No. 22A337

In the Supreme Court of the United States

LINDSEY GRAHAM, U.S. SENATOR,
APPLICANT,

v.

FULTON COUNTY SPECIAL PURPOSE GRAND JURY,
RESPONDENT.

BRIEF OF SEPARATION OF POWERS CLINIC AS *AMICUS CURIAE* IN SUPPORT OF APPLICATION FOR STAY AND INJUNCTION PENDING APPEAL

JENNIFER L. MASCOTT
R. TRENT MCCOTTER*
*COUNSEL OF RECORD
Separation of Powers Clinic
Gray Center for the Study of the Administrative State
Antonin Scalia Law School
George Mason University
3301 Fairfax Dr.
Arlington, VA 22201
(202) 706-5488
rmccotte@gmu.edu
Counsel for *Amicus Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional and Statutory Provisions

Other Authorities

INTEREST OF THE *AMICUS CURIAE*[1]

The Separation of Powers Clinic at the Gray Center for the Study of the Administrative State, located within the Antonin Scalia Law School at George Mason University, was established during the 2021–22 academic year for the purpose of studying, researching, and raising awareness of the proper application of the U.S. Constitution's separation of powers constraints on the exercise of federal government power. The Clinic provides students an opportunity to discuss, research, and write about separation of powers issues in ongoing litigation.

The Clinic has submitted numerous briefs in this Court and the lower federal courts in cases implicating separation of powers. The Clinic has submitted numerous briefs in this Court and in the lower courts in cases implicating separation of powers. This case is important to *amicus* because the constitutional text and structure and historical evidence suggest that the Speech or Debate Clause provides a constitutional protection aimed at ensuring the independence of federal legislators. This Court has indicated that the Speech or Debate Clause offers broad protection and preserves the separation of powers by insulating legislators from executive and judicial inquisitions into putatively legislative actions, facilitating the ability of legislators to make decisions as they deem appropriate in line with their constitutional authority and duties.

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[1] Under Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The separation of powers is "basic and vital" to preserving liberty and the proper functioning of the federal government. *O'Donoghue v. United States*, 289 U.S. 516, 530 (1933). This Court has recognized that the Speech or Debate Clause helps preserve checks and balances by facilitating the independence of legislators, who under the English parliamentary system had long faced executive and judicial inquisitions. *See* Part I, *infra*.

The Court has recognized that the Clause protects against inquiries not just into "pure" legislative acts like voting, but also predicate acts that legislators typically take to inform and prepare themselves for voting. The Court has further indicated that the Clause applies regardless of the legislator's supposed intent or even whether that preparation and investigation yielded anything discernible.

The text and structure of the Constitution along with historical evidence suggests that the speech or debate instances previously considered by the Court may not capture the full range of Speech or Debate Clause protection. For example, the Court's prior cases focus heavily on the connection between the Clause and lawmaking, but unlike other constitutional clauses specifically directed to "law," the terms of the speech or debate protection are not so limited. *See* Part II, *infra*.

Finally, the Court also has not had much occasion to evaluate the scope and function of speech or debate protection in the context of questioning by state-level actors. Distinct considerations come into play when state officials outside of the three branches subject to federal checks and balances seek to question a federal legislator's

preparation for an official act. Such considerations merit further evaluation by this Court and, more generally, suggest that federal courts should exercise caution before concluding that state officials may permissibly interview federal legislators on their preparation related to the formation of legislative proposals such as updated federal electoral legislation and congressional speeches, for which "they shall not be questioned in any other Place." *See* Part III, *infra*.

Application of the Court's precedent in this area counsels for review here, for the Court to consider the relevance of the broad scope of the Clause and evidence of the historical and longstanding meaning of the Clause within the context of a state court authorizing questioning related to a Senator's official speech or debate. Historical evidence and precedent suggest that a Senator's inquiries related to legislative proposals and statutorily authorized official action enjoy protection from inquisition.

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). For the reasons below, Senator Graham's application satisfies that standard.

I. The Speech or Debate Clause Reinforces Separation of Powers.

The Constitution's 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. This Court has held that this Clause "reinforc[es] the separation of powers so deliberately established by the Founders." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 502 (1975) (quoting *United States v. Johnson*, 383 U.S. 169, 178 (1966)).

In particular, the Clause preserves checks and balances by "insur[ing] that the legislative function the Constitution allocates to Congress may be performed independently." *Id.* This privilege was "not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators." *Id.* (quotation omitted).

That independence would be threatened if individual legislators were, for example, sued in "civil action[s], whether for an injunction or damages," as such suits "create[] a distraction and force[] Members to divert their time, energy, and attention from their legislative tasks to defend the litigation," which could also "delay and disrupt the legislative function." *Id.* at 503; *see also* 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 857 (1833) ("When a senator is withdrawn by summons, his state loses half its voice in debate and vote….").

In short, the Speech or Debate Clause preserves the separation of powers by preventing "intimidation of legislators" by executive officials or by "a possibly hostile judiciary." *Gravel v. United States*, 408 U.S. 606, 617 (1972). The Clause provides protection regardless of "however powerful" those inquisitors are, and regardless of

what "offence" "that liberty may occasion." 1 THE WORKS OF JAMES WILSON 421 (R. McCloskey ed., 1967).

The need for such protections had been proven by the experience in England, where there was a long history of interference with legislators' speech and even their preparations for votes and legislative matters. For example, after Peter Wentworth, a member of Parliament, criticized Queen Elizabeth I, the Privy Council issued a warrant to search Wentworth's house for "'all letters, bookes, or writings whatsoever that may concern … matter that hath bene or may be intended to be moved in Parliament.'" JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 205–06 (2017). Wentworth later died in the Tower of London after being arrested for refusing to provide preparatory materials for a speech. *Id.* at 206.

English history also demonstrated the risk of local interference with the national legislature such as in the prominent case of Richard Strode, a member of Parliament who was fined and imprisoned by local courts for proposing regulation on tin mining in 1512. After ordering his release, Parliament passed an act voiding all "sutes, accusementes, condempnacions, execucions, fynes, amerciamentes, punysshmentes, correccions, greviances, charges, and imposicions" on any member of Parliament—past, present, or future—"for any bill, spekyng, reasonyng, or declaryng of any matter or matters, concernyng the parliament." Strode's Act, 4 Hen. 8, c. 8, § 2 (1512) (original spellings and capitalization maintained). The act also created a cause of action against anyone who "vexed or trobeled" a member via any of those specified

acts. *Id.* Like the warrant in Wentworth's case, the act's language applied to a broad range of communications on matters "concerning" Parliament. *See also* 1 WILLIAM BLACKSTONE, COMMENTARIES *159 ("The privileges of parliament are likewise very large and indefinite.").

The English Bill of Rights later provided that "[t]he freedom of speech and debates or proceedings in Parliament shall not be impeached." Bill of Rights, 1689, 1 W. & M., 2d Sess., c. 2 (discussed in JOSH CHAFETZ, DEMOCRACY'S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS 87–88 (2007)). A version of the Clause later appeared in the Articles of Confederation as a significant protection. *See* Articles of Confederation art. V ("Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress ….").

Scholar of congressional history, Georgetown Law Professor Josh Chafetz has observed that there was no recorded controversy over the Clause during state ratification debates on the Constitution, the Committee on Style drafted the Clause in the latter part of the constitutional drafting process, and the Clause closely reflected its antecedent in the Articles of Confederation. CHAFETZ, DEMOCRACY'S PRIVILEGED FEW, *supra*, ch. 4. Professor Chafetz also cites early history on a broad understanding of the Clause's scope, including the suggestion by James Madison that the "reason and necessity of the privilege must be the guide" to its interpretation, and an early understanding that the privilege's state and common law roots extended its

scope to communication with constituents and any undue attempts to coerce legislators "in the discharge of their functions." *Id.* at 88 (quotation omitted).

Given the long history of English abuses, the inclusion of the Speech or Debate Clause in the American Constitution was "almost wholly uncontroversial." CHAFETZ, CONGRESS'S CONSTITUTION, *supra*, at 211. As this Court has noted, "[s]ince the Glorious Revolution in Britain, and throughout United States history, the privilege has been recognized as an important protection of the independence and integrity of the legislature." *United States v. Brewster*, 408 U.S. 501, 508 (1972).

II. Constitutional Textual, Structural, and Historical Evidence Suggests a Broad Scope of Coverage under the Speech or Debate Clause.

Consistent with historical statements suggesting broad protection under the Speech or Debate Clause, *see* Part I, *supra*, the Court has noted that it will interpret the Clause broadly. But the Court's repeated discussion of the privilege as commensurate with legislative acts, which lower courts such as the Eleventh Circuit have sought to apply, may have generated conceptual constraints that do not contemplate the full range of official acts authorized (and thus, protected) by the constitutional text. In contrast to multiple other constitutional provisions, the Speech or Debate Clause is not limited to actions taken "by Law."

Members and Senators have multiple functions authorized by law or the Constitution itself that extend beyond the enactment of legislation. Such actions include the selection of congressional officers, U.S. Const. art. I, §§ 2–3, impeachment and the subsequent conviction and judgment powers, *id.* §§ 2–3, the power to judge the elections and qualifications of each chamber's members, *id.* § 5 cl. 1, the power to

compel the attendance of Members, *id.* § 5 cl. 1, the power to select rules for each chamber's proceedings, *id.* § 5 cl. 2, and the duty to keep a Journal and record certain votes, *id.* § 5 cl. 3. The House and Senate also each has the authority to "punish its Members for disorderly Behaviour," *id.* § 5 cl. 2, a power that provides a congressionally governed mechanism for the investigation and punishment of misconduct where Speech or Debate protection precludes outside questioning, as scholars such as Georgetown University professor Josh Chafetz have observed in scholarship addressing the history and scope of the Speech or Debate Clause. *See* CHAFETZ, DEMOCRACY'S PRIVILEGED FEW, *supra*, at 93.

By its terms, the Speech or Debate Clause is not limited to remarks on actions taken "by Law," in contrast to other congressional functions which the Constitution expressly ties to "Law." *Compare* U.S. Const. art. I, § 6 cl. 1 (referencing "any Speech or Debate in either House"), *with, e.g.*, *id.* art. I, § 2 cl. 2 (providing the direction of the manner of the census "by Law"); *id.* art. I, § 4 cl. 1 (authorizing Congress "by Law" to "make or alter" regulations related to the "Times, Places and Manner of holding Elections"); *id.* art. I, § 4 cl. 2 (authorizing Congress to establish meeting times "by Law"); *id.* art. I, § 6 cl. 1 (addressing congressional compensation "to be ascertained by Law"); *id.* art. I, § 9 cl. 7 (requiring money drawn from the treasury to be "in Consequence of Appropriations made by Law"); *id.* art. II, § 2 cl. 2 (authorizing Congress to create offices and vest inferior officer appointment authority "by Law"); *id.* art. III, § 2 cl. 3 (authorizing Congress "by Law" to direct the place of trial for certain crimes).

This Court "has given the Clause a practical rather than a strictly literal reading" and in so doing has observed that its protection extends beyond just the delivery of a speech or debate itself. *See Hutchinson v. Proxmire*, 443 U.S. 111, 124 (1979). To "confine the protection of the Speech or Debate Clause to words spoken in debate would be an unacceptably narrow view," according to this Court. *Gravel*, 408 U.S. at 617. The Court has held that the Clause applies to all "legislative acts," *Doe v. McMillan*, 412 U.S. 306, 311–12 (1973), which are those "generally done in a session of the House by one of its members in relation to the business before it," *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880); *see Gravel*, 408 U.S. at 624. In that realm, "[w]ithout exception, [the Supreme Court's] cases have read the Speech or Debate Clause broadly to effectuate its purposes." *Eastland*, 421 U.S. at 501. But the Court's touchstone description of the Clause nonetheless still focuses on legislative acts in particular. *See, e.g.*, App'x 3a (relying in part on the statement in *Doe*, 412 U.S. at 313, that not all Senatorial acts are "legislative in nature" and therefore questioning the full applicability of the Speech or Debate Clause to Senator Graham's claims here).

The Court should evaluate whether the Clause's apparent textual applicability to other official acts, including presumably oversight and investigative functions that this Court has previously found legitimate, merits further examination and might impact or expand lower court analysis about the proper scope of the Speech or Debate privilege. Here, in particular, Senator Graham has claimed protection under the Clause for actions related to both the development of legislative proposals and the

decision whether to object to an election certification as statutorily authorized by the Electoral Reform Act, ancillary to the legislative process itself.

In any event, even under the Court's current conception of the breadth of protection of the Clause, the record's reflection of Senator Graham's actions in preparation for the development of legislative proposals and his evaluation of the electoral certification process under the Electoral Reform Act is consistent with the need for protection from state judicial questioning. The Court has observed that core "legislative acts" are those "deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel*, 408 U.S. at 625. Consequently, this Court has found it "beyond doubt that the Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts." *Brewster*, 401 U.S. at 525.

Accordingly, this Court's past analysis suggests that the Clause protects not only against inquiries into why a Member voted a certain way, but also into how the Member "deliberat[ed]" and "consider[ed]" how to vote. The Court has accordingly held that the Clause prohibits inquiry into the following, for example:

- "[C]ommunications between the Senator and his aides during the term of their employment and related to said meeting or any other legislative act of the Senator." *Gravel*, 408 U.S. at 629.

- "[A]ny act, in itself not criminal, performed by the Senator … *in preparation for the subcommittee hearing*." *Id.* (emphasis added).

Lower courts have stated, further, that "information gathering, whether by issuance of subpoenas or field work by a Senator or his staff, is essential to informed deliberation over proposed legislation," *McSurely v. McClellan*, 553 F.2d 1277, 1286 (D.C. Cir. 1976) (en banc), and thus protected, *see also Gov't of Virgin Islands v. Lee*, 775 F.2d 514, 521 (3d Cir. 1985).

The Clause's protection against inquiry into how Senators prepare and inform themselves for votes is premised on the recognition that the "power of inquiry … is an essential and appropriate auxiliary to the legislative function." *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927); *see Hutchinson*, 443 U.S. at 132–33 ("[C]ongressional efforts to inform itself through committee hearings are part of the legislative function."). If legislators could be questioned about how they informed themselves and prepared for votes, it would risk simply opening a backdoor for inquiries about why they voted a certain way, and it would risk chilling legislators' subsequent efforts to inform themselves in advance of important votes.

Professor Josh Chafetz has argued even further that "if legislators' communications with the public can be interfered with by another branch, then it is hard to see how they can compete effectively for public support." CHAFETZ, CONGRESS'S CONSTITUTION, *supra*, at 226. "[R]eal legislative authority is, in fact, largely constructed through the processes of public engagement, and the Speech or Debate Clause ought to be understood to facilitate those processes." *Id.* at 229. His

research therefore suggests that even communication with constituents and other public forms of Member communication fall within the scope of the Clause as originally understood. *See* CHAFETZ, DEMOCRACY'S PRIVILEGED FEW, *supra*, at 92. By contrast, the Court has previously indicated that acts not in the sequence of events typically leading up to consideration of legislation or a vote should usually not be protected, even though most legislators undertake such acts with regularity. For example, "a wide range of legitimate 'errands' performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called 'news letters' to constituents, news releases, and speeches delivered outside the Congress" are typically not protected. *Brewster*, 408 U.S. at 512.

Even under the Court's present framework, however, Senator Graham's inquiries with Georgia officials, as reflected in the record, apparently would fall within the Speech or Debate Clause's protection. The inquiries were taken to inform himself in advance of critical upcoming votes on issues such as whether to certify that State's electoral votes in favor of Joe Biden, which would fall within a broadly described category of "act[s] … performed by the Senator … in preparation for" a specific legislative vote. *Gravel*, 408 U.S. at 629.

In addition, the Court's precedent suggests that the facial purpose of Senator Graham's inquiries should not be set aside or questioned in favor of some supposed subjective intent. *See infra,* Part III.

III. Questioning by State Officials Raises Unique Concerns Under the Speech or Debate Clause that Would Benefit from This Court's Consideration.

The Court has held that "in determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it." *Eastland*, 421 U.S. at 508. As the Court has explained, "[i]f the mere allegation that a valid legislative act was undertaken for an unworthy purpose would lift the protection of the Clause, then the Clause simply would not provide the protection historically undergirding it." *Id.* at 508–09.

This is especially true, the Court warned, "[i]n times of political passion," when "dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed." *Id.* at 509. That concern is potentially present here and is likely heightened because the questioning is sought by a local official not directly subject to the checks and balances between the three federal branches. The prospect of local officials throughout the country hauling federal legislators in for questioning would risk chilling legislators' protected acts of information gathering. Such disruptions further would yield even greater interference with the legislative function.

Indeed, "coupled with, and reinforced by, the supremacy clause," the Speech or Debate protection arguably encompasses "a particular need … to protect federal functions and federal supremacy" when a Member or Senate is subject to potential "question[ing] by an official of a state or local government." John R. Bolton et al., *The Legislator's Shield: Speech or Debate Clause Protection Against State Interrogation*, 62 MARQUETTE L. REV. 351, 356–58 (1979) (analyzing history, constitutional text, and precedent related to the Clause). Such protection would be consistent with the

Founding-era understanding that "[i]n order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he 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 offence." 2 THE WORKS OF JAMES WILSON 38 (R. McCloskey ed., 1967) (discussing the Constitution's "liberal provision" for speech or debate protection.

In addition, the Court explained in *Tenney v. Brandhove*, 341 U.S. 367 (1951), that the "claim of an unworthy purpose does not destroy the privilege." *Id.* at 377. "The privilege would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader," and thus "courts should not go beyond the narrow confines of determining" whether an "inquiry may fairly be deemed within [the Member's] province." *Id.* at 377–78.

Thus, several lower courts have articulated that the Speech or Debate Clause "forbids not only inquiry into acts that are manifestly legislative but also inquiry into acts that are purportedly legislative, 'even to determine if they are legislative in fact.'" *United States v. Biaggi*, 853 F.2d 89, 103 (2d Cir. 1988) (quoting *United States v. Dowdy*, 479 F.2d 213, 226 (4th Cir. 1973)). Once it is determined that a legislative act "was *apparently* being performed, the propriety and the motivation for the action taken, as well as the detail of the acts performed, are immune from judicial inquiry." *Dowdy*, 479 F.2d at 226 (emphasis in original).

Accordingly, the Speech or Debate Clause protection as interpreted and applied by the Court precludes the contention that Senator Graham may be questioned in "[an]other Place" regarding his facially official and legislative preparatory acts of inquiring about information that might inform forthcoming objections and legislative proposals was prompted by some other motivation. Court precedent suggests that the Clause consequently also precludes questioning to determine the nature of his motivation and second-guess the purpose of the facially legislative and official acts.

Relatedly, the Court has held that the Speech or Debate Clause's immunity applies to a legislative act regardless of "what it produces." *Eastland*, 421 U.S. at 509. That is, "[t]o be a valid legislative inquiry there need be no predictable end result." The "nature of the investigative function—like any research—is that it takes the searchers up some 'blind alleys' and into nonproductive enterprises." *Id.* Under that standard, Senator Graham also would be subject to protection against questioning to evaluate whether his inquiries ultimately yielded relevant information or influenced his vote.

This Court's careful consideration of the breadth of the Speech or Debate Clause protection is merited here, where Senator Graham's application raises important questions about the role of the Clause's critical safeguards when state officers seek to ask questions related to a Senator's preparation for official acts.

CONCLUSION

The Court should grant the application.

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Respectfully submitted,

/s/ R. Trent McCotter
JENNIFER L. MASCOTT
R. TRENT MCCOTTER*
*COUNSEL OF RECORD
Separation of Powers Clinic
Gray Center for the Study of
the Administrative State
Antonin Scalia Law School
George Mason University
3301 Fairfax Dr.
Arlington, VA 22201
(202) 706-5488
rmccotte@gmu.edu
Counsel for *Amicus Curiae*