No. 22-11299

In the
United States Court of Appeals
For the Eleventh Circuit

MARJORIE TAYLOR GREENE,

Plaintiff – Appellant

v.

GEORGIA SECRETARY OF STATE,

Defendant – Appellee

and

DAVID ROWAN *et al.*,

Intervenor-Defendants – Appellees

Appeal from the United States District Court
For the Northern District of Georgia

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and
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I hereby certify under Eleventh Circuit Rules 26.1, 26.1-2, and 26.1-3 that these persons and entities have or may have an interest in the outcome:

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Statement Regarding Oral Argument

This interlocutory appeal is a constitutional challenge to an on-going state proceeding. Appellant Marjorie Taylor Greene, who is the incumbent member of the United States House of Representatives from Georgia's Fourteenth Congressional District, unsuccessfully sought preliminary injunctive relief halting a challenge under state law to her qualifications to seek re-election to that office. The appellees are the Secretary of State and other state officials who enforce candidate qualifications. Five of Greene's constituents who brought the underlying challenge intervened as defendants in the district court and are appellees here as well (the "Rowan intervenors").

Greene filed a motion to expedite this appeal, and this Court granted it in part. The Court directed the clerk to place this appeal on the next available argument calendar, and it has now been set for August 11, 2022. Although Greene's challenge to Georgia's procedures for determining candidate qualifications lacks merit, the Rowan intervenors agree that the constitutional issues raised in this appeal are worthy of oral argument.

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Statement of Jurisdiction

This is an interlocutory appeal from an order denying a preliminary injunction. Greene filed her notice of appeal on the next day. This Court therefore has jurisdiction under 28 U.S.C. § 1292(a)(1).

The district court had subject-matter jurisdiction over Counts I through III of Greene's complaint because those claims present federal questions. 28 U.S.C. § 1331.

The Rowan intervenors disagree with Greene's assertion that the district court found no subject-matter jurisdiction over her fourth count. Had the court so found, it would have had to dismiss that claim for lack of jurisdiction. But it did not. Hence there is no final judgment on Count IV.

Statement of the Issues

Greene's interlocutory appeal presents two issues: (1) whether the Rowan intervenors have standing;[1] and (2) whether the district

[1] Greene failed to list the standing issue in the "Statement of Issues" section of her brief or in her civil appeal statement, but she makes the argument in her brief.

court abused its discretion when it denied Greene's motion for a preliminary injunction.

Statement of the Case

I. Georgia's Challenge Procedures

Georgia law allows "any elector" who is eligible to vote for a candidate to "challenge the qualifications of the candidate by filing a written complaint with the Secretary of State giving the reasons why the elector believes the candidate is not qualified to seek and hold the public office for which he or she is offering." O.C.G.A. § 21-2-5(b). The statute requires the Secretary of State to notify the candidate of the basis for any such challenge and to refer the challenge to an administrative law judge for a hearing under the rules of the Office of State Administrative Hearings. *Id.; see also* O.C.G.A. § 50-13-41 (setting forth hearing procedures and the powers of the administrative law judge); Ga. Comp. R. & Regs. R. 616-1-2 (Rules of the Office of State Administrative Hearings). After the hearing, the administrative law judge reports her or his findings and conclusions to the Secretary of State. O.C.G.A. § 21-2-5(b).

At that point, the Secretary of State "shall determine if the candidate is qualified to seek and hold the public office for which such candidate is offering." *Id.* § 21-2-5(c). If the Secretary determines that the candidate is not qualified, the statute requires him to withhold the candidate's name from the ballot or to strike the candidate's name from the ballots if the ballots have already been printed. *Id.* But if there isn't enough time to withhold or to strike the candidate's name from the ballot, "a prominent notice shall be placed at each affected polling place advising voters of the disqualification" and "all votes cast for such candidate shall be void and shall not be counted." *Id.*

The candidate or an elector who filed the challenge may appeal the Secretary's decision to the Fulton County Superior Court. *Id.* § 21-2-5(e). That court may order an immediate stay of the Secretary's decision "upon appropriate terms for good cause shown." *Id.* Appellate review is conducted without a jury and is confined to the record. *Id.* The court may affirm the Secretary's decision or remand the case for further proceedings. *Id.* The court

may also reverse or modify the Secretary's decision if it determines that the decision is:

> (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.

Finally, any "aggrieved party" can appeal the final judgment of the superior court to the Georgia Court of Appeals or Georgia Supreme Court as provided by law. *Id.*

II. The Challenge to Greene's Qualifications

Marjorie Taylor Greene is the United States Representative for Georgia's Fourteenth Congressional District. (II:38 at 411.)[2] Two weeks after she filed to run for re-election to that office, five of Greene's constituents filed a challenge to her qualifications under O.C.G.A. § 21-2-5. (II:38 at 412.)

The challengers asserted that Greene is ineligible to serve as a member of Congress because she "voluntarily aided and engaged in an insurrection to obstruct the peaceful transfer of presidential power." (*Id.*) The challenge was based on the Disqualification Clause of the Fourteenth Amendment:

> 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.

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[2] Citations to the Appellant's Corrected Appendix are in the form (Volume:Tab at Page.) The page number refers to the number Bates-stamped in the lower right corner of the page. Each citation is hyperlinked to the electronic document and page cited.

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

U.S. Const. amend. XIV, § 3.

The Secretary referred the challenge to an administrative law judge as required by law and requested an expedited hearing. (II:38 at 412.) Administrative Law Judge Charles R. Beaudrot was assigned to hear the matter. (*Id.*) (II:38 at 412.)

Greene also filed a motion in limine to shift the burden of proof onto the petitioners. (III:48-1 at 522.) The administrative law judge granted Greene's motion to shift the burden to the petitioners but carried her motion to dismiss with the case. (*Id.* at 523-24.)

The administrative law judge held an evidentiary hearing on April 22. (State Appellee's Supp. App. at 83 (Tab 68-1).) Greene testified on her own behalf. (*Id.*) The parties filed post-hearing briefs on April 29, and the record was closed at that time. (*Id.* at 84.)

On May 6, the administrative law judge issued an initial decision concluding that Greene is qualified to be a candidate for United States Representative. (*Id.* at 100.) The court found that,

assuming that the events culminating on January 6, 2021, constituted an "insurrection" within the meaning of the Disqualification Clause, the petitioners had not proven that Greene "engaged" in that insurrection. (*Id.* at 99.) In light of that conclusion, the court declined to decide whether the events on January 6 did, in fact, constitute an "insurrection". (*Id.*) It also declined to rule on Greene's claim that the challenge statute, as applied to her, violated the 1872 Amnesty Act. (*Id.* at 100.) Finally, the court noted that administrative law judges are not permitted to rule on constitutional defenses, and it therefore declined to rule on the various constitutional defenses that she had asserted in her motion to dismiss. (*Id.* at 99-100.) The Secretary of State affirmed the administrative law judge's initial decision on the same day. (*Id.* at 102-03 (Tab 68-2).)

Ten days later, the challengers appealed the Secretary's decision to the Fulton County Superior Court. (*Id.* at 105-23 (Tab 68-3).) Greene did not appeal but moved to intervene in the challengers' appeal. (*Id.* at 128-39 (Tab 68-4).) The court granted Greene's motion to intervene, and, as of the date of this brief, the

petitioners' appeal remain pending in the Fulton County Superior Court.

III. Greene's Federal Lawsuit

A few days after the challengers filed their challenge with the Secretary of State, Greene filed suit against the Secretary and Judge Beaudrot in federal court to stop the state proceeding. (I:3 at 21.) She asserts claims under the First and Fourteenth Amendments (Counts I and II), Article I, Section 5 of the United States Constitution (Count III), and the 1872 Amnesty Act (Count IV). (*Id.* at 36-43.)

In Count I, Greene alleges that the challenge statute violates her right to run for political office by allowing voters to initiate a challenge to her qualifications based on the challengers' claim that she is unqualified. (*Id.* at 36-38.) Count II alleges that the challenge statute, as applied here, violates the Fourteenth Amendment's Due Process Clause because it places the burden on the candidate to prove that she did not engage in an insurrection in response to a challenger's claim that she did. (*Id.* at 39-40.) In

Count III, Greene claims that the challenge statute unconstitutionally usurps Congress's responsibilities under Article I, Section 5, which instructs that each House "shall be the Judges of the Elections, Returns and Qualifications of its own Members." (*Id.* at 40-42.) Finally, in Count IV, Greene alleges that the state proceeding violates the 1872 Amnesty Act. (*Id.* at 42-43.)

Along with her complaint, Greene filed a motion for a temporary restraining order and preliminary injunction asking the district court to enjoin the state proceeding. (I:4 at 109; I:5 at 176.) The challengers intervened as of right as defendants. (II:33 at 398.) After an expedited briefing schedule, the district court heard arguments from all parties. (III:Hearing at 419-98.)

On April 18, the district court issued a 73-page decision denying injunctive relief. (III:52 at 541.) Methodically reviewing each of Greene's claims, the court concluded that Greene had failed to establish that she was likely to succeed on any of them. (*Id.* at 612.)

The district court first addressed Greene's claim under the 1872 Amnesty Act (Count IV). (*Id.* at 560.) The court found that

Greene had not established a likelihood of success on that claim because she had not shown that the 1872 Amnesty Act creates an express or implied right of action for private individuals to enforce the statute in federal court. (*Id.* at 564.) In fact, Greene had not even argued that the Act itself confers a right of action but had rather relied during oral argument on the private right of action available under 42 U.S.C. § 1983. (III:52 at 562.) But, the district court noted, Greene's complaint brought Count IV directly under the 1872 Amnesty Act—not Section 1983—and Greene had made no showing that Congress in 1872 had intended to create a private right of action in federal court. (*Id.* at 563.)

The district court turned next to Greene's First and Fourteenth Amendment claims (Counts I and II). (*Id.* at 578.) The district court applied the familiar balancing test set out in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). Under that test, the level of scrutiny varies on a sliding scale with the extent of the asserted injury. *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

The district court first determined that Greene's challenge to the burden of proof under the challenge statute (Count II) was a

"nullity" because the administrative law judge had granted Greene's motion to shift the burden onto the challengers. (III:52 at 585.) As to Greene's claim about having to defend her qualifications based on a challenger's mere belief (Count I), the district court found that the burden of doing so is not severe. (*Id.* at 593.) Georgia law provides for a streamlined review process, the court found, as well as ways to weed out frivolous challenges and to shift the burden of proof onto a challenger when appropriate. (*Id.* at 586.) Under those circumstances, the court held that the "minimal burdens" imposed by the challenge process "are easily justified by the important state regulatory interest in the orderly administration of elections." (*Id.* at 604.)

Finally, the district court assessed Greene's claim that only Congress can determine whether a candidate is qualified to be elected to the United States House of Representatives (Count III). (*Id.*) While acknowledging the power of each house of Congress to act as "the Judge of the Elections, Returns and Qualifications of its own members" under Article I, Section 5 of the Constitution, the district court concluded that Greene had not established that

Georgia lacks authority to enforce existing constitutional qualifications under the states' authority to regulate the time, place, and manner of federal elections provided in Article 1, Section 4 of the Constitution. (*Id.* at 611.) The court relied, in particular, on the Supreme Court's decision in *Roudebush v. Hartke*, 405 U.S. 15, 24 (1972), which held that a state's recount procedures did not usurp the Senate's power to judge the election of its own members. (III:52 at 606.) The court also relied on decisions of two federal appellate courts that have held that states have the power under Article 1, Section 4 to exclude from the ballot constitutionally unqualified candidates for President. (*Id.* at 607.) In light of Greene's failure to cite any persuasive legal authority to the contrary, the court concluded that Greene had not established a likelihood of success on Count III. (*Id.* at 611.)

Having thus determined that Greene had not established a likelihood of success on any of her claims, the district court denied the motion without considering the other prerequisites for injunctive relief. (*Id.* at 612.)

Greene appealed the decision one day later. (III:53 at 614.) She moved to expedite the appeal but did not seek an injunction in this Court. The Court granted her motion to expedite, and this appeal is currently set for argument on August 11.

As of the date of this brief, Greene remains on the general-election ballot, and voting is set to begin on September 20.

Standards of Review

A preliminary injunction is "an extraordinary and drastic remedy not to be granted unless the movant clearly established the 'burden of persuasion' as to each of the four prerequisites" for an injunction. *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc) (cleaned up). This Court reviews a district court's denial of preliminary injunctive relief for an abuse of discretion. *Id.* at 1178. The Court reviews any underlying legal conclusions *de novo* and any factual findings for clear error. *Independent Party of Fla. v. Secretary of State*, 967 F.3d 1277, 1280 (11th Cir. 2020).

Standing is reviewed *de novo*. *Wood v. Raffensperger*, 981 F.3d 1307, 1313 (11th Cir. 2020).

Summary of the Argument

The Court should affirm the denial of a preliminary injunction because Greene's challenge to Georgia's procedures for determining candidate qualifications has no merit. The district court correctly found that those procedures impose only a minimal burden on Greene's right to run for office, and that minimal burden is easily justified by the State's legitimate interest in preventing ineligible candidates from appearing on the ballot. The district court also correctly determined that those procedures are well within the State's broad powers under the Elections Clause and do not usurp the power of Congress to make its own independent judgment about a candidate's qualifications. Finally, the district court correctly determined that the 1872 Amnesty Act does not provide an implied private right of action under which Greene can assert her claim that the Amnesty Act of 1872 granted her prospective amnesty for engaging in an insurrection more than 150 years later. But even if the Act did provide a private right of action, Greene's interpretation of the Act is at odds with its text and far-fetched at best.

Argument

I. The Rowan intervenors have standing.

Greene first argues that the Rowan intervenors lack standing to defend against Greene's claim that the 1872 Amnesty Act precludes their challenge to her qualifications (Count IV). (Appellant's Br. 13-15.) She asserts that the intervenors have only a generalized interest in upholding Georgia's challenge statute and that such interest is insufficient to confer standing.

Not so. The intervenors' interest in this case is direct, substantial, and legally protectible. Georgia law gives them a statutory right to challenge Greene's qualifications because they are eligible to vote for her. *See* O.C.G.A. § 21-2-5(b). And, having already filed a challenge, Georgia law gives them a number of other statutory rights, such as the right to have that challenge heard before an administrative law judge, O.C.G.A. § 50-13-41(a)(1); the right to engage in discovery, Ga. Comp. R. & Regs. R. 616-1-2-.19 and -.20; the right to present evidence at the hearing, Ga. Comp. R. & Regs. R. 616-1-2-.22; the right to receive a decision from the administrative law judge, O.C.G.A. § 50-13-41(c); and the right to

appeal the decision of the administrative law judge to the Fulton County Superior Court and the Georgia Supreme Court, O.C.G.A. § 21-2-5(e). The district court found these rights to be sufficient for purposes of intervention as of right (II:33 at 403.), and they are likewise sufficient to confer standing to defend against Greene's appeal. *See Cawthorn v. Amalfi*, No. 22-1251, ____ F.4th _____, 2022 WL 1635116 at *4 (4th Cir. May 24, 2022) (holding that challengers to a congressional candidate's qualifications have a personal stake in the candidate's federal litigation to stop the challenge). Greene's requested injunction, moreover, would prevent the Rowan intervenors, personally, from exercising those statutory rights in the still-pending state proceeding. This appeal therefore affects the Rowan intervenors in a particularized way that is different from other Georgians.

Greene's reliance on *Hollingsworth v. Perry*, 570 U.S. 693 (2013), and *Diamond* v. *Charles*, 476 U.S. 54 (1986), is misplaced. In both cases, private individuals were the *appellants*—not the appellees—and Greene has identified no authority suggesting that an intervenor appellee must independently establish standing on

appeal. In addition, the private intervenors in those cases sought only to defend the constitutionality of the state laws at issue. They had no role in the challenged laws' enforcement, and the outcome would have affected them no differently than any other person subject to the laws at issue. But that is obviously not the case here, where Georgia law gives the Rowan intervenors a role in enforcing candidate qualifications and their challenge remains pending. The Rowan intervenors here thus have precisely the sort of particularized interest that the private intervenors lacked in *Hollingsworth* and *Diamond*.

II. The district court did not abuse its discretion when it denied a preliminary injunction.

To obtain a preliminary injunction, a plaintiff must show: (1) a substantial likelihood of success on the merits of her claim; (2) a substantial threat of irreparable harm in the absence of injunctive relief; (3) that the threatened injury outweighs the harm that an injunction might cause the defendants; and (4) that granting the injunction would be in the public interest. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Swain v. Junior*, 961 F.3d

1276, 1284-85 (11th Cir. 2020). This Court's inquiry here can begin and end with the first requirement. Because Greene failed to establish a substantial likelihood of success on any of her claims, the district court correctly denied her motion for a preliminary injunction.

A. Count I: The First and Fourteenth Amendments

Greene first claims that Georgia's challenge process unconstitutionally burdens her "First Amendment right to run for political office." (I:3 at 36.) This claim requires the Court to apply the balancing test set forth in *Anderson v. Celebrezze*:

> First, a court must evaluate the character and magnitude of the asserted injury to rights protected by the First and Fourteenth Amendments. Second, it must identify the interests advanced by the State as justifications for the burdens imposed by the rules. Third, it must evaluate the legitimacy and strength of each asserted state interest and determine the extent to which those interests necessitate the burdening of the plaintiffs' rights.

Bergland v. Harris, 767 F.2d 1551, 1553-54 (11th Cir. 1985) (paraphrasing *Anderson*, 460 U.S. at 789; *accord Cowen v. Georgia Sec'y of State*, 22 F.4th 1227, 1231 (11th Cir. 2022).

Under the *Anderson* test, the level of scrutiny varies on a sliding scale with the extent of the asserted injury. When, at the low end of the scale, the law "imposes only 'reasonable, nondiscriminatory restrictions' upon First and Fourteenth Amendment rights, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788, 788-89 n.9). But when the law places "severe" burdens on the rights of political parties, candidates, or voters, "the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Burdick,* 504 U.S. at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

The district court applied the *Anderson* test and found that the challenge process imposes only a minimal burden on Greene's constitutionally protected, though limited, right to run for office. (III:52 at 604.) That finding is not clearly erroneous.

In the district court, Greene offered no evidence to support her contention that the challenge process is burdensome. Nor did she cite any cases that had assessed the burden of similar statutes. The district court correctly observed that the challenge process does

not appear unduly burdensome on its face; it consists of a streamlined process under Georgia's ordinary rules of administrative procedure. (*Id.* at 587-88.) At oral argument, Greene argued that the timing of the process was burdensome because it would be impossible to complete the appellate review process before the primary election. (*Id.* at 588.) But the district court correctly noted that candidate challenges are handled swiftly and that Greene would remain on the primary ballot in any event. (*Id.* at 589-90.) Lastly, the district court compared the burden of having to go through the challenge process to several other burdens that the Eleventh Circuit has found not to be severe. (*Id.* at 591-93.) In *Cowen v. Georgia Secretary of State*, for example, this Court found no severe burden from a ballot-access petition requirement that requires independent and third-party candidates for United States Representative to gather tens of thousands of signatures to appear on the ballot. 22 F.4th at 1230. The district court correctly determined that Georgia's challenge process is not more burdensome than that.

Greene nonetheless argues here that the district court made three mistakes in its analysis of the burden. First, she argues that the district court underestimated the burden "by suggesting that the case does not present a justiciable claim of voter right infringement." (Appellant's Br. 33.) But the district court "assum[ed] arguendo" that Greene had standing to assert her supporters' First Amendment rights and correctly found that she "has presented no evidence" of a burden on those rights. (III:52 at 588 n.18.)

Second, Greene argues that the challenge statute imposes a severe burden because it allows electors to initiate a challenge without first showing probable cause. (Appellant's Br. 34.) Greene relies on *Watkins v. United States*, 354 U.S. 178, 197 (1957), and *Tobey v. Jones*, 706 F.3d 379, 387 (4th Cir. 2013), to support her argument, but that reliance is misplaced. Both cases involved criminal prosecutions or arrests, and they do not support the proposition that a state may not burden a citizen's First Amendment rights without first having probable cause to do so. Were that the rule, election administration in this state and nation

would be impossible. *See, e.g.,* O.C.G.A. § 21-2-229 (authorizing any elector to make an unlimited number of challenges to the qualifications of any other elector in the challenger's county or municipality without any showing of probable cause). And, as the district court observed, the challenge procedures authorize an administrative law judge to weed out frivolous challenges and to sanction those responsible. (III:52 at 586-87.)

Third, Greene argues that the district court made an error of law when it found that the streamlined challenge process ameliorates the burden on her right to run for office. (Appellant's Br. 34-35.) Although she claimed in the district court that the process is too slow, she now claims that the process is too fast, thereby depriving her of the opportunity to conduct extensive discovery and to adjudicate her defenses with pretrial motion practice. Greene does not explain how the district court's view of the streamlined process constitutes legal error, however, and the streamlined challenge process does not, in fact, deprive her of the opportunity to conduct discovery or to file dispositive motions. *See* Ga. Comp. R. & Regs. R. 616-1-2-.19 (subpoenas and notices to

produce); *id.* R. 616-1-2-.20 (depositions); *id.* R. 616-1-2-.22(1)(i) (motions to dismiss). Greene chose not to conduct any discovery during the administrative process, but she did file a dispositive motion that was ultimately denied.

Lastly, Greene argues that her right to run for office is severely burdened because the challenge statute provides that Greene's name would be struck from the ballot and votes for Greene would not be counted if she is disqualified. (Appellant's Br. 36-39.) But here, too, she fails to explain how this would constitute a burden if she is properly disqualified. Nor does she explain why the challenge statute's appellate provisions do not ameliorate the burden of being improperly disqualified. *See* O.C.G.A. § 21-2-5(e).

None of Greene's arguments undermine the district court's finding that the challenge statute imposes no severe burden on Greene's right to run for office. Under the *Anderson* test, the statute's minimal burdens need only be justified by the state's

legitimate interests. The district court correctly found that they are, and Greene does not challenge that conclusion on appeal.[3]

B. Count II: The Burden of Proof

In the district court, Greene argued that the challenge statute's burden of proof is unconstitutional because it requires her to prove a negative—that is, that she did *not* engage in an insurrection after taking the oath of office. The district court correctly observed that the burden of proof under the challenge statute did not seem unduly burdensome because Greene could meet that burden "by simply submitting an affidavit stating under oath that she did not engage in an insurrection or addressing the allegations in the challenge that are focused on her own activities." (III:52 at 585.) At the same time, the court also noted that the administrative law judge in the state proceeding had exercised his authority under the applicable rules to shift the burden onto the challengers, making any concerns about the burden of proof "a

[3] Greene argues only that the challenge statute fails strict scrutiny. (Appellant's Br. 39-41.) She does not contend that the statute fails less exacting review.

nullity." (*Id.*) Greene does not contest that conclusion on appeal. (Appellant's Br. 32 n.9.)

C. Count III: Article I, Section 5 of the Constitution

Greene's third claim involves Article I, Section 5 of the United States Constitution, which provides that "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members." U.S. Const. art. I, § 5, cl. 1. Greene argues that this clause prohibits states from making any determination of a congressional candidate's constitutional qualifications. But that is not the law.

The Constitution's Elections Clause gives the states broad authority to regulate congressional elections:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

U.S. Const. art. I, § 4, cl. 1. With this authority, states may enact "numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *U.S. Term Limits v. Thornton*, 514 U.S. 779, 834

(1995) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)). *See also Storer v. Brown*, 415 U.S. 724, 730 (1974) ("[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos is to accompany the democratic processes."); *United States v. Classic*, 313 U.S. 299, 311 (1941) ("[T]he states are given, and in fact exercise, a wide discretion in the formulation of a system for the choice by the people of representatives in Congress.").

Relying on those broad powers, the Supreme Court has upheld an Indiana recount procedure against a claim that the process usurped a power that only the Senate could exercise. *Roudebush*, 405 U.S. at 25. The Court reasoned that "a recount can be said to 'usurp' the Senate's function only if it frustrates the Senate's ability to make an independent final judgment." *Id.* at 25. Indiana's procedure did not frustrate the Senate's function, the Court explained, because the Senate remained "free to accept or reject the apparent winner in either count, and, if it so chooses, to conduct its own recount." *Id.* at 25-26 (footnotes omitted). As a

result, the recount process did not violate Article 1, Section 5. *See id.* at 26.

So too here. The House of Representatives remains free to accept or reject Georgia's determination of Greene's qualifications and can, if it so chooses, void the election and require a new one if it disagrees with a determination that Greene is disqualified. Georgia's challenge process therefore does not usurp the House's power any more than Indiana's recount process usurped the Senate's. *Accord Cawthorn*, 2022 WL 1635116 at *11 (Wynn, J., concurring) (rejecting an argument identical to Greene's).

Federal appellate courts have also held that states have the power to exclude constitutionally unqualified candidates from the ballot. In *Hassan v. Colorado*, 495 F. App'x 947, 948 (10th Cir. 2012), then-Judge Neil Gorsuch wrote for the Tenth Circuit, holding that Colorado could exclude the plaintiff from the presidential ballot because he was a naturalized citizen and therefore constitutionally prohibited from assuming the office of President of the United States. The Court determined that "a state's legitimate interest in protecting the integrity and practical

functioning of the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office." *Id.* Similarly, in *Lindsay v. Bowen*, 750 F.3d 1061, 1064 (9th Cir. 2014), the Ninth Circuit held that California could exclude from the ballot a twenty-seven-year-old who was constitutionally ineligible to become president because of her age.

This conclusion also aligns with the practice of the states, most of which have constitutional provisions that parallel Article I, Section 5. Of the states that have addressed the question, all but one allow for pre-election verification of legislative candidates' constitutional eligibility,[4] including Georgia[5] and Alabama.[6] State

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[4] *See e.g.*, Mo. Const. art. III, § 18 ("Each house . . . shall be sole judge of the qualifications, election and returns of its own members"); *State ex rel. Gralike v. Walsh*, 483 S.W.2d 70, 72 (Mo. 1972) (the state Qualifications Clause does not prevent a pre-election determination of eligibility for ballot access to the primary); *but see In re McGee*, 226 P.2d 1 (Cal. 1951) (the only exception).

[5] *See, e.g., Russell v. Hudgens*, OSAH-ELE-CE-or18341-95-Gatto, (Ga. Office of State Admin. Hearings June 2, 2004), *available at* http://www.administrativelawreport.com/wp-content/uploads/gravity_forms/7-4290b068ac7052f5d7bce1ca986eb4ee/2014/07/Hudgens-0418341.doc (last accessed April 10, 2022).

[6] *See, e.g.*, *White v. Knight*, 424 So. 2d 566, 567–69 (Ala. 1982); *Hobbie v. Vance*, 294 So. 2d 743, 744–47 (Ala. 1974) (per curiam); *see also Butler v. Amos*, 292 So. 2d 645, 645–46 (Ala. 1974).

courts have consistently recognized that "[m]embers of the Legislature are elected in general (or special) elections, not primaries; hence the Constitution granted the Legislature the right to hear legislative election contests *following* a general (or special) election." *Dillon v. Myers*, 227 So. 3d 923, 927 (Miss. 2017) (emphasis added).

Greene cites no case for the proposition that states may not exclude constitutionally ineligible candidates from the ballot, and any such rule would be absurd. An unregulated process would invite minors, out-of-state residents, or foreign nationals to run for Congress, and the states would be powerless to prevent that from happening.

The district court correctly determined that Greene is unlikely to succeed on Count III.

D. Count IV: The Amnesty Act of 1872

Greene's fourth claim arises under the Amnesty Act of 1872, which provides in full as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*

> *(two-thirds of each house concurring therein)*, 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, officers 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). Greene argues that the on-going state proceeding violates the Amnesty Act of 1872 because that statute granted her prospective amnesty under the Disqualification Clause for the insurrection of January 6, 2021. The district court found that Greene is unlikely to succeed on that claim because she has not established that the Amnesty Act of 1872 provides a private right of action.

1. Congress did not provide a private right of action under the Amnesty Act of 1872.

Greene concedes on appeal that there is no private right of action under the Amnesty Act of 1872. (Appellant's Br. 22.) She argues, however, that her complaint asserts a right of action under 42 U.S.C. § 1983 for a violation of rights guaranteed to her by the

Amnesty Act of 1872. (*Id.*) But this argument mischaracterizes Greene's complaint.

Greene's complaint brings Count IV directly under the Amnesty Act of 1872. That is apparent from the face of the complaint, which identifies the statute giving rise to the cause of action directly under the heading for each count. Counts I though III identify "42 U.S.C. § 1983" as the cause of action, while Count IV identifies "42 Cong. Ch. 194, May 22, 1872, 17 Stat. 142" as the cause of action. (*Compare* I:3 at 36, 39, 40 *with id.* at 42.)

Greene argues that, because her complaint mentions Section 1983 in paragraphs 1, 4, 11, and 12, she did not need to identify Section 1983 as the cause of action for Count IV. (Appellant's Br. 22.) But that assertion is not persuasive. There is nothing in any of those paragraphs suggesting that she was asserting Section 1983 as the cause of action for Count IV. The district court correctly found that "Count IV, as alleged, is brought directly under the 1872 Amnesty Act, not Section 1983." (III:52 at 562.)

The district court also correctly observed that the parties had not briefed whether the Amnesty Act of 1872 creates a private right

of action and that it is not obvious that Congress intended to do so. (*Id.* at 563-64.) *See*, *e.g.*, *Cawthorn*, 2022 WL 1635116 at *8 n.8 (expressing doubts that a member of Congress has a cause of action under the 1872 Amnesty Act). Given legitimate doubts about Greene's right to enforce the Act, the district court did not abuse its discretion in denying a preliminary injunction on Count IV.

2. The Amnesty Act of 1872 does not grant prospective amnesty to all future insurrectionists.

Even if this Court were to find an implied right of action under the Amnesty Act of 1872, Greene would still be unable to establish a likelihood of success on her claim that the Act granted her prospective amnesty for actions taken almost 150 years later.

To begin with, Congress has no power to grant prospective amnesty. The Disqualification Clause gives Congress the power only to "remove" a disqualification. U.S. Const. amend. XIV, § 3. The word "remove" means to "take away or off"; "to get rid of"; or to "eliminate." *ACLU of Fla. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1219 (11th Cir. 2009); *Vurv Techn. LLC v. Kenexa Corp.*, 2009 WL 2171042, at * 5 (N.D. Ga. Jul. 20, 2009); *see also Dr. Webster's*

Complete Dictionary of the English Language 1116 (Chauncey A. Goodrich & Noah Porter, eds., 1864) (defining "remove" when used as a verb: "To cause to change place; to move away from the position occupied; to displace."). The text of the Disqualification Clause thus suggests that Congress lacks the power to remove something that does not yet exist. *Cf. Cawthorn*, 2022 WL 1635116 at *10 (stating that a prospective-amnesty reading of the Act "would raise potentially difficult questions about the outer limits of Congress's power under Section 3 of the Fourteenth Amendment").

Congress confirmed this understanding of its power under the Disqualification Clause in 1919 when it rejected a similar argument, based on the Amnesty Act of 1898, from Representative Victor Berger who had been convicted of espionage. After acknowledging that the Disqualification Clause authorizes Congress to remove disqualifications, the House concluded that "manifestly it could only remove disabilities incurred previously to the passage of the [1898 Amnesty] act, and Congress in the very nature of things would not have the power to remove any future disabilities." 6 Clarence Cannon, *Cannon's Precedents of the House*

of Representatives of the United States 55 (2d ed. 1935). The history of the Clause thus also suggests that the Constitution does not give Congress the power to grant prospective amnesty.

Congress also "has no power whatever to repeal a provision of the Constitution by a mere statute." *Id.* Constitutional amendments require passage by two-thirds of both houses of Congress and ratification by three-fourths of the states. U.S. Const. art. V. Greene's argument that the 1872 Amnesty Act granted prospective amnesty to all future insurrectionists would mean, however, that Congress had effectively repealed the Disqualification Clause without the necessary ratification by the states. Congress plainly has no power to do that.

But even if Congress had the power to do so, the text and history of the Amnesty Act of 1872 suggest that Congress did not intend to grant prospective amnesty. The Act uses the past participle "imposed" rather than "which may be imposed," or "which shall be imposed" or something similar, suggesting that it only applies to political disabilities that have already been imposed. "[T]he Act's operative clause refers to those 'political disabilities

imposed' in the past tense rather than new disabilities that might arise in the future. The past tense is 'backward-looking'; it refers to things that have already happened, not those yet to come." *Cawthorn*, 2022 WL 1635116 at *8; *see also Gundy v. United States,* 139 S. Ct. 2116, 2127 (2019) (noting that the use of past tense indicates that a statute applies to pre-enactment conduct); *Carr v. United States,* 560 U.S. 438, 448 (2010) (observing that the Supreme Court has "frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach"); *Blair v. City of Chicago*, 201 U.S. 400, 465 (1906) ("This declaration is in the past tense, and can have no reference by any fair construction to future engagements."). The Act also uses the phrase "are hereby *removed*." As with the Disqualification Clause itself, the plain meaning of these phrases indicates that the Act takes away political disabilities that already exist. *See Cawthorn*, 2022 WL 1635116 at *9 ("In the mid-nineteenth century, as today, that word generally connoted taking away something that already exists rather than forestalling something yet to come.").

The history of the Act confirms the plain meaning of the text. *See Cawthorn*, 2022 WL 1635116 at *9-10; Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comment. 87, 111-20 (2021). Before the Act, Congress had been passing private bills to remove political disabilities from former Confederates. *See id.* at 112. That soon became cumbersome, with thousands of names in each bill. *Id.* Rather than pass another statute with a long list of names, Congress chose to use a general phrase to identify those former Confederates it was relieving of a political disability, with a few exceptions for some of the most prominent Confederate leaders. *Id.* at 116-20. It was not a statute designed to grant amnesty to future insurrectionists.

Greene argues that the word "imposed," as used in the Act, is a participle modifying the word "disabilities" and is not, as the district court suggested, a verb in the past tense. (Appellant's Br. 27.) Maybe so. But she concedes that "imposed" is a *past participle* (*id.* at 27 n.8), which, in the English language, is "[a] verb form indicating past or completed action or time that is used as a verbal adjective in phrases such as *baked beans* and *finished work*." *Fla.*

Dep't of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 39 (2008) (alteration in original) (quoting American Heritage Dictionary 1287 (4th ed. 2000)). Congress used the past participle to convey its intent to remove only those political disabilities that had already been "imposed."

Greene also suggests that the 1898 Amnesty Act, which removed the disability from certain officeholders and military personnel who had not been covered by the 1872 Amnesty Act, shows that Congress meant for the 1872 Amnesty Act to apply prospectively. The 1898 Amnesty Act lifted, without exception, any "disability ... heretofore incurred" under the Disqualification Clause. *See* Act of June 6, 1898, ch. 389, 30 Stat. 432 (1898). But while the use of "heretofore" in 1898 more clearly limits the Act's effect to disabilities "incurred" before its enactment, the 1898 Amnesty Act sheds little light on what a different Congress meant in 1872.

Greene's interpretation of the 1872 Amnesty Act is far-fetched at best. Indeed, it strains credulity to suggest that Congress intended to grant amnesty to insurrectionists whose misdeeds they

could not even foresee. *See Cawthorn*, 2022 WL 1635116 at *10 ("Having specifically decided to withhold amnesty from the *actual* Jefferson Davis, the notion that the 1872 Congress simultaneously deemed any future Davis worthy of categorical advance forgiveness seems quite a stretch.") Greene offers no cases to support that reading, and the only appellate court to have considered similar arguments so far has rejected them. *See id.* at *8-10.

For all of these reasons, this Court should conclude that the 1872 Amnesty Act did not prospectively shield Greene or anyone else from the consequences of the Disqualification Clause.

Conclusion

The Court should affirm the denial of a preliminary injunction and remand the case for further proceedings.

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This brief complies with the type-volume limitation of Rule 32(a)(7)(B)(i) of the Federal Rules of Appellate Procedure because, excluding parts of the brief exempted by Rule 32(f), it contains 7,015 words. This brief also complies with the typeface and type-style requirements of Rule 32(a)(5) and (6) because it has been prepared in the 14-point Century Schoolbook typeface in roman style.

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