No. 22A337

IN THE UNITED STATES SUPREME COURT

SENATOR LINDSEY GRAHAM, *Applicant*

v.

FULTON COUNTY SPECIAL PURPOSE GRAND JURY, *Respondent.*

On emergency application for a stay and injunction pending appeal
from the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF PROFESSOR DEREK T. MULLER IN SUPPORT OF APPLICANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Other Authorities

Regulations

Constitutional Provisions

INTEREST OF AMICUS CURIAE[1]

Derek T. Muller holds the Ben V. Willie Professorship in Excellence at the University of Iowa College of Law. He teaches and researches in the areas of election law and federal courts. He has written extensively about the rules concerning federal elections, state administration of federal elections, presidential elections, the Electoral College, the Electoral Count Act, and litigation surrounding these issues. See, e.g., Derek T. Muller, Electoral Votes Regularly Given, 55 Ga. L. Rev. 1529 (2021). He has a particular interest in ensuring that members of Congress have the flexibility to investigate and respond to election issues. He has advised members of Congress and their staff about reforming the Electoral Count Act, including testifying before the United States Senate Committee on Rules and Administration on August 3, 2022, in support of the Electoral Count Reform and Presidential Transition Improvement Act of 2022.

INTRODUCTION AND SUMMARY OF ARGUMENT

The merits of this case are colored by partisan overtones. But the overarching legal questions implicate nonpartisan, institutional concerns. The Speech or Debate Clause has deep historical roots that protect important interests in legislative independence. That independence requires strong protection for legislative inquiry under an objective standard rooted in the facial basis for a particular investigation. If courts intrude on that independence by basing the standard for constitutional protection on the subjective motive of the legislator—as the district court and Eleventh Circuit did here—members will conduct fewer investigations, to the detriment of all.

There is a split of authority on whether the Clause's protections extend to informal investigations. The Eleventh Circuit sidestepped that question, holding that "even assuming" that

[1] Amicus certifies that no counsel for a party—or anyone else other than counsel listed above—authored this brief in whole or in part or made any monetary contribution toward it. Sup. Ct. R. 37.6.

they do, "courts still must determine whether a legislator's conversation was a protected investigation or an unprotected non-legislative discussion." Eleventh Circuit Order, October 20, 2022 (Order). But in sidestepping that split, the court deepened another. It relied on a Third Circuit case, *United States v. Melendez*, which says that when there is a question about whether an activity is legislative, a court "consider[s] the content, purpose, and motive of the act" to decide. 831 F.3d 155, 166 (3d Cir. 2016) (emphasis added). That is, the inquiry becomes subjective.

The Eleventh and Third Circuits are wrong. They contradict this Court's holding in *Bogan v. Scott-Harris* that "[w]hether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it." 523 U.S. 44, 55 (1988). They conflict with cases from the First, Second, and Eighth Circuits that establish an objective inquiry. *Leapheart v. Williamson*, 705 F.3d 310, 313 (8th Cir. 2013) ("A legislator's potential or alleged motives are 'wholly irrelevant to [the] determination of whether [a legislator is] entitled to legislative immunity.'" (quoting *State Emps. Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 90 (2d Cir. 2007) (citing *Bogan*, 523 U.S. at 55); *Figueora-Serrano v. Ramos-Alverio*, 221 F.3d 1, 5 (1st Cir. 2000) ("The official's motive or intent is irrelevant to the determination of whether an action is legislative or administrative.") (citing *Bogan*, 523 U.S. at 54). They even conflict with Third Circuit itself. *See Youngblood v. DeWeese*, 352 F.3d 836, 840-41 (3d Cir. 2003) ("To opine on immunity, we must examine the legislators' acts 'stripped of all considerations of intent and motive.'" (citing *Bogan*, 523 U.S. 44, 55 (1998), *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 508 (1975), and *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)).

Under the Eleventh Circuit's analysis, whether an activity is legislative largely turns on the subjective motive or purpose behind it. But determining motive can be a slippery and protracted

business—which helps explain why this Court has repeatedly stated that motive is irrelevant. That is, the inquiry is objective, not subjective.

While the Third Circuit has recognized that courts may not inquire "into the motives or purposes of a legislative act," it believes that motive is crucial in determining whether an act is legislative to begin with. *Government of Virgin Islands v. Lee*, 775 F.2d 514, 522 (3d Cir. 1985) (emphasis added). But unless the legislative nature of an act is readily apparent—like something said on the Senate floor during a debate on a bill—this purportedly limited rule flings the door wide open to inquire into the purposes and motives behind all manner of important Congressional business. And even if those inquiries end up going nowhere, the people's business is harmed solely by allowing the inquiry.

These important issues deserve full development and resolution on the merits. And a merits inquiry requires a stay because the constitutional interests at stake will be irreparably lost at the moment the district attorney's questioning begins. *See Chafin v. Chafin*, 568 U.S. 165, 178 (2013) ("Issuance of a stay is warranted" where "the normal course of appellate review might otherwise cause the case to become moot."); *cf. Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985) (explaining that a collateral order denying a claim of immunity is immediately appealable because otherwise the case "can never be reviewed at all"). Amicus urges the Court to grant Senator Graham's requested stay for four reasons: First, the Clause's history shows that its protections should be construed broadly. Second, determining motive is central to the rulings below, but this Court has repeatedly eschewed motive inquiry in Speech or Debate analysis. Third, determining motive will result in prolonged litigation that is unlikely to reveal a legislator's true motive anyway. And fourth, permitting any inquiry into Senator Graham's actions here undermines the purposes of the Speech or Debate Clause.

ARGUMENT

When considering emergency stay applications, this Court considers three factors: whether there is (1) a "reasonable probability that four Justices will consider [an] issue sufficiently meritorious to grant certiorari"; (2) "a fair prospect that the 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). Amicus agrees with Senator Graham that all these factors weigh in favor of granting a stay, but focuses here on the second factor, under which this Court considers the likelihood of success on the merits. *NFIB v. OSHA*, 142 S.Ct. 661, 664 (2022).

The Eleventh Circuit affirmed the District Court's decision subjecting Speech or Debate Clause protection to an exception based on an allegedly non-legislative motive. That is a problem for four reasons: (1) the history of the Clause shows the need for broad protections, including of informal investigations; (2) this Court has repeatedly said that motive is irrelevant to Speech or Debate inquiries; (3) determining motive is likely to spawn protracted litigation; and (4) inquiring into motive undermines the purposes of the Clause's broad protections.

I. The history of the Speech or Debate Clause shows that informal investigations merit robust protections.

The Speech or Debate Clause provides essential nonpartisan protection of the workings of Congress. It enables members of that body to resist executive and judicial encroachments on the legislative power. *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 510 (1975). It also protects legislators from judicial distractions to or disruptions of their roles. *Id.* at 503. And, in the context here, it maintains the federal-state balance of power by granting protection from retaliation or obstruction by more than 2,300 local prosecutors across the nation. *Cf. Trump v. Vance*, 140 S. Ct. 2412, 2431 (2020) (explaining that the President cannot be subpoenaed by state law

enforcement when compliance would interfere with his ability to perform his duties); *id.* at 2452 (Alito, J., dissenting) (noting the potential threat to the President from "the use of the subpoena power by the Nation's 2,300+ local prosecutors").

The Clause's parliamentary ancestor was born of the Glorious Revolution of 1688—the culmination of a centuries-long struggle against royal oppression and manipulation. *Kent v. Ohio House of Representatives Democratic Caucus*, 33 F.4th 359, 362 (6th Cir. 2022).

The value of these protections was widely appreciated in America before and after Independence. *See id.* at 362–63. Many of the colonies (and later States) adopted the privilege, the Articles of Confederation included it, and the Philadelphia Convention adopted it without debate or dissent. *Id.* Although the language of the privilege at issue here speaks to "Speech or Debate in either House," U.S. Const. art. I § 6, the Speech or Debate Clause is to be "read 'broadly to effectuate its purposes.'" *Doe v. McMillan*, 412 U.S. 306, 311 (1973). In 1880, the United States Supreme Court followed State court decisions interpreting similar provisions and rejected a "narrow view" that would have limited the Clause "to words spoken in a debate." See *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880). Instead, the Court explained, the Clause applies to all "things generally done in a session of the House by one of its members in relation to the business before it." Id. It later specified that the relevant inquiry is whether a legislator is "acting in the sphere of legitimate legislative activity." *Tenney*, 341 U.S. at 376-79.

"Investigations" fall squarely within that sphere as "an established part of representative government." *Id.* at 377 & n.6. Congress's "broad" power to investigate is "inherent in the legislative process," and includes "inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes" and "surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them." *Watkins v. United*

States, 354 U.S. 178, 187 (1957); *accord Eastland*, 421 U.S. at 504. Investigations are "inherent in the power to make laws" because legislatures "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)). Investigations are also necessary for legislators to cast votes in a manner consistent with their constitutional oaths. The Speech or Debate Clause protects these investigations to enable individual legislators to obtain the necessary information to cast informed votes, to decide whether to propose "possibly needed" bills, *see Watkins*, 384 U.S. at 187, and to decide whether further investigation is necessary.

The Speech or Debate Clause also protects informal investigations by individual legislators because the principles that support protecting formal investigations apply with equal force to informal investigations. *See Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 530 (9th Cir. 1983); *Lee*, 775 F.2d at 521; *McSurely v. McClellan*, 553 F.2d 1277, 1286-87 (D.C. Cir. 1976). *But see Bastien v. Office of Senator Ben Nighthorse Campbell*, 390 F.3d 1301, 1314–16 (10th Cir. 2004).

The power to vote, propose legislation, and investigate includes the power to inform oneself about those very actions. *See McSurely*, 553 F.2d at 1286–87 (explaining that informal "information gathering . . . is essential to informed deliberation" and is "a necessary concomitant of legislative conduct" such that protection is necessary (internal quotation marks omitted)). Formal investigations are not always an option for various reasons—Congress has limited time and resources for formal investigations, members of the minority party have limited access to formal investigations, and not all subjects are suited for formal investigation due to time constraints or sensitive matters. So, informal factfinding is crucial for lawmakers to "properly" fulfill their

"constitutional duties." *Id.* (internal quotation marks omitted). Refusing to protect such investigations—or protecting them only partially—would require legislators to choose between opening themselves up to civil suits, discovery requests, subpoenas, or even criminal prosecutions, and honoring their constitutional obligations. The Speech or Debate Clause protects legislators from the difficulties in that dilemma. *See Eastland*, 421 U.S. at 511.

This is especially important in light of the breadth of topics that federal legislation touches on. Just about everything that Congress legislates on could implicate a potential lawsuit. For example, regulating social media companies could implicate First Amendment rights. *AAPS v. Schiff*, 518 F. Supp. 3d 505, 510 (D.D.C. 2021). Regulating the securities industry implicates a broad array of both civil and criminal enforcement actions—as well as the defendants' rights in those actions. *See* 17 C.F.R. § 240.10b-5 (securities fraud provisions enforceable by both criminal and civil SEC actions). It is not uncommon for members of Congress to initiate those investigations by sending a letter to the SEC. *See, e.g., Nat'l Pub. Radio, Inc. v. United States Int'l Dev. Fin. Corp*., 2021 WL 5507215, *1 (C.D. Cal., Nov. 24, 2021) (explaining that Senator Elizabeth Warren inquired into and thereby initiated SEC investigation regarding COVID loans). *See generally SEC v. Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118, 126 (3d Cir. 1981) (discussing commonality of third-party referrals for investigation to administrative agencies, many of them from members of Congress). And regulating immigration impacts criminal law (like deportations and removals, *see Padilla v. Kentucky*, 559 U.S. 356 (2010)), as well as civil issues, *see, e.g., Florida v. United States*, 2022 WL 4021934 (N.D. Fla., Sep. 2, 2022).

Amicus emphasizes the nonpartisan, institutional interests at stake in a decision on the scope of the Speech or Debate Clause. Members of Congress from both parties extensively pursue informal factfinding. *See, e.g., Schiff*, 518 F. Supp. 3d at 510 (detailing the informal factfinding

efforts of Congressman Adam Schiff). But that activity will be chilled if their actions are subject to discovery, civil suits, or criminal prosecutions delving into their motives for doing so. *See Miller*, 709 F.2d at 531 (explaining the chilling effect that would result if lawmakers were required to be witnesses in civil suits). And to the extent lawmakers nevertheless decide to inform themselves through informal investigations, the potentially endless probes will interfere with their ability to fulfill their constitutional obligations to their constituents. *See Eastland*, 421 U.S. at 503.

II. Motive lies at the root of the erroneous rulings below, and this Court has repeatedly refused to consider motive in the Speech or Debate analysis.

That chilling effect cannot be avoided by limiting such inquiries to "precise, targeted questions" about whether the activity in question was "entirely" investigative. See D.E. 44, at 10, 12–13; Order. The lower courts' maneuver is flawed because this Court has repeatedly eschewed motive inquiries in Speech or Debate analysis.

The district court's order—and the Eleventh Circuit's refusal to grant relief—purported to separate out legislative from other reasons for an informal investigation based on motive. In each of the lower courts' views, alleged "communications and coordination with the Trump campaign regarding its post-election efforts in Georgia, public statements regarding the 2020 election, and efforts to 'cajole' or 'exhort' Georgia election officials . . . . could not qualify as legislative activities under any understanding of" this Court's precedent. Order. But this turns what ought to be an objective inquiry into a subjective one, in conflict with this Court's precedent. *See Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998) ("Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it."). It also conflicts with several other Circuits' understanding of that precedent. *Leapheart*, 705 F.3d at 313 ("A legislator's potential or alleged motives are 'wholly irrelevant to [the] determination of whether [a legislator is] entitled to legislative immunity.'" (quoting *State Emps. Bargaining Agent Coal.*, 494 F.3d at

90 (citing *Bogan*, 523 U.S. at 55); *Figueora-Serrano*, 221 F.3d at 5 ("The official's motive or intent is irrelevant to the determination of whether an action is legislative or administrative.") (citing *Bogan*, 523 U.S. at 54). That includes other decisions from the Third Circuit—the very one the court below relied on to inquire into motive. *See, e.g., Youngblood*, 352 F.3d at 840-41 ("To opine on immunity, we must examine the legislators' acts 'stripped of all considerations of intent and motive.'" (citing *Bogan*, 523 U.S. at 55, *Eastland*, 421 U.S. at 508, and *Tenney*, 341 U.S. at 376).

Sanctioning inquiries into a lawmaker's supposed "purpose" for an investigation would eviscerate the protection of the Speech or Debate Clause. Purpose and motive are synonymous. *See Motive*, Oxford English Dictionary (3d ed. Dec. 2022) ("A purpose."). And this Court has repeatedly instructed that motive is irrelevant to determining whether an act is legislative. *See, e.g., Bogan*, 523 U.S. at 54. So, an inquiry into the "purpose" of an activity is just as impermissible as an inquiry into the "motive" of an activity. *See United States v. Johnson*, 383 U.S. at 185 (holding clause protects not only "legislative acts" of Congressional members, but also members' "motives for performing them"); *Watkins*, 354 U.S. at 200 (declining to "test[] the motives of committee members" to determine reasons behind legislative acts); *Tenney*, 341 U.S. at 377 ("[T]he claim of an unworthy purpose does not destroy the privilege."); *see also Comm. on Ways & Means v. U.S. Dep't of Treasury*, 45 F.4th 324, 333 (D.C. Cir. 2022) ("The courts do not probe the motives of individual legislators. These motives are explicitly protected by the Speech or Debate Clause.").

III. Sussing out motive also presents practical concerns, creating protracted litigation and undermining the Clause's purposes.

In addition to conflicting with this Court's precedent, the lower courts' maneuver also creates practical problems. Teasing out motive can be complicated, and any questioning

undermines one of the core purposes of the clause: to protect members from harassment and inconvenience.

Purpose, like any other state of mind, can be difficult to prove, as direct evidence is not often available. *See DeSpain v. Uphoff*, 264 F.3d 965, 975 (10th Cir. 2001) ("Because it is difficult, if not impossible, to prove another person's actual state of mind, whether an official had knowledge may be inferred from circumstantial evidence."); *see also* Gregory Klass, *Meaning, Purpose, and Cause in the Law of Deception*, 100 Geo. L.J. 449, 471 (2012) (explaining that the "inherent difficulty of proving state of mind . . . create[s] [a] hurdle[]" to verifying a "bad actor's purpose"). Searching for circumstantial evidence of motive can give rise to extensive—and sometimes fruitless—discovery. *See, e.g., Weit v. Cont'l Illinois Nat'l Bank and Tr. Co. of Chi*., 641 F.2d 457 (7th Cir. 1981) (explaining that eight years of discovery failed to uncover evidence of illicit motive); *Jean v. Collins*, 221 F.3d 656, 662 n.3 (4th Cir. 2000) (noting that civil rights plaintiff had been allowed "extensive discovery" during seventeen years between arrest and lawsuit but failed to discover evidence of bad faith). That discovery itself may be driven by bad motives. *See Brown v. Maxwell*, 929 F.3d 41, 47 (2d Cir. 2019) ("Unscrupulous litigants can weaponize the discovery process to humiliate and embarrass their adversaries."). As may be criminal prosecutions. *See generally* Matt Taibbi, *The Justice Department Was Dangerous Before Trump. It's Out of Control Now*, Sept. 17, 2022, available at https://taibbi.substack.com/p/the-justice-department-was-dangerous-dbe (chronicling politicized prosecutions since 2001). So it is no defense to say that only "narrow" or "precise, targeted questions" about a legislator's purpose will be asked. *See* D.E. 44, at 6, 12.

The goal of pinpointing a single underlying motive will often be fruitless, particularly on issues that are deeply political. Many human decisions involve mixed motives, particularly when

emotions run high. And hindsight, later events, and intended audiences can affect how one explains his prior actions. For these and other reasons, the inquiry called for by the district court (and endorsed by the Eleventh Circuit) is unlikely to lead to the determination of a single motive after the fact. Even if it were practical to parse motives out and quantify them, that still leaves unanswered some important threshold questions: How much legislative motive must a legislator have to merit protection by the Clause? 25 percent? 51 percent? More? Requiring the member to appear and answer questions would still undermine one of the central purposes of the Speech or Debate Clause: preventing disruption of the people's business by taking up a member's time. *Eastland*, 421 U.S. at 503.

Consider a hypothetical bill regulating what social media companies can (or must) remove from their websites, similar to the laws recently enacted in Florida and Texas. *See NetChoice, LLC v. Att'y Gen., Fla.*, 34 F.4th 1196, 1205–07 (11th Cir. 2022); *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 445–46 (5th Cir. 2022). This would no doubt prompt—and rightly so—a great deal of informal investigation by Senators on both sides of the aisle. That sort of investigation ought to be encouraged. But if Senators are later required to speak to any alleged non-legislative reasons for investigating, they are likely to conduct fewer investigations—even if they had to explain only a portion of their motives for doing so. And if the depth of legislative investigation is reduced, the output of the legislative process will also be negatively affected.

This concern extends to more ordinary legislative tasks, like the removal of an unruly person from a legislative hearing. That is unquestionably a legislative act protected by the Constitution. *See Bardoff v. United States*, 628 A.2d 86 (D.C. Ct. App. 1993) (holding that speech or debate clause protected Senators from answering subpoenas from protesters who had been forcibly removed from committee hearing on Iran-Contra affair). And it is not hard to imagine that

such act could lead to a charge of infringement of the removed person's rights. *See, e.g., id.* at 90 (alleging Fifth and Sixth Amendment violations stemming from meeting removal); *Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945, 1954 (2018) (holding that Lozman could pursue First Amendment retaliatory arrest claim against city council, which "require[d] objective evidence of a policy motivated by retaliation"). If courts could open the door to an inquiry into any non-legislative motives for this action, the disruption of the member's duties would be substantial.

The Third Circuit—on which the Eleventh Circuit relied here—has held that the motive/purpose inquiry only kicks in where acts are not "so clearly legislative in nature that no further examination ha[s] to be made to determine their appropriate status." *Lee*, 775 F.2d at 522. That is, motive or purpose acts like a tiebreaker or an ambiguity-resolving rule when an act might be considered both legislative and non-legislative. But these supposedly ambiguous cases cover such a wide swath of legitimate legislative activity as to largely nullify the Clause's protections in activities like informal investigations. And this two-step process merely shifts the fight to whether the activity is ambiguous. Hinging the Clause's protections on the creativity of litigants will result in portrayals of most actions as ambiguous and increased calls to inquire into motive or purpose.

If this Court were to permit inquiries into purported non-legislative motives, the burden would fall disproportionately on members of Congress in the minority party. Members of the minority party have less access to formal investigative mechanisms because the subpoena power resides in the majority of a committee or in its chair. *See* Christopher F. Corr & Gregory J. Spak, *The Congressional Subpoena: Power, Limitations and Witness Protection*, 6 BYU J. Pub. L. 37, 38–41 (1992). So minority members rely heavily on informal means of investigation. If the protections of the Constitution could be erased by this purportedly limited inquiry, members of the minority party would be even more limited in their ability to pursue formal investigation—and

hobbled in their ability conduct informal investigation without exposing themselves to any number of judicial demands. This would undermine the ability of an out-of-power party to highlight flaws in majority policy and to seek to influence it for the better.

Even for members of the majority party, allowing the executive or the judiciary to circumvent the constitutional protection of the Speech or Debate Clause would seriously hinder the legislative process. Before initiating a formal investigation, lawmakers must "ha[ve] enough threshold information to know" what or whom to investigate. *See* Robert J. Reinstein & Harvey A. Silvergate, *Legislative Privilege and the Separation of Powers*, 86 Harv. L. Rev. 1113, 1154 (1973). Delving into those questions is objectively reasonable whatever other motives may be involved, and ought to be protected.

After Congress decides what and whom to investigate, it still faces the constraints of time and resources—key limitations on the length, scope, and number of formal investigations that may feasibly be conducted. These constraints will be heighted if the protections of the Speech or Debate Clause are available only for acts spurred by purely legislative motives (if such things exist). And the legislative process will be harmed in important ways because lawmakers would choose more often that ignorance is better than exposure to local inquiries based on the whims of local authorities.

IV. Allowing this kind of inquiry will unduly burden lawmakers and prevent them from fulfilling their constitutional duties.

Inquiring into purpose will necessarily be invasive and disrupt legislative functions. Even if lawmakers could ensure that their activities were wholly investigative, they would be subject to inquiry so long as there is an allegation that the investigative activity included some non-investigative statements, that the "sole purpose" of the activity was not investigative, or that observers thought the activity suggested or implied something more than factfinding. *See* D.E. 44

at 5–6 n.1. Many of the informal investigative activities members of Congress undertake will be subject to those same allegations. *See, e.g., Schiff*, 518 F. Supp. 3d at 510–11. This risk is especially acute when considering that lawmakers disproportionately investigate hotly contested and politically charged questions, such as Presidential tax returns and social media companies' treatment of vaccine misinformation. *See Ways & Means*, 45 F.4th at 331–32 (committee subpoena for former President Trump's tax returns); *Schiff*, 518 F. Supp. 3d at 510–11 (a Representative's letter to social media companies). "The mere fact that individual members of Congress may have political motivations as well as legislative ones is of no moment. Indeed, it is likely rare that an individual member of Congress would work for a legislative purpose without considering the political implications." *Ways & Means*, 45 F.4th 324 (denying Trump parties' request to investigate ulterior motives for subpoenas for Trump tax returns).

A move to weaken Speech or Debate Clause protections will subject members of Congress to extensive demands in answering civil suits, responding to discovery requests and subpoenas, and defending against criminal prosecutions. *See Eastland*, 421 U.S. at 503. Because lawmakers must engage in informal investigations to fulfill their constitutional obligations, such investigations would by necessity continue with some frequency. And engaging in informal factfinding will in turn expose them to questioning about their purpose and the allegedly non-investigative parts of their investigations. These demands will "create[] . . . distraction[s] and force[] [m]embers to divert their time, energy, and attention from their legislative tasks." *Eastland*, 421 U.S. at 503. Lawmakers already face severe time demands and have intensive job requirements. See Congr. Mgmt. Found., *Life in Congress: The Member Perspective*, *17–19 (2013), available at https://www.congressfoundation.org/storage/documents/CMF_Pubs/life-in-congress-the-member-perspective.pdf. The potential for any citizen to file a civil suit or seek

discovery from a lawmaker, and the potential for any prosecutor in the nation to issue a subpoena or launch a criminal prosecution, present a grave threat to the ability of lawmakers to do their jobs.

CONCLUSION

A decision concerning the scope of the Speech or Debate Clause implicates fundamental and nonpartisan institutional interests. This Court should grant a stay pending a decision on the merits for four reasons: the Clause's history; the irrelevance of motive under this Court's cases; practical issues of determining motive; and the danger that a motive inquiry presents to the purposes of the Clause. Allowing the special grand jury to go forward will inhibit lawmakers' ability to "propose legislation, debate and vote intelligently, . . . inform people about the workings of the government," and conduct effective investigations. *See* Reinstein & Silvergate, *supra*, at 1153. This Court should not countenance that result.

Respectfully submitted.

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