No. 22A337

In the Supreme Court of the United States

LINDSEY GRAHAM, U.S. SENATOR,
Applicant,

v.

FULTON COUNTY SPECIAL PURPOSE GRAND JURY,
Respondent.

AMICUS BRIEF OF THE STATES OF TEXAS, ALABAMA, FLORIDA, INDIANA, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, SOUTH CAROLINA, AND UTAH IN SUPPORT OF APPLICANT SENATOR LINDSEY GRAHAM

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JUDD E. STONE II
Solicitor General
Counsel of Record

LANORA C. PETTIT
Principal Deputy Solicitor General

BENJAMIN D. WILSON
Deputy Solicitor General

Office of the Texas Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697
Judd.Stone@oag.texas.gov

Counsel for Amici Curiae

Additional counsel listed with signature block

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Interest of Amici Curiae and Introduction

The States of Texas, 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 has explained, "state legislators enjoy common-law immunity from liability for their legislative acts, an immunity that is similar in origin and rationale to that accorded Congressmen under the Speech or Debate Clause." *Supreme Court of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 732 (1980)); *see also Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998).

Moreover, *amici* States have a strong interest in their senators not being required to testify concerning legislative tasks at the behest of local prosecutors or other investigative bodies—particularly when that testimony would directly conflict with their senators' duties as legislators. Absent this Court's intervention that will be the case here, as the

Fulton County District Attorney's Office has purported to require Senator Graham's testimony on November 17, 2022, App.69a—a day when the Senate is scheduled to be in session. *See* United States Senate, *Tentative 2022 Legislative Schedule*, https://www.senate.gov/legislative/2022_schedule.htm.

This Court should grant Senator Graham a stay pending appeal. The Speech or Debate Clause provides that legislators like Senator Graham "shall not be questioned" about "any Speech or Debate." U.S. Const. art. I, § 6, cl.1. Under this Court's precedent, Senator Graham's investigation concerning the 2020 election in Georgia is a legislative act protected by the Speech or Debate Clause.

This Court's intervention is all the more necessary because, absent a stay, the contents of Senator Graham's protected investigation "will have been disclosed to third parties" before he exercises his appellate rights, "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.*; *see also Chafin v. Chafin*, 568 U.S. 165, 178 (2013) (explaining that "issuance of a stay" may be warranted where "the normal course of appellate review might otherwise cause the case to become moot"); *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 761 (D.C. Cir. 2014) (Kavanaugh, J.) (explaining "post-release review of a ruling that documents

are unprivileged is often inadequate to vindicate a privilege the very purpose of which is to prevent the release of those confidential documents").

ARGUMENT

A stay pending appeal is appropriate when there is (1) "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari"; (2) "a fair prospect that a majority of the Court will vote to reverse the judgment below"; and (3) "a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). Senator Graham satisfies that standard; in particular, he is likely to succeed in showing that his investigation was protected by the Speech or Debate Clause.

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

The Speech or Debate Clause protects Senator Graham's investigation into the 2020 election in Georgia. That investigation was a legislative act because Senator Graham, among other things, was required to vote to certify the results of the election, was at the time chairman of the Senate Judiciary Committee, and is now an original co-sponsor of the Electoral Count Reform Act. Inquiry into Senator Graham's motivation for conducting that investigation, however indirect, is prohibited by the Speech or Debate Clause and this Court's precedent.

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. This Court has therefore "read the Speech or Debate Clause broadly to effectuate its purpose" which is "to insure that the legislative function the Constitution allocates to Congress may be performed independently." *Eastland v. U. S. Servicemen's Fund*, 421 U.S. 491, 501-02 (1975).

"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 this 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.* at 373 (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). The Speech or Debate Clause "protect[s] the integrity of the legislative process by insuring the independence of individual legislators" and "serves the additional function of reinforcing the separation of powers so deliberately established by the Founders." *Eastland*, 421 U.S. at 502 (citations and internal quotation marks omitted). 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." *Id.* at 502-03.

To serve these essential 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. So long as a legislator is conducting an investigation "within the sphere of legitimate legislative activity," he is "'protected not only from the consequences of litigation's results but also from the burden of defending'" himself. *Id.* at 503 (quoting *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (per curiam)).

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

The district court correctly held, App.14a, 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. The court of appeals assumed but did not decide that informal investigations are protected by the Speech or Debate Clause, and did not disturb the district court's conclusion. App.4a-5a.

The Speech or Debate Clause protects a legislator's investigation—even when conducted informally. 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). The Speech or Debate Clause thus protects "things generally done in a session of the House by one of its members in relation to the business before it"—including investigative efforts undertaken by a senator. *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880).

On its face, the Petition for Certification of Need (ECF 2-3)—the document the Fulton County District Attorney used to initiate the process of obtaining Senator Graham's testimony—seeks protected information about senatorial fact-gathering.[1] 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

[1] ECF citations are citations to filings in *Fulton County Special Purpose Grand Jury v. Graham*, No. 1:22-cv-03027 (N.D. Ga.).

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. Senator Graham's Application (at 18-19), demonstrates that he had several legislative reasons to seek such information.

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 these acts 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 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 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. At a minimum, this now-pending legislation demonstrates that Senator Graham's investigation via telephone calls concerned "a subject on which legislation could

be had." *Comm. on Ways & Means, United States House of Representatives v. United States Dep't of Treasury*, 45 F.4th 324, 330 (D.C. Cir. 2022) (internal quotation marks omitted).

There is thus little reason to doubt that Senator Graham had a legislative purpose protected by the Speech or Debate Clause for the telephone calls at issue—as the district court acknowledged, at least in part. App.14a-15a. Because "once it is determined that Members are acting within the 'legitimate legislative sphere' the Speech or Debate Clause is an absolute bar to interference," the district court's inquiry should have ended there. *Eastland*, 421 U.S. at 503 (citing *Doe*, 412 U.S. at 314).

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, App.15a-16a, where it allowed inquiry into individual statements on these calls that the district court believed were not aimed at gathering specific facts but might instead reveal Senator Graham's motivations for seeking those facts, App.16a-17a.

This Court has made clear that the Speech or Debate Clause protects a legislator against inquiry into both a legislator's 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.* The same is true of legislative privilege, a close analogue to the immunity provided by the Speech or Debate Clause. *E.g.*, *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 re Hubbard*, 803 F.3d 1298, 1310 (11th Cir. 2015).

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." App.16a. 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." App.16a. That is, at most 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. But that is simply an indirect inquiry into Senator Graham's motivation for making telephone calls that were concededly investigatory by focusing on what Senator Graham might have meant to imply or suggest during them.

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.*, *Cnty. of Butler v. Governor of Pennsylvania*, 8 F.4th 226, 230 (3d Cir. 2021)(Courts "generally presume that government officials act in good faith."); *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. And if such weak inference suffices to overcome the immunity created by the Speech or Debate Clause, legislators like Senator Graham will often be required to bear "the burden of defending themselves" from litigation, even though this Court has made clear the Speech or Debate Clause protects them from just that. *Eastland*, 421 U.S. at 503. "[J]udicial power" will regularly be "brought to bear on Members of Congress" and "legislative independence . . . imperiled." *Id.*

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

In addition to questioning about the two phone calls, the district court's order allows Senator Graham to be questioned about: (1) "coordination or communications with the Trump Campaign and its post-election efforts in Georgia," App.20a-22a; (2) "public statements (outside of Congress) regarding Georgia's 2020 elections," App.22a-24a; and (3) "alleged attempts to encourage, 'cajole,' or 'exhort' Georgia election offi-

cials to take certain actions," App.25a-27a. 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. *Id.* at 616-17. Inquiry into the process of setting up the two telephone calls could at most cast light on Senator Graham's motivation for conducting them; but inquiry into his intent is squarely prohibited by the Speech or Debate Clause. *Helstoski*, 442 U.S. at 489; *Brewster*, 408 U.S. at 525.

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: To the extent the district attorney in fact requested such information at all, any such request improperly rests on inferences concerning Senator Graham's intent. *E.g.*, ECF 9 at 26. Again, inquiry into the Senator Graham's intent is precluded by the Speech or Debate Clause.

The proper question is whether Senator Graham's "actions were legislative" when "stripped of all considerations of intent and motive." *Bogan*, 523 U.S. at 55.

Third, though Senator Graham's public statements themselves are not protected by the Speech or Debate Clause, those public statements alone can hardly justify the district court's extraordinary remedy of ordering a sitting senator to testify to a special purpose 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.

Because each of these areas of inquiry at a minimum seeks information as to Senator Graham's motives for conducting the telephone calls that were part of the investigation at issue, the Speech or Debate Clause protects Senator Graham from being required to provide testimony.

CONCLUSION

The Court should grant Senator Graham's Application.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

/s/ Judd E. Stone II
JUDD E. STONE II
Solicitor General
Counsel of Record

LANORA C. PETTIT
Principal Deputy Solicitor General

BENJAMIN D. WILSON
Deputy Solicitor General

Office of the Texas Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697
Judd.Stone@oag.texas.gov

Counsel for Amici Curiae

STEVE MARSHALL
Attorney General of Alabama

ASHLEY MOODY
Attorney General of Florida

TODD ROKITA
Attorney General of Indiana

JEFF LANDRY
Attorney General of Louisiana

LYNN FITCH
Attorney General of Mississippi

ERIC SCHMITT
Attorney General of Missouri

AUSTIN KNUDSEN
Attorney General of Montana

ALAN WILSON
Attorney General of South Carolina

SEAN REYES
Attorney General of Utah

October 2022