No. 22A337

IN THE SUPREME COURT OF THE UNITED STATES

SENATOR LINDSEY GRAHAM,

Applicant,

v.

FULTON COUNTY SPECIAL PURPOSE GRAND JURY

Respondent.

Regarding the Application from the United States Court of Appeals for the Eleventh Circuit (No. 22-12696)

RESPONSE IN OPPOSITION TO APPLICANT'S EMERGENCY APPLICATION FOR STAY AND INJUNCTION PENDING APPEAL

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TO THE HONORABLE CLARENCE THOMAS, ASSOCIATE JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE ELEVENTH CIRCUIT:

In accordance with Rule 21.4 of this Court and Your Honor's order of October 22, 2022, the Fulton County Special Purpose Grand Jury, through its legal advisor, Atlanta Judicial Circuit District Attorney Fani T. Willis, responds in opposition to Senator Lindsey Graham's "emergency application" for a stay of the district court's order and request for an injunction pending his appeal.

Introduction

The Fulton County Special Purpose Grand Jury seeks to question Senator Lindsey Graham regarding certain activities related to its ongoing investigation into possible criminal activity surrounding the 2020 general elections in Georgia. After two unsuccessful attempts to persuade a court to enter a stay delaying his appearance before the Grand Jury, Senator Graham now asks Your Honor to postpone any questioning until after the ultimate resolution of any appeals to this Court. The Grand Jury maintains that the Senator's arguments in favor of a stay demonstrate no significant likelihood of future success or even a grant of certiorari, and the delay resulting from a stay would be unavoidably harmful to the administration of its investigation. While the harm to the public's interest in the timely and effective resolution of this investigation would be certain, Senator Graham faces no danger of harm should a stay be denied. The Eleventh Circuit has approved an orderly process of questioning proposed by the district court, wherein Senator Graham is immune from questioning regarding legislative activities and can resolve any future disputes under supervision of the federal courts. Despite Senator Graham's attempts to

portray himself and the future of the Speech or Debate Clause as imperiled by the prospect of his questioning, the record and the orders of the lower courts demonstrate that his arguments lack adequate factual or legal support to carry his heavy burden before Your Honor. With the framework for a logical and constitutionally-supported form of questioning already in place, the Special Purpose Grand Jury respectfully requests that Your Honor deny the Senator's application and allow the Grand Jury to continue its investigation unhindered by unnecessary delay.

Statement

The Special Purpose Grand Jury was created by an order of the Chief Judge of the Fulton County Superior Court on January 24, 2022, in accordance with O.C.G.A. § 15-12-100. See Doc. 2-2 at 7.[1] The Grand Jury was tasked with investigating the facts and circumstances "relating directly or indirectly to possible attempts to disrupt the lawful administration of the 2020 elections in Georgia."[2] See Doc. 2-2 at 10. Thereafter, it began to receive evidence and testimony from a number of witnesses, including Georgia Secretary of State Brad Raffensperger and his subordinate, Gabriel

[1] In the interest of uniformity, this Response will cite to "Doc. ___" in reference to docket filings from *Fulton County Special Purpose Grand Jury v. Graham*, No. 1-22-cv-03027 (N.D. Ga.). When required to cite to documents from the Eleventh Circuit's docket in Case No. 22-12696, the Response will use footnotes.

[2] Senator Graham has argued, citing the Georgia Court of Appeals in *Kenerly v. State*, 715 S.E.2d 688, 690 (Ga. 2011), that the Special Purpose Grand Jury is somehow a civil body rather than a criminal investigative body. App. Br. 7. This argument was thoroughly addressed by the Superior Court of Fulton County in another matter involving a prospective witness's attempt to quash a subpoena. In an Order denying that motion, the Superior Court distinguished *Kenerly* and observed O.C.G.A. § 15-12-100 explicitly authorizes special purpose grand juries to conduct criminal investigations. *See* Respondent's Appendix, Order at 3-4 n.3. The Superior Court concluded that the Grand Jury's "purpose is unquestionably and exclusively to conduct a criminal investigation" and that "there is nothing about this special purpose grand jury that involves or implicates civil practice." *Id.* at 4-5.

Sterling. The Grand Jury has also sought the testimony of Lindsey O. Graham, a United States senator from South Carolina, who participated in at least two telephone calls with Secretary Raffensperger in November of 2020.

Almost immediately after the calls became public knowledge, there was considerable public dispute among the participants as to what precisely Senator Graham had said during the calls. Secretary Raffensperger said that Senator Graham suggested that Georgia could discard or invalidate large numbers of mail-in ballots from certain areas.[3] Mr. Sterling supported Secretary Raffensperger's recollection and said that Senator Graham brought up Georgia's signature verification process on the call in order to explore the viability of a "potential court challenge"[4] or ways to "help defend" President Donald Trump.[5] Secretary Raffensperger has also noted that, on the same day Senator Graham called him, attorney Lin Wood filed a lawsuit challenging the legality of Georgia's signature verification procedures, and former President Trump tweeted criticism of Georgia's signature verification methods. Secretary Raffensperger found the context significant in light of his conversation with the Senator.[6]

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[3] Melissa Quinn, *Georgia's secretary of state says Lindsey Graham suggested throwing out certain ballots*. CBSNews. https://www.cbsnews.com/news/georgia-election-brad-raffensperger-lindsey-graham-throw-out-ballots/.

[4]Video: https://archive.org/details/CNNW_20201118_010000_Anderson_Cooper_360/start/2400/end/2460

[5] CNN Newsource, 11/18/20, video interview with Deputy Secretary Gabriel Sterling at 2:43: https://wgxa.tv/news/beyond-the-podium/georgia-election-official-speaks-on-sen-graham-sos-declining-to-endorse-trump?video=2368d15bd2aa42609109976b02d7412f&jwsource=cl

[6] Brad Raffensperger, *Integrity Counts*, 113-14 (2021).

Senator Graham directly contradicted Secretary Raffensperger and Mr. Sterling, denying that he ever made suggestions for invalidating ballots. Senator Graham also made comments indicating that he *did* suggest changes in Georgia's election procedures to Secretary Raffensperger[7] and that the actual focus of the telephone calls had been Georgia's upcoming Senate runoff elections, later held on January 5, 2021.[8] Over the next several weeks, Senator Graham continued to make public statements and comments regarding the 2020 election and purported election fraud or malfeasance.[9]

As part of its ongoing investigation, the Special Purpose Grand Jury sought Senator Graham's appearance in order for him to testify about the calls and other issues related to the Grand Jury's investigative focus. *See* Doc. 2-2 at 2-5. Senator Graham eventually agreed to accept service of a subpoena and began attempting to have it quashed. Over the course of the next several months, Senator Graham moved the district court for the Northern District of Georgia to quash his subpoena; after briefing and argument, his motion was denied. *See* Doc. 2; Doc. 27; Appx. at 47a.[10] Senator Graham then filed an emergency motion for a stay with the district court,

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[7] Dareh Gregorian, Dartunorro Clark et al., *Georgia officials spar with Sen. Lindsey Graham over alleged ballot tossing comments*. NBCNews. https://www.nbcnews.com/politics/2020-election/georgia-secretary-state-raffensperger-says-sen-graham-asked-him-about-n1247968

[8] Video: https://archive.org/details/CNNW_20201118_010000_Anderson_Cooper_360/start/2400/end/2460

[9] *See generally* Doc. 9 at 4-5; Appellee's Response in Opposition, filed in Eleventh Circuit Court of Appeals 10/07/2022, at 1-2, 5.

[10] This Response will cite to Applicant's Appendix of Lower Court Orders and Opinions as "Appx."

which it also denied. *See* Doc. 29; Doc. 37; Appx. at 32a. Almost simultaneously, Senator Graham filed an emergency motion for a stay in the Eleventh Circuit Court of Appeals, which held the case in abeyance and ordered the district court to consider whether Senator Graham was entitled to "partial quashal" of his subpoena. *See* Doc. 39; Appx. at 30a. After additional briefing, the district court largely denied Senator Graham's request for partial quashal, granting him quashal as to any questions related to any "informal investigatory" questions the Senator might have asked on the telephone calls to Raffensperger but otherwise upholding the subpoena as to all other matters. *See* Doc. 44; Appx at 7a. The case then returned to the Eleventh Circuit. After ordering the parties to submit another round of briefing, that court also denied Senator Graham's request for a stay. *See* Doc. 52; Appx at 1a. Following the Eleventh Circuit's denial of his motion, Senator Graham filed the Application currently before Your Honor.

Senator Graham's Application Cannot Satisfy the Applicable Standard

To obtain a stay pending resolution of case on appeal or pending a petition for certiorari, an applicant must demonstrate "(1) a reasonable probability that four Justices would vote to grant certiorari; (2) a significant possibility that the Court would reverse the judgment below; and (3) a likelihood of irreparable harm, assuming the correctness of the applicant's position, if the judgment is not stayed." *Barnes v. E-Systems, Inc. Group Medical & Surgical Ins. Plan*, 501 U.S. 1301, 1302 (1991) (slip op., at 2) (Scalia, J., in chambers). The Senator asserts that this Court "regularly" grants stays of a district court's order pending disposition of an appeal in a United

States Court of Appeals. App. Br. at 13. In fact, the opposite is true. In the present circumstances, where an appeal is pending before a Court of Appeals, the grant of a stay is highly unusual. "[T]he rule to be followed is that '[ordinarily] a stay application to a Circuit Justice on a matter before a court of appeals is rarely granted . . . .'" *Atiyeh v. Capps*, 449 U.S. 1312, 1313 (1981) (Rehnquist, J., in chambers) (quoting *Pasadena Board of Education v. Spangler*, 423 U.S. 1335, 1336 (1975) (Rehnquist, J., in chambers)). "When a matter is pending before a court of appeals, it long has been the practice of Members of this Court to grant stay applications only 'upon the weightiest considerations.'" *Fargo Women's Health Org. v. Schafer*, 507 U. S. 1013, 1014 (1993) (O'Connor, J., concurring) (quoting *O'Rourke v. Levine*, 80 S. Ct. 623, 624, (1960)).

Additionally, "[the] normal presumption is that [in] all cases, the fact weighs heavily that the lower court refused to stay its order pending appeal." *Atiyeh*, 449 U.S. at 1313 (internal quotation marks omitted). The burden weighs heavier still where, as here, a unanimous panel of the Court of Appeals has declined to issue a stay. *Beame v. Friends of the Earth*, 434 U.S. 1310, 1312, 54 L. Ed. 2d 23, 98 S. Ct. 4 (1977) (Marshall, J., in chambers) (applicant's "burden is particularly heavy when . . . a stay has been denied by the District Court and by a unanimous panel of the Court of Appeals"). And generally, a stay remains "an intrusion into the ordinary processes of administration and judicial review." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (internal quotation marks omitted). The burden Senator Graham's application faces, then, would appear to be as heavy as it is possible for it to be.

A review of the orders issued by the lower courts constrains the Special Purpose Grand Jury to observe that Senator Graham's arguments have largely proceeded with an absence of factual or legal support in their favor. In the course of several months of litigation, the district court has observed that Senator Graham has "misconstrued" its holdings, "plainly misrepresented" Supreme Court analysis, "misunderstood" or attempted to "avoid the objective facts," "dismissed" inconvenient facts as "irrelevant," and advanced arguments "bereft of any meaningful support." The Eleventh Circuit then observed that the Senator has argued that he should be afforded legislative immunity for actions that "could not qualify as legislative activities under any understanding of Supreme Court precedent."[11] The Senator has presented many of these same arguments in his application to Your Honor.

Because his application cannot carry the profound burden placed upon it by prior rulings of this Court, the Special Purpose Grand Jury requests that Your Honor deny Senator Graham's request. The Senator has failed to demonstrate that he has a likelihood of success on appeal or that four members of this Court would grant certiorari, and he ignores the lower courts' holdings demonstrating that his rights are not in danger, much less at risk of "irreparable harm." Particularly in the "unusual" circumstances present here, Senator Graham has failed to carry his burden, and his application should be denied.

[11] *See* Appx. at 34a and 58a; 25a; 17a; 17a and 57a; 40a-41a; and 6a, respectively.

Senator Graham Cannot Demonstrate a Significant Possibility of Success on the Merits.

"In our judicial system, 'the public has a right to every man's evidence.'" *Trump v. Vance*, 140 S. Ct. 2412 at 2420 (2020). "Every man" has been held to mean exactly that, up to and including the President of the United States. The arguments advanced by Senator Graham do not hold to this maxim, nor do they find support in either the record or in the prior decisions of this Court. As a result, Senator Graham cannot carry his heavy burden to establish a "significant possibility" that this Court will ultimately rule in his favor.

1. The Speech or Debate Clause.

Senator Graham's arguments on the merits primarily involve the Speech or Debate Clause. The Clause, found at Art. 1, § 6, cl. 1, of the Constitution, states in pertinent part that as to United States Senators and Representatives, "for any Speech or Debate in either House, they shall not be questioned in any other Place." The privilege has been interpreted to protect activities other than speech or debate that fall within the "legitimate legislative sphere," requiring a review "to see whether the activities took place in a session of the House by one of its members in relation to the business before it." *Eastland v. United States Servicemen's Fund*, 421 U. S. 491, 503 (1975).

The privilege protects only activities which are connected to actual legislative acts of the congressional member. *Gravel v. United States*, 408 U. S. 606, 625 (1972); *accord, Eastland v. USSF*, supra at 503. Conduct is privileged only in so far as it is connected to pending legislation or a current legislative enterprise; promises or

statements of future intent to act are not traditionally covered by the Clause. *United States v. Helstoski*, 442 U.S. 477, 490 (1979). "Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it." *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998) (emphasis supplied).

Traditionally, cases in which Speech or Debate immunity has arisen have involved conduct directly connected to a manifestly legislative act—an act so clearly legislative in nature that no further examination need be made to determine its status. To that end, an objective, factual connection between allegedly protected conduct and a manifestly legislative act is central to the Speech or Debate analysis contained in every case cited by Senator Graham on this issue. "In every case thus far before the Court, the Speech or Debate Clause has been limited to an act which was clearly part of the legislative process—the due functioning of the process." *United States v. Brewster*, 408 U.S. 501, 515-516 (1972).

Senator Graham now asks that Your Honor depart from established precedent and find that his telephone calls to Georgia's Secretary of State are, on their face, "manifestly legislative acts." The Senator continues to maintain that "every objective fact," stripped of any considerations of motive, demonstrates that the phone calls were entirely legislative. Put simply, this is because he apparently asked about Georgia's voting procedures and ultimately would vote on the certification of the 2020 election and propose amendments to the Electoral Count Act.[12] App. Br. 19. The

[12] Senator Graham has not shown how his phone call to a state secretary of state, allegedly about absentee ballots and signature verification processes, relates in any way to the Senate's adoption or administration of the Electoral Count Reform Act of 2022, which is about clarifying how electoral votes are tallied by Congress and not how to "correct flaws" he might have discovered on such a call.

Senator thus reasons that he could not have engaged in activity *other than* legislative activity on these calls.

However, as the district court observed, "though Senator Graham frequently argues that the Court would easily conclude that the calls themselves are obviously legislative if the Court properly applied the test and ignored all suggestions of motive, it is, in fact, Senator Graham who asks the Court to accept his proposed motive (to carry out an individual investigation so as to inform his choice to certify the election) in assessing whether the calls constitute only legitimate legislative activity." Appx. at 11a. This is an instance where the Senator's arguments ignore the findings of the district court and the Court of Appeals. The district court determined that calls "between a U.S. Senator from South Carolina and Georgia's state election officials—are not manifestly legislative on their face" and that "the objective facts about the calls are disputed," *id.* at 11a, having earlier determined that it could not "simply accept Senator Graham's conclusory characterizations of these calls and reject others'." *Id.* at 58a. The district court determined that a granular analysis of the facts reinforced these disputes, and that Senator Graham himself stated publicly that he was making suggestions for changing Georgia election procedures on the call. *Id.* at 12a. The Eleventh Circuit then explicitly upheld the district court's finding that "there is significant dispute about whether his phone calls with Georgia election officials were legislative investigations at all." *Id.* at 5a.

The law offers no more support for the Senator's arguments than do the facts. Senator Graham's description of the phone calls as "manifestly legislative" would be

a far more expansive reading of the Speech or Debate Clause than this Court has previously countenanced. As the Eleventh Circuit observed,

> not "everything a Member of Congress may regularly do" is a "legislative act within the protection of the Speech or Debate Clause"—the Clause "has not been extended beyond the legislative sphere," and the fact that "Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature." *Doe v. McMillan*, 412 U.S. 306, 313, 93 S. Ct. 2018, 36 L. Ed. 2d 912 (1973); *Gravel v. United States*, 408 U.S. 606, 624-25, 92 S. Ct. 2614, 33 L. Ed. 2d 583 (1972). The Supreme Court has warned that it is not "sound or wise" to "extend the privilege beyond its intended scope, its literal language, and its history, to include all things in any way related to the legislative process." *Brewster*, 408 U.S. at 516. One reason is obvious: "Given such a sweeping reading, we have no doubt that there are few activities in which a legislator engages that he would be unable somehow to 'relate' to the legislative process." *Id.* Activities that fall outside the Clause's scope include, for example, "cajoling" executive officials and delivering speeches outside of Congress. *Gravel*, 408 U.S. at 625; *Brewster*, 408 U.S. at 512.

Appx. at 2a-3a. Senator Graham's insistence that because his phone call to Secretary Raffensperger involved the 2020 election, it must have related to some aspect of his service as a United States Senator, was predicted by this Court in *Brewster* and brings to mind concerns from Justice Stevens described in *United States v. Helstoski,* 442 U.S. 477, 488 n.7 (1979). Justice Stevens warned against an understanding of the Clause that would allow a Member of Congress to render any of his communications inadmissible "by inserting references to past legislative acts in all communications."

The path taken by the district court, and endorsed by the Eleventh Circuit, was to forbid questioning into any investigatory activity by the Senator on the telephone calls while allowing questioning as to matters clearly *not* protected by the Clause. The district court noted that this approach was suggested by this Court in *Helstoski* when it encouraged "excising references to legislative acts, so that the

remainder of the evidence would be admissible." This fulfills the Clause's purpose, which is to provide a shield "only for utterances within the legislative acts as defined in our holdings." *Id.* The framework designed by the district court thus balances the protections to be afforded a Senator under the Clause against any "unsound or unwise" expansion of the Clause's protection beyond its traditional limits.

Finally, Senator Graham argues that the district court and the Eleventh Circuit were both mistaken when they concluded that the Grand Jury could question the Senator on a variety of topics aside from the Raffensperger phone call. These topics include public statements made by the Senator, any communication or coordination with the Trump campaign, and any efforts by the Senator to "cajole" or "exhort" Georgia officials to take certain actions. The Senator insists that questions on these topics are no more than attempts to find a "backdoor" route to questioning the Senator's motivations in making the phone calls. However, there is no basis in law or in fact for such an argument. As noted above, these categories of activities are plainly outside the Clause's limits, categories which the Eleventh Circuit observed "could not qualify as legislative activities under any understanding of Supreme Court precedent." Appx. at 6a. Even if there were some legal basis for the Senator's argument, the facts also offer no support. As the district court observed, "the record belies Senator Graham's suggestion that these *separate* topics of inquiry will simply be used as a 'backdoor' for questioning Senator Graham about the phone calls." *Id.* at 39a (emphasis original).

2. Sovereign Immunity.

Senator Graham also argues that the Eleventh Circuit ignored his arguments regarding sovereign immunity as a basis for total quashal of his subpoena. App. Br. 25-27. It is true that the Eleventh Circuit did not address the Senator's argument on this issue. But the Senator's argument on the issue was arguably abandoned, contained as it was in a single footnote of his brief to the Eleventh Circuit.[13] In any event, the Eleventh Circuit's silence on the issue does not indicate that it was ignored, but simply that the Senator's arguments on the issue did not merit comment, much less an evaluation that the Senator would likely achieve reversal of the district court's order on the basis of the issue.

Prior to the Eleventh Circuit's opinion, the district court observed that the Senator's argument on the issue consisted of "just over two paragraphs" and swept "so broadly as to fully preclude enforcement of the subpoena simply because he is a United States Senator." Appx. at 62a. Senator Graham's arguments to the district court consisted, as they do here, of cases where executive branch regulations barred enforcement of a subpoena on a federal employee. The district court was correct to observe that these cases do not offer any support for the Senator's arguments, which overall are "bereft of any meaningful support." *Id.* at 40a. To the extent there is any comment on whether legislators are immune from subpoenas, it contradicts the Senator's arguments. "Freedom from arrest" does not "confer immunity on a Member from service of process as a defendant in civil matters, *or as a witness in a criminal*

[13] *See* Supplement to Emergency Motion, filed in Eleventh Circuit Court of Appeals on 09/22/2022, at 3 n.1.

case." *Gravel*, 408 U.S. at 614-15 (emphasis added) (internal citations omitted). Further, the Court was not aware of "any privilege to exempt members of congress from the service, or the obligations, of a *subpoena*, in such cases." *Id.* at 615 (emphasis original) (citations omitted). Finally, none of the authority cited by the Senator contain circumstances relevant or analogous to the circumstances here. They all either involve subpoenas to executive branch employees in conflict with applicable *Touhy* regulations (such as *Boron Oil Co. v. Downie*, 873 F2d 67, 70 (1989) or *Smith v. Cromer*, 159 F.3d 875, 879-81 (4th Cir. 1999)) or attempts to subpoena Congress *as a whole* (such as *Keener v. Cong. Of U.S.*, 467 F.2d 952, 953 (5th Cir. 1972), discussed and dismissed by the district court at Appx. 62a-63a). None concern an individual legislator subpoenaed by a grand jury investigating possible criminal activity.

While the Senator states that the subpoena was issued to "Senator Graham" rather than "citizen Graham," that is simply not true. The Grand Jury is aware that it cannot question "Senator Graham" about his indisputably legislative actions, and a great deal of time and effort has been expended to determine precisely the safest way to question the Senator and avoid improper questioning. Any questions will be addressed to topics *outside* legislative duties as defined by this Court. Because the Senator's arguments do not have a foundation in the law, as the district court repeatedly held, sovereign immunity does not afford him a basis for success on the merits of his arguments.

Senator Graham Has Not Demonstrated a Reasonable Probability that this Court will Grant Certiorari.

The Senator also cannot carry his burden in establishing a reasonable probability that four Members of this Court will eventually grant a writ of certiorari in this case. Senator Graham maintains that the district court has improperly authorized the Grand Jury to "probe" into his "motives" in order to "determine whether his apparently legislative activity was 'in fact' or 'actually' legislative." App. Br. 23-24.

However, the district court did not do this because it did not find that Senator Graham's telephone calls to Secretary Raffensperger were "apparently legislative." It in fact found the opposite, as stated above: the Senator's phone calls were "not manifestly legislative on their face" and remained an area of intense factual dispute (as opposed to "objectively legislative"). Appx. at 11a. This places them in contrast with the cases cited by Senator Graham in his application, all of which involve activities that are easily described as "apparently legislative acts." *See United States v. Dowdy*, 479 F.2d 213, 226 (4th Cir. 1973) (officially authorized investigation of a complaint to determine whether hearings should be held by House subcommittee); *Comm. on Ways & Means v. United States Dep't of the Treasury*, 45 F.4th 324, 330-31 (D.C. Cir. 2022) (statutorily-authorized request for information from House committee chairman); *McSurely v. McClellan*, 753 F.2d 88, 106 (D.C. Cir. 1985) (official investigation and acquisition of materials by employees of Senate subcommittee "unquestionably" authorized to investigate underlying events of the case). The telephone calls at issue in this case fall into an altogether separate category

of activity that is not manifestly legislative on its face but is alleged to be legislative by a Member of Congress. As the district court explained, "this Court never held or otherwise suggested that courts (or the grand jury) may probe into the motivation for legislative acts. That proposition is foreclosed by Supreme Court precedent." Appx. at 36a. Instead, the court could not simply accept the Senator's "conclusory characterizations of these phone calls as *only* containing legitimate legislative factfinding inquiries and thereby ignore (and indeed reject)" the public disagreement about their contents. *Id.*

The Senator's argument for a reasonable probability of an eventual grant of certiorari is built upon this point: the phone calls are apparently legislative activity, and so any further inquiry is forbidden. App. Br. 24-25. The Senator, citing *Dowdy*, *Ways & Means*, and *McSurely*, describes a circuit split regarding "whether courts may look beyond the face of an act to determine whether it is *actually* legislative." App. Br. 24. But no such split exists. In *Gov't of V.I. v. Lee*, 775 F.2d 514, 524 (3d Cir. 1985), the Third Circuit declined to follow a district court's expansive reading of *Dowdy* as forbidding inquiry into whether "purportedly legislative acts" were, in fact, legislative. The district court described the principle succinctly: "courts are not precluded from probing into the facts and circumstances of alleged legislative acts to determine *what* these acts actually are—that is, legislative or non-legislative—but courts *are* precluded from probing into motivations for such acts once it has been determined that they are, in fact, legislative."[14] Appx. at 60a (emphasis original). The

[14] Such an inquiry would appear to be entirely unavoidable in this case, based on the underlying facts. A letter from the former the former Director of the U.S. Office of Government Ethics

Third Circuit's holding in *Lee* (and therefore the Eleventh Circuit's holding here) does not conflict with the holdings from the Fourth Circuit and D.C. Circuit cases cited by the Senator because those cases involve activities that were easily described as "in fact, legislative." By contrast, in *Lee*, there had yet to be a determination of whether certain activities were legislative *in the first place*: "Thus, the government here does not seek to inquire into motives for a legislative act, but rather questions whether certain legislative acts were in fact taken, and whether other non-legislative acts were misrepresented as legislative." 775 F.2d at 524. The Third Circuit went on to note that its interpretation of *Dowdy* was supported by precedents of this Court, including *Helstoski* and *Eastland*. There is thus no circuit split on this issue.

Senator Graham also argues that the Eleventh Circuit will create a circuit split if it holds that the burden falls on a legislator to demonstrate the applicability of the Speech or Debate Clause. App. Br. at 24-25. Again, no split is evident. The Senator does not point to any case that holds otherwise. Additionally, no circuit split is threatened here because the burden did not matter in this case: the district court held that even if the burden lay with the Special Purpose Grand Jury, "that burden has been met" because the Grand Jury "showed, at minimum, that there are topics of inquiry on which Senator Graham could be questioned that would clearly fall outside of the Speech or Debate Clause's protections." Appx. at 52a n.3. The Eleventh Circuit did not even refer to any burden of proof in its opinion because the burden played no

observed that Senator Graham's actions had "obliterated the distinction between personal capacity political opinions and official actions with respect to this particular election controversy." *See* Letter of Claire O. Finkelstein, Richard W. Painter, and Walter M. Schaub, Jr., found at https://www.law.upenn.edu/live/files/11121-ethics-complaint-against-senator-lindsey-o-graham.

role in the resolution of any issues in the case. Similarly, a third circuit split proposed by Senator Graham (App. Br. 25 n.10) was sidestepped entirely by the lower courts, who opted to simply take an approach that was more expansive and beneficial to the Senator's interests.

No circuit splits are implicated by the holdings in this case, which arises from extremely unusual circumstances that are unlikely to be repeated. The Senator certainly does not point to any prior analogous cases. The Special Purpose Grand Jury respectfully submits that this Court is unlikely to grant certiorari in such an unusual case, particularly where the lower courts' holdings simply apply the longstanding precedents of this Court and avoid broader jurisprudential conflict. Certainly, where the Senator's burden weighs as heavily as it does in these circumstances, he does not satisfy the requirements of the standard.

There Is No Likelihood of Irreparable Harm from the Denial of a Stay.

Finally, there is no likelihood that Senator Graham will suffer "irreparable harm" should Your Honor or this Court decline to grant his application. As noted above, the Senator will benefit from the framework put in place by the district court, and approved by the Eleventh Circuit, ensuring that he will not be subjected to questioning regarding legitimate legislative activity. What is certain is that, if the Senator receives his stay, the Special Purpose Grand Jury will be foreclosed indefinitely from pursuing unique information, analyzing any resulting evidence, or using the Senator's testimony to explore additional routes of valid inquiry.

The Grand Jury was empaneled to sit for a calendar year, from May of 2022 to April of 2023. Should Your Honor stay the application of the district court's order until after all available appeals are exhausted, it is highly unlikely that the Grand Jury will be able to receive testimony in that timeframe, even if he is ultimately unsuccessful on appeal. And even if matters before the Eleventh Circuit were to move expeditiously, and then this Court were to deny certiorari with all due haste, there is essentially no possibility that the Grand Jury could receive Senator Graham's testimony in time to pursue any investigative leads derived therefrom before the end of its term. Additionally, the Special Purpose Grand Jury is required to create a report of its findings and submit it to the judge supervising its investigation. A stay would create the possibility, or perhaps the certainty, that the Grand Jury would either have to pursue an extension of its term indefinitely to await the testimony of a single witness or issue a report without receiving any testimony or information from the Senator at all.

Against this, Senator Graham presents only the remote possibility of harm that would befall him should his more sweeping arguments ultimately win the day. As observed above, these arguments are generally without support in the record or in the law, and a unanimous panel of the Eleventh Circuit has determined that they are unlikely to succeed on appeal. The framework put in place by the district court, and approved by the Eleventh Circuit, will foreclose questioning about protected legislative activity including questioning on any topics related to individual investigation by the Senator into election wrongdoing in Georgia, while allowing

questioning only on topics outside the boundaries of legislative activity. This is the very definition of the protection afforded to a legislator by the Speech or Debate Clause.

As the Eleventh Circuit observed, "[e]ven assuming that the Clause protects informal legislative investigations," as the district court did, "the district court's approach ensures that Senator Graham will not be questioned about such investigations." Appx at 5a. The framework will also allow the Senator to resolve any future disputes regarding questioning in federal court, where his rights are sure to be adequately protected under the law. "Should there be a dispute over whether a given question about Senator Graham's phone calls asks about investigatory conduct, the Senator may raise those issues at that time." *Id.* at 5a-6a. While the Senator complains that the Eleventh Circuit did not address the equities, the foregoing statement indicates that they foresee no harm befalling the Senator under this approach.

Earlier, the district court had weighed the equities in these unique circumstances and concluded that "in this context, the public interest is well-served when a lawful investigation aimed at uncovering the facts and circumstances of alleged attempts to disrupt or influence Georgia's elections is allowed to proceed without unnecessary encumbrances." *Id.* at 44a. Crucially, the district court found that "it also serves the public interest for the Supreme Court's understanding of the [Speech or Debate Clause's] purpose and limitations to be vindicated" and quoted this Court's holding in *Brewster*: "Admittedly, the Speech or Debate Clause must be read

broadly to effectuate its purpose of protecting the independence of the Legislative Branch, but no more than the statutes we apply, was its purpose to make Members of Congress super-citizens[]." 408 U.S. at 516.

The Special Purpose Grand Jury stands ready, with the District Attorney's guidance, to see that every applicable courtesy and protection is afforded to Senator Graham under this approach. The existing framework suggested by the district court is more than adequate to facilitate such an approach. Should the Senator's application be denied, he will not suffer "irreparable harm" but will instead be subjected to questioning in a manner prescribed by a federal court to protect his rights, and he will remain under federal court supervision. If his application is granted, the Grand Jury will unquestionably face delays and disruptions that will affect the entirety of its tenure. In order to ensure the efficient administration of an ongoing investigation as well as the protection of the public's interest in the enforcement of the laws, the Grand Jury asks that Your Honor conclude that a stay will harm the Grand Jury, while denial will not harm Senator Graham.

CONCLUSION

Senator Graham cites factual conclusions which the record does not support in order to advance arguments without a basis in prior decisions of this Court, seeking protection for activities which the Speech or Debate Clause does not contemplate. Should the Senator's application be granted, the Grand Jury's work will be delayed indefinitely, ensuring that information which could either clear the innocent of suspicion or increase scrutiny on the guilty will continue to lie beyond the Grand Jury's grasp. Such interference with the Grand Jury's ongoing investigation is not

necessary in order to ensure the protection of the Senator's rights, which will be safeguarded by court order, or the effective application of the Speech or Debate Clause in these circumstances. The Special Purpose Grand Jury therefore respectfully requests that Your Honor decline to grant the Senator a stay or enjoin his questioning until final resolution of his appeal.

Respectfully submitted, October 27, 2022.

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