IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FULTON COUNTY SPECIAL PURPOSE GRAND JURY,

PLAINTIFF-APPELLEE,

v.

LINDSEY GRAHAM,

DEFENDANT-APPELLANT.

No. 22-12696

RESPONSE OF FORMER FEDERAL PROSECUTORS AS *AMICI CURIAE* IN OPPOSITION TO APPELLANT LINDSEY GRAHAM'S SUPPLEMENT TO EMERGENCY MOTION TO STAY DISTRICT COURT'S ORDER AND ENJOIN SELECT GRAND JURY PROCEEDINGS PENDING APPEAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-3, *amici* former federal prosecutors ("*amici*") provide this Certificate of Interested Persons and Corporate Disclosure Statement. To the best of *amici*'s knowledge, the following persons and entities may have an interest in the outcome of this case:

Association of American Physicians and Surgeons

Austin, Marshall T.

Daniel, Edward Bart

Eagle Forum Education & Legal Defense Fund

Eisen, Norman Larry

Fulton County District Attorney's Office

Fulton County Special Purpose Grand Jury

Graham, Senator Lindsey O.

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To the best of *amici*'s knowledge, no other persons, associations of persons, firms, partnerships, or corporations have an interest in the outcome of this case or appeal.

Dated: October 7, 2022

Respectfully submitted,

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INTEREST AND IDENTITY OF *AMICI CURIAE*[1]

Amici are former federal prosecutors Donald B. Ayer, John Farmer, Renato Mariotti, Sarah R. Saldaña, William F. Weld, and Shan Wu.

Through various forms of experience, including their work as prosecutors, *amici* have substantial knowledge and experience relating to subpoenas, including those issued to public officials, and with claims of testimonial privileges raised under the Constitution and on other grounds. They also have substantial knowledge and experience with the structure and process of law enforcement investigations, including in the context of public officials.

Given their decades of public service, their personal familiarity with the law enforcement and constitutional claims at issue here, and their commitment to the integrity of our democratic system, *amici* maintain an active interest in the proper resolution of important questions raised by Senator Lindsey Graham's pending motion.

ARGUMENT

The Superior Court of Fulton County authorized a targeted subpoena compelling Senator Graham to testify about possible attempts to disrupt the lawful

[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. Both parties consent to the filing of this brief.

administration of the 2020 elections in Georgia. Senator Graham removed this case to federal court and moved to quash the subpoena in its entirety, resting his extraordinary request principally on the Speech or Debate Clause of the United States Constitution.

The district court rejected Senator Graham's novel immunity theories, denied his motion to quash, and remanded the matter back to the state court. Senator Graham sought emergency relief from this Court, which issued a temporary stay and remanded the case to the district court to consider whether the subpoena should be partially quashed or modified. Consistent with this Court's directive, the district court narrowed the scope of the subpoena. In particular, the court prohibited questioning about "investigatory fact-finding that allegedly took place" during Senator Graham's phone calls with Georgia election officials, but permitted questioning about the Senator's efforts to "cajole" state election officials, his alleged communications and coordination with the Trump campaign, and his public statements related to Georgia's 2020 elections. Dkt. 44, at 22.

The district court's decision is correct: Senator Graham is not categorically immune from testifying about non-legislative activity under the Speech or Debate Clause. As the district court explained, even if legislative immunity covers *some* of the testimony contemplated by the subpoena, it certainly does not cover all of it. If disputes arise as to specific questions or lines of inquiry, Senator Graham may raise

those concrete issues in federal court—the same approach the district court has already taken with another Member of Congress. *See id.* at 14 n.3. Because Senator Graham has failed to show a likelihood of success on appeal or raise "serious questions" going to the merits of his primary claim under the Speech or Debate Clause, the Court should deny his stay motion.

I. Legislative Privilege Does Not Apply to Non-Legislative Acts.

The Speech or Debate Clause provides that "for any Speech or Debate in either House," Senators and Representatives "shall not be questioned in any other Place." U.S. Const., art. I, § 6, cl. 1. Although the terms "Speech" and "Debate" have been read to reach beyond "pure speech or debate in either House," *Gravel v. United States*, 408 U.S. 606, 625 (1972), that reading does not encompass "everything a Member of Congress may regularly do," *Doe v. McMillan*, 412 U.S. 306, 311, 313 (1973). The Supreme Court rejected such a "sweeping" protection "simply out of an abundance of caution to doubly insure legislative independence." *United States v. Brewster*, 408 U.S. 501, 516-17 (1972). Instead, the Clause protects only "against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts." *Id.* at 525. Thus, "Members of the Congress engage in many activities" that are not protected by the Clause, and those acts receive no protection even though they are "entirely legitimate," *id.* at 512, and "within the scope of [a Member's] employment," *Gravel*, 408 U.S. at 622. As explained below,

the district court faithfully applied those principles and concluded that Senator Graham's (renewed) request for wholesale immunity from compliance with the subpoena—which seeks information that has nothing to do with his legislative duties—is meritless.

II. The Subpoena Targets Non-Legislative Acts Other Than Senator Graham's Phone Calls.

Senator Graham's Speech or Debate argument rests on the premise that every subject about which the subpoena seeks testimony is shielded by legislative privilege. He takes the position that every aspect of his behavior relating to the 2020 Georgia election was legislative in character—including making calls to Georgia election officials, arranging those calls, communicating with third parties about the planning and execution of those calls, making public statements about his calls and about conduct respecting the Georgia election, and communicating with the Trump Campaign and other parties about any efforts to influence the election results.

But that categorical claim is at odds with the law of legislative privilege. In fact, setting aside the calls for the moment, there are at least three additional areas of inquiry that fall squarely outside the ambit of Speech or Debate immunity.

1. Connections to Third Parties. In general, "communications between legislators and constituents, lobbyists, and interest groups are not entitled to protection under a legislative privilege." *Texas v. Holder*, No. 12 Civ. 128, 2012 WL 13070060, at *2 (D.D.C. June 5, 2012); *accord Bastien v. Off. of Senator Ben*

Nighthorse Campbell, 390 F.3d 1301, 1316 (10th Cir. 2004). Similarly, when Members of Congress engage in campaign activity—for themselves or others—they are not acting within the scope of their duties as Members, let alone engaging in legislative acts shielded by a constitutional privilege. *See* Dkt. 33, United States' Response to Defendant Mo Brooks's Petition to Certify He Was Acting Within the Scope of his Office or Employment, *Swalwell v. Trump*, 1:21 Civ. 586, at 9-14 (D.D.C. July 27, 2021) (summarizing judicial, executive branch, and legislative authority).

The subpoena states that Senator Graham possesses unique knowledge concerning "any communications between himself, others involved in the planning and execution of the telephone calls, the Trump Campaign, and other known and unknown individuals" with relevant information. To the extent the subpoena seeks testimony about Senator Graham's communications with interest groups, his own constituents, Trump campaign officials, journalists, or other third parties related to the subject of the District Attorney's investigation, Senator Graham likely lacks any valid claim of legislative privilege (and he has offered no evidence to the contrary). As the district court rightly observed, "tailored and targeted inquiries on this issue are permissible." Dkt. 44, at 16.

2. Public Statements. In *Hutchinson v. Proxmire*, the Supreme Court held that public statements—issued outside official congressional proceedings—are not

legislative, even when they relate to legislative activity. 443 U.S. 111, 127-28 (1979). Senator Graham has made many public statements about his calls with Georgia officials describing his conduct respecting the Georgia election. *E.g.*, Dareh Gregorian *et al.*, NBC NEWS, *Georgia Officials Spar with Sen. Lindsey Graham over Alleged Ballot Tossing Comments*, https://nbcnews.to/3CdRBmp (Nov. 17, 2020) (commenting to reporter about the calls). These statements are beyond any privilege. *See Texas*, 2012 WL 13070060, at *3 ("[V]erifying that a public speech was given, where it was given, and even why it was given are all permissible questions"); Dkt. 44, at 16-18 (same).

3. Arranging Meetings. "[M]eeting arrangements are only 'casually or incidentally related to legislative affairs' and are not part of the legislative process itself." *U.S. Merit Sys. Prot. Bd. v. McEntee*, No. WDQ-07-1936, 2007 WL 9780552, at *3 (D. Md. Dec. 13, 2007) (quoting *Brewster*, 408 U.S. at 528). The Speech or Debate Clause offers no basis to prohibit questions about the logistics involved in calls to Georgia officials. Consequently, as the district court rightly found, "Senator Graham may be asked specific, targeted, and factually oriented questions about the logistics of setting up the phone calls . . . without implicating any potential legislative activity." Dkt. 44, at 13-14.

III. Senator Graham Failed to Show That His Calls to Secretary Raffensperger Were Legislative Acts.

Senator Graham asserts that his calls with Secretary Raffensperger were legislative acts because they constituted investigative activity into the conduct of elections in Georgia. But as the district court recognized, there is significant dispute about the nature of these phone calls, in part due to Senator Graham's public statements long before he was subpoenaed. Dkt. 44, at 6-7, 11-12.[2] In addition, Secretary Raffensperger and his colleague Gabriel Sterling have testified to the grand jury, and Secretary Raffensperger has publicly stated that Senator Graham was encouraging him to "[discard] ballots for counties who have the highest frequency error of signatures." Dkt. 9, at 2. Based on the record, the district court determined that it could not "simply accept Senator Graham's sweeping and conclusory characterizations of the calls" as legislative activity. Dkt. 44, at 10.

That conclusion was not erroneous—much less clearly erroneous. *See United States v. Menendez*, 831 F.3d 155, 169 (3d Cir. 2016). The Speech or Debate Clause "does not protect attempts to influence the conduct of executive agencies," including through "telephone calls to executive agencies." *Hutchinson*, 443 U.S. at 121 n.10. Nor does it shield efforts to "cajole, and exhort with respect to the administration"

[2] In November 2020, Senator Graham told a reporter on video that he contacted Secretary Raffensperger to encourage him to alter the process for verifying signatures on absentee ballots, not simply to gather information. *See* Dkt. 9, at 3-4; Gregorian, *supra*.

of the law. *Gravel*, 408 U.S. at 625. Consistent with this precedent, the district court correctly held that, even assuming the calls contained some protected legislative activity, the grand jury would not "necessarily be precluded from *all* inquiries about the calls." Dkt. 27, at 14; Dkt. 44, at 12-14.

Senator Graham alternatively argues (at 5-9) that the district court had no authority to question whether the calls were legislative activities because that is a forbidden inquiry into motive. But that contention is unavailing. As the district court explained, courts "may not consider *any* motive or intent" (including Senator Graham's asserted motive) when determining if activity is legislative. Dkt. 44 at 6. But where, as here, the activity (the calls) are not legislative on their face, courts can (and should) look to "the nature of those activities and inquiries [to] determine[] if the Speech or Debate Clause forecloses questioning." *Id.*; *Government of the Virgin Islands v. Lee*, 775 F.2d 514, 522 (3d Cir. 1985); *Menendez*, 831 F.3d at 168. That context-driven approach makes good sense. When a Member of Congress speaks to a government official, or takes a meeting, the applicability of legislative privilege is highly fact dependent. *See Menendez*, 831 F.3d at 168. In such cases, courts do not merely accept conclusory assertions from legislators that they were engaged in investigation (or other legislative activity). *See id.* at 172; *Lee*, 775 F.2d at 522. Rather, courts apply the Speech or Debate Clause and its protections only "once it is determined that members are acting within the 'legitimate legislative sphere.'" *Lee*,

775 F.2d at 522 (citation omitted); *accord United States v. Helstoski*, 442 U.S. 477, 490 (1979). Were the rule otherwise, a Member could simply claim that he was involved in informal investigation and declare victory. But, as *Lee* and *Menendez* show, that is not, and has never been, the law.

Senator Graham's citations (at 8) are not to the contrary. Those cases merely confirm the settled proposition—acknowledged by the district court—that *if* an act is legislative, it does not lose protection under the Speech or Debate Clause because of impure motives. *See Cmte. on Ways and Means v. U.S. Dep't of the Treasury*, 45 F.4th 324, 331-33 (D.C. Cir. 2022) (holding that House Committee's request for documents was legislative notwithstanding allegedly political motives underlying request); *Tenney v. Brandhove*, 341 U.S. 367, 371 (1951) (rejecting argument that committee proceeding was not legislative because it was designed "to intimidate and silence plaintiff . . . from effectively exercising his [] rights"); *Scott v. Taylor*, 405 F.3d 1251, 1256 (11th Cir. 2005) (holding that enacting legislation was protected by legislative immunity regardless of motive); *Bogan v. Scott-Harris*, 523 U.S. 44, 48 (1998) (same as to voting); *Bryant v. Jones*, 575 F.3d 1281, 1306-07 (11th Cir. 2009) (same as to legislative elimination of public employment position). None of these cases prohibits a district court from undertaking the fact-intensive analysis of whether an ambiguous act like calling a state election official is legislative in the first place.

The only case Senator Graham cites that says that a court cannot inquire whether "[acts] are legislative in fact" is *United States v. Dowdy*, 479 F.2d 213, 226 (4th Cir. 1973). But, as the Third Circuit explained in *Lee*, *Dowdy* does not apply when there is a threshold dispute about whether an ambiguous act is legislative in nature. *Lee*, 775 F.2d at 524. *Dowdy* involved a charge of a "sham investigation" orchestrated by a subcommittee chairman. *Id.* But, "[n]o matter how illicit Dowdy's motives were," conducting an investigation was "clearly within the scope of his authority." *Id. Dowdy* thus did not address whether it was appropriate to probe whether Speech or Debate protection applied to an act that was not on its face legislative.

Senator Graham seeks (at 4-5) to broaden the scope of legislative immunity by asserting that the Speech or Debate Clause prohibits courts from "parsing" legislative activity. But that argument is mistaken. The district court did not parse legislative activity; it carefully assessed Senator Graham's conduct based on the current, limited record and determined (consistent with precedent) that much of his conduct was not legislative. That determination is consistent with the settled principle that "[l]egislative acts are not all-encompassing." *Gravel*, 408 U.S. at 625; *Brewster*, 408 U.S. at 517, 521; *see also Helstoski*, 442 U.S. at 488 n.7 ("[A] Member can use the Speech or Debate Clause as a shield . . . , but only for utterances within the scope of legislative acts . . . ."); *United States v. Rayburn House Building*, 497

F.3d 654, 659 (D.C. Cir. 2007) (instructing district court to "review *in camera* any specific documents or records identified as legislative and make findings regarding whether the specific documents or records are legislative in nature").

Finally, Senator Graham and his *amici* worry that the district court's ruling will undermine the separation of powers and spell the end of legislative immunity. We do not share that concern. The district court carefully assessed the facts, studiously applied controlling precedent, and took appropriate steps to modify the subpoena to safeguard Senator Graham's prerogatives under the Speech or Debate Clause. To the extent Senator Graham harbors any lingering concerns that the district court's order will allow an end-run around legislative immunity, the district court stands willing and able to adjudicate those disputes as they arise—as federal courts routinely do when resolving claims of privilege. *See* Dkt. 44, at 14 n.3; *cf. Rayburn House Building*, 497 F.3d at 664-65 (recognizing the district court's gatekeeping role in resolving disputes regarding scope of legislative immunity). Until then, Senator Graham cannot escape questioning for his non-legislative acts by hiding behind the cloak of the Speech or Debate Clause.

CONCLUSION

For these reasons, the Court should deny Senator Graham's stay motion.

Dated: October 7, 2022

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/s/ *Jonathan L. Williams* ____
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I hereby certify that on October 7, 2022, I electronically filed the foregoing using the Court's PACER system, which will automatically send e-mail notification of such filing to the attorneys of records who are registered participants in the Court's electronic notice and filing system.

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