N.D. Ga. 2018) (explaining the *Anderson/Burdick*[5] balancing test). The district court erred in its application of this balancing test.

The district court recognized that "'[b]urdens are severe if they go beyond the

[5] *See Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992).

merely inconvenient'" (Vol. III:52 at 191) (quoting *Crawford v. Marion County Election Board*, 553 U.S. 181, 205 (2008) (Scalia, J., concurring)). But the district court erred when it found the burden to Rep. Greene imposed by the Challenge Statute did not rise to the level of severe because of the presumably expeditious manner this case would be resolved in the state process and because the burdens placed on Rep. Greene were "mere inconveniences." (*Id.* at 189-91.) Likewise, State Appellees assert that the Challenge Statute imposes a "reasonable, nondiscriminatory restriction that imposes a minimal burden." State's Br. at 41. Intervenor's assert that Rep. Greene's constitutional claim is rooted in a belief the "process is too fast." Intervenor's Br. at 35. Both also assert that the ability to Challenge a candidate without probable cause does not create a constitutional issue because this procedure isn't a criminal prosecution or arrests. See State's Br. at 42 (not a "government investigation"); Intervenor's Br. at 34.

If the challenge to Rep. Greene's candidacy was based upon her age or residency, the district court's and State Appellees' and Intervenor's comparisons to other, relatively simple processes or civil adjudications would have merit. After all, in those cases, Rep. Greene could provide proof of her age or residency merely by providing the ALJ with her birth certificate or any number of documents that could prove her residency (financial statements, utility bills, driver's license, etc.).

But such a straightforward production of evidence easily resolved in an expeditious manner is not at issue here.

Instead, Rep. Greene faced an eight-hour hearing in which she testified for several hours. (*See* Vol III:Hearing Tr. at 461-541.) Before the hearing took place, counsel for Rep. Greene responded in opposition to a notice to produce documents, (Vol I:3-2 at 100-110), a motion to take a party deposition, (Vol I:3-3 at 111-120), as well as several evidentiary issues that arose before ALJ Beaudrot. At issue was not a simple question of "how old are you?" or "where do you live?" but rather complex questions of both law and fact, including, *inter alia*, what constituted "engagement," what period of time was applicable to the Challenge, what is an "insurrection" under the applicable law, analysis of statements made by Rep. Greene over several years, and detailed information about what Rep. Greene did over the relevant time frame (Jan. 3-6, 2021).

The process Rep. Greene was, and is, subject to, differs significantly from the "mere inconveniences" upheld in other contexts and cited to by the district court. First, in all of these cases, the voter or candidate knew both the scope and details of the burden she would be subjected to beforehand. *See e.g.*, *Common Cause/ Georgia v. Billups*, 554 F.3d 1340, 1345, 1354 (11th Cir. 2009) (voter photo identification required); *Cowen*, 22 F.4th at 1230 (signature petition requirement).

Here, the scope and details of the process at issue far exceed any of the requirements the district court used in its comparison of burden and are closer to a criminal investigation and trial than to a straightforward administrative procedure.

And while the administrative hearing and Sec. Raffensperger's final decision have been completed and issued, and the primary election is over; the state appeal process of the challenge continues. Petition for Judicial Review, *Rowan v. Raffensperger*, No. 2022CV364778 (Fulton County Superior Ct. May 16, 2022). There Challengers argue that: (1) ALJ Beaudrot erred when he shifted the burden of proof to them[6]; (2) Sec. Raffensperger erred by quashing their notice to produce; (3) Sec. Raffensperger erred by failing to properly consider Rep. Greene's conduct prior to taking the oath of office; and (4) Sec. Raffensperger erred by applying the incorrect legal standard for "engaging" in insurrection. *Id.* Even assuming that the Superior Court for Fulton County affirms Sec. Raffensperger's final decision, the Challengers can still appeal to the Supreme Court of Georgia. *Burke v. Liberty Cnt'y Bd. of Elections*, 291 Ga. 802, 803 (2012). And, of course, Challengers may petition for a writ of certiorari to the Supreme Court of the United

[6] Rep. Greene acknowledged that ALJ Beaudrot shifted the burden to Challengers. Appellant's Br. at 41, n. 9. However, the questions surrounding Rep. Greene's due process claim is still active as the state court could reverse ALJ Beaudrot's decision on burden shifting.

States. 28 U.S.C. § 1257(a).

Rep. Greene never argued that the state doesn't have a legitimate interest in protecting the integrity of the political process. But given the substantial, not minimal, burden placed on Rep. Greene, the state's interest needs to rise above merely "legitimate"—it must be compelling. *Burdick*, 504 U.S. at 434. None of the ballot protection interest cases have found a state's interest to be sufficiently compelling to justify anything like the severely burdensome Challenge Statute. See Appellant's Br. at 48-50.

C. The district court erred in its analysis of Rep. Greene's Article 1, Section 5 claim [Count III].

State Appellees' argue that the Challenge Statute does not violate Article 1, Section 5 of the U.S. Constitution because states "have the authority to regulate candidates and elections for federal office, while Congress retains the authority to regulate its members after they are elected." State's Br. at 47 (citing *Roudebush v. Hartke*, 405 U.S. 15, 24-26 (1972). Intervenor's similarly argue. *See* Intervenor's Br. at 39-40. But comparison of the process in *Roudebush* is inapposite here.

Roudebush involved a *recount* of an election. Of course, states have the authority to regulate the time, place, and manner of elections under Article I, Section 4 of the U.S. Constitution, and a recount of votes cast in an election falls squarely

within that purview. That same type of regulation is not at issue here.

Here, the Challenge Statute permits the State of Georgia to make its own independent evaluation of whether a Candidate is constitutionally qualified to be a Member of the U.S. House of Representatives. O.C.G.A. § 21-2-5. That goes far beyond the state's authority to regulate an election recount—voters have unfettered discretion in voting to independently evaluate whether federal candidates meet the constitutional qualifications for office. Derek T. Muller, *Scrutinizing Federal Electoral Qualifications*, 90 Ind. L.J. 559, 592 (2015) ("**Muller**") (citations omitted). But Congress has an exclusive role in judging the qualifications of its own members to determine if they are eligible to take a seat in Congress. *Id*. at 611 (collecting cases).

Because the Challenge Statute directly usurps Congress' constitutional responsibilities, it violates Article 1, § 5 of the U.S. Constitution.

D. The district court erred in holding that § 3 could be applied to disqualify Rep. Greene (Count IV).

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

Neither the State Appellees nor the Intervenor's address Rep. Greene's argument that the district court erred in its legal conclusion that § 3 bars candidacy, *see, e.g.*, (Vol. III:52 at 202) (referencing "candidates who are not disqualified by

[§ 3] . . . .”). But the district court clearly erred in this analysis.

The plain meaning inherent in every word of § 3 makes it clear that it applies to officeholders, not candidates. *See* Appellant’s Br. at 29-31 (§ 3 aimed at those who have “previously taken an oath”; their *office-holding* “[n]o person shall be a . . . Representative”). Congress has the plenary authority to remove the political disability inherent in § 3 (assuming *arguendo* that the Amnesty Act of 1872 has not already done so) from its Members. A construction applying § 3 to a candidacy, way before it can be dermined that the candidate is qualified to take office, renders its second sentence—one of only two—a nullity.

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

So the district court erred in finding that § 3’s disability bars candidacy.

2. The district court erred in its holding that it did not have jurisdiction over Rep. Greene’s 1872 Act claim.

The district court abused its discretion by making an error of law when it held that “Plaintiff has . . . not carried her burden to establish that the Court has juris-

diction over her 1872 Act claim," because the "parties have not briefed the novel issue as to whether the [1872 Act] creates a private right that may serve as the basis for a private suit." (Vol III:52 at 161-62.) Challengers argue that since Rep. Greene did not identify Section 1983 as the cause of action for Count IV, the district court was correct in finding this count was "brought directly under the 1872 Amnesty Act, not Section 1983." Intervenor's Br. at 44 (citing Vol. III:52 at 562.) The district court erred both because Rep. Greene brought this claim under Section 1983 and because the 1872 Act provides for a private cause of action.

First, the district court's holding ignores the general rules of pleading. Fed. R. Civ. P. 8. Rep. Greene stated at the beginning of her Complaint and thereafter that it was brought under 42 U.S.C. § 1983. Compl. at ¶¶ 1, 4, 11, 12. So it was unnecessary to repeat that in Count IV. And the district court acknowledged that Rep. Greene reasserted that Count IV was brought under § 1983 at oral argument, and it analyzed jurisdiction on the basis that Court IV was brought under § 1983. (Vol III:52 at 158, 160-62.)

Second, the district court erred in its analysis of whether the 1872 Act provides a private cause of action. To provide a private cause of action, Congress had to intend "to confer individual rights upon a class of beneficiaries." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285-86 (2002). But the district court didn't believe the 1872

Act provided any such right to immunity, based "especially" on its rejection of the Act's prospective application. (Vol III:52 at 162.) However, in the 1872 Act, Congress employed its authority under § 3 to eliminate the sort of disabilities § 3 imposed (with exceptions later eliminated) both retroactively *and prospectively*. *See infra* Part III.D.3.

The "class of beneficiaries," under the 1872 Act, is those that would have otherwise been subject to § 3 disability but are now removed from them by the 1872 Act. That class includes *holders* of offices listed in § 3[7] and *candidates* for such offices against whom a § 3 disqualification effort is made since such an effort is based on the notion that they can't *hold* the office due to a § 3 disability. Rep. Greene is part of that class of beneficiaries.

Imposing current clarity standards for a private cause of action on the 1872 Act would be anachronistic as courts at that time typically implied private rights of actions for federal-statute violations, focusing on remedying wrongs instead of congressional intent. *Swift v. Tyson*, 41 U.S. 1 (1842). Given the unique nature of the 1872 Act—removing a political disability from persons subject to it—Congress would have thought the 1872 Act's wording entirely adequate to authorize what it intended, namely, that persons freed from disability by the Act may assert

[7] No one seeks to disqualify Rep. Greene under § 3 as a Representative *now*.

that right to immunity as a cause of action against those who would reimpose the disability.

The district court had jurisdiction over Count IV.

3. The district court erred in its analysis of the 1872 Act.

Both the State Appellees and the Intervenors assert that The Amnesty Act of 1872 did not provide prospective amnesty to future insurrectionists. *See* State's Br. at 51; Intervenor's Br. at 45. Both agree with the district court's analysis that the language used in the 1872 Act indicates retrospective removal of the political disability only. The district court erred in its linguistic and statutory analysis, as do the State Appellants and the Challengers.

The district court said that the 1872 Act only has retrospective effect because it "utilizes only the past tense phrase that 'all political disabilities *imposed* by the third section of the fourteenth article . . . are hereby *removed* . . . .'" (Vol III:52 at 196.) But the court erred grammatically. "Imposed" is used in § 3 as a past *participle*[8]—*not* a "past tense" *verb*—in the participial phrase "imposed by [§ 3]," which acts as an adjective to show *which* "disabilities" are referenced. And those are dis-

[8] Participles are "verbals" (not verbs but based on verbs) that come in "past" ("imposed") and "present" ("imposing") versions. Purdue Online Writing Lab, Participles, https://owl.purdue.edu/owl/general_writing/mechanics/gerunds_participles_and_infinitives/participles.html.

abilities imposed *by* § 3, not *based on* § 3, so the reference is to the *sort* of *legal* disability § 3 imposes, not particular applications of § 3 to individuals. *Accord Impose* www.merriam-webster.com/dictionary/impose ("to establish or apply by authority"). Accordingly, "imposed" doesn't justify the court's use of "disabilities *already* imposed" to claim only retrospective application. Thus, when the 1872 Act says that particular legal disability created by § 3 is "hereby removed from all persons whomsoever," it meant "all" to apply prospectively too.

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

The district court completely disregarded the difference between the two acts, stating that the differences don't matter and that Rep. Greene's sole argument for why the 1872 Act is prospective is that "Congress did not include the 'heretofore incurred' language that was later included in the 1898 Act." (Vol III:52 at 197.) That is wrong because the use of the 1898 Act is to show that Congress knew *how* to create retrospective application only. Standing alone, the 1872 Act is both pro-

spective and retroactive. As before, "disability imposed [§ 3]" is a participial phrase indicating *which* legal disability is at issue. If "imposed by" had meant only prior application to particular persons, there would have been no need for "heretofore incurred" in the 1898 Act, violating construction cannons.

The District Court recites legislative history. (Vol III:52 at 194-95.) But as the 1872 Act is clear and unambiguous, considering legislative history [i]s unnecessary and improper. *See Tobib v. Radloff*, 501 U.S. 157, 162 (1991) (quoting *Blum v. Stenson*, 465 U.S. 886, 896 (1984)). Even so, that argument is unpersuasive.

The District Court first discussed the numerous requests and calls for Amnesty following the Civil War. (Vol III:52 at 194-95.) However, none of that extraneous material confirms why the district court's declaration that the 1872 Act applies only retrospectively is correct. This is especially true considering that the plain language of the 1872 Act removed the political consequence of § 3 from any Representative other than those who served during the 36th and 37th Congresses.

The district court next claims that Congress interpreted the 1872 Act retrospectively, citing the House's refusal to seat Berger. (Vol III:52 at 197.) Berger's exclusion, after criticizing American involvement in World War I, predated modern First Amendment doctrine. *See* Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comment. 87, 130 (2021). Further,

the House considered only the 1898 Act, not the 1872 Act, as the District Court conceded. "In Berger's defense, he argued . . . that he could not be disqualified by [§ 3] because [it] had been 'entirely repealed' by the 1898 Act." (Vol III:52 at 197.) Congress' determination regarding Berger has no bearing on this case, as it involved only "the 1898 Act," which by its terms had only retroactive application.

The district court also stated that the 1872 Act must be construed to avoid unconstitutionality, and that reading it as prospectively would render § 3 ineffective. *(Id.* at 201.) But the plain language of § 3 gave Congress plenary power to remove any and all § 3 disabilities, which applied both retroactively and prospectively, and the district court identifies no provision limiting the breadth of that power.

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

Conclusion

For all the foregoing reasons, this Court should reverse the decision of the district court and grant the preliminary injunction.

June 21, 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 5,313 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 June 21, 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.