IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

DAVID ROWAN, DONALD GUYOTT, ROBERT RASBURY, RUTH DEMETER, and DANIEL COOPER,	)	
Petitioners,	)	CIVIL ACTION NO. 2022CV364778
v.	)	
BRAD RAFFENSPERGER, Georgia Secretary of State,	)	
Respondent,	)	
and	)	
MARJORIE TAYLOR GREENE,	)	
Intervenor-Respondent.	)	

SECRETARY OF STATE RAFFENSPERGER'S OBJECTION TO INTERVENOR-RESPONDENT MARJORIE TAYLOR GREENE'S AFFIRMATIVE DEFENSES, COUNTERCLAIMS, AND CROSS-CLAIMS

Respondent Georgia Secretary of State Brad Raffensperger (the "Secretary") objects to the "Affirmative Defenses, Counterclaims, and Cross-claims" asserted by Intervenor-Respondent Marjorie Taylor Greene ("Rep. Greene") in her Answer to the Petition for Judicial Review. In her Answer, Rep. Greene improperly attempts to assert "counterclaims" and "cross-claims" under 42 U.S. § 1983 against the Petitioners and the Secretary, which are

outside the scope of this Court's judicial review of the Secretary's final decision under O.C.G.A. § 21-2-5(e) (the "Challenge Statute").

Setting aside the absurdity of Rep. Greene's attempt to appeal the Secretary's decision in her favor, this Court is without jurisdiction to entertain her claims. If Rep. Greene wished to initiate an appeal of any part of the Secretary's decision or any evidentiary rulings by the Administrative Law Judge ("ALJ"), she failed to do so within ten days as is required by the Challenge Statute, O.C.G.A. § 21-2-5(e), and any claims that Rep. Greene wished to raise herself in regards to the alleged constitutional infirmity of the Challenge Statute have been procedurally defaulted. Moreover, there is nothing in the Challenge Statute or the Administrative Procedure Act ("APA") that permits Rep. Greene to assert counterclaims or cross-claims in the judicial review process governed by the APA, and her claims for relief under Section 1983 should be dismissed as falling outside the permissible contours of a judicial review under the APA.

In any event, the Court can and should avoid reaching Rep. Greene's constitutional claims because the resolution of the non-constitutional question—namely, whether the Secretary's decision that Rep. Greene did not engage in insurrection is clearly erroneous—is sufficient to resolve the case. But even if the Court could consider Rep. Greene's constitutional claims as affirmative defenses, they are without merit. The Challenge Statute does not violate the First and Fourteenth Amendment because the Challenge Statute is

a reasonable, nondiscriminatory restriction that is justified by the state's important interest in limiting ballot access to candidates who meet the legal requirements for office. The Challenge Statute also does not usurp Congress's authority under Article I, Section 5 of the Constitution to judge the qualification of its members because this authority co-exists with the constitutional authority of states to regulate candidate access to the ballot under Article I, Section 4. Rep. Greene is also wrong that Section 3 of the Fourteenth Amendment bars only holding office, rather than election, and that this disability may be removed by Congress at any time before Rep. Greene would be sworn in on January 3, 2023. This argument, if accepted, would undermine the legitimate state interest in ensuring that every candidate is qualified before allowing candidates access to the ballot, without having to rely on a hypothetical act of Congress to cure the candidate's ineligibility. Finally, the Amnesty Act of 1872 did not provide prospective amnesty to all future insurrectionists. Accordingly, this Court should affirm the Secretary's decision that Rep. Greene is not disqualified under Section 3 of the Fourteenth Amendment.

STANDARD OF REVIEW

In considering a petition for judicial review of the Secretary's final decision under the Challenge Statute, this Court cannot substitute its judgment for that of the Secretary as to the weight of the evidence on questions

of fact. O.C.G.A. § 21-2-5(e). This Court may affirm the decision or remand the case for further proceedings. *Id.* 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 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.

ARGUMENT

I. Rep. Greene failed to file a timely appeal of the Secretary's final decision.

O.C.G.A. § 21-2-5(e) specifically states that either the elector who initiated the challenge proceeding or the candidate has the right to appeal the final decision by the Secretary by filing a petition with this Court within ten days after the entry of the Secretary's final decision. If Rep. Greene wished to raise objections to the Secretary's decision in her favor, or have that decision reversed or modified, she should have filed a petition for judicial review during the ten-day window set forth in the Challenge Statute. This Court has granted Rep. Greene the ability to intervene in this case as a respondent, but Rep.

Greene should not be permitted to raise arguments in an out-of-time appeal that seeks to overturn the Secretary's final decision.

II. This Court has no jurisdiction to consider Rep. Greene's "counterclaims" and "cross-claims" in this proceeding.

In her Answer, Rep. Greene attempts to bring "counterclaims" and "cross-claims" against the Petitioners and the Secretary under 42 U.S.C. § 1983 (Counts I through V), and also seeks an award of attorneys' fees, costs, and expenses under 42 U.S.C. § 1988 or other applicable law. (Rep. Greene's Answer, p. 20-21.) She also seeks preliminary and permanent injunctive relief. (*Id*., p. 21.) However, before the Court is a petition for judicial review, not a complaint under the Civil Practice Act, and there is no legal basis for Rep. Greene to bring claims against Petitioners or the Secretary, or to request injunctive relief. This Court's review of Petitioners' appeal of the Secretary's final decision is limited in scope: it "may affirm the decision or remand the case for further proceedings," or reverse or modify the decision if substantial rights of the appellant have been prejudiced because the findings, inferences, conclusions, or decisions of the Secretary are erroneous for any of the reasons set forth in O.C.G.A. § 21-2-5(e).

If Rep. Greene wished to appeal of any part of the Secretary's decision or any evidentiary rulings by the ALJ, she failed to do so within ten days as is required by the Challenge Statute, O.C.G.A. § 21-2-5(e), and any claims that

Rep. Greene wished to raise herself in regards to the alleged constitutional infirmity of the Challenge Statute have been procedurally defaulted. *See Miller v. Real Estate Comm'n*, 136 Ga. App. 718, 718 (1975) (holding that failure to petition for judicial review within the statutory time set out governing the administrative process required dismissal of the asserted appellate claims). To the extent that Rep. Greene is seeking any relief beyond a remand or an affirmation, reversal, or modification of the Secretary's decision, her requests for relief should be denied as they go beyond the scope of this proceeding under the Challenge Statute.

III. Because the Secretary's decision was correct and should be affirmed, this Court need not address the constitutional questions raised by Rep. Greene.

The Supreme Court of Georgia has cautioned that courts generally ought to avoid constitutional questions when the resolution of non-constitutional questions is sufficient to decide a case. *Deal v. Coleman*, 294 Ga. 170, 171 n.7 (2013); *see Bd. of Tax Assessors v. Tom's Foods*, 264 Ga. 309, 310 (1994) ("[T]his court will never decide a constitutional question if the decision of the case presented can be made upon other grounds.") (citation and punctuation omitted). The Secretary's determination that Rep. Greene is a qualified candidate was correct and should be affirmed by this Court. If this Court affirms the decision that Rep. Greene should remain on the ballot, then the Court need not resolve Rep. Greene's constitutional claims, which will be moot.

IV. The Challenge Statute does not violate the First or Fourteenth Amendments.

It is well established that states have an important interest in regulating candidate access to the ballot. *See, e.g., Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983); *Storer v. Brown*, 415 U.S. 724, 732 (1974); *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). Contrary to Rep. Greene's assertion, candidacy is not a fundamental constitutional right, and there is certainly no protected right to run for federal office if the candidate does not meet the constitutional requirements. *See Bullock v. Carter*, 405 U.S. 134, 142-43 (1972). Courts have recognized, however, that state restrictions on candidates' eligibility for the ballot can implicate voting and due process rights under the First and Fourteenth Amendments. *Clements v. Fashing*, 457 U.S. 957, 963 (1982); *see also Anderson*, 460 U.S. at 786-87. But still, not all of these restrictions impose constitutionally suspect burdens on voters' rights requiring close scrutiny. *Anderson,* 460 U.S. at 788; *Clements*, 457 U.S. at 963.

In reviewing challenges to restrictions on candidacy under the First and Fourteenth Amendments, courts are to apply the *Anderson-Burdick* framework, which weighs the "character and magnitude of the asserted injury" against the state's asserted interests. *Anderson*, 460 U.S. at 789 (1982);

Burdick v. Takushi, 504 U.S. 428, 434 (1992).[1] The rigorousness of the Court's inquiry "depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick*, 504 U.S. at 434. When "those rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Id.* (citations omitted). "Lesser burdens, however, trigger less exacting review, and a State's 'important regulatory interests' will usually be enough to justify 'reasonable, nondiscriminatory restrictions.'" *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (quoting *Burdick*, 504 U.S. at 434). The Eleventh Circuit has held that the *Anderson-Burdick* framework applies to both substantive and procedural due process claims. *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1282 (11th Cir. 2020).

Rep. Greene contends that because Petitioners here were able to initiate their challenge based upon a "belief" that Greene was not qualified, this infringed "upon a fundamental First Amendment right by the triggering [of] a government investigation," (Rep. Greene's Answer, Count I), but the challenge

[1] Most recently, the Supreme Court of Georgia applied the *Anderson-Burdick* framework in considering an action under the First and Fourteenth Amendments challenging the decision of the county board of elections to void votes cast in favor of a deceased candidate in a non-partisan county commission election, and to certify election in favor of the opponent, even though the opponent received fewer votes than deceased candidate. *See Rhoden v. Athens-Clarke Cnty. Bd. of Elections*, 310 Ga. 266, 272 (2020).

proceeding before the Office of State Administrative Hearings ("OSAH") was not a "government investigation." It was a civil administrative proceeding brought by a group of voters seeking to disqualify Rep. Greene as a candidate. The Secretary did not initiate this proceeding but was merely the referring agency and not a party. Furthermore, no person, including Rep. Greene, has a fundamental First Amendment right to be a candidate for federal office, especially if the person does not meet the constitutional qualifications for office.

Rep. Greene also argues that it is severely burdensome to require her to bear the burden of proving that she did not engage in insurrection during the OSAH proceeding. (Rep. Greene's Answer, Count II.) Because most candidate qualification challenges involve straight-forward issues such as age or residency, the Georgia Supreme Court has held that it should not be the challenger's burden to disprove a candidate's eligibility to run for office, when the candidate has already sworn in an affidavit that he or she is eligible, based upon the candidate's knowledge of his or her own eligibility. *See Haynes v. Wells*, 273 Ga. 106, 108-09 (2000) (holding that the challenger "is not required to disprove anything regarding [the candidate's] eligibility to run for office"). However, Rep. Greene fails to cite a single case supporting her argument that this allocation of the burden of proof imposes a severe burden on candidates. Furthermore, OSAH rules allow an ALJ to shift the burden from the candidate

to the challengers where justice requires, Ga. Comp. R. & Regs. 616-1-2-.07(2), and here, ALJ Beaudrot did *exactly* that when he shifted the burden onto Petitioners, recognizing that this particular challenge proceeding did not involve a straight-forward issue of proving an objective qualification, such as age or residency, that could be proven by information within the candidate's possession. (Admin. R. Part 1, OSAH 00776-77.) Because she was not required to bear the burden of proof in the challenge proceeding, Rep. Greene cannot plausibly explain how she was severely burdened by the process.

Rep. Greene, at most, faced a mere inconvenience by having to participate in the challenge proceeding. *Greene v. Raffensperger*, No. 22-CV-1294-AT, 2022 WL 1136729, at *21 (N.D. Ga. Apr. 18, 2022). This mere inconvenience is far outweighed by the compelling interest of the state and the voters to ensure that candidates are eligible for office before placing their names on the ballot. The state "has an interest, *if not a duty* to protect the integrity of its political processes" by ensuring that only candidates who meet the legal requirements for office are placed on the ballot. *Bullock*, 405 U.S. at 145 (emphasis added). The Challenge Statute plainly advances this important state interest.

Undoubtedly, the public's interest in having only eligible candidates on the ballot more than outweighs any inconvenience that may be imposed on a candidate facing a challenge proceeding. Thus, the Challenge Statute is a

"reasonable, nondiscriminatory restriction" on ballot access that is more than justified by the state's "important regulatory interests," *Timmons*, 520 U.S. at 358, and Rep. Greene's arguments that the Challenge Statute or the OSAH proceeding in this case violated her First or Fourteenth Amendment rights fail.

V. The Challenge Statute does not usurp Congress's authority to judge the qualifications of its members.

Contrary to Rep. Greene's argument, the Challenge Statute does not usurp the Congress's power to be "Judge of the Elections, Returns and Qualifications of its own Members" under Article I, Section 5. (Rep. Greene's Answer, Count III.) Rather, the state's powers to regulate the time, place, and manner of elections under Article I, Section 4 and Congress's powers under Article I, Section 5 are complimentary. *See Roudebush v. Hartke*, 405 U.S. 15, 24-26 (1972) (holding that Article 1, Section 4 gives the states the ability to conduct a recount for a U.S. Senate election without usurping the Senates authority to judge the election results under its Article I, Section 5 powers).

The U.S. Constitution "anticipates that the electoral process is to be largely controlled by the states and reviewed by the legislature." *Hutchinson v. Miller*, 797 F.2d 1279, 1283 (4th Cir. 1986). 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. *See id.*; *see also Roudebush*, 405 U.S. at 24-26; *McIntyre v. Fallahay*, 766 F.2d 1078, 1083 (7th

Cir. 1985). Thus, while Congress can decline to seat a candidate who has won election as a U.S. Representative, the states have the constitutional authority, if not the duty, to regulate which candidates for U.S. Representative are placed on the ballot and the manner of their election.

The Challenge Statute is the State's only mechanism for verifying candidate qualifications before voters cast their ballots. Without the ability to verify candidate eligibility through the administrative process set forth in the Challenge Statute, there is no way for the State to avoid the possibility that fraudulent or unqualified candidates such as minors, out-of-state residents, or non-citizens could be elected to Congress. And if a candidate for U.S. Representative is elected by a majority of voters in the general election and then subsequently is disqualified by Congress, the State and counties would be required to incur the significant expense of a special election to fill the resulting vacancy. *See* O.C.G.A. § 21-2-543. To conduct a new election after a candidate is disqualified from taking office would be a tremendous waste of state and county resources and harmful to voter confidence in the electoral process.

VI. The terms of the Disqualification Clause do not prohibit the Secretary from ensuring that only qualified candidates are on the ballot.

Rep. Greene also argues that "Georgia law permits removal of candidates from the ballot based on prospective ineligibility to *take office*" but that the

Disqualification Clause "bars only office-holding, and that disability may be removed by Congress at *any time* before Rep. Greene is sworn in on January 3, 2023." (Rep. Greene's Answer, p. 19, Count IV (emphasis in original).) She contends that "it cannot be determined now that she will be ineligible to take office then." (*Id*.) However, Rep. Greene's reading of the Disqualification Clause would undermine the legitimate interest that a state has in ensuring that only qualified candidates are on the ballot, as discussed *supra*. Under Rep. Greene's reading, the Secretary would have to permit someone who cannot hold office pursuant to the Disqualification Clause, to remain on the ballot, on the outside possibility that two-thirds of the members of Congress will agree to remove that disability between the time of the election and when the otherwise disqualified candidate would be sworn into office. A more logical reading would be that a person who is disqualified under Section 3 of the Fourteenth Amendment who has his or her disability removed by a two-thirds vote of Congress would, henceforth, no longer be barred from the ballot under the Disqualification Clause.

VII. The Challenge Statute as applied to Greene does not run afoul of the Amnesty Act of 1872.

The Amnesty Act of 1872 does not prospectively remove any disability incurred under Section 3 to all future members of Congress, as Greene asserts. After the passage of the Fourteenth Amendment, Congress relied on private

bills to remove the disabilities imposed by Section 3 on certain individuals, but Congress soon became overwhelmed by requests for amnesty, which "led to calls for general section three amnesty legislation." *See* Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comment. 87, 131–35 (2021). Accordingly, Congress passed a broad amnesty act in 1872, *id*., which provided specifically:

> That all political disabilities imposed by the third section of the fourteenth article of amendments of the Constitution of the United States are hereby removed from all persons whomsoever, except Senators and Representatives of the thirty-sixth and thirty-seventh Congresses, offices in the judicial, military, and naval service of the United States, heads of departments, and foreign ministers of the United States.

Act of May 22, 1872, ch. 193, 17 Stat. 142 (1872). The plain language of the Amnesty Act of 1872 simply does not support Rep. Greene's contentions that it removed any disability imposed by the Disqualification Clause both retrospectively and prospectively, such that it would shield any future member of Congress who engages in insurrection.

The Fourth Circuit recently rejected the same argument in a nearly identical case brought by Rep. Madison Cawthorn, who was facing the same challenge to his candidacy as Rep. Greene. *Cawthorn v. Amalfi*, 35 F.4th 245 (4th Cir. 2022). Specifically, the Fourth Circuit rejected Rep. Cawthorn's argument that the Amnesty Act of 1872 removed any possible disability imposed by the Disqualification Clause on future insurrectionists by

concluding "[t]he most fundamental problem with Rep. Cawthorn's proposed interpretation is that the Act's operative clause refers to those 'political disabilities *imposed*' in the past tense rather than new disabilities that might arise in the future." *Cawthorn*, 35 F.4th at 258 (emphasis in original). "The past tense is 'backward-looking'; it refers to things that have already happened, not those yet to come." *Id*. (citing *Cullen v. Pinholster*, 563 U.S. 170, 181-82 (2011)). Thus, according to the Fourth Circuit, the Amnesty Act of 1872 "did not prospectively immunize Representative Cawthorn—or anyone else—from Section 3's reach." *Cawthorn*, 35 F.4th at 261.

There is no reason for this Court to depart from the correct analysis by the Fourth Circuit. The plain language of the 1872 Amnesty Act is quite clear in that it was not removing any disability under Section 3 of the Fourteenth Amendment that was incurred in the future, but rather, only disabilities that had already been incurred previously by Congress's use of past tense participles and verbs. *See* Act of May 22, 1872, ch. 193, 17 Stat. 142 (1872) ("That all political disabilities imposed . . . are hereby removed.") (emphasis added); *see also Cawthorn*, 35 F.4th at 257-59. And although Congress has the authority to "remove such disability" imposed by Section 3 of the Fourteenth Amendment, it cannot effectively repeal Section 3 and render it forever inoperative. Thus, Rep. Greene's claims that the Challenge Statute, as applied to her, violates the Amnesty Act of 1872 are without basis because the Act did

not provide a blanket of amnesty.

VIII. Congress is not required to create a "private cause of action" for the Secretary to ensure only qualified candidates are on the ballot.

As an affirmative defense, Rep. Greene contends that Congress must create a private cause of action "[i]n order for Challengers to mount their § 3 Challenge." (Rep. Greene's Answer, p. 12, Affirmative Defense No. 4.) In support of this argument, Rep. Greene cites to *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320 (2015), a case in which providers of services to Medicaid-eligible individuals brought an against certain state health and welfare officials, challenging state's Department of Health and Welfare's failure to amend existing Medicaid reimbursement rates, and seeking injunctive relief. The Supreme Court held that the ability to sue to enjoin unconstitutional actions by state officers does not rest upon an implied right of action contained in the Supremacy Clause, *id.* at 324, and the Medicaid Act did not authorize providers' private action for injunctive relief to enforce against a state the Act's reimbursement-rate standard because Medicaid Act, by providing an administrative remedy, implicitly precluded such a private enforcement action, and the provision that the providers sought to enforce was judicially unadministrable. *Id.* at 327-32. In other words, the *Armstrong* decision does not speak to the issue of how a state can regulate the ballot to ensure that only qualified candidates are included.

Rep. Greene also cites to the trial court decision in *Hansen, et al. v. Finchem, et al.*, Case No. CV 2022-004321, Superior Court of Arizona, Maricopa County. (Rep. Greene's Answer, p. 12.) The Supreme Court of Arizona has since issued a decision on the appeal in that case, finding that the candidates were not disqualified from appearing on the ballot based on the specific wording of A.R.S. § 16-351(B), Arizona's version of a Challenge Statute, which authorizes an elector to challenge a candidate "for any reason relating to qualifications for the office sought as prescribed by law, including age, residency, professional requirements or failure to fully pay fines ..."; "[b]y its terms, the statute's scope is limited to challenges based upon 'qualifications ... as prescribed by law,' and does not include the Disqualification Clause, a legal proscription from holding office." *Hansen v. Finchem*, No. CV-22-0099-AP/EL, 2022 WL 1468157, at *1 (Ariz. May 9, 2022). The *Hansen* decision is inapplicable here, where the Challenge Statute permits a "challenge [to] the qualifications of any candidate" without differentiating as to whether qualifications are prescribed or proscribed by law. O.C.G.A. § 21-2-5(b). Furthermore, Georgia's Challenge Statute is also differentiated from A.R.S. § 16-351 because the Arizona statute provides for the elector to file a court action directly. A.R.S. § 16-351(A). The procedure under Georgia's Challenge Statute reflects the State's special interest in ensuring that candidates on the ballot are qualified and falls within the power of the states to provide for the time,

place, and manner of elections, which is its duty under Article I, Section 4 of the U.S. Constitution, to regulate "the Times, Places and Manner of holding Elections for Senators and Representatives."

IX. The Secretary can consider whether a candidate should be removed from the ballot pursuant to the Disqualification Clause during a proceeding under the Challenge Statute.

Rep. Greene also attempts to assert the "affirmative defense" that the Challenge Statute does not permit challenges based upon the Disqualification Clause because the "Challenge Statute allows Georgia electors to challenge 'the qualifications of the candidate.'" (Rep. Greene's Answer, p. 13, Affirmative Defense No. 5.) However, this argument defies logic – the "qualifications of the candidate" would certainly include the requirement that the candidate is not disqualified, by any criterion including those set out in the Georgia Constitution. *See* GA. CONST. Art. II, Sec. II, Para. III. To hold otherwise would deprive the State of its ability to ensure that only candidates who are qualified (and not, for some reason, not qualified or disqualified) may remain on the ballot.

CONCLUSION

The Secretary respectfully submits that this Court should dismiss Rep. Greene's attempts to invalidate the Challenge Statute and, for the reasons set forth in the Secretary's Response to the Petition, uphold the Secretary's

decision that Rep. Greene is qualified to be a candidate for the14th Congressional District.

Respectfully submitted this 11th of July, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed the foregoing **SECRETARY OF STATE RAFFENSPERGER'S OBJECTION TO INTERVENOR-RESPONDENT MARJORIE TAYLOR GREENE'S AFFIRMATIVE DEFENSES, COUNTERCLAIMS, AND CROSS-CLAIMS** with the Clerk of Court using the electronic filing system, which will send notification of such filing to all parties of record via electronic notification.

Dated: July 11, 2022.

/s/ Elizabeth Vaughan
Elizabeth Vaughan
Assistant Attorney General