# APPENDIX

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# APPENDIX A

In the

# United States Court of Appeals

## For the Eleventh Circuit

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No. 22-12696-DD

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FULTON COUNTY SPECIAL PURPOSE GRAND JURY,

Plaintiff-Appellee,

*versus*

LINDSEY GRAHAM,
in his official capacity as United States Senator,

Defendant-Appellant.

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Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:22-cv-03027-LMM

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Before: WILSON, NEWSOM, and GRANT, Circuit Judges.

BY THE COURT:

The "Emergency Motion by Senator Lindsey O. Graham to Stay District Court's Order and Enjoin Select Grand Jury Proceedings Pending Appeal" is DENIED. Senator Graham has failed to demonstrate that he is likely to succeed on the merits of his appeal. *See Nken v. Holder*, 556 U.S. 418, 434 (2009).

The Speech and Debate Clause ensures that, for "any Speech or Debate in either House," Members of Congress "shall not be questioned in any other Place." U.S. Const. art. I, § 6, cl. 1. The Supreme Court has interpreted the Clause to protect against "inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts." *United States v. Brewster*, 408 U.S. 501, 525 (1972). The Clause thus protects "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 v. United States Servicemen's Fund*, 421 U.S. 491, 502 (1975) (quotations omitted).

But not "everything a Member of Congress may regularly do" is a "legislative act within the protection of the Speech or Debate Clause"—the Clause "has not been extended beyond the legislative sphere," and the fact that "Senators generally perform certain acts in their official capacity as Senators does not necessarily

make all such acts legislative in nature." *Doe v. McMillan*, 412 U.S. 306, 313 (1973); *Gravel v. United States*, 408 U.S. 606, 624–25 (1972). The Supreme Court has warned that it is not "sound or wise" to "extend the privilege beyond its intended scope, its literal language, and its history, to include all things in any way related to the legislative process." *Brewster*, 408 U.S. at 516. One reason is obvious: "Given such a sweeping reading, we have no doubt that there are few activities in which a legislator engages that he would be unable somehow to 'relate' to the legislative process." *Id.* Activities that fall outside the Clause's scope include, for example, "cajoling" executive officials and delivering speeches outside of Congress. *Gravel*, 408 U.S. at 625; *Brewster*, 408 U.S. at 512.

To determine whether an activity is covered by the Clause, the Supreme Court has considered whether it "took place 'in a session of [Congress] by one of its members in relation to the business before it.'" *Eastland*, 421 U.S at 503 (quoting *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880)). And more specifically, the Court has asked "whether the activities are 'an integral part of the deliberative and communicative processes'" used by Members to participate in committee or congressional 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.'" *Id.* at 504 (quoting *Gravel*, 408 U.S. at 625).

Applying these principles in *Eastland*, the Supreme Court held that subpoenas issued in the context of formal investigations

conducted by a congressional committee are protected by the Clause. *See id.* at 504–05. In justifying its holding, the Court emphasized that the Committee acted "on behalf of one of the Houses" to "do the task assigned to it by Congress" in "furtherance of a legitimate task of Congress." *Id.* at 505. In contrast, the Court has never considered whether an informal investigation by an individual legislator acting without committee authorization is ever protected legislative activity under the Speech and Debate Clause, and the lower courts have disagreed. *Compare, e.g.*, *Bastien v. Off. of Senator Ben Nighthorse Campbell*, 390 F.3d 1301, 1316 (10th Cir. 2004), *cert. denied*, 546 U.S. 926 (2005) (holding that such informal investigations are not protected legislative activity), *with Gov't of Virgin Islands v. Lee*, 775 F.2d 514, 521 (3d Cir. 1985) (holding that they are). But even assuming that such informal investigations are covered by the Speech and Debate Clause, courts still must determine whether a legislator's conversation was a protected investigation or an unprotected non-legislative discussion. *See, e.g.*, *United States v. Menendez*, 831 F.3d 155, 166–69 (3d Cir. 2016).

The district court adopted the more protective view, that the Speech and Debate Clause can shield informal legislative investigations. It included within that category any factfinding inquiries in Senator Graham's phone calls to Georgia election officials relating to his decision "to certify the results of the 2020 presidential election." The court quashed the subpoena to the extent that it covered that sort of investigation. But it held that

targeted questions about non-investigatory conduct by Senator Graham could proceed. It reasoned that any non-investigatory conduct covered by the subpoena was not protected by the Clause, and that there was genuine dispute about whether Senator Graham's phone calls with Georgia election officials were investigatory. The court also reasoned that three topics unrelated to the phone calls—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—were not legislative activities. And the court noted that Senator Graham may still seek to assert his Speech and Debate Clause privilege if there is a dispute about whether a concrete question implicates his factfinding relating to certification.

Senator Graham has failed to demonstrate that this approach will violate his rights under the Speech and Debate Clause. Even assuming that the Clause protects informal legislative investigations, the district court's approach ensures that Senator Graham will not be questioned about such investigations. As the court determined, there is significant dispute about whether his phone calls with Georgia election officials were legislative investigations at all. The court's partial quashal enabled a process through which that dispute can be resolved. The District Attorney can ask about non-investigatory conduct that falls within the subpoena's scope, but the District Attorney may not ask about any investigatory conduct. Should there be a dispute over whether a

given question about Senator Graham's phone calls asks about investigatory conduct, the Senator may raise those issues at that time. We also agree that the three enumerated categories set out by the district court could not qualify as legislative activities under any understanding of Supreme Court precedent. We thus find it unlikely that questions about them would violate the Speech and Debate Clause.

The temporary stay of the district court's August 15, 2022 order remanding the case to the Superior Court of Fulton County for further proceedings—as modified by the district court's September 1, 2022 order granting in part and denying in part the supplemental motion to quash—is LIFTED.

All pending motions requesting leave to file an amicus brief are GRANTED.

# APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

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| IN RE: SUBPOENA TO NON-PARTY LINDSEY O. GRAHAM in his official capacity as United States Senator,<br><br>In the matter of:<br><br>SPECIAL PURPOSE GRAND JURY, FULTON COUNTY SUPERIOR COURT CASE NO. 2022-EX-000024. | : | CIVIL ACTION NO. 1:22-cv-03027-LMM |

**ORDER**

This case comes before the Court on Senator Lindsey Graham's Supplemental Motion to Quash [40]. After due consideration, the Court again declines to quash the subpoena in its entirety. As to the issue of partial quashal, the Court quashes the subpoena only as to questions about Senator Graham's investigatory fact-finding on the telephone calls to Georgia election officials, including how such information related to his decision to certify the results of the 2020 presidential election. The Court finds that this area of inquiry falls under the protection of the Speech or Debate Clause, which prohibits questions on legislative activity. As to the other categories, the Court finds that they are not legislative, and the Speech or Debate Clause does not apply to them. As such, Senator Graham may be questioned about any alleged efforts to encourage Secretary Raffensperger or others to throw out ballots or otherwise alter

Georgia's election practices and procedures. Likewise, the grand jury may inquire into Senator Graham's alleged communications and coordination with the Trump Campaign and its post-election efforts in Georgia, as well as into Senator Graham's public statements related to Georgia's 2020 elections.

## I. BACKGROUND

In this matter, Senator Graham seeks to quash the subpoena issued to him as part of the Fulton County Special Purpose Grand Jury's investigation into attempts to disrupt the lawful administration of Georgia's 2020 elections. On August 15, 2022, the Court denied Senator Graham's Expedited Motion to Quash, see Dkt. No. [27], and the Court subsequently denied Senator Graham's request to stay that order. See Dkt. No. [37]. Senator Graham appealed, and the Eleventh Circuit Court of Appeals temporarily stayed this Court's earlier order and remanded the case to this Court to determine whether Senator Graham is entitled to a partial quashal or modification of the grand jury subpoena pursuant to the Constitution's Speech or Debate Clause. Fulton Cnty. Special Purpose Grand Jury v. Graham, No. 22-12696-DD, 2022 WL 3581876, at *1 (11th Cir. Aug. 22, 2022). The Eleventh Circuit ordered that the parties submit briefing on this issue, see id., and this Court therefore directed Senator Graham to file a motion articulating his arguments for partial quashal. Dkt. No. [38]. Senator Graham's Supplemental Motion to Quash, the District Attorney's Response in opposition, and Senator Graham's Reply are presently before the Court.

## II. DISCUSSION

Under Federal Rule of Civil Procedure 45, and on timely motion, a district court "must quash or modify a subpoena that . . . requires disclosure of privileged or other protected matter, if no exception or waiver applies[.]" Fed. R. Civ. P. 45(d)(3)(A)(iii); see also In re Hubbard, 803 F.3d 1298, 1307 (11th Cir. 2015). The parties dispute whether and to what extent the subpoena should be partially quashed or modified.

As an initial matter, however, Senator Graham begins by arguing that the subpoena should be quashed in its entirety. See generally Dkt. No. [40-1] at 6–14; id. at 14 ("[C]omplete quashal remains appropriate."). In doing so, Senator Graham merely rehashes the same arguments the Court has previously rejected. The Court will not revisit these same arguments for complete quashal because the Court has already considered and rejected Senator Graham's arguments in two prior orders. See Dkt. Nos. [27, 37]. Moreover, by continuing to raise arguments for complete quashal, Senator Graham goes against the directions of both the Eleventh Circuit and this Court. In its order remanding the case, the Eleventh Circuit stated unequivocally that the case was returning to this Court for the "limited purpose" of determining whether Senator Graham "is entitled to a partial quashal or modification of the subpoena." Graham, 2022 WL 3581876, at *1. To that end, the Eleventh Circuit ordered the parties to submit briefing on that issue only. Id. This Court then entered an order directing Senator Graham to "file a Motion as to exactly which questions and/or categories of information he is

requesting the Court to address in an Order to partially quash the subpoena." Dkt. No. [38] at 1. Nevertheless, Senator Graham continues to raise arguments for quashing the subpoena in its entirety. Because these arguments are both unavailing, see Dkt. Nos. [27, 37], and improperly raised at this time, the Court will only consider Senator Graham's arguments in favor of partially quashing or modifying the subpoena. Because Senator Graham argues that certain categories of information are protected from questioning under the Speech or Debate Clause, the Court will address whether quashal of the subpoena as to these categories is appropriate.

**A. Phone Calls to Georgia Election Officials**

Senator Graham argues first that the Court should quash the subpoena with respect to any potential questions regarding the phone calls he made to Georgia election officials. Dkt. No. [40-1] at 17. Senator Graham characterizes the phone calls as "investigatory phone calls" and argues that they cannot be the subject of any questioning because they are comprised *entirely* of legitimate legislative activity. See id. at 6–7, 17. In this way, Senator Graham suggests that the phone calls are monolithic and comprised exclusively of investigative fact-finding, and he urges the Court to accept his characterization of the calls and thereby conclude that the Speech or Debate Clause completely prohibits all inquiries related to them without regard to the information being sought. Id.

The Court is unpersuaded by the breadth of Senator Graham's argument and does not find that the Speech or Debate Clause completely prevents all

questioning related to the calls. As a starting point, the Court must look objectively at the activity at issue—phone calls made by an individual U.S. Senator from South Carolina to Georgia state election officials—to determine whether such activity is "legislative" and thus categorically excluded from inquiry under the Speech or Debate Clause. Under this test, the Court must not consider the motives or intentions of the individual performing the act. See, e.g., 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.").

As the Court has previously indicated, the calls themselves—again, calls between a U.S. Senator from South Carolina and Georgia's state election officials—are not manifestly legislative on their face. Indeed, though Senator Graham frequently argues that the Court would easily conclude that the calls themselves are obviously legislative if the Court properly applied the test and ignored all suggestions of motive, it is, in fact, Senator Graham who asks the Court to accept his proposed motive (to carry out an individual investigation so as to inform his choice to certify the election) in assessing whether the calls constitute only legitimate legislative activity. But as the Supreme Court has indicated on numerous occasions, the Court may not consider *any* motive or intent in making this assessment, including the motivation that Senator Graham proposes and asks the Court to adopt. Bogan, 523 U.S. at 54–55. And so, whether there are areas of inquiry that are barred from questioning under the Speech or

Debate Clause requires a more granular analysis of the phone calls and the activities and inquiries that allegedly took place on the calls.[1] It is the nature of those activities and inquiries that determines if the Speech or Debate Clause forecloses questioning. The actual question being asked is also important. Narrow questions can, by their specific subject matter, completely foreclose any argument that they are related to legislative activity.

Turning, then, to the substance of the calls, there is not only dispute between the parties as to the nature and substance of Senator Graham's inquiries and statements on the calls, but, as the record illustrates, there is also significant public dispute on these issues among those who were present on the calls. For his part, Senator Graham argues that the phone calls were entirely investigative and are therefore protected from inquiry. Dkt. No. [40-1] at 6–7. In other words,

[1] Even if the Court were to take a wider view of the calls and consider additional facts in assessing whether they are legislative, the Court would reach the same conclusion. Here, the objective facts about the calls are disputed: Senator Graham maintains that his calls were exclusively concerned with legislative fact-finding relevant to his upcoming certification vote; by contrast, other participants on the calls, namely Secretary Raffensperger himself, have publicly stated that this was not the sole purpose of the calls and that Senator Graham instead suggested or implied that he (Secretary Raffensperger) should take certain actions such as throwing out ballots. As alluded to in the District Attorney's earlier briefing and referenced in this Court's earlier order, see Dkt. No. [27] at 12 n.4, Senator Graham himself also appears to have stated publicly that he was at least making suggestions as to how Georgia election officials should change the state's signature-verification process going forward; of course, "cajoling" officials from a different branch of government in that manner is not legislative activity. See Gravel v. United States, 408 U.S. 606, 624–25 (1972). Thus, even when taking a closer look at the circumstances of the calls, it is evident on their face that they are not comprised *exclusively* of legislative activity and thus are not shielded in their entirety under the Speech or Debate Clause.

Senator Graham maintains that his inquiries on the phone calls were all in furtherance of his attempt to personally investigate allegations of voter fraud in Georgia and to thereby inform his upcoming certification decision. Id. However, as alluded to in the District Attorney's briefing throughout this case, individuals who were on the calls have publicly indicated their understanding that Senator Graham was not simply gathering information about Georgia's election processes but was, instead, suggesting or implying that Georgia Secretary of State Raffensperger should throw out ballots or otherwise adopt procedures that would alter the results of the state's election.

To begin, and as a threshold matter, the Court must first decide whether the kind of individual investigation Senator Graham suggests he was carrying out would, in fact, constitute legislative activity for the purposes of the Speech or Debate Clause. Dkt. No. [40-1] at 6–7. Stated another way, the Court must first determine whether an individual, informal investigation carried out by a senator regarding an issue that arguably falls within his legislative province (such as the certification of a presidential election) could constitute legitimate legislative activity and therefore be protected under the Speech or Debate Clause.

The Court concludes that, under certain circumstances, such investigations may constitute legitimate legislative activity that falls within the protections of the Speech or Debate Clause. Though the Supreme Court has never directly addressed this specific issue, the Court finds that this conclusion aligns with the underlying reasoning of the Supreme Court's test for determining whether a

given activity is legislative. As discussed above, courts must objectively assess the activity at issue (without considerations of intent and motive) to determine whether it is legislative. Bogan, 523 U.S. at 54–55. Under this test, if a given activity or investigation is sanctioned by Congress in some formal way, then that official endorsement would presumably carry dispositive weight in determining that the given activity is legislative in nature. See, e.g., Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 505 (1975) (finding that the issuance of a subpoena by a Senate subcommittee pursuant to an officially sanctioned and authorized investigation constituted protected legislative activity under the Speech or Debate Clause). But the test itself does not necessarily include a formality requirement and, as presently fashioned, it allows for flexibility of analysis depending on the circumstances of a given case. Thus, while actions taken pursuant to a formally authorized congressional investigation would presumably always fall within the sphere of legitimate legislative activity, the fact that a member's individual investigative efforts may not be tied to an official congressional inquiry does not necessarily mean that such an investigation is per se non-legislative. The Court is therefore persuaded that, in some instances, fact-finding inquiries carried out by individual members of Congress can fall within the sphere of legislative activity protected by the Speech or Debate Clause. See, e.g., Gov't of the Virgin Islands v. Lee, 775 F.2d 514, 520–21 (3d Cir. 1985) (concluding that legislative immunity should apply to fact-finding and information-gathering).

Returning to the facts of this case, Senator Graham has suggested that he was, at minimum, carrying out a legitimate (albeit informal) investigation into allegations of voter fraud so as to eventually fulfill his congressional role in certifying the results of the 2020 presidential election. Dkt. No. [40-1] at 6–7. Given that the Electoral Count Act designates the responsibility of certification to the members of Congress, the Court finds that a member of Congress could, pursuant to this duty, engage in individual investigatory efforts to understand a state's voting procedures so as to inform his or her eventual decision to certify the results of a presidential election.[2] Thus, to the extent Senator Graham was merely asking questions about Georgia's then-existing election procedures and allegations of voter fraud in the leadup to his certification vote, such questions are shielded from inquiry under the Speech or Debate Clause. In other words, Senator Graham cannot be asked about the portions of the calls that were legislative fact-finding.

But this conclusion does not end the analysis on this issue. Though Senator Graham maintains that these calls were comprised *entirely* of legislative fact-

[2] Senator Graham has suggested that his inquiries were also "legislative" because he eventually co-sponsored legislation to amend the Electoral Count Act, because he was chair of the Judiciary Committee, and also because he was investigating possible "national standards" for mail-in voting. Dkt. No. [40-1] at 7. Because the Court concludes that an investigation into an individual state's election procedures can constitute legislative activity when done pursuant to a member of Congress's duty to certify the results of a presidential election, the Court need not—and does not—reach the issue of whether Senator Graham's purported investigation was "legislative" for any additional reasons.

finding relevant to his certification vote (and urges the Court to accept this conclusion on its face), the Court does not find that it can simply accept Senator Graham's sweeping and conclusory characterizations of the calls and ignore other objective facts in the record that call Senator Graham's characterizations into question. As noted above, and as discussed at length in the Court's earlier orders, the very nature and substance of these calls has been a source of public debate and dispute among the calls' participants. Indeed, as alluded to in both parties' briefing, Secretary Raffensperger has stated publicly that he understood Senator Graham to be implying or otherwise suggesting that he (Secretary Raffensperger) should throw out ballots. As the Court has previously stated, any such "cajoling," "exhorting," or pressuring of Secretary Raffensperger (or any other Georgia election officials) to throw out ballots or otherwise change Georgia's election processes, including changing processes so as to alter the state's results, is not protected legislative activity under the Speech or Debate Clause. See Gravel, 408 U.S. at 625. Regardless of whether such conduct is criminal, it is, at minimum, "in no wise related to the due functioning of the legislative process." United States v. Brewster, 408 U.S. 501, 525 (1972). Accordingly, Senator Graham may face targeted and specific questioning regarding this alleged activity, which is to say he may, at minimum, be asked whether he in fact implied, suggested, or otherwise indicated that Secretary Raffensperger (or other Georgia election officials) throw out ballots or otherwise alter their election procedures (including

in ways that would alter election results). This is not legislative fact-finding on its face.

Senator Graham argues that any such questions are impermissible and barred by the Speech or Debate Clause because they merely seek to delve into his subjective motivations for his investigative inquiries. See Dkt. No. [40-1] at 6–9, 20–21. However, Senator Graham's arguments on this point are unpersuasive. First, Senator Graham is simply incorrect when he states that "every objective fact . . . shows that [his] phone calls were part of . . . a facially legislative investigation." Id. at 6–7. To the contrary, the objective facts in this case (with regard to the phone calls) show that there has been significant public dispute as to the meaning and nature of the calls and Senator Graham's statements and inquiries therein. Senator Graham dismisses *these* facts as irrelevant, but in doing so, he either misunderstands or attempts to avoid the objective facts as they exist in the present record. For example, though Senator Graham argues that Secretary Raffensperger's comments merely speak to the Secretary's unfounded suppositions about Senator Graham's "motivations," that is not the import of Secretary Raffensperger's statements. Rather than hypothesizing about Senator Graham's secret motivations, Secretary Raffensperger's comments about the calls reflect his understanding of what Senator Graham's questions and statements *themselves* actually meant (i.e., an attempt to suggest or imply that Secretary Raffensperger should throw out ballots). In this way, and contrary to Senator Graham's framing of the "objective facts," the public dispute regarding these calls

is not reducible to a mere disagreement over Senator Graham's "real" motivations; instead, there is a fundamental factual dispute as to the very nature and substance of the phone calls and what Senator Graham *actually stated and suggested* on the calls. And so, to the extent he asked questions or made statements that went beyond mere inquiries into Georgia's then-existing procedures (that is, to the extent Senator Graham suggested that Georgia election officials take certain actions or alter their procedures), those statements and questions may be the subject of inquiry before the grand jury because they are not protected legislative activity.

Practically speaking, this is the difference between asking broad questions of intent that could implicate some legitimate legislative activity (such as asking Senator Graham why he made the calls to Georgia election officials) versus asking precise, targeted questions regarding decidedly non-legislative activity (such as asking Senator Graham whether he suggested or implied that Secretary Raffensperger or other officials should throw out ballots or otherwise alter Georgia's election procedures, or whether he made any such instructions at the behest of the Trump Campaign). Again, the Court finds that this manner of targeted and specific inquiry aligns with the approach endorsed by the Supreme Court in United States v. Helstoski, 442 U.S. 477, 488 n.7 (1979). In that case, the Supreme Court explained that non-legislative activity could be examined or used while carefully avoiding or "excising" any references to protected legislative activity. Id. ("Nothing in our opinion, by any conceivable reading, prohibits

excising references to legislative acts, so that the remainder of the evidence would be admissible. . . . [A] Member can use the Speech or Debate Clause as a shield against prosecution by the Executive Branch, but only for utterances within the scope of legislative acts as defined in our holdings. That is the clear purpose of the Clause."). So too may the grand jury carefully question Senator Graham on topics that do not involve legislative activity. Again, it is possible that the phone calls contained both legislative and non-legislative activity, and the Speech or Debate Clause protects *only* that which is legislative. Id.

The same approach is applicable to questions regarding the logistics of the phone calls and any potential coordination with the Trump Campaign in organizing the calls. Senator Graham suggests that any questions about his communications or coordination with the Trump Campaign would just be a veiled maneuver to ask him why he "really" made the calls and whether he did so at the behest of former President Trump. Dkt. No. [40-1] at 18–19. But here again, the Court is not persuaded that the grand jury should be broadly forbidden from asking any questions regarding the logistics of setting up the phone calls. Instead, Senator Graham may be asked specific, targeted, and factually oriented questions about the logistics of setting up the phone calls (as opposed to broad, intent-oriented questions as to why Senator Graham "really" made the phone

calls) without implicating any potential legislative activity. Helstoski, 442 U.S. at 488 n.7.[3]

### B. Topics and Activities Unrelated to the Phone Calls

In his Supplemental Brief, Senator Graham argues that three additional areas of inquiry are, in fact, improper and that the subpoena should be partially quashed or modified to exclude them. Dkt. No. [40-1] at 18–23. The Court addresses these topics and Senator Graham's arguments below.

#### 1. Communications and Coordination with the Trump Campaign Regarding Its Post-Election Efforts in Georgia

As noted above in Part II.A., Senator Graham argues that questions about his potential coordination or communications with the Trump Campaign and its post-election efforts in Georgia are impermissible because such questions would just be used as a "backdoor" for questioning him as to his real motivations for making the phone calls. Dkt. No. [40-1] at 18–19. Senator Graham maintains that any such inquiries are therefore impermissible under the Speech or Debate Clause. Id.

[3] As this Court has maintained throughout these proceedings, even if this case is remanded to the Superior Court of Fulton County, Senator Graham may still remove (to this Court) discrete disputes regarding the application of legislative immunity to specific questions. In other words, if there are specific questions as to which Senator Graham wishes to assert a privilege or immunity claim, he may still do so and then remove those disputes to this Court, at which time the Court would be able to issue a ruling in the context of that specific (and therefore concrete) dispute. This is the approach successfully taken as to Congressman Jody Hice's subpoena to appear in front of this same grand jury.

Though Senator Graham attempts to conflate this category of potential questions into a single issue—that is, whether he will be asked why he "really" made the calls and whether they were made at the request of the Trump Campaign or President Trump himself—the issue is broader than what Senator Graham argues. Most importantly, as the Court explained in its previous order, there is no indication in the record that the grand jury's potential inquiry into Senator Graham's alleged coordination and communications with the Trump Campaign regarding the Campaign's post-election efforts in Georgia (or coordination with other third parties for the same or similar purposes) is somehow *exclusively* tied to the subject of Senator Graham's phone calls to Georgia election officials. See Dkt. No. [27] at 7–8 (quoting Dkt. Nos. [1-2, 9] and referring to the District Attorney's representations at the hearing as to the scope of Senator Graham's relevance to the investigation). In other words, to the extent Senator Graham would face questioning about his alleged coordination or communication with the Trump Campaign and its post-election efforts in Georgia on topics *other than* the phone calls, those questions are permitted because any such actions (i.e., potentially coordinating with a political campaign to participate in or advance that campaign's post-election efforts in Georgia) are fundamentally "political in nature rather than legislative" and therefore do not fall within the protections of the Speech or Debate Clause. Brewster, 408 U.S. at 512.

Accordingly, and as the Court previously held, the Court does not find that the subpoena should be quashed or modified to exclude all questions about

Senator Graham's potential communications or coordination with the Trump Campaign and its post-election efforts in Georgia. To the extent Senator Graham may be asked questions about his communications or coordination with the Trump Campaign outside of any reference to the phone calls themselves, the Court finds no basis for concluding that those actions are legislative and therefore shielded from inquiry under the Speech or Debate Clause. Id. ("[I]t has never been seriously contended that [political activities and errands], however appropriate, have the protection afforded by the Speech or Debate Clause."). As to the separate issue of whether Senator Graham could be questioned regarding his coordination with the Trump Campaign relative to the logistics of setting up the calls themselves, the Court addressed that issue above in Part II.A. and finds that tailored and targeted inquiries on this issue are permissible.

**2. Public Statements Regarding the 2020 Election**

Senator Graham also argues that he may not be asked about his public statements (outside of Congress) regarding Georgia's 2020 elections. Dkt. No. [40-1] at 19–20. Senator Graham suggests that any questions about such public statements would simply be another "backdoor" way to question him about the phone calls and his investigative inquiries. Id. Fundamentally, Senator Graham suggests that because at least some of the information related to his public statements may overlap with legislative activity, he simply cannot be questioned about such public statements.

Senator Graham's arguments on this issue are without merit. First, as Senator Graham concedes, public statements given outside of Congress are not considered protected legislative activity under the Speech or Debate Clause. Brewster, 408 U.S. at 512 (explaining that "news releases" and "speeches delivered outside the Congress" are among the activities that are "political in nature rather than legislative" and therefore not protected by the Speech or Debate Clause). Moreover, the reasoning behind Senator Graham's central argument—that is, that he may not be questioned about his public statements because those statements were referring to his "investigative calls"—has already been rejected by the Supreme Court. For example, in Hutchinson v. Proxmire, 443 U.S. 111, 127–30 (1979), the Supreme Court considered and rejected Senator Proxmire's attempt to avoid liability for libel after he republished a speech delivered in Congress[4] in newsletters and a press release. Indeed, in that case, "the text of [the Senator's] speech was incorporated into [the] press release, with only the addition of introductory and concluding sentences." Id. at 115–16. In rejecting the Senator's argument that the press release and newsletters (which themselves also "repeated the essence of the speech," see id. at 117) were protected under the Speech or Debate Clause, the Supreme Court expressly

[4] In Hutchinson, Senator Proxmire could not recall whether he actually delivered the speech in Congress or simply entered it into the Congressional Record. Hutchinson, 443 U.S. at 116 n.3. The Supreme Court assumed without deciding that a speech that had, at minimum, been printed in the Congressional Record would "carr[y] immunity under the Speech or Debate Clause as though delivered on the floor." Id.

rejected the argument that material that once fell squarely within the protected legislative sphere remains completely shielded when a member of Congress brings that material into an unprotected sphere:

> A speech by [Senator] Proxmire in the Senate would be wholly immune and would be available to other Members of Congress and the public in the Congressional Record. But neither the newsletters nor the press release was 'essential to the deliberations of the Senate' and neither was part of the deliberative process.

Id. at 130; see also id. at 127–28 ("[T]he precedents abundantly support the conclusion that a Member may be held liable for republishing defamatory statements originally made in either House. We perceive no basis for departing from that long-established rule.").

Senator Graham also argues that his public statements regarding Georgia's 2020 elections do not fall within the "ambit" of the subpoena. Dkt. No. [40-1] at 20. However, there is no support for this argument. The grand jury is authorized to "investigate the facts and circumstances relating directly or indirectly to possible attempts to disrupt the lawful administration of the 2020 elections in the State of Georgia." Dkt. No. [1-2] at 7. Thus, to the extent Senator Graham made public comments regarding Georgia's 2020 elections, and to the extent these comments are relevant to the facts and circumstances related to potential attempts to disrupt the lawful administration of Georgia's 2020 elections, such public statements unquestionably fall within the investigative purview of the grand jury (and are not shielded from inquiry by the Speech or Debate Clause), and Senator Graham may therefore be questioned as to such statements.

### 3. Efforts to "Cajole" or "Exhort" Georgia Election Officials

Senator Graham also argues that any questions regarding his alleged attempts to encourage, "cajole," or "exhort" Georgia election officials to take certain actions, including throwing out ballots and changing their election procedures going forward, should also be excluded. Dkt. No. [40-1] at 20–23.

First, Senator Graham states, "[T]he Supreme Court has never held that the Speech or Debate Clause does not cover efforts to convince executive officials to generally enforce or act upon a particular understanding of the law[.]" Id. at 20. But in making this argument, Senator Graham plainly misrepresents the Supreme Court's analysis on this issue:

> Members of Congress are constantly in touch with the Executive Branch of the Government and with administrative agencies—they may cajole, and exhort with respect to the administration of a federal statute—but such conduct, though generally done, is not protected legislative activity. *United States v. Johnson decided at least this much*.

Gravel, 408 U.S. at 605 (emphasis added).

Second, Senator Graham argues that any questions regarding his alleged efforts to cajole or encourage Secretary Raffensperger to throw out ballots or otherwise change Georgia's election procedures is simply an impermissible "backdoor" to questioning him about his motives for legitimate legislative activity. Dkt. No. [40-1] at 20. The Court addressed and rejected this argument above in Part II.A.

And finally, Senator Graham argues that any statements he may have made to encourage and cajole Georgia election officials to change their signature-verification processes going forward should also be excluded from inquiry. Dkt. No. [40-1] at 21–22. Senator Graham makes two general arguments in support of this position.

First, Senator Graham suggests that it was within his legislative province to affirmatively direct or encourage Georgia election officials to change their state's election laws and procedures because the "quality of Senate elections" falls within his legislative province and because "requests for changes in implementation of the laws is immunized by the Speech or Debate Clause, properly understood." Id. at 22. The Court finds no support for the suggestion that Senator Graham's position or responsibilities as a U.S. Senator entitled him to exhort or pressure Georgia state election officials as to how they should change or otherwise administer their state's election laws and procedures; again, Senator Graham's argument is squarely foreclosed by the Supreme Court's analysis in Gravel, as noted above. See Gravel, 408 U.S. at 625.

Second, Senator Graham argues that any questions about his attempts to encourage and cajole Georgia election officials to change their signature-verification process in the future was related to the then-upcoming runoffs for Georgia's two Senate seats. Because these runoff elections were technically held in early January 2021 (instead of within 2020), Senator Graham reasons that he may not be questioned about anything related to the Senate runoffs because the

grand jury's investigation (and therefore the scope of the subpoena) are limited to Georgia's 2020 elections. Dkt. No. [40-1] at 22–23. In other words, Senator Graham contends that he may not be asked about Georgia's Senate runoff races stemming from the November 2020 elections because those runoffs technically occurred in early January 2021 instead of 2020. This argument lacks factual and logical support, and its reliance on a technicality cannot carry it forward. The Senate runoffs held in early January 2021 were the culmination of Georgia's 2020 Senate elections. Because the grand jury has been impaneled to "investigate the facts and circumstances relating directly or indirectly to possible attempts to disrupt the lawful administration of the 2020 elections in the State of Georgia[,]" see Dkt. No. [1-2] at 7, questions regarding the administration of Georgia's Senate runoffs (including attempts to disrupt the lawful administration of the runoffs) fall within the purview of the grand jury's investigation.[5]

[5] Senator Graham has also argued that the Court itself has "suggested potential lines of inquiry that are or could be unrelated to the 2020 election[]" and which are beyond the scope of the grand jury's investigation. Dkt. No. [40-1] at 21–22 (citing Dkt. No. [27] at 12 n.4). There is no support for this argument because neither the Court nor any other party has indicated that Senator Graham may (or should) be questioned on topics that fall outside the scope of the grand jury's investigation. The footnote from the Court's previous order that Senator Graham cites does not suggest that Senator Graham could be asked about topics outside the scope of the grand jury's investigation. Instead, the Court observed that—contrary to Senator Graham's assertions that he was only asking questions about Georgia's election processes so as to gather information for legislative purposes—Senator Graham himself stated publicly that he was making affirmative suggestions as to how Georgia election officials should change their signature-verification process going forward. Dkt. No. [27] at 12 n.4. Moreover, and as an overarching matter, the Court has relied on the grand jury's stated scope and purpose—as reflected in both the District Attorney's request to impanel the grand

## III. CONCLUSION

In accordance with the foregoing, Senator Lindsey Graham's Supplemental Motion to Quash [40] is **GRANTED IN PART** and **DENIED IN PART**. Senator Graham may not be questioned about investigatory fact-finding that allegedly took place on the phone calls with Georgia election officials because such fact-finding constitutes protected legislative activity. Specifically, this means that Senator Graham cannot be questioned as to any information-gathering questions he posed (or why he posed them) about Georgia's then-existing election procedures or allegations of voter fraud. Senator Graham's Motion is otherwise denied as to all other topics addressed in his brief and discussed in the sections above. In sum, and as explained above, Senator Graham may be questioned about any alleged efforts to "cajole" or encourage Secretary Raffensperger or other Georgia election officials to throw out ballots or otherwise alter Georgia's election practices and procedures. Likewise, the grand jury may inquire into Senator Graham's alleged communications and coordination with the Trump Campaign and its post-election efforts in Georgia, as well as into Senator Graham's public statements related to Georgia's 2020 elections.[6]

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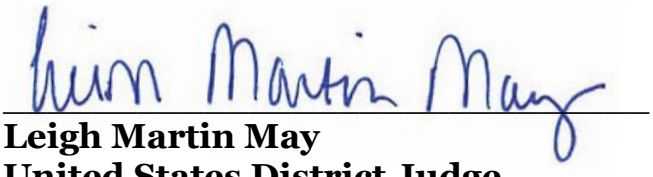
jury as well as the Fulton County Superior Court's order impaneling the grand jury and adopting the purpose stated in the District Attorney's request—to assess whether Senator Graham may be questioned on topics raised in the parties' briefing and during the hearing. See id. at 7 (citing Dkt. No. [1-2] at 7, 10).

[6] Senator Graham concludes his brief by arguing that the Court has improperly inverted the burden by directing him to address the categories of information and topics which he believes are shielded by the Speech or Debate Clause (and

It is the Court's understanding that this concludes the scope of the remand to this Court. The Court further **DIRECTS** the Clerk to **TRANSMIT** a copy of this Order and the record on limited remand [38-43] to the Eleventh Circuit Court of Appeals.

**IT IS SO ORDERED** this 1st day of September, 2022.



**Leigh Martin May**
**United States District Judge**

thereby demonstrate why partial quashal or modification of the subpoena is justified based on his invocation of legislative immunity). Dkt. No. [40-1] at 23–26. Senator Graham argues that the burden should instead be on the District Attorney to show that certain topics, conversations, or actions are *not* legislative. Id. The Court disagrees. As the Court has previously stated, Eleventh Circuit caselaw indicates that the burden rests with Senator Graham to articulate why he is entitled to legislative immunity under the Speech or Debate Clause. See Bryant v. Jones, 575 F.3d 1281, 1304 (11th Cir. 2009) ("While the Court has given the [Speech or Debate] Clause broad application, its protections are carefully tailored to its purposes. Officials claiming protection must show that such immunity is justified for the governmental function at issue." (quotation marks and citation omitted)); see also In re Hubbard, 803 F.3d at 1307–09 (explaining that state legislators properly asserted their claims to legislative privilege in response to subpoenas because they (1) invoked their legislative privilege claims through counsel and (2) "made their privilege claims known through written motions to quash"). In addition, the Court does not issue advisory opinions. A movant asking for partial quashal or modification of a subpoena must ask the Court what he wants quashed.

# APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 22-12696-DD

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FULTON COUNTY SPECIAL PURPOSE GRAND JURY,

Plaintiff - Appellee,

versus

LINDSEY GRAHAM,
in his official capacity as United States Senator,

Defendant - Appellant.

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On Appeal from the United States
District Court for the Northern District of Georgia

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BEFORE: WILSON, NEWSOM, and GRANT, Circuit Judges.

BY THE COURT:

The district court's August 15, 2022 order remanding the case to the Superior Court of Fulton County for further proceedings (Doc. 27) is TEMPORARILY STAYED pending resolution of the "Emergency Motion by Senator Lindsey O. Graham to Stay District Court's Order and Enjoin Select Grand Jury Proceedings Pending Appeal," which is HELD IN ABEYANCE pending a limited remand.

This case is REMANDED to the district court for the limited purpose of allowing the district court to determine whether Appellant is entitled to a partial quashal or modification of the subpoena to appear before the special purpose grand jury based on any protections afforded by the Speech or Debate Clause of the United States Constitution.

The parties shall brief the issue of whether Appellant is entitled to a partial quashal or modification of the subpoena in the district court. The district court shall expedite the parties' briefing in a manner that it deems appropriate.

Following resolution of the partial-quashal issue on limited remand, the matter will be returned to this Court for further consideration.

# APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

| | | |
|---|---|---|
| IN RE: SUBPOENA TO NON-PARTY LINDSEY O. GRAHAM in his official capacity as United States Senator,<br><br>In the matter of:<br><br>SPECIAL PURPOSE GRAND JURY, FULTON COUNTY SUPERIOR COURT CASE NO. 2022-EX-000024. | : | CIVIL ACTION NO. 1:22-cv-03027-LMM |

**ORDER**

This case comes before the Court on Senator Lindsey Graham's Emergency Motion to Stay [29].[1] After due consideration, the Court enters the following Order.

## I. BACKGROUND

In this matter, Senator Graham sought to quash a subpoena that was issued to him as part of the Fulton County Special Purpose Grand Jury's investigation into possible attempts to disrupt the lawful administration of Georgia's 2020 elections. On August 15, 2022, the Court entered an order denying Senator Graham's Expedited Motion to Quash. Dkt. No. [27]. Following

[1] Senator Graham also filed an Emergency Motion for Hearing [30]. Because the Court finds that it can resolve the issues presented in Senator Graham's Emergency Motion to Stay without a hearing, Senator Graham's Emergency Motion for Hearing [30] is **DENIED**.

entry of that order, Senator Graham filed an Emergency Motion to Stay wherein he requests (1) a stay of the Court's August 15, 2022, order and (2) an order enjoining the grand jury from acting on Senator Graham's subpoena before the conclusion of his appeal. Dkt. Nos. [29, 29-1].

## II. DISCUSSION

Under the "traditional standard for a stay," the Court considers four factors:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

League of Women Voters of Fla., Inc. v. Fla. Sec'y of State, 32 F.4th 1363, 1370 (11th Cir. 2022) (quotation marks omitted) (quoting Nken v. Holder, 556 U.S. 418, 425–26 (2009)). These factors overlap substantially with the factors relevant to obtaining a preliminary injunction. See, e.g., Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr, S.A., 320 F.3d 1205, 1210 (11th Cir. 2003) (listing preliminary injunction factors); see also Nken, 556 U.S at 434 ("There is substantial overlap between [the stay factors] and the factors governing preliminary injunctions, not because the two are one and the same, but because similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined." (internal citation omitted)). "The first two factors are the 'most critical.'" Hand v. Scott, 888 F.3d 1206, 1207 (11th Cir. 2018) (quoting Nken, 556 U.S. at 434). With

regard to the first factor, "in some circumstances—namely, 'when the balance of equities weighs heavily in favor of granting the stay'—[the Eleventh Circuit] relax[es] the likely-to-succeed-on-the-merits requirement[,]" and a stay "may be granted upon a lesser showing of a 'substantial case on the merits.'" League of Women Voters, 32 F.4th at 1370 (ellipsis omitted) (quoting Garcia-Mir v. Meese, 781 F.2d 1450, 1453 (11th Cir. 1986)).

As the Supreme Court has explained, "[a] stay is not a matter of right[] . . . ." Nken, 556 U.S. at 433. Instead, a stay is "an exercise of judicial discretion, and the propriety of its issue is dependent upon the circumstances of the particular case." Id. Accordingly, "[t]he party requesting the stay bears the burden of showing that the circumstances justify an exercise of that discretion." Id. As discussed below, Senator Graham has failed to carry that burden.

**1. Likelihood of Success on the Merits**

The first factor is "whether the stay applicant has made a strong showing that he is likely to succeed on the merits." League of Women Voters, 32 F.4th at 1370. Senator Graham raises a number of arguments as to why he is likely to succeed on the merits, but they are all unpersuasive, not least because they largely misconstrue the Court's holdings.

First, Senator Graham argues that he is likely to succeed on the merits because probing into the motives of legislative acts is unequivocally forbidden under the Speech or Debate Clause. Dkt. No. [29-1] at 9–14. Senator Graham maintains that the calls themselves constitute legitimate legislative activity in

their entirety, and he argues that the Court erred by "injecting" considerations of motive into its Speech or Debate analysis about the calls. Id.

As an initial matter, the Court's holding regarding the calls themselves, as well as what inquiries may be proper as to those calls, was an alternative basis for denying Senator Graham's requested relief. As was clear from the order, and as is discussed more fully below, Senator Graham requested that the subpoena be quashed in its entirety, and the Court denied this request first and primarily because there are multiple topics upon which Senator Graham could face questioning that in no way implicate protected legislative activity under the Speech or Debate Clause.

As the Court already explained, Senator Graham can be questioned on all activities that fall within the parameters of the grand jury's investigation and which are "political in nature rather than legislative," including (1) Senator Graham's alleged coordination with the Trump Campaign or other third parties regarding post-election efforts in Georgia; (2) attempts to "cajole" or "exhort" Georgia election officials to change their election processes or results; and (3) public statements or speeches he made outside of Congress about the 2020 elections. And so, because there are topics upon which Senator Graham could be questioned that fall outside the protections of the Speech or Debate Clause, his request to quash the subpoena in its entirety under the Clause necessarily failed. Senator Graham presents no persuasive argument as to why this holding raises a "substantial case on the merits" given how clearly the Supreme Court has stated

that actions which are fundamentally political in nature—such as giving speeches outside of Congress or "cajoling" or "exhorting" officials from different branches of government to take certain actions—are *not* protected by the Speech or Debate Clause.

Furthermore, and contrary to Senator Graham's suggestions in his Motion to Stay, this Court never held or otherwise suggested that courts (or the grand jury) may probe into the motivation for legislative acts. That proposition is foreclosed by Supreme Court precedent. Instead, the Court found that, at this stage and based on the current record, it could not simply accept Senator Graham's conclusory characterizations of these phone calls as *only* containing legitimate legislative factfinding inquiries and thereby ignore (and indeed reject) the fact that the substance of these calls has been a source of public dispute and disagreement by some of the calls' other participants. To this end, the Court observed that Senator Graham may be asked targeted questions on topics that in no way implicate legitimate legislative activity (such as attempts to "cajole" or "exhort" Georgia election officials to take certain actions relative to the state's voting and election practices) so as to probe whether—as Senator Graham suggests—the calls were, in fact, comprised *entirely* of legislative activity or instead (and as some other individuals who were on the calls have suggested) included at least some lines of inquiry that clearly fall outside the scope of the Speech or Debate Clause's protections. Senator Graham's arguments ignore the idea that more than one subject may have been discussed on the calls. To the

extent some parts of the calls *do* fall outside the sphere of protected legislative activity, the Supreme Court's analysis in United States v. Helstoski, 442 U.S. 477, 488 n.7 (1979), suggests that the grand jury could properly probe into these issues specifically while avoiding or "excising" any legitimate legislative activities from its questioning. The Court finds no basis for concluding that its holdings as to these issues are likely to be reversed on the merits. Holding otherwise would allow any sitting senator to shield all manner of potential criminal conduct occurring during a phone call merely by asserting the purpose of the call was legislative fact-finding—no matter whether the call subsequently took a different turn.

Second, Senator Graham argues that the Court's central holding—which, as just discussed, is that even assuming Senator Graham is correct that any questioning about the phone calls is barred under the Speech or Debate Clause, his request to quash the subpoena in its entirety still failed because there are multiple other areas of potential questioning and testimony that do not implicate "legislative activity" as that term has been defined by numerous Supreme Court decisions—is likely to be reversed by the Eleventh Circuit. Dkt. No. [29-1] at 14–17.

Here again, and as discussed above, Senator Graham's arguments are entirely unpersuasive, and they do not even demonstrate a "substantial case on the merits." As an initial matter, Senator Graham takes issue with the Court's recognition that his sole request—to quash the subpoena in its entirety—was built

largely (if not entirely) on the premise that Senator Graham will only be questioned about the phone calls, which Senator Graham characterizes as legitimate legislative factfinding exercises and thus completely protected by the Speech or Debate Clause. Dkt. No. [29-1] at 15. Instead, Senator Graham maintains that he believes that the "other topics" will simply be used as a "backdoor" for questioning him about the phone calls. Id.

The problem for Senator Graham is that the record thoroughly contradicts his suggestion that the District Attorney and grand jury simply wish to use questions on other topics as a "backdoor" to asking him about the legislative fact-finding on the phone calls. Over and again, the District Attorney has demonstrated an intention to question Senator Graham on issues that are not related to the phone calls themselves and—even more importantly—are not related to legitimate legislative activity as defined by the Supreme Court. By way of example: (1) the Certificate of Material Witness itself states that Senator Graham "possesses unique knowledge concerning . . . the Trump Campaign, and other known and unknown individuals involved in the multi-state, coordinated efforts to influence the results of the November 2020 election in Georgia and elsewhere" and that Senator Graham's testimony "is likely to reveal additional sources of information regarding the subject of [the Special Purpose Grand Jury] investigation[,]" see Dkt. No. [1-2] at 3–4; (2) in relevant part, the District Attorney argued in her Response that the grand jury is "entitled to hear [Senator Graham's] sworn testimony about, inter alia, the circumstances leading to his

telephone calls to Raffensperger, what [Senator Graham] sought and obtained from the conversation, *and any coordination either before or after the calls with the Trump campaign's post-election efforts in Georgia*[,]" see Dkt. No. [9] at 10–11 (emphasis added); and (3) the District Attorney stated at the hearing that, while the Certificate of Material Witness discusses the calls in relevant part, there are several other topics on which Senator Graham has personal knowledge that fall squarely within the purview of the grand jury's investigation and upon which Senator Graham could therefore be questioned.

In short, the record belies Senator Graham's suggestion that these *separate* topics of inquiry will simply be used as a "backdoor" for questioning Senator Graham about the phone calls. Senator Graham's insistent repetition of this argument does not make it true. It therefore bears repeating that, even assuming Senator Graham is correct in all of his contentions as to the application of the Speech or Debate Clause to the calls themselves, his requested relief—quashing the subpoena in its entirety—would still have to be denied because the record shows that there are multiple areas of proper inquiry that in no way implicate protected legislative activity as that term has been defined and clarified by numerous Supreme Court decisions interpreting the Speech or Debate Clause.

Third, Senator Graham suggests that he is likely to succeed on the merits, and that the Eleventh Circuit is likely to reverse this Court, because the Court did not partially quash or modify the subpoena. Dkt. No. [29-1] at 17–20. On this point, Senator Graham appears to believe that the Court simply did not realize

that, under Federal Rule of Civil Procedure 45(d)(3), it could enter an order partially quashing the subpoena or otherwise modifying it. But that misinterprets the Court's order. The problem with Senator Graham's argument on this issue is that he requested this relief for the first time at the hearing and then again in his supplemental brief—a development that meant that the parties never fully briefed this issue nor presented the Court with any detailed indication of what such a request for partial relief or modification would entail.

In other words, Senator Graham merely stating at the hearing that he wished in the alternative for the Court to partially quash the subpoena as it saw fit is not the same as properly presenting that issue to the Court and providing detailed argument from which the Court could shape appropriate relief. It is of course axiomatic that courts will not—and indeed cannot—make arguments for either party. If Senator Graham wanted the Court to rule as to each and every question he might be asked, he had to brief that issue. This would require identifying the questions and then explaining specifically why each question would be off limits. It is not for the Court to try and think up all the different issues that might be raised and then rule on them without the parties having an opportunity to address them.

Fourth, Senator Graham argues that he is likely to succeed on the merits of his sovereign immunity argument. Dkt. No. [29-1] at 20–22. As evidenced by the Court's earlier order, the Court finds no support for Senator Graham's position in either persuasive or binding authority. This argument is bereft of any meaningful

support and, in this Court's estimation, presents neither an issue that is likely to succeed on the merits nor one that is a "substantial case on the merits."

As indicated above, the Court is not persuaded that Senator Graham is likely to succeed on the merits of his arguments or that he has shown a substantial case on the merits. Even if he had shown a substantial case on the merits, that exception comes with a significant caveat: in order to rely on a showing of a "substantial case on the merits," the balance of the equities must "weigh[] heavily in favor of granting the stay[.]" League of Women Voters, 32 F.4th at 1370. In determining the balance of the equities, the Court considers the second, third, and fourth factors. Garcia-Mir, 781 F.2d at 1453. As discussed below, the Court does not find that the equities weigh so heavily in Senator Graham's favor as to justify the granting of a stay based only on a showing of a "substantial case on the merits" even if such a showing had been made.

**2. Irreparable Injury**

The second factor is "whether the applicant will be irreparably injured absent a stay[.]" League of Women Voters, 32 F.4th at 1370. Senator Graham argues that he will suffer irreparable harm if the Court does not grant his request for a stay because two immunities—immunity under the Speech or Debate Clause from being "questioned in any other Place[,]" as well as sovereign immunity—will both be violated if he must appear for questioning before the grand jury. Dkt. No. [29-1] at 22–24.

The Court acknowledges that if Senator Graham is correct on the merits of his Speech or Debate Clause contentions as he has framed them—that is, that all subjects relating to his conduct regarding Georgia's 2020 elections, even press interviews, should presumably be categorized as legislative and therefore shielded—he would suffer irreparable harm because the Speech or Debate Clause entitles members of Congress to be free from being "questioned in any other Place[]" regarding their legitimate legislative acts. U.S. Const. art. I, § 6, cl. 1. Similarly, the Court acknowledges that if it is ultimately determined that Senator Graham is in fact entitled to the novel and sweeping formulation of sovereign immunity he has proposed in this case, he would likewise suffer irreparable harm by being subjected to questioning before the grand jury. Be that as it may, the Supreme Court has stated that "[a] stay is not a matter of right, even if irreparable injury might otherwise result." Nken, 556 U.S. at 433.

**3. Injury to the Other Party**

The third factor is "whether issuance of the stay will substantially injure the other parties interested in the proceeding[.]" League of Women Voters, 32 F.4th at 1370. Senator Graham argues that the grand jury will not suffer any injury if the Court grants a stay pending appeal because (1) the subpoena at issue pertains only to him, so the grand jury's investigation can continue without his immediate testimony; and (2) he will seek to expedite his appeal and thus the grand jury will still have time for his testimony on any topics the Eleventh Circuit determines are permissible. Dkt. No. [29-1] at 25.

The District Attorney argues that a stay would result in substantial injury to the grand jury. Dkt. No. [36] at 6–7. In essence, the District Attorney argues that Senator Graham's testimony is sought not only because he possesses necessary and material information in his own right, but also because he is expected to testify as to other sources of information relevant to the grand jury's investigation. Id. To this end, the District Attorney notes that the grand jury has been attempting to secure Senator Graham's appearance since July 5, 2022, and that a stay will add to the significant delay that has already occurred, even assuming an expedited appeal. Id. The District Attorney argues that additional delays that would result from a stay will harm the grand jury's full investigation because such a delay not only affects Senator Graham but also delays revelation of new categories of information and witnesses, thereby compounding the total delay and hampering the grand jury as it attempts to carry out its investigation expeditiously. Id.

The Court agrees with the District Attorney on this issue. As reflected in both the Certificate of Material Witness and in the District Attorney's arguments before this Court, it is expected that Senator Graham possesses necessary and material knowledge of additional sources of information that are relevant to the grand jury's investigation. Under the circumstances, further delay of Senator Graham's testimony would greatly compound the overall delay in carrying out the grand jury's investigation. Further delay thus poses a significant risk of overall hindrance to the grand jury's investigation, and the Court therefore finds that

granting a stay would almost certainly result in material injury to the grand jury and its investigation. Accordingly, this factor weighs against Senator Graham and in favor of the grand jury.

**4. The Public Interest**

The final factor requires consideration of "where the public interest lies." League of Women Voters, 32 F.4th at 1370 (quotation mark omitted). Senator Graham argues that granting a stay and maintaining the status quo serves the public interest because he seeks to vindicate two constitutional immunity doctrines that are important to the separation of powers and federalism. Dkt. No. [29-1] at 25–26. He also suggests that the issues in his appeal will serve "the People[] more generally" because their elected officials will be able to carry out investigations relevant to legislation without fear of reprisal or interference. Id. In response, the District Attorney argues that the public interest is served by allowing Senator Graham's appearance to proceed, thereby ensuring that the grand jury's investigation may proceed efficiently. Dkt. No. [36] at 7–8.

The Court finds that, under the unique facts of this case, the public interest would not be served by granting a stay. As has been discussed at length, the grand jury has been impaneled to investigate potential attempts to disrupt the lawful administration of Georgia's 2020 elections. In this context, the public interest is well-served when a lawful investigation aimed at uncovering the facts and circumstances of alleged attempts to disrupt or influence Georgia's elections is allowed to proceed without unnecessary encumbrances. Indeed, it is important

that citizens maintain faith that there are mechanisms in place for investigating any such attempts to disrupt elections and, if necessary, to prosecute these crimes which, by their very nature, strike at the heart of a democratic system. Furthermore, given that this case, at minimum, involves areas of inquiry that clearly fall outside the scope of the Speech or Debate Clause, the Court finds that it also serves the public interest for the Supreme Court's understanding of the Clause's purpose and limitations to be vindicated: "Admittedly, the Speech or Debate Clause must be read broadly to effectuate its purpose of protecting the independence of the Legislative Branch, but no more than the statutes we apply, was its purpose to make Members of Congress super-citizens[] . . . ." United States v. Brewster, 408 U.S. 501, 516 (1972). Thus, under the circumstances of this case, the Court finds that granting a stay would not serve the public interest. This factor therefore weighs against Senator Graham.

**5. Weighing of Factors**

After reviewing the relevant factors, the Court finds that the only factor that arguably weighs in Senator Graham's favor is the second. Both the third and fourth factors weigh against the granting of a stay under the unique circumstances of this case. As for the first factor, the Court is not persuaded that Senator Graham has shown a likelihood of success on the merits. Therefore, because the balance of the equities reflected in the second, third, and fourth factors do not "weigh[] *heavily* in favor of granting the stay[,]" a stay is not justified even assuming for the sake of argument that Senator Graham has shown

"a substantial case on the merits." Garcia-Mir, 781 F.2d at 1453 (emphasis added). Accordingly, Senator Graham's request for an order staying the Court's August 15, 2022 order and enjoining the Special Purpose Grand Jury from acting on the subpoena is **DENIED**.

## III. CONCLUSION

In accordance with the foregoing, Senator Lindsey Graham's Emergency Motion to Stay [29] is **DENIED**. Senator Graham's Emergency Motion for Hearing [30] is likewise **DENIED**.

**IT IS SO ORDERED** this 19th day of August, 2022.

**Leigh Martin May**
**United States District Judge**

# APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

| | | |
|---|---|---|
| IN RE: SUBPOENA TO NON-PARTY LINDSEY O. GRAHAM in his official capacity as United States Senator,<br><br>In the matter of:<br><br>SPECIAL PURPOSE GRAND JURY, FULTON COUNTY SUPERIOR COURT CASE NO. 2022-EX-000024. | : | CIVIL ACTION NO. 1:22-cv-03027-LMM |

**ORDER**

This case comes before the Court on Senator Lindsey Graham's Expedited Motion to Quash [2]. After due consideration, and with the benefit of a hearing, the Court **DENIES** the Motion. In sum, the Court finds that there are considerable areas of potential grand jury inquiry falling outside the Speech or Debate Clause's protections. Additionally, sovereign immunity fails to shield Senator Graham from testifying before the Special Purpose Grand Jury. Finally, though Senator Graham argues that he is exempt from testifying as a high-ranking government official, the Court finds that the District Attorney has shown extraordinary circumstances and a special need for Senator Graham's testimony on issues relating to alleged attempts to influence or disrupt the lawful administration of Georgia's 2022 elections.

## I. BACKGROUND[1]

The matters presently before the Court relate to a subpoena issued to United States Senator Lindsey Graham from the Fulton County Superior Court and its requirement to testify before a special purpose grand jury. On January 20, 2022, the Fulton County District Attorney requested that the Superior Court of Fulton County impanel a special purpose grand jury pursuant to O.C.G.A. § 15-12-100 *et seq*. "for the purpose of investigating the facts and circumstances relating directly or indirectly to possible attempts to disrupt the lawful administration of the 2020 elections in the State of Georgia." Dkt. No. [1-2] at 10. On January 24, 2022, the Superior Court of Fulton County entered an order granting the District Attorney's request and authorizing the convening and impaneling of the Special Purpose Grand Jury pursuant to O.C.G.A. § 15-12-100 *et seq*. Id. at 7–8. The order expressly authorized the Special Purpose Grand Jury "to investigate any and all facts and circumstances relating directly or indirectly to alleged violations of the law of the State of Georgia, as set forth in the request of the District Attorney referenced herein above." Id. at 7.

During this investigation, Senator Graham was identified as a witness, and his appearance before the grand jury was requested. To this end, the District Attorney obtained a Certificate of Material Witness pursuant to the Uniform Act to Secure the Attendance of Witnesses from Without the State, O.C.G.A. § 24-13-

[1] The facts discussed in this section are taken from the parties' briefs and exhibits and, unless otherwise noted, are largely undisputed.

90 *et seq.*, from the Superior Court of Fulton County. See id. at 2–5. Following initial litigation in federal court in South Carolina related to this Certificate,[2] the parties agreed that Senator Graham would instead accept service of a subpoena in Georgia. The subpoena was issued on July 26, 2022, see Dkt. No. [1-1] at 2, and Senator Graham accepted service of it the following day, July 27. Dkt. No. [1] at 2. The subpoena requires Senator Graham to appear as a witness before the Special Purpose Grand Jury on August 23, 2022. Dkt. No. [1-1] at 2.

On July 29, 2022, Senator Graham removed the subpoena to this Court pursuant to 28 U.S.C. § 1442 and filed his Expedited Motion to Quash. Dkt. Nos. [1, 2]. In his Expedited Motion to Quash, Senator Graham argues that the subpoena should be quashed in its entirety. See Dkt. Nos. [2, 2-1]. The Fulton County District Attorney's Office opposes Senator Graham's request. See Dkt. No. [9].

## II. DISCUSSION

Senator Graham asserts three grounds for quashing the subpoena. First, he argues that the Speech or Debate Clause of the U.S. Constitution completely shields his testimony. Dkt. No. [2-1] at 6–21. Second, he argues that the doctrine of sovereign immunity protects him from testifying. Id. at 21–22. And finally,

[2] Senator Graham indicates in his briefing that a separate Certificate of Material Witness was obtained and directed to the Superior Court of the District of Columbia, see Dkt. No. [2-1] at 5 & n.4, but the Court refers only to the Certificate directed to South Carolina because that is the only Certificate Senator Graham has placed in the record.

Senator Graham maintains that the subpoena should be quashed because he is a high-ranking government official. Id. at 22–26. The Court addresses each argument in turn.

**a. The Speech or Debate Clause**

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. "The purpose of the Clause is to insure that the legislative function the Constitution allocates to Congress may be performed independently[,]" as well as to reinforce the constitutional structure of the separation of powers. See Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 502 (1975). Accordingly, "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." United States v. Brewster, 408 U.S. 501, 525 (1972). To this end, the Clause, where applicable, protects members of Congress "against civil as well as criminal actions, and against actions brought by private individuals as well as those initiated by the Executive Branch." Eastland, 421 U.S. at 502–03; see also United States v. Swindall, 971 F.2d 1531, 1544 (11th Cir. 1992) ("The Speech or Debate Clause 'at the very least protects [a member of Congress] from criminal or civil liability and from questioning elsewhere than in Congress.'" (quoting Gravel v. United States, 408 U.S. 606, 615 (1972))).

The Speech or Debate Clause has been read "broadly to effectuate its purposes." Eastland, 421 U.S. at 501–02. Still, "the Clause has not been extended beyond the legislative sphere." Gravel, 408 U.S. at 624–25. As a result, the central issue in most cases is "whether the activity the legislator wishes to shield from scrutiny is truly a legislative activity or is instead 'casually or incidentally related to legislative affairs but not part of the process itself.'" Swindall, 971 F.2d at 1544 (quoting Brewster, 408 U.S. at 512). In determining which activities "beyond pure speech and debate in either House" constitute protected legislative activity under the Speech or Debate Clause, courts consider whether the activities at issue are "an integral part of the 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; see also Eastland, 421 U.S. at 504–05.

Here, Senator Graham argues that the subpoena must be quashed in its entirety under the Speech or Debate Clause because it seeks to compel testimony about his legislative acts. See Dkt. No. [2-1] at 4–17. In support of this position, Senator Graham argues that the District Attorney seeks to question him only about the substance and logistics of two phone calls he allegedly made to Georgia Secretary of State Brad Raffensperger in the weeks following the November 2020 election. See id. Senator Graham maintains that these two phone calls constitute protected legislative activity because they were investigatory, information-

gathering exercises that were "legislative" in three ways: (1) the conversations allegedly concerned topics "on which legislation could be had" such as national standards for mail-in-voting; (2) Senator Graham was the then-Chair of the Senate Judiciary Committee and his inquiries (through these calls) into voting integrity and election law were within the province of that committee and his position within it; and (3) as a Senator, he was also tasked with certifying the 2020 presidential election, and these calls were therefore part of his investigation process before certifying the election results. Id. at 10–16. Stated succinctly, Senator Graham's argument is that he is shielded from testifying before the grand jury because (1) he will be asked about these calls and (2) these calls were protected legislative factfinding inquiries related to issues that fall within his legislative province. Id.[3]

[3] As an initial matter, the parties disagree as to whether Senator Graham bears the burden of demonstrating that he is entitled to immunity under the Speech or Debate Clause. Binding Eleventh Circuit law suggests that the burden rests with Senator Graham. Bryant v. Jones, 575 F.3d 1281, 1304 (11th Cir. 2009) ("While the Court has given the [Speech or Debate] Clause broad application, its protections are carefully tailored to its purposes. Officials claiming protection must show that such immunity is justified for the governmental function at issue." (quotation marks and citation omitted)). This view of the burden appears to align with other, non-binding authority. See, e.g., United States v. Menendez, 831 F.3d 155, 165 (3d Cir. 2016) ("A Member seeking to invoke the Clause's protections bears the burden of establishing the applicability of legislative immunity by a preponderance of the evidence." (alterations adopted) (quotation marks omitted)); Lange v. Houston Cnty., 499 F. Supp. 3d 1258, 1278 (M.D. Ga. 2020) ("The burden to establish legislative immunity is on the party asserting it."). However, even if the burden is the District Attorney's, that burden has been met because, as discussed below, the District Attorney has showed, at minimum, that there are topics of inquiry on which Senator Graham could be questioned that would clearly fall outside of the Speech or Debate Clause's protections.

As a starting point, one of the essential premises of Senator Graham's arguments is that the District Attorney seeks to *only* question him about the two phone calls he made to Georgia election officials following the November 2020 election. See Dkt. No. [2-1] at 4–17. In this way, Senator Graham tethers his argument to a selective reading of the Certificate of Material Witness that was issued by the Fulton County Superior Court, and in doing so, he suggests that its references to the two calls he made to Georgia Secretary of State Raffensperger are the only areas on which he will (or could) be questioned. Id.

However, both the District Attorney's request to impanel the grand jury and the Superior Court's order granting that request make clear that the grand jury's purpose is broader. It has been impaneled to "investigat[e] the facts and circumstances relating directly or indirectly to possible attempts to disrupt the lawful administration of the 2020 elections in the State of Georgia." Dkt. No. [1-2] at 10; id. at 7. Indeed, as the District Attorney argues in her Response, the grand jury "is entitled to hear [Senator Graham's] sworn testimony about, inter alia, . . . any coordination either before or after the calls with the Trump campaign's post-election efforts in Georgia." Dkt. No. [9] at 10–11. Further, as the District Attorney emphasized during the August 10 hearing, the Certificate does not represent an exhaustive list of the topics or areas of testimony that the grand jury may seek from Senator Graham. Instead, the District Attorney explained that, while the Certificate itself refers to the simplest and most publicly-known ways that Senator Graham's testimony is material to the grand jury's

investigation, there are other areas of relevant inquiry on which Senator Graham has knowledge and may be questioned, including his public statements after the election, as well as conversations or interactions he had with the Trump Campaign or other third parties that are relevant to the grand jury's investigation into attempts to disrupt the lawful administration of Georgia's 2020 elections.

Additionally, even if the Court were to look exclusively to the Certificate itself, it too states that Senator Graham possesses knowledge about matters that are material to the grand jury's investigation that are outside of the two phone calls. In pertinent part, the Certificate states that Senator Graham is a material and necessary witness to the grand jury's investigation and that he "possesses unique knowledge concerning . . . the Trump Campaign, and other known and unknown individuals involved in the multi-state, coordinated efforts to influence the results of the November 2020 election in Georgia and elsewhere" and that Senator Graham's testimony "is likely to reveal additional sources of information regarding the subject of [the Special Purpose Grand Jury] investigation." Dkt. No. [1-2] at 3–4. Thus, the Certificate itself indicates that Senator Graham's relevance to the grand jury's investigation—and thus the areas on which he could be asked to testify—extends beyond issues related to the two phone calls he made to Secretary Raffensperger.

The fact that Senator Graham may be questioned on topics outside the two phone calls—including (1) his potential communications and coordination with the Trump Campaign and its post-election efforts in Georgia; (2) his knowledge

of other groups or individuals involved with efforts to influence the results of Georgia's 2020 election; and (3) his public statements following the 2020 election—is of great significance to the issue presently before the Court.

The Speech or Debate Clause does not "prohibit inquiry into activities that are casually or incidentally related to legislative affairs[,]" see Brewster, 408 U.S. at 528, but instead offers protection 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. The Supreme Court has expressly rejected a sweeping interpretation of the Speech or Debate Clause that would include conduct that is merely "related" to the legislative process:

> In no case has this Court ever treated the Clause as protecting all conduct relating to the legislative process. In every case thus for before this Court, the Speech or Debate Clause has been limited to an act which was clearly a part of the legislative process—the due functioning of that process. We would not think it sound or wise, simply out of an abundance of caution to doubly insure legislative independence, to extend the privilege beyond its intended scope, its literal language, and its history, to include all things in any way related to the legislative process. Given such a sweeping reading, we have no doubt that there are few activities in which a legislator engages that he would be unable somehow to 'relate' to the legislative process.

Brewster, 408 U.S. at 516. To this end, the Supreme Court has recognized that there are any number of activities a member of Congress might engage in that unquestionably fall outside the scope of protected legislative activity because they are, in fact, "political in nature rather than legislative":

> It is well known, of course, that Members of the Congress engage in many activities other than the purely legislative activities protected by the Speech or Debate Clause. These include 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. The range of these related activities has grown over the years. They are performed in part because they have come to be expected by constituents, and because they are a means of developing continuing support for future elections. Although these are entirely legitimate activities, they are political in nature rather than legislative, in the sense that term has been used by the Court in prior cases. But it has never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause.

Id. at 512; see also Gravel, 408 U.S. at 625 ("That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature. Members of Congress are constantly in touch with the Executive Branch of the Government and with administrative agencies—they may cajole, and exhort with respect to the administration of a federal statute—but such conduct, though generally done, is not protected legislative activity.").

Thus, as illustrated by the Supreme Court's analysis, the Speech or Debate Clause will not shield actions that are "political in nature rather than legislative" (or otherwise not fundamentally "legislative in nature"). These actions may include, among other things, (1) statements and speeches given outside of Congress regarding the 2020 election, (2) efforts to "cajole" or "exhort" state election officials to change their election practices or alter election results, and (3) coordination with the Trump Campaign (or other third parties) regarding post-election efforts in Georgia. And so, even if the Court were to accept that Senator Graham's two calls to Georgia election officials were comprised entirely

of legislative factfinding—and that any inquiry related to those two calls was therefore shielded by the Speech or Debate Clause—there would still be significant areas of potential testimony related to the grand jury's investigation on which Senator Graham could be questioned that would in no way fall within the Clause's protections. Stated another way, the mere possibility that some lines of inquiry could implicate Senator Graham's immunity under the Speech or Debate Clause does not justify quashing the subpoena in its entirety because there are considerable areas of inquiry which are clearly not legislative in nature. Senator Graham's Motion would therefore fail on this basis alone.

But even if the Court were to accept Senator Graham's preferred framing of the issues—that is, that his testimony before the grand jury will be limited to questions regarding his two calls to Georgia election officials—his request to quash the subpoena on this basis in its entirety would still fail. Here, Senator Graham's central argument is that his purpose in making the calls—indeed, the whole point of the calls—was to investigate issues related to voting and election law (including mail-in voting and reforms to the Electoral Count Act) and to gather information relevant to his duty to eventually certify the results of the 2020 presidential election. See Dkt. No. [2-1] at 10–16. To this end, Senator Graham dismisses as irrelevant the fact that individuals on the calls have publicly suggested that Senator Graham was not simply engaged in legislative factfinding but was instead suggesting or implying that Georgia election officials change their

processes or otherwise potentially alter the state's results.[4] See id. at 16–17; see also Dkt. No. [23] at 8.

Specifically, Senator Graham suggests that to credit others' characterizations or descriptions of his calls would be to improperly consider the motives for his legislative activities. See Dkt. Nos. [2-1] at 16–17; [23] at 8. But in making this argument, Senator Graham fundamentally misconstrues the nature of the Court's required inquiry. To begin, the specific activity at issue involves a Senator from South Carolina making personal phone calls to state-level election officials in Georgia concerning Georgia's election processes and the results of the state's 2020 election. On its face, such conduct is not a "manifestly legislative act." See Gov't of the Virgin Islands v. Lee, 775 F.2d 514, 522 (3d Cir. 1985) (collecting Supreme Court decisions involving decidedly "legislative" activities, including introducing proposed legislation, delivering a speech in Congress, and subpoenaing records for a congressional committee hearing). Moreover, and contrary to Senator Graham's assertions that there exists no "conflict of legally material fact" as to the purpose and substance of the calls, see Dkt. No. [23] at 7, there has been public disagreement and dispute among the calls' participants as to the nature and meaning of Senator Graham's statements and inquiries therein. In fact, it has been suggested that Senator Graham was seeking to influence

[4] Taking others' comments aside, the District Attorney notes in her Response that Senator Graham himself appears to have indicated in news interviews that he made suggestions as to how Georgia officials might change their signature-verification process. See Dkt. No. [9] at 3–4, 12–13.

Secretary Raffensperger's actions. Under these circumstances, and as the record presently exists, the Court cannot simply accept Senator Graham's conclusory characterizations of these calls and reject others'—indeed, such an approach has been expressly rejected by other courts facing the same issue. See Lee, 775 F.2d at 522 ("Although [the legislator] maintains that his meetings and conversations were official in nature, and did involve information gathering, such assertions cannot preclude a court of competent jurisdiction from determining whether [his] conversations were, in fact, legislative in nature so as to trigger the immunity."); see also Menendez, 831 F.3d at 166–68.

Instead, the record must be more developed so that the Court may determine in the first instance whether the entirety of Senator Graham's calls to Georgia election officials in fact constitute legitimate legislative activity. Menendez, 831 F.3d at 167 ("[W]e consider a legislator's purpose and motive to the extent they bear on whether 'certain legislative acts were in fact taken' or whether 'non-legislative acts [are being] misrepresented as legislative' in order to invoke the Speech or Debate privilege improperly."); see also id. at 168 ("Courts may dig down to discern if [the purported legislative activity] should be deemed legislative or non-legislative."). And so, it is only once the acts are determined to actually be legislative that all inquiry must cease and any motivations for such actions become irrelevant. Id. at 167 ("Only after we conclude that an act is in fact

legislative must we refrain from inquiring into a legislator's purpose or motive.").[5]

Furthermore, and even assuming for the sake of argument that these calls contained some protected legislative activity,[6] the grand jury would not necessarily be precluded from *all* inquiries about the calls unless every aspect of the calls was determined to fall within the sphere of legitimate legislative activity. Such inquiry can be made without infringing on the Speech or Debate Clause's complete prohibition on legislative questioning with carefully framed questions. For example, asking Senator Graham whether he directed the Georgia Secretary of State to take certain actions would be permissible and not violate the Speech or Debate Clause. That would be outside the information gathering that Senator Graham claims was legislative.

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[5] In other words, courts are not precluded from probing into the facts and circumstances of alleged legislative acts to determine *what* these acts actually are—that is, legislative or non-legislative—but courts *are* precluded from probing into motivations for such acts once it has been determined that they are, in fact, legislative.

[6] The Court here assumes that Senator Graham's individual, investigative inquiries into topics that arguably fall within his legislative province—such as gathering information to inform himself before voting to certify the results of the 2020 presidential election—would constitute protected legislative activity for the purposes of the Speech or Debate Clause. But that is not a settled issue of law, and the Court takes no broader position on that issue at this time. Compare, e.g., Bastien v. Off. of Senator Ben Nighthorse Campbell, 390 F.3d 1301, 1315 (10th Cir. 2004), cert. denied, 546 U.S. 926 (2005) ("No Supreme Court opinion indicates that Speech or Debate Clause immunity extends to informal information gathering by individual members of Congress.") with Lee, 775 F.3d at 521 ("[F]act-finding occupies a position of sufficient importance in the legislative process to justify the protection afforded by legislative immunity.").

This approach is consistent with the Supreme Court's analysis in United States v. Helstoski, 442 U.S. 477, 488 n.7 (1979). In Helstoski, the majority addressed Justice Stevens's concern that legislators may be able to insert references to past legislative acts into evidence and thereby render broad swaths of that evidence inadmissible under the Speech or Debate Clause:

> Mr. Justice STEVENS suggests that our holding is broader than the Speech or Debate Clause requires. In his view, 'it is illogical to adopt rules of evidence that will allow a Member of Congress effectively to immunize himself from conviction [for bribery] simply by inserting references to past legislative acts in all communications, thus rendering all such evidence inadmissible.' *Post*, at 2444. Nothing in our opinion, by any conceivable reading, prohibits excising references to legislative acts, so that the remainder of the evidence would be admissible. This is a familiar process in the admission of documentary evidence. Of course, a Member can use the Speech or Debate Clause as a shield against prosecution by the Executive Branch, but only for utterances within the scope of legislative acts as defined in our holdings. That is the clear purpose of the Clause.

Helstoski, 442 U.S. at 488 n.7. Here, Senator Graham advances a position that appears to track closely to Justice Stevens's concern—that is, he attempts to label everything contained within the disputed phone calls as legislative activity and thereby completely shield them from further inquiry. The Court is unpersuaded by such an attempt. And so, to the extent some of Senator Graham's statements on the calls may clearly fall outside the Speech or Debate Clause's protections—for example, if Senator Graham in fact "cajoled" or "exhorted" Georgia election officials to take certain actions in administering Georgia's election and voting processes—such statements could presumably be inquired into even if other

statements or lines of inquiry on the calls are protected as legitimate legislative activity. See id.

Accordingly, and for the reasons discussed above, Senator Graham's request to quash the subpoena in its entirety under the Speech or Debate Clause must be denied at this time.

**b. Sovereign Immunity**

Senator Graham also briefly argues that sovereign immunity applies to completely shield him from complying with the grand jury subpoena. Dkt. No. [2-1] at 21–22. In an argument spanning just over two paragraphs, Senator Graham suggests that the doctrine of sovereign immunity sweeps so broadly as to fully preclude enforcement of the subpoena simply because he is a United States Senator. Id. If the Court were to accept Senator Graham's sovereign immunity argument, it would mean that U.S. Senators would not be required to testify before state grand juries no matter the circumstances. The law would give them complete immunity based solely on their status as federal officials.

The Court finds no support in controlling law for Senator Graham's suggestion that the doctrine of sovereign immunity applies to him in this case. Senator Graham has not cited any authority—controlling or persuasive—that deals with an analogous situation, and the Court has found none. At most, this Court is bound by the former Fifth Circuit's holding in Keener v. Congress of

United States, 467 F.2d 952, 952 (5th Cir. 1972),[7] wherein the Fifth Circuit affirmed, *inter alia*, that sovereign immunity protected Congress *itself* from suit by a pro se litigant who was distressed by Congress's abandonment of the gold standard in 1934 and therefore sought a writ of mandamus to compel Congress "to return to some 'uniform method of valuation' for United States currency." Id. Keener does not suggest that sovereign immunity broadly applies to protect individual members of Congress from testifying before state grand jury investigations. The Court finds Senator Graham's argument on this issue unpersuasive and unavailing.

**c. High-Ranking Officials and Extraordinary Circumstances**

Last, Senator Graham argues that the grand jury subpoena should be quashed because he is a high-ranking government official. Dkt. No. [2-1] at 22–26.

Under Eleventh Circuit law, a party seeking to depose a high-ranking government official or otherwise call that individual as a witness must show "extraordinary circumstances" or a "special need" for doing so. See In re United States (Kessler), 985 F.2d 510, 512 (11th Cir. 1993); In re United States (Jackson), 624 F.3d 1368, 1372 (11th Cir. 2010). The rationale for this rule is that high-

[7] Decisions of the former Fifth Circuit handed down on or before September 30, 1981, are binding precedent in the Eleventh Circuit. Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

ranking government officials "have greater duties and time constraints than other witnesses," and, if allowed to be freely called in as witnesses, their time would likely be monopolized by preparing for and testifying in lawsuits. In re United States (Kessler), 985 F.2d at 512. For this reason, courts applying this rule consider whether the official being called to testify has personal knowledge or experience relevant to material issues in the suit, as well as whether such information is available from other witnesses such as lower-level officials. See id. at 512–13 (noting that "testimony was available from alternate witnesses" and that because the high-ranking official in question was not employed at the FDA during the relevant time period, he "could not have been responsible for selectively prosecuting the defendants"); see also Fair Fight Action, Inc. v. Raffensperger, 333 F.R.D. 689, 693 (N.D. Ga. 2019) ("The exceptional circumstances requirement is considered met when high-ranking officials have direct personal factual information pertaining to material issues in an action and the information to be gained is not available from any other sources such as lower-level officials." (quotation marks omitted)). Though the Eleventh Circuit has so far only applied the rule to high-ranking officials in federal agencies, other courts have extended it to members of Congress. See In re United States (Kessler), 985 F.2d at 512–13 (Food and Drug Administration Commissioner); In re United States (Jackson), 624 F.3d at 1369, 1377 (Environmental Protection Agency Administrator); but see Moriah v. Bank of China Ltd., 72 F. Supp. 3d 437,

440–41 (S.D.N.Y. 2014) (quashing subpoena where record indicated that former congressman lacked knowledge of relevant issues).

Senator Graham argues that the District Attorney cannot satisfy the "extraordinary circumstances" standard in this case and therefore cannot justify calling Senator Graham to testify before the grand jury. Dkt. No. [2-1] at 22–26. To this end, Senator Graham argues that the information about the substance and logistics of his calls with Georgia election officials could easily be obtained from other individuals present on the call, including those who have already testified (or who will soon testify) before the grand jury. Id. at 23–24. As to materiality, Senator Graham argues that the District Attorney has failed to demonstrate that Senator Graham's testimony is essential to the grand jury's investigation. Id.[8] In response, the District Attorney argues that the high-ranking official doctrine does not apply in this case but that, even if it does, the "exceptional circumstances" standard has been met. Dkt. No. [9] at 25–27.

[8] Senator Graham attempts to import the standard from a Ninth Circuit case involving a request to quash a subpoena that was issued to former Secretary of Education DeVos. Dkt. No. [2-1] at 24 (quoting In re U.S. Dep't of Educ., 25 F.4th 692 (9th Cir. 2022)). In that case, the Ninth Circuit was tasked with deciding what a party would have to demonstrate in order to show that "extraordinary circumstances sufficient to justify the taking of a cabinet secretary's deposition exist . . . ." In re U.S. Dep't of Educ., 25 F.4th at 702. Among the requirements articulated by the Ninth Circuit and cited by Senator Graham is "a showing of agency bad faith[.]" Id.; see also Dkt. No. [2-1] at 24–25. Because the circumstances of this Ninth Circuit decision are significantly and materially distinguishable from the present case, the Court declines to adopt this standard and will instead rely, as it must, on Eleventh Circuit precedent, as well as decisions applying Eleventh Circuit law.

The Court agrees with the District Attorney that, even assuming the high-ranking official doctrine applies to Senator Graham under these circumstances, the District Attorney has nevertheless satisfied the "extraordinary circumstances" standard. First, Senator Graham has unique personal knowledge about the substance and circumstances of the phone calls with Georgia election officials, as well as the logistics of setting them up and his actions afterward. And though other Georgia election officials were allegedly present on these calls and have made public statements about the substance of those conversations, Senator Graham has largely (and indeed publicly) disputed their characterizations of the nature of the calls and what was said and implied. Accordingly, Senator Graham's potential testimony on these issues—in addition to his knowledge about topics outside of the calls such as his alleged coordination with the Trump Campaign before and after the calls are unique to Senator Graham, and Senator Graham has not suggested that anyone else from his office can speak to these issues or has unique personal knowledge of them.

The issues that Senator Graham has direct knowledge of are also highly material to those that are within the investigative purview of the grand jury. As noted above, the grand jury was convened for the purpose of "investigating the facts and circumstances relating directly or indirectly to possible attempts to disrupt the lawful administration of the 2020 elections in the State of Georgia." Dkt. No. [1-2] at 10; see also id. at 7 ("The special purpose grand jury shall be authorized to investigate any and all facts and circumstances relating directly or

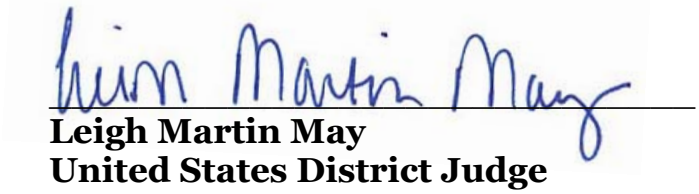
indirectly to alleged violations of the laws of the State of Georgia, as set forth in the request of the District Attorney referenced herein above."). And here, Senator Graham has direct personal knowledge of conversations with Georgia election officials which have been the subject of public dispute as to the nature of his inquiries and requests, including any implicit or overt suggestions to discard ballots or otherwise alter the election results. Moreover, in her Petition to secure a Certificate of Material Witness from the Fulton County Superior Court, the District Attorney described Senator Graham as a "necessary and material witness in [the Special Purpose Grand Jury] investigation[]" not only because of his personal knowledge of the phone calls with Georgia election officials, but also because he possesses "unique knowledge" concerning "the Trump Campaign[] and other known and unknown individuals involved in the multi-state, coordinated efforts to influence the results of the November 2020 election in Georgia and elsewhere." Dkt. No. [1-3] at 3. Based on the record presently before the Court, and similar to the Superior Court of Fulton County, the Court finds that the District Attorney has demonstrated that Senator Graham possesses unique personal knowledge of issues that are highly material to the Special Purpose Grand Jury's investigation. Accordingly, the Court finds that the District Attorney has carried her burden as to the "high-ranking official" doctrine.

## III. CONCLUSION

In accordance with the foregoing, Senator Lindsey Graham's Expedited Motion to Quash [2] is **DENIED without prejudice**. Because the record must

be more fully developed before the Court can address the applicability of the Speech or Debate Clause to specific questions or lines of inquiry, and because Senator Graham's only request in removing the subpoena to this Court was to quash the subpoena in its entirety, the Case is **REMANDED** to the Superior Court of Fulton County for further proceedings.[9]

**IT IS SO ORDERED** this 15th day of August, 2022.



**Leigh Martin May**
**United States District Judge**

[9] During the hearing and in his supplemental brief, Senator Graham requested for the first time that, if the Court declines to quash the subpoena in its entirety, the Court should enter an order potentially modifying the subpoena or prescribing areas of inquiry that are barred. There are two problems with Senator Graham's late request. First, this is not the relief requested in Senator Graham's Motion. Instead, Senator Graham unequivocally moved to quash the subpoena in its entirety. Federal Rule of Civil Procedure 45(3)(A) speaks only of "quash[ing] or modify[ing] a subpoena "on timely motion[,]" and here Senator Graham's only request in his Motion is to completely quash the subpoena, not to modify it. See Dkt. Nos. [2, 2-1]. Second, the Court also declines Senator Graham's request because these topics have not been fully briefed by either party. Without a more thoroughly developed record, the Court would be ruling on hypothetical lines of questioning as well as hypothetical applications of various immunity doctrines to those potential questions that neither party has fully addressed. The Court will not engage in such a process.