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 RESPONSE TO THE PETITION FOR JUDICIAL REVIEW AND BRIEF IN SUPPORT THEREOF

Respondent Georgia Secretary of State Brad Raffensperger (the "Secretary") submits the following Response to the Petition for Judicial Review filed by David Rowan, Donald Guyott, Robert Rasbury, Ruth Demeter, and Daniel Cooper (collectively "Petitioners"), seeking the Court's review of the Secretary of State's decision that Marjorie Taylor Greene ("Rep. Greene") is qualified to be a candidate for U.S. Representative from Georgia's Fourteenth Congressional District.

INTRODUCTION

Petitioners are a group of voters from the Fourteenth Congressional District who initiated a candidate qualifications challenge against Rep. Greene pursuant to O.C.G.A. § 21-2-5 (the "Challenge Statute"). The Challenge Statute provides an administrative process by which interested voters or the Secretary may challenge the qualifications of candidates for office through an expedited hearing before an administrative law judge ("ALJ"), with the Secretary making the final determination. Candidate challenges typically involve straight-forward issues such as the candidate's age or length of residency within the district. But here, the Petitioners' challenge is unique – they contend that Rep. Greene should be disqualified from serving as a member of the U.S. House of Representatives because, as they allege, she voluntarily aided and engaged in insurrection, thus disqualifying her from serving as a member of Congress pursuant to Section 3 of the Fourteenth Amendment to the U.S. Constitution.[1]

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[1] Section 3 of the Fourteenth Amendment, otherwise referred to as the Disqualification Clause, states 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.

Following a hearing before the Office of State Administrative Hearings ("OSAH"), ALJ Charles R. Beaudrot entered an Initial Decision holding that Rep. Greene is qualified as a candidate for U.S. Representative from Georgia's Fourteenth Congressional District. The Secretary issued a Final Decision that affirmed ALJ Beaudrot's Initial Decision, Findings of Fact, and Conclusions of Law.

Petitioners now ask this Court to reverse the Secretary's Final Decision or issue a remand, arguing that that the Secretary's decision was made "upon unlawful procedures and affected by other errors of law" because: (1) the ALJ shifted the burden to Petitioners to prove that Rep. Greene should be disqualified pursuant to Section 3 of the Fourteenth Amendment; (2) the ALJ erred by not permitting Petitioners to engage in extensive pre-hearing discovery; (3) the Secretary's decision failed to consider Rep. Greene's conduct prior to taking the oath of office; and (4) the Secretary erred by applying the incorrect legal standard for "engaging" in insurrection.

For the reasons discussed herein, Petitioners have failed to establish any grounds for remand or reversal of the Secretary's Final Decision, and the Petition should be dismissed. *First*, the burden to prove whether Rep. Greene is disqualified pursuant to Section 3 of the Fourteenth Amendment was properly placed on Petitioners, in the interests of justice. *Second*, the underlying proceeding before OSAH was being conducted under the Georgia

Administrative Procedure Act – this is not a civil lawsuit subject to the Civil Practice Act – and as such, Petitioners were not entitled to engage in extensive pre-hearing discovery. *Third*, the Secretary's Final Decision did, despite Petitioners' allegations to the contrary, take into consideration Rep. Greene's conduct prior to taking the oath of office. *Fourth*, the Secretary did not use an incorrect legal standard for determining whether Rep. Greene "engaged" in insurrection. Finally, on each of their enumerated "issues" for this appeal, Petitioners have failed to show how their substantial rights have been prejudiced, as is required by O.C.G.A. § 21-2-5(e) for this Court to reverse or modify the Secretary's Final Decision.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

I. Petitioners' Challenge to Rep. Greene's Candidacy

Within two weeks of the close of candidate qualifying, an elector who is eligible to vote for a candidate may challenge the qualification of the candidate by filing a written complaint with the Secretary, giving the reasons why the elector believes that the candidate is not qualified to seek and hold the office. O.C.G.A. § 21-2-5(b). Petitioners submitted a written complaint regarding Rep. Greene, challenging her qualifications as a candidate for the office of U.S. Representative on the grounds that she is disqualified pursuant to Section 3 of

the Fourteenth Amendment. (Admin. R., Part 1, OSAH 0005-51.)[2] Pursuant to O.C.G.A. § 21-2-5(a), the Secretary referred the matter to OSAH and requested a hearing before an ALJ. (*Id.*, OSAH 00002.)

In their Notice of Candidacy Challenge (*id.*, OSAH 00005-46), Petitioners allege that, after taking the oath of office as a member of Congress to defend and protect the Constitution, "before, on, and after January 6, 2021, Greene voluntarily aided and engaged in an insurrection to obstruct the peaceful transfer of presidential power." (*Id.*, OSAH 00005.) They contend that Rep. Greene "has a history, leading up to and continuing after her swearing-in as a Member of the U.S. House of Representatives, of advocating for political violence" and that she "made supportive statements about the insurrectionist who stormed the Capitol, describing them as 'patriots,' while falsely claiming that the violence at the Capitol was perpetrated by 'antifa' infiltrators or the FBI." (*Id.*, OSAH 000010, ¶12.)

Petitioners contend that "there is reliable reporting that Representative Greene, who was intimately involved in the plans *inside* the Capitol to reject the electoral votes of several states, was also involved with, at minimum, the

[2] Due to the size of the Administrative Record in this case, the May 26, 2022 filing of the Administration Record was split into Part 1 and Part 2. Citations to OSAH#### refer to specific pages in the Administrative Record. Additional multimedia files that are part of the Administrative Record were also filed with the Clerk of Court, as reflected in the May 25, 2022 Notice of Manual Filing.

planning and promotion of events that led to the insurrection" and that Rep. Greene promoted the event as a sitting member of Congress. (*Id*., OSAH 00042-43, ¶ 83.) When the legal attempts to overturn the election failed, Petitioners allege that Rep. Greene's supporters "did what she had told them for years they had to do, and what they had said they would do: fight – not metaphorically, but violently." (*Id*.) As such, Petitioners asked that the ALJ and the Secretary determine that Rep. Greene is not qualified for office under Section 3 of the Fourteenth Amendment and withhold her name from the ballot. (*Id*., OSAH 00045, Requested Relief.)

II. OSAH Pre-Hearing Proceedings

A. ALJ Beaudrot's rulings on discovery issues

1. Motion to Take Deposition of Rep. Greene

Petitioners' challenge to Rep. Greene's candidate qualifications was initially set for a hearing before OSAH on April 13, 2022.[3] (Admin. R. Part 1, OSAH 00054.) On March 28, 2022, Petitioners filed a Motion to Take a Party Deposition, to depose Rep. Greene on April 11, 2022, which Rep. Greene opposed. (*Id*., OSAH 00130-33; OSAH 00469-508.) By Order entered on April 4, 2022, ALJ Beaudrot denied Petitioners' Motion to take Rep. Greene's

[3] Rep. Greene and Petitioners later agreed that the hearing should be rescheduled to April 22, 2022, to accommodate Rep. Greene's schedule. (*See* Admin. R. Part 1, OSAH 00753.)

deposition. (*Id.*, OSAH 00553.) ALJ Beaudrot noted that proceedings before OSAH are administrative in nature, that depositions in OSAH proceedings are permissible by Court order, and that discovery in OSAH proceedings are the exception, not the rule. (*Id.*) Given the expedited nature of this matter, ALJ Beaudrot held that "it is impracticable and unrealistic to require a deposition of [Rep. Greene] prior to the scheduled hearing date." (*Id.*)

2. Notice to Produce to Rep. Greene

Petitioners also served a Notice to Produce to Rep. Greene, seeking production of documents in response to 24 requests. (Admin. R. Part 1, OSAH 00139-48.) Rep. Greene objected to the Notice to Produce and filed a Motion to Strike because: (1) Rep. Greene had initiated a proceeding in federal court in an attempt to enjoin the OSAH proceeding and the Secretary's consideration of Rep. Greene's qualifications under the Challenge Statute[4]; (2) Rep. Greene

[4] On April 1, 2022, Rep. Greene filed a Complaint, an Emergency Motion for a Temporary Restraining Order, and a Motion for Preliminary Injunction in the U.S. District Court for the Northern District of Georgia, in which she sought to enjoin the application of the Challenge Statute from disqualifying her under Section Three of the Fourteenth Amendment, naming the Secretary and ALJ Beaudrot as the defendants. (*Id.*, OSAH 00229-390; OSAH 00399-427.) By Order dated April 18, 2022, the District Court denied Rep. Greene's Motions, and the state proceeding before OSAH proceeded. *Greene v. Raffensperger*, No. 22-CV-1294-AT, 2022 WL 1136729, at *1 (N.D. Ga. Apr. 18, 2022). Rep. Greene appealed to the Eleventh Circuit, and oral argument is currently set for August 11, 2022.

raised various Constitutional objections regarding the Notice to Produce[5]; (3) Rep. Greene argued that a prima facie case must be made that there was an insurrection – and that Rep. Greene had engaged in such insurrection – and that until that is made, discovery would be irrelevant; (4) Rep. Greene asserted privilege objections, regarding protections of her activities under the First Amendment, as well as statements and materials protected under the Speech and Debate Clause of U.S. Const. Art. I, § 6; and (5) additional specific objections to the requests for production, including, for example, requests that were overbroad, sought immaterial information, were outside the relevant time period, or that were protected by attorney-client privilege. (*Id.*, OSAH 00509-50.) Petitioners responded to Rep. Greene's objections and Motion to Strike the Notice to Produce. (*Id.*, OSAH 00557-70.)

By an Order dated April 8, 2022, ALJ Beaudrot sustained Rep. Greene's objection that it would be "impracticable and unrealistic to require [Rep. Greene] to deliver a significant volume of material prior to the scheduled

[5] Specifically, Rep. Greene argued that: (A) the Challenge Statute being triggered by a "belief" that Rep. Green is unqualified violated the First Amendment; (B) the Challenge Statute shifts the "burden of proving a negative" to the Candidate, as applied to any challenge under Section 3 of the Fourteenth Amendment, in violation of the candidate's right to due process; (C) the Challenge Statute usurps the U.S. House of Representatives' power to determine the qualifications of its members pursuant to U.S. Const. Art. I, § 5; and (D) the Challenge Statute, as applied to Rep. Greene under Section 3 of the Fourteenth Amendment, violates federal law (the Amnesty Act of 1872).

hearing date." (*Id*., OSAH 00571-72.) ALJ Beaudrot observed that Notices to Produce in OSAH proceedings do not serve the same function as they do under the Georgia Civil Procedure Act and its extensive provisions pertaining to discovery. (*Id*., OSAH 00571 (citing *Ga. State Bd. of Dental Exam'rs v. Daniels*, 137 Ga. App. 706, 709 (1976)).) He reiterated that "[d]iscovery in OSAH proceedings is the exception, and not the rule," and held that Notices to Produce under the OSAH rule are not intended to serve as the basis for extensive pre-hearing discovery. (*Id*., OSAH 00571-72.)

B. Decision regarding the burden of proof

Rep. Green filed a Motion in Limine to Set the Burden of Proof and a Motion to Set Burden of Proof with Petitioners, in response to Petitioners' assertions that the burden should lie with Rep. Greene to affirmatively prove that she did not engage in insurrection. (Admin. R. Part 1, OSAH 00651-53; OSAH 00706-09.) Rep. Greene cited to OSAH Rule 616-1-2-.07, which permits the ALJ, prior to the commencement of the hearing, to determine that law or justice requires a different placement of the burden of proof. (*Id*., OSAH 00708 (citing Ga. Comp. R. & Regs. 616-1-2-.07).)

Petitioners opposed Rep. Greene's Motion to Set the Burden of Proof, arguing that (1) the Georgia Supreme Court in *Haynes v. Wells*, 273 Ga. 106, 109 (2000) affirmatively requires candidates to establish their eligibility; and (2) Rep. Greene's reliance on OSAH Rule 616-1-2-.07 was inappropriate

because that rule governs the circumstances under which an agency would bear the burden of proof, and Petitioners are private citizens. (*Id*., OSAH 00718-22.)

In the Prehearing Order entered on April 13, 2022, ALJ Beaudrot granted Rep. Greene's Burden of Proof Motion and held that the burden of proof for the hearing would be on Petitioners. (*Id*., OSAH 00776-77.) He noted that, in the typical challenge to disqualify a candidate under the Challenge Statute, "the issues are straightforward issues of a candidate's age, residency or the like," and "[i]n such cases, it is entirely appropriate that the burden of proof is on the candidate to establish these criteria are met." (*Id*., OSAH 00776 (citing *Haynes*, 273 Ga. at 106).) ALJ Beaudrot also found that "[j]ustice does not require [Rep. Greene] to 'prove a negative.' Justice in this setting requires that the burden of is on Petitioners to establish that [Rep. Greene] is disqualified by showing 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." (Admin. R. Part 1, OSAH 00777.)

III. Hearing and Initial Decision by ALJ Beaudrot

A hearing on this matter before ALJ Beaudrot was held on April 22, 2022, with hours of sworn witness testimony from Rep. Greene and from

Gerard N. Magliocca, Professor of Law at Indiana University, who testified about the history of Section 3 of the Fourteenth Amendment. (*See* Ex. A to Petition for Judicial Review, p. 2.) Documentary evidence, including video recordings and written records proffered by the parties, reviewed by ALJ Beaudrot in advance of the hearing, was admitted, and additional documentary evidence was admitted during the course of the hearing. (Ex. A to Petition, p. 2.) Rep. Greene and Petitioners, respectively, also submitted post-hearing briefs and various supporting exhibits on April 29, 2022, and the record was closed at that time. (*Id*., p. 3.)

In the Initial Decision issued on May 6, 2022, ALJ Beaudrot found that "the evidence in this matter is insufficient to establish that Rep. Greene was disqualified pursuant to Section 3 of the Fourteenth Amendment and that Petitioners failed to prove their case by a preponderance of the evidence. (*Id*., p. 19.) He stated that, to prove that the Disqualification Clause bars Rep. Greene's candidacy, Petitioners must show that: (1) after Rep. Greene took an oath to defend the Constitution (2) she engaged (3) in insurrection against the Constitution. (*Id*., p. 12 (emphasis in original).) Regarding the oath, ALJ Beaudrot noted that the parties stipulated that the first time Rep. Greene took an oath to defend the Constitution was on January 3, 2021, when she was sworn in as a member of Congress, and therefore, "only conduct occurring after taking that oath on January 3, 2021, is relevant in determining whether the

Disqualification Clause applies." (*Id*., p. 12-13.) ALJ Beaudrot also found that statements made by Rep. Greene and actions that she took prior to taking the oath of office "are only relevant, and can only be considered, to the extent they explain her conduct occurring after taking the oath of office and that conduct prior to January 3, standing alone, may not disqualify Rep. Greene but may be used to show that conduct after January 3 amounted to "engag[ing] in insurrection or rebellion." (*Id*., p. 13.)

ALJ Beaudrot stated that there "appear to be two judicial opinions that have considered the meaning of 'engage' as used in the Disqualification Clause. (*Id*. (citing *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 the insurrectionists' perspective] termination") and *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").) ALJ Beaudrot observed that "[i]t appears that it is not necessary that an individual personally commit an act of violence to have 'engaged' in insurrection." (Ex. A to Petition, p. 13 (citations omitted).) ALJ Beaudrot also noted that Rep. Greene provided an example of the use of the word "engage" in a similarly-worded 1867 statute regarding disenfranchisement and that the Attorney General construed that statute to require "some direct overt act, done with the intent to further the rebellion."

(*Id*., p. 14 (quoting 12 Op. Att'y Gen. 141, 164 (1867).) ALJ Beaudrot held that, on the balance, it appears that the term "engage" includes overt actions and, in certain limited contexts, words used in furtherance of the insurrections and associated actions. (Ex. A to Petition, p. 14.)

ALJ Beaudrot observed that Petitioners' argument is 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" and that Petitioners contend that "Rep. Greene was planning and furthering insurrection long before she took office," a plan which began as soon as it was clear that President Trump would lose the 2020 election. (*Id*., p. 14-15.) However, ALJ Beaudrot found that Petitioners "produced insufficient evidence" to show, under "[w]hatever the exact parameters of the meaning of 'engage' as used in the 14th Amendment," that Rep. Greene "engaged" in an insurrection after she took the oath of office on January 3, 2021 because Petitioners "presented no persuasive evidence Rep. Green took <u>any</u> action – direct physical efforts, contribution of personal services or capital, issuance of directives or marching orders, transmission of intelligence, or even statements of encouragement – in furtherance thereof on or after January 3, 2021." *(Id*., p. 15 (emphasis in original).)

Furthermore, ALJ Beaudrot found that there was no evidence that Rep. Greene participated in the invasion of the Capitol itself and that, "[t]o the contrary, 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." (*Id.*) He also found no evidence showing that, after January 3, 2021, Rep. Greene communicated with or issued directives to persons engaged in the invasion and that "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." (*Id.*)

ALJ Beaudrot found that, "prior to January 3, 2021, Rep. Greene engaged in months of heated political rhetoric clothed with strong 1st Amendment protections." (*Id.*, p. 16 (citations omitted).) However, ALJ Beaudrot found that 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." (*Id.*) He determined that, although Rep. Greene's "public statements and heated rhetoric may well have contributed to the environment that ultimately led to the Invasion," the "expressing of 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." (*Id.*)

The only conduct by Rep. Greene which ALJ Beaudrot found that "could even possibly be interpreted as triggering the Disqualification Clause," (*id.*), was a statement made by Rep. Greene during a Newsmax interview on January 5, 2021, in which Rep. Greene discussed her plans to challenge the results of the 2020 presidential election by supporting challenges to the certification of Electoral College votes. (*Id.*, p. 5.) When Rep. Greene was asked, "What is your plan tomorrow? What are you prepared for?" she 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." (*Id.*) ALJ Beaudrot found that, if this statement by Rep. Greene "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 be an overt act and one that occurred after she took her oath as a Representative." (*Id.*, p. 16.)

Based on the evidence, ALJ Beaudrot was unpersuaded that the "1776 moment" statement was "a coded call to violent insurrection on January 6, 2021," although it could be considered heated political rhetoric, encouragement to supporters of efforts to prevent certification of the election of President Biden, or encouragement to attend the Save America Rally or other rallies and to demonstrate against the certification of the election results. (*Id.*) ALJ Beaudrot found that it was "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." (*Id*., p 16-17.) Because ALJ Beaudrot found that Rep. Greene did not "engage" in the January 6 invasion of the Capitol, he did not rule on the question of whether the events of January 6 constituted an "insurrection" within the meaning of the Fourteenth Amendment. (*Id*., p. 18.)

Regarding Rep. Greene's constitutional claims, ALJ Beaudrot found that "Rep. Greene has made and properly preserved various objections, including constitutional objections, to this proceeding and the conduct of the hearing," noting that these claim were initially identified in Rep. Greene's Motion to Dismiss (Admin. R. Part 1, OSAH 00428-68), were renewed in her Motion to Request Ruling on Constitutional Objections (*id*., OSAH 00655-72), and enumerated again in her post-hearing brief (*id*., OSAH 01160-1278). (Ex. A to Petition, p. 18-19.) ALJ Beaudrot opined that he, as an OSAH judge, "is not permitted to invalidate or decline to follow a statute based upon a finding that it is unconstitutional" but that an OSAH judge is "permitted to develop the record as to relevant issues of constitutional validity and make findings of facts as to those issues." (*Id*., p. 18 (citing Ga. Comp. R. & Regs. 616-1-2-.22(3)). As

such, ALJ Beaudrot stated that "Rep. Greene's objections are noted, have been properly raised, and have been preserved for appeal." (Ex. A to Petition, p. 19.)[6]

IV. Final Decision by the Secretary

On May 6, 2022, the Secretary issued the Final Decision, adopting the Initial Decision and the Findings of Fact and Conclusions of Law by ALJ Beaudrot. (Ex. B to Petition, p. 2.) Pursuant to the Secretary's Final Decision, Rep. Greene is qualified to be a candidate for the office of U.S. Representative for Georgia's 14th Congressional District. (*Id.*)

STANDARD OF REVIEW

In considering the Petition for Judicial Review, 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;

[6] The Secretary intends to address Rep. Greene's affirmative defenses, counterclaims, and cross-claims asserted in her Answer to the Petition for Judicial Review in a separate filing.

> (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. Here, Petitioners contend that the Secretary's final decision "was made upon unlawful procedures and affected by other errors of law." (Petition, p. 9, ¶30.

ARGUMENT

I. The burden to prove whether Rep. Greene is disqualified pursuant to Section 3 of the Fourteenth Amendment was properly placed on Petitioners.

Petitioners concede that OSAH Rule 616-1-2-.07(2) permits an administrative law judge to shift the burden of proof in a matter when "law or justice requires," as ALJ Beaudrot did here. However, they argue that this administrative rule should not apply to a candidate challenge based on the Georgia Supreme Court's decision in *Haynes v. Wells*, 273 Ga. 106, 108-09 (2000). (Petition, p. 9-11.)

But the *Haynes* decision does not foreclose the ability of an ALJ to shift the burden of proof in a candidate qualification challenge where justice requires. As ALJ Beaudrot observed, in the typical challenge to disqualify a candidate under the Challenge Statute, "the issues are straightforward issues of a candidate's age, residency or the like," and "[i]n such cases, it is entirely appropriate that the burden of proof is on the candidate to establish these

criteria are met." (Admin. R. Part 1, OSAH 00776 (citing *Haynes*, 273 Ga. at 106).) Indeed, the issue in *Haynes* was the straightforward issue of whether the candidate was eligible to vote in the district because he was not a resident and was, thus, ineligible to run for the district's school board seat. 273 Ga. at 106. The Supreme Court held that, because Haynes was required under the Elections Code to file an affidavit attesting that he was qualified to run for office, and because the facts of his residency were known to the candidate, the burden of proof should be on him to demonstrate his qualifications. *Id.* at 108-09.

Here, under the *Haynes* rubric, Rep. Greene has an affirmative obligation to establish her qualifications and eligibility for U.S. Representative, which are the three criterion to serve as a U.S. Representative listed in U.S. Const. art. I, § 2, cl. 2, namely: (1) that she be at least 25 years old; (2) that she has been a United States citizen for at least seven years; and (3) that she is an inhabitant, at the time of the election, of the state in which she is chosen. U.S. Const. art. I, § 2, cl. 2. However, as noted above, this is not a "typical" candidate qualification challenge, which would turn on straightforward issues such as the candidate's age or place of residence. As ALJ Beaudrot held, justice in this case called for the burden of prove to be on the challengers to prove that Rep. Greene, after taking the oath of office, engaged in insurrection and is, until such disability is removed by Congress,

disqualified from office pursuant to Section 3 of the Fourteenth Amendment. To place the burden of proof on Rep. Greene to prove that she did not engage in insurrection would, as Rep. Greene argued, place a burden on her to prove a negative. The inherent justness of placing the burden of proof on Petitioners in this case is further supported by the seriousness of their allegations against Rep. Greene. By contending that she "engaged" in an insurrection, Petitioners are, in essence, accusing Rep. Greene of committing a felony under federal law. *See* 18 U.S.C. § 2383 ("Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be fined under this title or imprisoned not more than ten years, or both; and shall be incapable of holding any office under the United States.") It is entirely unclear how Petitioners can support an argument that "law or justice" would require a person accused of a crime to prove his or her innocence or disprove his or her alleged guilt by a preponderance of the evidence.

Even if ALJ Beaudrot's decision to place the burden of proof on Petitioners resulted in the Secretary's Final Decision being "made upon unlawful procedures" or "affected by other error of law," Petitioners have still failed to show how "substantial rights of [Petitioners] have been prejudiced" by this alleged error, as is required for this Court to reverse or modify the Secretary's decision pursuant to O.C.G.A. § 21-2-5(e). Thus, even if ALJ

Beaudrot's decision to place the burden of proof on Petitioners was in error, it would, at worst, be a harmless error, in light of Rep. Greene's sworn testimony and the lack of evidence from Petitioners to support their theory.

Petitioners also argue that ALJ Beaudrot's decision to place the burden of proof on Petitioners was erroneous because "all the relevant evidence was in Greene's control but the administrative law judge blocked the petitioners from all discovery." (Petition, p. 11.) As a preliminary matter, Petitioners stipulated that "[a] group of people that did not include [Rep. Greene] unlawfully entered the U.S. Capitol on January 6, 2021." (Admin. R. Part 1, Stipulated Facts, OSAH 00912.) Furthermore, ALJ Beaudrot did not block Petitioners from all discovery, but rather, as discussed below, he entered an appropriate order regarding Petitioners' Notice to Produce to Rep. Greene, as discussed *infra*, but still permitted Petitioners to engage in a thorough and sifting testimonial examination of Rep. Greene during the administrative proceeding.

II. Petitioners were not entitled to engage in extensive discovery in the OSAH proceeding.

Petitioners also contend that ALJ Beaudrot erred by quashing their Notice to Produce to Rep. Greene. But Petitioners fail to articulate how their substantial rights were prejudiced by the ALJ's decision not to permit extensive discovery in the challenge proceeding.

As a general rule, discovery is not permitted in administrative proceedings as it is in cases under the Civil Practice Act. (Admin. R. Part 1, OSAH 00571 (ALJ Beaudrot, noting that "[d]iscovery in OSAH proceedings is the exception, not the rule").) OSAH Rule 616-1-2-.19 provides that a party may serve a notice to produce in order to compel production of documents or objects in the possession, custody, or control of another party, in lieu of serving a subpoena. Like OSAH's procedures for quashing a subpoena, a notice to produce may be quashed by the ALJ if it appears that: (1) the notice to produce is unreasonable or oppressive; (2) the testimony, documents, or objects sought are irrelevant, immaterial, or cumulative; (3) the notice to produce is unnecessary to a party's preparation and presentation of its position at the hearing; or (4) basic fairness dictates that the notice to produce should not be enforced. OSAH Rule 616-1-2-.19 (1)(e) and (2)(c). In his April 8, 2022 Order, ALJ Beaudrot sustained Rep. Greene's objection that it would be "impracticable and unrealistic to require [Rep. Greene] to deliver a significant volume of material prior to the scheduled hearing date." (Admin. R. Part 1, OSAH 00571-72.) This rationale fits well within the parameters of at least categories (1) and (4) above regarding the grounds under which a notice to produce may be quashed in an OSAH proceeding.

Furthermore, OSAH proceedings are not subject to the Georgia Civil Procedure Act and its extensive provisions pertaining to discovery. (*Id.*, OSAH

00571 (citing *Ga. State Bd. of Dental Exam'rs v. Daniels*, 137 Ga. App. 706, 709 (1976)).) The Civil Practice Act simply does not apply to proceedings under the Georgia Administrative Procedure Act. *Georgia State Bd. of Dental Examiners*, 137 Ga. App. at 709. Indeed, Petitioners' challenge was conducted pursuant to the Georgia Administrative Procedure Act. *See* O.C.G.A. § 21-2-5(b) (providing the Secretary will, in response to a complaint under the Challenge Statute, request "a hearing on the matter before an administrative law judge of the Office of State Administrative Hearings pursuant to Article 2 of Chapter 13 of Title 50"); O.C.G.A. § 50-13-1 (stating that this chapter of Code is the "Georgia Administrative Procedure Act.")

The discovery provisions of the Civil Practice Act do not apply to a proceeding under the Administrative Procedure Act, and Petitioners have failed to cite to any other law that would support their contention that pre-hearing discovery is required by law. *Fulton Cnty. Bd. of Assessors v. Saks Fifth Ave., Inc.*, 248 Ga. App. 836, 838–39 (2001) ("Discovery under the Civil Practice Act does not apply to a proceeding under the Administrative Procedure Act and is not otherwise authorized by law in this matter.") (citations omitted). Petitioners did not have a right, much less a "substantial right," to the production of documents that they sought from Rep. Greene through the Notice to Produce. Furthermore, as ALJ Beaudrot held, notices to produce under the

OSAH rule are not intended to serve as the basis for extensive pre-hearing discovery. (Admin. R. Part 1, OSAH 00572.)

Furthermore, notably absent from the Petition are any specific allegations regarding how "substantial rights of [Petitioners] have been prejudiced" by the ALJ's decision regarding discovery issues, which would be required for this Court to modify or reverse the Secretary's decision pursuant to O.C.G.A. § 21-2-5(e). The only time the word "prejudiced" seems to appear in the Petition is when Petitioners quote the text of O.C.G.A. § 21-2-5(e), in the "Grounds for Review" section. (Petition, p. 8-9.) Petitioners have not, and cannot, establish that they have a "substantial right" to the pre-hearing discovery that they sought in this case, nor can they establish that they were prejudiced by not being able to engage in extensive discovery prior to the OSAH hearing. During the OSAH hearing on April 22, 2022, testimony from Rep. Greene represented a significant amount of the evidentiary proceedings. (Admin. R. Part 2, OSAH 01684-1835.) Petitioners could have availed themselves of other tools under the OSAH rules to prove their case, including subpoenaing additional witnesses – which they elected not to do. Petitioners have failed completely to establish grounds for this Court to reverse or modify the Secretary's decision in this matter.

III. The Secretary's Final Decision did not fail to consider Rep. Greene's conduct prior to taking the oath of office.

There is no requirement that an ALJ's findings of fact make specific reference to all evidence presented at the hearing. *Rothell v. Waffle House, Inc.*, 171 Ga. App. 199, 199 (1984) (citing *Union Carbide Corp. v. Coffman*, 158 Ga. App. 360, 360 (1981)). Petitioners fail to assert any evidence whatsoever that supports their barebones contention that examples of pre-oath conduct and statements by Rep. Greene demonstrate that, by saying in an interview on January 5, 2021, that "this is our 1776 moment," Rep. Greene was giving "a marching order or directive to disrupt or obstruct a congressional proceeding and forcibly prevent the peaceful transfer of power." (*Id.*, p. 15.) Reaching Petitioners' conclusion requires a leap that is unsupported by the evidence in this case. Furthermore, Petitioners have failed to establish how the omission of a discussion of certain evidence in ALJ Beaudrot's summary of the voluminous administrative record in this case prejudiced Petitioners' substantial rights, which is a required finding under the Challenge Statute for this Court to reverse or modify the Secretary's decision. *See* O.C.G.A. § 21-2-5(e).

IV. The Secretary employed the correct legal standard for determining whether Rep. Greene "engaged" in insurrection.

Petitioners also claim that ALJ Beaudrot applied an incorrect legal standard because he "concluded, as a matter of law, that the petitioners had

failed to establish that Greene had 'engaged' in insurrection within the meaning of the Disqualification Clause because they had failed to show 'months of planning and plotting to bring about the Invasion,' a 'months-long enterprise' culminating in '[a] call to arms for consummation of a pre-planned violent revolution.'" (Petition, p. 16.) Petitioners contend that the correct legal definition for the term "engagement" is "a voluntary effort to assist the Insurrection . . . and to bring it to a successful [from insurrectionists' perspective] termination," i.e., "[v]oluntarily aiding the rebellion by personal service or by contributions, other than charitable, of anything that was useful or necessary." (*Id*., p. 16-17.)

However, in the Initial Decision, ALJ Beaudrot acknowledged the two judicial opinions that have considered the meaning of the word "engage" as used in the Disqualification Clause, including the language cited by Petitioners. (Ex. A to Petition, p. 13 (citing *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"); *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") (footnotes omitted)). ALJ Beaudrot ultimately found that "[w]hatever 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." (Ex. A to Petition, p. 16 (emphasis added).) ALJ Beaudrot found the difficulty with Petitioners' theory to be the lack of actual evidence tied to Rep. Greene, regardless of the specific definition of the term "engage." (*Id.*)

Petitioners contend that "even if Greene did not learn about any plan to unlawfully challenge the election and attack the Capitol until she voiced her support for it on January 5, 2021, her encouragement would still constitute 'voluntary aiding' and therefore engaging in insurrection" and that "even if the insurrectionist plan was not hatched until January 5, shortly before Greene urged her support, that too would amount to 'voluntary aiding' and therefore engaging in insurrection." (Petition, p. 17.) However, Rep. Greene did not take the oath of office until January 3, 2021, and it is Petitioners who have repeatedly referred to conduct and statements by Rep. Greene from months prior, even arguing in this action that ALJ Beaudrot should have given more consideration to those pre-oath comments and actions by Rep. Greene. (*Id.*, p. 14-16.)

Furthermore, Petitioners have failed to show how this alleged error regarding the legal standard for "engagement" in an insurrection prejudiced Petitioners' substantial rights, as would be required for this Court to reverse

or modify the Secretary's decision pursuant to O.C.G.A. § 21-2-5(e). ALJ Beaudrot found that Petitioners "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." (Ex. A to Petition, p. 15 (emphasis in original).) Petitioners ask this Court to make an unsubstantiated leap to reverse the Secretary's decision to adopt ALJ Beaudrot's Initial Decision, Findings of Fact, and Conclusions of Law, and the Petition should, therefore, be denied.

CONCLUSION

The Secretary respectfully requests that this Court deny the Petition for Judicial Review.

Respectfully submitted this 24th day of June, 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 RESPONSE TO THE PETITION FOR JUDICIAL REVIEW AND BRIEF IN SUPPORT THEREOF** 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: June 24, 2022.

/s/ Elizabeth Vaughan
Elizabeth Vaughan
Assistant Attorney General