No. 22-12696

In the United States Court of Appeals for the Eleventh Circuit

FULTON COUNTY SPECIAL PURPOSE GRAND JURY,
Plaintiff-Appellee,

v.

LINDSEY GRAHAM, in his official capacity as United States Senator,
Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Georgia

BRIEF FOR THE STATES OF TEXAS, ALABAMA, FLORIDA, INDIANA, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, SOUTH CAROLINA, AND UTAH AS AMICI CURIAE IN SUPPORT OF MOTION TO STAY PENDING APPEAL

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Certificate of Interested Persons

No. 22-12629

Fulton County Special Purpose Grand Jury,
Plaintiff-Appellee,

v.

Lindsey Graham, in his official capacity as United States Senator,
Defendant-Appellant.

Amici Curiae certify that, to the best of their knowledge, the following is a complete list of interested persons as required by Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1, 28-1(b), and 29-2:

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To the best of amici's knowledge, no publicly traded company or corporate entity has an interest in the outcome of this case or appeal

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Interest of Amici Curiae

The State of Texas and the States of Alabama, Florida, Indiana, Louisiana, Mississippi, Missouri, Montana, South Carolina, and Utah have a strong interest in the interpretation of the Speech or Debate Clause, which informs the scope of a closely related legislative privilege enjoyed by state legislators. Indeed, reflecting the importance of allowing legislators to conduct constitutionally assigned duties without fear of future litigation, "[f]orty-three [state] constitutions"—including Texas's—"contain a provision, analogous to the U.S. Constitution's Speech or Debate Clause[,] . . . granting state legislators a legal privilege in connection with their legislative work." Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 Wm. & Mary L. Rev. 221, 221 (2003); Tex. Const. Art. III, § 21. And, as this Court and the Supreme Court have explained, "it is well-established that state lawmakers possess a legislative privilege" that applies in federal court as a matter of federal common law, which "is 'similar in origin and rationale to that accorded Congressmen under the Speech or Debate Clause.'" *In re Hubbard*, 803 F.3d 1298, 1310 n.11 (11th Cir. 2015) (quoting *Supreme Court of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 732 (1980)).

ARGUMENT

This Court should stay Senator Graham's deposition pending resolution of his appeal of the scope of his immunity against inquiry into legislative acts—which includes even informal investigations conducted by a legislator. Absent such a stay, the allegedly protected material "will have been disclosed to third parties" before this Court will be able to address the appeal, "making the issue of privilege effectively moot." *In re Sealed Case (Med. Records)*, 381 F.3d 1205, 1210 (D.C. Cir. 2004) (Garland, J.) (citation omitted). In other words, the proverbial "cat [will be] out of the bag." *Id.* Because, under those circumstances, "the balance of equities . . . weighs heavily in favor of granting the stay," this Court "relax[es] the likely-to-succeed-on-the-merits requirement." *League of Women Voters of Fla., Inc. v. Fla. Sec'y of State*, 32 F.4th 1363, 1370 (11th Cir. 2022). Since even the district court's most recent discovery order is at least overbroad—if not entirely inappropriate—Senator Graham easily meets that standard.

After its initial refusal to quash any part of the subpoena, ECF 27, 37—and an initial remand from this Court—the district court has belatedly recognized that "Senator Graham cannot be questioned as to any information-gathering questions he posed (or why he posed them) about Georgia's then-existing election procedures or allegations of voter fraud." ECF 44 at 22. It has allowed Senator Graham to be questioned, however, about—among other things—"alleged communications and coordination with the Trump Campaign and its post-election efforts in Georgia," and any "public statements related to Georgia's 2020 elections." *Id.* Because such topics are either protected by legislative immunity or likely cannot be cabined in a

way that avoids impinging upon that immunity, the district court erred as a matter of law.

I. The Constitution Protects Senator Graham from Indirect Inquiry into His Legislative Acts and the Motives Behind Those Acts.

A. The Speech or Debate Clause serves an essential constitutional and historical function.

"The scope of [any] privilege is limited by its underlying purpose." *Roviaro v. United States*, 353 U.S. 53, 60 (1957). The "central importance" of the immunity created by the Speech or Debate Clause is to "prevent[] intrusion by [the] Executive and Judiciary into the legislative sphere." *United States v. Helstoski*, 442 U.S. 477, 491 (1979). The constitutional magnitude of that immunity carries with it a necessarily broad scope.

"Since the Glorious Revolution in Britain, and throughout United States history, the privilege" that the Speech or Debate Clause protects "has been recognized as an important protection of the independence and integrity of the legislature." *United States v. Johnson*, 383 U.S. 169, 178 (1966). As the Supreme Court has explained, by the Founding "[f]reedom of speech and action in the legislature was taken as a matter of course," and the Framers deemed it "so essential . . . that it was written into the Articles of Confederation and later into the Constitution." *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951).

This immunity was designed not to protect the dignity of the legislator, but the security of individual liberty: "'In order to enable and encourage a representative of the public to discharge his public trust with firmness and success,'" it was

understood that a legislator "'should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense.'" *Id.* (quoting II Works of James Wilson 38 (Andrews ed. 1896)). The immunity thus preserves our tripartite system of government, and thereby the security of the people, by "prevent[ing] intimidation of legislators by the Executive and accountability before a possibly hostile judiciary." *Gravel v. United States*, 408 U.S. 606, 617 (1972). It also ensures that litigation will not "create[] a distraction and force[] Members to divert their time, energy, and attention from their legislative tasks to defend the litigation." *Eastland v. U. S. Servicemen's Fund*, 421 U.S. 491, 502-03 (1975).

To serve these purposes, the Speech or Debate Clause is, compared to similar privileges, relatively broad: it "protects 'against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts'" and "precludes any showing of how [a legislator] acted, voted, or decided." *Helstoski*, 442 U.S. at 489 (quoting *United States v. Brewster*, 408 U.S. 501, 525, 527 (1972)). Moreover, the legislative process includes not only "words spoken in debate," but also "[c]ommittee reports, resolutions, and the act of voting" and "things generally done" during a legislature's session "by one of its members in relation to the business before it." *Gravel*, 408 U.S. at 617. This necessarily includes information gathering, because "[t]he power to investigate is inherent in the power to make laws." *Eastland*, 421 U.S. at 504. The Speech or Debate Clause "protects the legislative process itself, and therefore covers . . . legislators' actions in the proposal, formulation, and passage of legislation." *Hubbard*, 803 F.3d at 1308.

B. The Speech or Debate Clause protects Senator Graham's efforts to obtain information to perform legislative acts.

The district court correctly held (at 8) that although the Speech or Debate Clause applies only to "legislative acts," *Doe v. McMillan*, 412 U.S. 306, 312 (1973), that protection extends to efforts to obtain information related to legislative acts. Because "a legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change," *Eastland*, 421 U.S. at 504 (quoting *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927)), to "conclude that the power of inquiry is other than an integral part of the legislative process" would undercut the purpose of the Speech or Debate Clause—namely, to ensure "the 'integrity of the legislative process,'" *id.* at 505 (quoting *Brewster*, 408 U.S. at 524).

On its face, the Petition for Certification of Need (ECF 2-3) seeks protected information about senatorial fact-gathering. Specifically, it states that Senator Graham "is a necessary and material witness" because "the State has learned that the Witness made at least two telephone calls to Georgia Secretary of State Brad Raffensperger and members of his staff in the weeks following the November 2020 election in Georgia." ECF 2-3; Emergency Motion, Ex. 4-2 *accord id.* at Ex. 4-1 (Certificate of Material Witness) (similar). In the district attorney's own words, she seeks information regarding these calls because they involved "absentee ballots cast in Georgia" and "allegations of widespread voter fraud in the November 2020 election in Georgia." *Id.* at Ex. 4-2. But Senator Graham's motion for a stay confirms those calls enabled him to perform at least three legislative functions.

First, like all members of Congress, federal law requires Senator Graham to certify the results of a presidential election. *See* 3 U.S.C. § 15. Senator Graham also made a speech relating to his vote to certify the results of the 2020 election. *See* 167 Cong. Rec. S31 (daily ed. Jan. 6, 2021). Such activities are indisputably legislative. *Supra* Part I.A. Efforts to obtain information before undertaking them was a "necessary concomitant of legislative conduct," which allowed Senator Graham "to discharge [his] constitutional duties properly"—including "[t]he acquisition of knowledge through informal sources." *McSurely v. McClellan*, 553 F.2d 1277, 1287 (D.C. Cir. 1976) (en banc). That is, such "information gathering, whether by issuance of subpoenas or field work by a Senator or his staff, is essential to informed deliberation over proposed legislation." *Id.* at 1286.

Second, Senator Graham is a member of, and in 2020 was chairman of, the Senate Judiciary Committee. *See*, Committee on the Judiciary, Graham Elected Chairman of the Senate Judiciary Committee, https://www.judiciary.senate.gov/press/rep/releases/graham-elected-chairman-of-the-senate-judiciary-committee. That Committee regularly holds hearings concerning elections, election integrity, and election security—including only days after the 2020 election. *See* Committee on the Judiciary, Breaking the News: Censorship, Suppression, and the 2020 Election, https://www.judiciary.senate.gov/meetings/breaking-the-news-censorship-suppression-and-the-2020-election. Like floor statements, committee activities are indisputably covered by the Speech or Debate Clause. *Rangel v. Boehner*, 785 F.3d 19, 24 (D.C. Cir. 2015) (preparing committee reports and conducting hearings is legislative "at the atomic level").

Third, Senator Graham is an original co-sponsor of the Electoral Count Reform and Presidential Transition Improvement Act of 2022. *See*, Congress.Gov, Electoral Count Reform and Presidential Transition Improvement Act of 2022, https://www.congress.gov/bill/117th-congress/senate-bill/4573/cosponsors. Senator Graham's investigation into issues surrounding the 2020 election is plainly relevant to legislation seeking to address those issues in Congress—and is therefore protected by the Speech or Debate Clause. *E.g.*, *Doe*, 412 U.S. at 312. There is thus little reason to doubt that Senator Graham had a legislative purpose protected by the Speech or Debate Clause for the calls at issue—as the district court acknowledged, at least in part. ECF 44 at 8-9.

C. The district court's order is improper because the Speech or Debate Clause prohibits inquiry into the motivation behind Senator Graham's legislative acts.

The district court's analysis went awry where it allowed inquiry into individual statements on these calls that (the district court believes) were not aimed at gathering specific facts but might instead reveal Senator Graham's motivations for seeking those facts. The Supreme Court has made clear: the Speech or Debate Clause protects a legislator against inquiry into both his legislative acts *and* "'the motivation for those acts.'" *Helstoski*, 442 U.S. at 489 (quoting *Brewster*, 408 U.S. at 525). "The claim of an unworthy purpose does not destroy the privilege" because it is "not consonant with our scheme of government for a court to inquire into the motives of legislators." *Johnson*, 383 U.S. at 180 (cleaned up). Indeed, courts—including this one—routinely hold that inquiry into whether a legislator's conduct was

"improperly motivated" is "precisely what the Speech or Debate Clause generally forecloses." *Id.*; *see also, e.g.*, *Hubbard*, 803 F.3d at 1310; *Am. Trucking Ass'ns v. Alviti*, 14 F.4th 76, 87 (1st Cir. 2021); *Lee v. City of Los Angeles*, 908 F.3d 1175, 1187 (9th Cir. 2018).

In its most recent order, the district court nonetheless concluded that the special purpose grand jury could ask, among other things, "whether [Senator Graham] in fact implied, suggested, or otherwise indicated" that Georgia election officials should "alter their election procedures." ECF 44 at 10. But nothing suggests that Senator Graham actually *asked* for such a change. Instead, the main basis for the district court's intrusive discovery order is Georgia Secretary of State Brad Raffensperger's public statements "that he understood Senator Graham to be implying or otherwise suggesting that he . . . should throw out ballots." *Id.* That is, Secretary Raffensperger inferred that Senator Graham's questions about absentee ballot fraud and Georgia's processes related to absentee ballots were motivated not by a desire for information to inform his actions in the Senate, but by a desire for Georgia to throw out ballots or otherwise influence electoral results. NBC News, Video, https://www.nbcnews.com/politics/2020-election/georgia-secretary-state-raffensperger-says-sen-graham-asked-him-about-n1247968.

However indirect the inquiry the district court authorized, its order ensures that the "central role of the Speech or Debate Clause—to prevent intimidation of legislators by the Executive and accountability before a possible hostile judiciary—will be inevitably diminished and frustrated." *Gravel*, 408 U.S. at 617. (citation omitted) Ordinarily, even low-level civil servants are accorded a presumption of good faith in

their actions. *E.g.*, *Rd. & Highway Builders, LLC v. United States*, 702 F.3d 1365, 1368 (Fed. Cir. 2012) (collecting authority). Instead of applying that presumption, the district court has required a long-serving United States senator to sit for questioning on broad topics based on little more than speculation about what he meant to imply by asking questions during a fact-finding call. Regardless of what one thinks of the underlying merits of the accusations that the grand jury seeks to investigate (about which amici take no position), that cannot be enough to overcome a 500-year-old legislative prerogative that finds its roots in the "history of conflict between the Commons and the Tudor and Stuart Monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators." *Johnson*, 383 U.S. at 178. If it were, no "representative of the public" would be willing "to discharge his public trust with [the] firmness" upon which our constitutional system depends. *Tenney*, 341 U.S. at 373.

II. The Other Areas of Inquiry Allowed by the District Court's Most Recent Order are Likewise Improper.

In addition to questioning about the two phone calls, the district court's latest order allows Senator Graham to be questioned about: (1) "coordination or communications with the Trump Campaign and its post-election efforts in Georgia," ECF 44 at 14-16; (2) "public statements (outside of Congress) regarding Georgia's 2020 elections," *id.* at 16-18; and (3) "alleged attempts to encourage, 'cajole,' or 'exhort' Georgia election officials to take certain actions," *id.* at 19-21. Such questioning is overbroad and likely impossible to cabin from investigation protected by the Speech or Debate Clause.

First, efforts to set up or coordinate telephone calls for a legislative purpose have the same legislative purpose that conducting the calls themselves would. Because "it is literally impossible" for "[m]embers of Congress to perform their legislative tasks without the help of aides and assistants," legislative immunities extend not just to members but to their aides. *Gravel*, 408 U.S. at 616. And actions taken to effectuate a telephone call for the purpose of conducting an investigation are every bit as much part of the "legislative process" as assisting to prepare a floor speech or conducting an investigation itself. *Hubbard*, 803 F.3d at 1308.

Second, inquiry into whether Senator Graham sought to cajole or exhort changes to Georgia's elections processes are improper for the same reasons that inquiry into the telephone calls is inappropriate generally: the district attorney's request for such information improperly rests on inferences concerning Senator Graham's intent. *E.g.*, ECF 9 at 26. Inquiry into the Senator's intent is precluded by the Speech or Debate Clause. *Supra* Part I.C.

Third, though Senator Graham's public statements themselves are not protected by the Speech or Debate Clause, they can hardly justify the district court's extraordinary remedy of ordering a sitting senator to testify to a grand jury. After all, the statements themselves are a matter of public record. When a legislator makes statements in performing a legislative function, those statements fall within the heart of the legislator's constitutional immunity. *Eastland*, 421 U.S. at 508. Even when they do not, they cannot be used to ascertain Senator Graham's motives for performing legislative acts—such as the telephone calls at question.

Conclusion

The Court should grant the requested stay pending appeal.

Respectfully submitted.

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Certificate of Service

On September 22, 2022, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court.

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Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 2,598 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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