No. 22A337

In the Supreme Court of the United States

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

v.

FULTON COUNTY SPECIAL PURPOSE GRAND JURY,
Respondent.

BRIEF OF *AMICI CURIAE* FORMER FEDERAL PROSECUTORS IN OPPOSITION TO EMERGENCY APPLICATION FOR STAY AND INJUNCTION PENDING APPEAL

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INTEREST AND IDENTITY OF AMICI CURIAE

Amici are former federal prosecutors Donald B. Ayer, John Farmer, Renato Mariotti, Sarah R. Saldaña, William F. Weld, and Shan Wu. *Amici* collectively have many decades of experience with subpoenas to public officials and related claims of testimonial privilege under the Constitution. They also have substantial personal experience with the structure of law enforcement investigations. Given their decades of public service and commitment to the integrity of our legal system, *amici* maintain a strong interest in the proper resolution of the questions presented by this case, and they participated as *amici* in both the district court and Eleventh Circuit.[1]

PRELIMINARY STATEMENT

Senator Graham asks this Court to enter a stay that would substantially hinder a grand jury convened in Fulton County from obtaining his testimony about efforts to disrupt the 2020 election in Georgia. His request should be denied.

The Speech or Debate Clause immunizes Senator Graham from testimony *only* as to his legislative acts. Here, the grand jury subpoena seeks testimony concerning several topics, the majority of which involve non-legislative conduct as defined by this Court's precedents. There is no constitutional bar to obtaining such testimony, and there is no merit to Senator Graham's assertion that questioning on such topics would serve only as a pretext to ask otherwise forbidden questions about his motives for legislative acts. With respect to Senator Graham's calls to state officials, the district

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

court and Eleventh Circuit drew sensible lines to fully protect legislative privilege: Senator Graham cannot be asked about truly legislative conduct (such as gathering information to inform a future vote), but he may be asked precise questions to see if he engaged in the non-legislative conduct described by several participants on those calls (namely, cajoling officials to not count certain ballots or to prospectively modify Georgia's ballot counting procedures). These lines are firmly supported by precedent, and strike a reasoned balance between the Senator's immunities and the principle that grand juries may seek "every man's evidence." *See Trump v. Vance*, 140 S. Ct. 2412, 2420 (2020). Senator Graham's objections to this approach misstate the facts and the law, and do not justify the extraordinary relief he seeks.

Nor is there merit to Senator Graham's remaining contentions. This Court's sovereign immunity precedents do not preclude state grand jury subpoenas to federal legislators about non-legislative acts. There is no circuit split on the methodology for analyzing claims of legislative privilege, nor is there a circuit split on the question of who bears the burden of proof in such cases (an issue that the Eleventh Circuit did not even address in this case). There is no reasonable probability that the Court will grant review given the absence of a circuit split, the novelty and weakness of Senator Graham's position, and the vehicle issues that render this case a flawed proceeding through which to offer broad pronouncements on the law of legislative privilege. And whereas requiring Senator Graham to testify poses little risk of injury to him given the district court's formidable safeguards, granting a stay would undermine vital public interests in criminal law enforcement and ensuring election integrity.

BACKGROUND

I. Factual Background

The Fulton County District Attorney has convened a Special Purpose Grand Jury to investigate possible attempts to disrupt the lawful administration of the 2020 elections in Georgia. Dkt. 2-2, Ex. 1, at ¶ 1.[2] As part of that targeted inquiry, the Superior Court of Fulton County authorized a subpoena to compel Senator Graham to appear and testify before the grand jury. *See id.* at ¶¶ 2, 10. In so doing, the Superior Court specifically found that Senator Graham is a "necessary and material witness," *id.* at ¶ 2, and that his anticipated testimony would likely "reveal additional sources of information regarding the subject of this investigation," *id.* at ¶ 4.

Senator Graham characterizes the subpoena as concerned almost exclusively with two calls that he made to Georgia Secretary of State Brad Raffensperger in late 2020. *See* Emergency App. at 8-10. Senator Graham describes those calls as purely legislative investigations designed to gather information for a "certainly impending vote on certifying the election under the Electoral Count Act." *Id.* at 3. At the time the calls occurred, however, Georgia had not certified its presidential election results, there was no alleged competing slate of Georgia electors, the Electoral College had not yet met, and no question as to certification was in fact pending before Congress.

In any event, Senator Graham's account is incomplete—both in its description of the subpoena and its characterization of the disputed phone calls. Starting with the subpoena itself: the Superior Court found that Senator Graham possesses "unique

[2] Citations to "App." refer to the Appendix filed by Senator Graham. Citations to "Dkt." refer to the district court docket, *Fulton County Special Purpose Grand Jury v. Graham*, No. 22-3027 (N.D. Ga.).

knowledge" not only concerning "the substance of the telephone calls," but also "the logistics of setting up the telephone calls." Dkt. 2-2, Ex. 1, at ¶ 4. More important, the subpoena affirms that Senator Graham has "unique knowledge" of "communications between himself, others involved in the planning and execution of the telephone calls, 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." *Id.* The subpoena is thus addressed to the calls, but also to a series of related logistical exchanges with third parties—and to any other communications more broadly concerning efforts to interfere with the administration of the 2020 election in Georgia (whether or not they have any connection to the calls). In addition, Senator Graham's testimony has been found "likely to reveal additional sources of information regarding the subject of this investigation." *Id.*

With respect to the phone calls, Senator Graham's claim that they were purely investigative is subject to credible factual dispute. In Senator Graham's telling, the calls are covered by the Speech or Debate Clause because he did nothing more than investigate Georgia's elections processes to inform himself about pending votes and potential legislative reform. Nobody here denies that a purely information-gathering investigation by a Member of Congress related to upcoming legislative business is covered by legislative privilege. But Georgia election officials who participated in the calls deny that Senator Graham confined himself to gathering information. In their telling, the Senator took a significant step past any such investigation when he affirmatively tried to cajole them to either throw out certain ballots or to immediately

modify their ballot counting procedures. *See Gravel v. United States*, 408 U.S. 606, 625 (1972) (efforts to cajole generally are not covered by Speech or Debate Clause immunity); *see also Hutchinson v. Proxmire*, 443 U.S. 111, 121 n.10 (1979) (same).

Specifically, Secretary Raffensperger near-contemporaneously described his November 13, 2020 call with Senator Graham as one in which the Senator pushed him to find a way to throw out substantial numbers of legally cast ballots: "It sure looked like he was wanting to go down that road." *See* Amy Gardner, *Ga. Secretary of State Says Fellow Republicans Are Pressuring Him to Find Ways to Exclude Ballots*, Wash. Post (Nov. 16, 2020). The Secretary later adhered to that account in an interview: "But then Senator Graham implied for us to audit the envelopes and then throw out the ballots for counties who have the highest frequency error of signatures." Melissa Quinn, *Georgia's Secretary of State Says Lindsey Graham Suggested Throwing Out Certain Ballots*, CBS News (Nov. 17, 2020). Two other Georgia election officials who were on this call agreed that Senator Graham made a "request" of the Secretary, apparently to either throw out ballots or modify ballot counting procedures. Jessica Huseman & Mike Spies, *Trump Campaign Officials Started Pressuring Georgia's Secretary of State Long Before the Election*, ProPublica (Nov. 18, 2020). In fact, even while purporting to deny these accounts, Senator Graham candidly admitted just four days after the call that he used the conversation to urge Secretary Raffensperger to change how his office counted the remaining ballots: "[I] talked to him about how you verify signatures. Right now a single person verifies signatures and I suggested as you go forward can you change it to make sure that a

bipartisan team verifies signatures and if there is a dispute, come up with an appeals process." *See* Ben Kamisar, *Graham Denies Georgia Sec. Charge He Inquired About Tossing Ballots*, NBC News (Nov. 17, 2020) (online version updated June 21, 2022).

These contemporaneous public statements are consistent with the subpoena's recitation that Senator Graham "questioned Secretary Raffensperger and his staff about reexamining certain absentee ballots cast in Georgia in order to explore the possibility of a more favorable outcome for former President Donald J. Trump." Dkt. 2-2, Ex. 1, at ¶ 3. They also accord with the subpoena's premise that communications between Senator Graham and third parties—as well as evidence concerning the Senator's associated public statements, and his contacts with the Trump campaign in this period—may more broadly illuminate coordinated acts to influence the results of the November 2020 presidential election in Georgia. *See id.*

II. Procedural Background

Following receipt of the grand jury subpoena, Senator Graham removed the case to federal court and filed a motion seeking quashal of the subpoena in its entirety. The district court ordered two rounds of briefing and held oral argument. Ultimately, it denied Senator Graham's motion, concluding that quashal of the subpoena in its entirety was not warranted because much of the inquiry described by the subpoena would not implicate any Speech or Debate Clause protections.

The district court based that conclusion on two grounds. *First*, it found that the subpoena seeks testimony about public statements and communications with third parties and political campaigns, none of which would implicate any Speech or Debate

Clause protection. *See* App. at 54a-57a; *see also Hutchinson*, 443 U.S. at 127-28. *Second*, the district court found that the subpoena seeks testimony about phone calls as to which there is a factual dispute concerning Senator Graham's conduct. *See* App. at 57a-62a. Given that dispute, the district court concluded that further development of the record was necessary to ascertain whether the calls truly involved only protected legislative activity (such as information gathering) or whether they also included activity not shielded by the Speech or Debate Clause (such as cajoling officials to disregard ballots or modify ballot counting procedures). *See id.* at 59a-60a; *see also Gravel*, 408 U.S. at 625; *United States v. Menendez*, 831 F.3d 155, 167-68 (3d Cir. 2016). The district court further held that the grand jury could, at minimum, narrowly inquire into whether Senator Graham cajoled the election officials. *See* App. at 60a-62a; *see also United States v. Helstoski*, 442 U.S. 477, 488 n.7 (1979). For these reasons, the district court found that quashal of the entire subpoena was not warranted and remanded the case to the Superior Court.

Following this decision, Senator Graham filed an emergency motion to stay the district court's order, claiming that it had authorized an inquiry into his motivations for legislative acts. *See* Dkt. 29. The district court denied that motion, emphasizing that "this Court has never held or otherwise suggested that courts (or the grand jury) may probe into the motivation for legislative acts," and "[t]hat proposition is foreclosed by Supreme Court precedent." App. at 36a. Citing the factual dispute about Senator Graham's conduct on the calls, the district court explained that it had authorized only "targeted questions on topics that in no way implicate legislative

privilege"—"such as attempts to 'cajole' or 'exhort' Georgia election officials to take certain actions relative to the state's voting and election practices"—in order to ascertain whether Senator Graham had in fact engaged in unprotected conduct while speaking to state officials. *Id.* Turning to the separate topics covered in the subpoena, the district court rejected Senator Graham's claim (which he repeats again in this Court) that they are merely an illicit backdoor to probe his motives for investigative activity on the calls. *Id.* at 38a. The district court noted that "the record thoroughly contradicts" Senator Graham's suggestion that those topics are pretextual: "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." *Id.* Finally, the district court concluded that the remaining equitable factors did not support entering a stay, highlighting the public interest in a "lawful investigation aimed at uncovering the facts and circumstances of alleged attempts to disrupt or influence Georgia's elections . . . ." *Id.* at 44a.

Senator Graham next sought interim relief in the Eleventh Circuit, which held his request in abeyance and 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 . . . based on any protections afforded by the Speech or Debate Clause of the United States Constitution." App. at 30a.

On remand, and consistent with its earlier rulings, the district court partially quashed the subpoena, barring any "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." App. at 7a. The district court otherwise denied the motion to quash. *Id.*

In reaching this conclusion, the district court looked "objectively at the activity at issue," without any consideration of Senator Graham's "motives or intentions." *Id.* at 11a. Starting with the calls, it found that phone calls from a South Carolina Senator to Georgia state officials are "not manifestly legislative on their face." *Id.* Given the existence of a factual dispute about whether Senator Graham was engaged in purely investigative activities on the calls—or whether he instead pushed state officials to "throw out ballots or otherwise adopt procedures that would alter the results of the state's election"—the district court found that limited questioning about the calls was permitted. *Id.* at 13a. While investigators may not ask Senator Graham about his motives for the call or his investigative activities, they may ask "targeted and specific question[s] . . . [such as] 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)." *Id.* at 16a-17a. Such targeted questions, the district court reasoned, would not involve any "hypothesizing about Senator Graham's secret motivations," but would instead reflect several participants' "understanding of what Senator Graham's questions and statements *themselves* actually meant." *Id.*; *see also id.* at 18a (explaining that these targeted and specific questions are proper because "there is a fundamental factual dispute as to . . . what Senator Graham *actually stated*

and suggested on the calls."). Thus, investigators may ask narrow, factual questions about Senator's Graham's non-legislative conduct on the call (including any cajoling of Georgia officials who oversaw elections in 2020), but they may not probe his motives or his legislative investigations—and that same approach applies to the logistics and communications surrounding those calls. *Id.* at 19a.

The district court then addressed the remaining topics in the subpoena, which Senator Graham once again described as inextricably intertwined with any inquiry into the calls. The district court found his argument meritless. *See id.* at 21a-28a. As the district court explained, "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." *Id.* at 21a.

Senator Graham responded to this ruling by seeking an emergency stay from the Eleventh Circuit, which received extensive briefing over a two-month period and then denied relief on the ground that Senator Graham is unlikely to succeed on the merits of his appeal. *See* App. at 2a. In a unanimous opinion, the Eleventh Circuit concluded that the district court had correctly stated and applied the law, and that its measured approach "ensures that Senator Graham will not be questioned about [legislative] investigations." *Id.* at 5a. In particular, the Eleventh Circuit determined

that the district court's procedures allow for the parties' factual dispute regarding the phone call to be resolved with appropriate guardrails to protect Senator Graham's legislative privilege: "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 [in federal court] at that time." *Id.* at 5a-6a. Finally, the Eleventh Circuit agreed that the remaining categories covered by the subpoena did not implicate legislative activities under the Speech or Debate Clause. *Id.* at 6a.[3]

ARGUMENT

To justify a stay, Senator Graham must demonstrate a fair prospect that the Court will reverse the judgment below, a reasonable probability that the Court will grant review, and irreparable injury from denial of a stay. *See Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (*per curiam*). Senator Graham cannot satisfy that high standard. The decision below is correct and none of the traditional criteria for certiorari are satisfied. Moreover, entering a stay would injure important public interests. Senator Graham's emergency application should therefore be denied.

[3] Senator Graham implies that the Eleventh Circuit proceeding was unduly rushed, but if anything the opposite is true: that court initially remanded the case for a careful assessment of where the Speech or Debate Clause may in fact preclude questioning, and then it studied the issues for two months (assisted in its deliberations by six amicus briefs) before denying a stay on the ground that Senator Graham's claims likely lack legal merit.

I. The Decision Below Is Correct

The most basic reason why this Court should deny a stay is that the decision below is correct. There is no merit to Senator Graham's position under the Speech or Debate Clause, and the rulings below create a sensible, workable framework for any questions about his knowledge of (or involvement in) interference with the election in Georgia. The Senator's genuinely legislative activity will remain fully immunized from inquiry, including into his motives. At the same time, consistent with the limited nature of Speech or Debate Clause immunity, the Senator may be questioned about non-legislative conduct beyond the scope of his constitutional privilege. This careful approach respects precedent, and properly balances legislative immunity against the presumption that grand juries may seek "every man's evidence." *See Trump v. Vance*, 140 S. Ct. 2414, 2420 (2020). It also accords with principles of sovereign immunity, which the Senator cites (albeit briefly and incorrectly) as a separate basis for reversal.

A. Speech or Debate Clause

1. Legislative Privilege Applies Only to Legislative Acts

The Speech or Debate Clause provides that "for any Speech or Debate in either House," Senators and Representatives "shall not be questioned in any other Place." U.S. Const., art. I, § 6, cl. 1. The 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). Thus, a federal legislator cannot be compelled to testify about matters covered by the privilege. *See Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 418 (D.C. Cir. 1995). Such

matters include official congressional investigations and may also include informal individual investigations by Members of Congress. *See* App. at 4a (recognizing split and assuming for purposes of this case informal investigations qualify as legislative).

But "[o]ur speech or debate privilege was designed to preserve legislative independence, not supremacy." *Brewster*, 448 U.S. at 508. Therefore, the privilege is limited solely to legislative acts "generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881); *see also Gravel v. United States*, 408 U.S. 606, 617-18 (1972) (explaining that legislative acts include committee reports, resolutions, and votes).

That is a significant limitation. As this Court has emphasized, "legislative acts are not all-encompassing." *Id. at* 625. "Members of the Congress engage in many activities other than the purely legislative activities protected by the Speech or Debate Clause." *Brewster*, 408 U.S. at 512; *accord Doe v. McMillan*, 412 U.S. 306, 313 (1973) ("[E]verything a Member of Congress may regularly do is not a legislative act within the protection of the Speech or Debate Clause."). Put differently, "[t]he Speech or Debate Clause protects conduct that is integral to the legislative process, not a Member's legislative goals." *Fields v. Off. of Eddie Bernice Johnson*, 459 F.3d 1, 12 (D.C. Cir. 2006). Consistent with that historical understanding, this Court has never "treated the Clause as protecting all conduct relating to the legislative process." *Brewster*, 408 U.S. at 515. Indeed, it has repeatedly rejected a "sweeping reading" under which "there are few activities in which a legislator engages that he would be unable somehow to 'relate' to the legislative process." *Id.* at 516.

Federal courts have implemented these broad principles by recognizing that Members of Congress engage in certain categories of non-legislative conduct as to which they may properly be questioned. Several such categories are relevant here.

For example, it is black letter law that "contacting an executive agency in order to influence its conduct" is not a legislative act. *Jewish War Veterans of the U.S. of Am., Inc. v. Gates*, 506 F. Supp. 2d 30, 54 (D.D.C. 2007). As this Court explained in *Gravel*, Members of Congress "may cajole, and exhort with respect to the administration of a federal statute—but such conduct, though generally done, is not protected legislative activity." 408 U.S. at 625. Thus, "[r]egardless of whether and to what extent the Speech or Debate Clause may protect calls" to executive officials in which a legislator seeks information, "it does not protect attempts to influence the conduct of executive agencies." *Hutchinson*, 443 U.S. at 121 n.10. While Senators may act within their legislative sphere when contacting officials for purely investigative purposes, communications that include efforts to cajole, influence, or exhort official behavior are not protected by legislative privilege. *See United States v. Johnson*, 383 U.S. 169, 172 (1966); *Chastain v. Sundquist,* 833 F.2d 311, 314-15 (D.C. Cir. 1987); *Payne v. District of Columbia*, 859 F. Supp. 2d 125, 134 (D.D.C. 2012). For this reason, when a Senator makes a phone call to state or federal officials, whether that call is covered by Speech or Debate Clause immunity depends on what happens on the call.

In *Hutchinson v. Proxmire*, this Court held that public statements uttered outside the context of official congressional proceedings constitute another category of "non-legislative" activity. *See* 443 U.S. at 127-30. That is true even when a

Senator's public statements may have "a significant impact on the other Senators," and even when they are issued in furtherance of the "informing function" of Congress. *See id.* at 130-33. Because "[n]ewsletters and press releases" are "primarily means of informing those outside the legislative forum" and "represent the views and will of a single Member," they are "not entitled to the protection of the Speech or Debate Clause." *Id.* at 133. Thus, when a Senator is subpoenaed for testimony about public statements and the circumstances surrounding them, he generally must answer.

A final relevant category is third-party and logistical communications: as a general matter, "communications between legislators and constituents, lobbyists, and interest groups are not entitled to protection under a legislative privilege." *Texas v. Holder*, No. 12 Civ. 128, 2012 WL 13070060, at *2 (D.D.C. June 5, 2012) (Tatel, Collyer, Wilkins, JJ.); *accord Bastien v. Off. of Senator Ben Nighthorse Campbell*, 390 F.3d 1301, 1316 (10th Cir. 2004); *NAACP v. E. Ramapo Cent. Sch. Dist.*, No. 17 Civ. 8943, 2018 WL 11260468, at *6 (S.D.N.Y. Apr. 27, 2018); *Lee v. Va. State Bd. of Elections*, No. 3:15 Civ. 357, 2015 WL 9461505, at *7 (E.D. Va. Dec. 23, 2015).[4] In the same vein, "meeting arrangements are only 'casually or incidentally related to legislative affairs' and are not part of the legislative process itself." *U.S. Merit Sys. Prot. Bd. v. McEntee*, No. 07 Civ. 1936, 2007 WL 9780552, at *3 (D. Md. Dec. 13, 2007) (quoting *Brewster*, 408 U.S. at 528). And substantial authority supports the view that

[4] Several of these cases address the common law privilege enjoyed by state legislators, which "is similar in scope and object to the immunity enjoyed by federal legislators under the Speech or Debate Clause." *Nat'l Ass'n of Soc. Workers v. Harwood*, 69 F.3d 622, 629 (1st Cir. 1995). Indeed, courts have "acknowledged that the immunities enjoyed by federal and state legislators are essentially coterminous," *id.*; *see also Larsen v. Senate of Pa.*, 152 F.3d 240, 249 (3d Cir. 1998).

when Members of Congress engage in campaign activity—for themselves or others—they are not acting within the scope of their duties as Members, let alone engaging in legislative acts shielded by a constitutional privilege. *See* ECF No. 33, United States' Response to Defendant Mo Brooks's Petition to Certify He Was Acting Within the Scope of his Office or Employment, *Swalwell v. Trump*, 1:21 Civ. 586 at 9-14 (D.D.C. July 27, 2021) (summarizing judicial, executive branch, and legislative authority).

When Members of Congress engage in the categories of conduct described above, they do not enjoy legislative privilege and may be required to testify about their actions: "Although these are entirely legitimate activities, they are political in nature rather than legislative." *Brewster*, 408 U.S. at 512. Even if such conduct is otherwise "appropriate," it lacks "the protection afforded by the Speech or Debate Clause." *Id.*; *accord Fowler-Nash v. Dem. Caucus of Pa. House of Rep.*, 469 F.3d 328, 336-37 (3d Cir. 2006) ("[S]imply because a Senator performs certain duties in his official capacity does not make those duties legislative."). Thus, to the extent the grand jury subpoena at issue here seeks testimony from Senator Graham concerning conduct that qualifies as non-legislative, legislative privilege does not apply. And consistent with longstanding practice, where the subpoena covers a course of conduct involving legislative and non-legislative acts, it may still be enforced as to any non-legislative acts, as many courts have recognized. *See Helstoski*, 442 U.S. at 488 n.7; *Gov't. of the Virgin Islands v. Lee*, 775 F.2d 514, 522-25 (3d Cir. 1985); *In re Grand Jury Invest.*, 587 F.2d 589, 597 (3d Cir. 1978); *SEC v. Comm. on Ways & Means*, 161 F. Supp. 3d 199, 245-46 (S.D.N.Y. 2015); *Jewish War Veterans*, 506 F. Supp. 2d at 58.

2. Legislative Privilege Does Not Preclude the Limited Questioning Permitted by the District Court

Senator Graham claims that the Speech or Debate Clause categorically forbids the subpoena, including the narrow and factually precise lines of questioning that the district court authorized. This argument rests on three premises: (1) the subpoena is focused on calls consisting entirely of legislative conduct; (2) it seeks only to explore his motives on those calls; and (3) any testimony it seeks beyond the calls is merely pretext for an inquiry into his motives on the calls. Each of these premises is faulty.

First, contrary to Senator Graham's position, there is a credible factual dispute concerning the nature of his calls. Senator Graham frames the calls as official legislative investigations into Georgia's election, which he claims to have launched on his own initiative to inform his eventual vote under the Electoral Count Act. *See* Emergency App. at 1-3, 18-19. But participants on those calls have stated that Senator Graham—who was also acting on behalf of a political campaign in this period—took a crucial step beyond gathering information: in their telling, he cajoled or encouraged them to undertake specific official acts (namely, to throw out certain legally cast mail-in ballots or to prospectively modify ballot counting procedures). *See supra* at 4-6. In one of his contemporaneous public statements, Senator Graham even admitted that he "suggested" that Georgia officials modify their ballot counting procedures. *See supra* at 5-6. This Court has made clear that Senators may "cajole" and "exhort" officials in their administration of the law, "but such conduct, though generally done, is not protected legislative activity." *Gravel*, 408 U.S. at 625; *see also supra* at 14. That holding applies directly to the factual dispute here and precludes a

finding that the calls consisted entirely of legislative conduct. *See Hutchinson*, 443 U.S. at 121 n.10 ("Regardless of whether and to what extent the Speech or Debate Clause may protect calls to federal agencies seeking information, it does not protect attempts to influence the conduct of executive agencies."). In these circumstances, it makes perfect sense to authorize narrowly drawn questioning to assess whether Senator Graham in fact engaged in the non-legislative acts that multiple witnesses to the calls (including the Senator himself) have publicly described.

Second, whereas Senator Graham asserts that this factual dispute bears on his legislative motives, the dispute does not require inquiry into his state of mind. As the district court recognized, precedent precludes any inquiry into a legislator's motives for engaging in legislative acts. *See supra* at 7. At the same time, where a course of conduct is not facially or manifestly legislative (such as a phone call to state officials), precedent does not require ignoring evidence that it included non-legislative acts. *See Helstoski*, 442 U.S. at 488 n.7; *Lee*, 775 F.2d at 522-25. Instead, courts may properly assess the objective nature of the conduct: here, whether Senator Graham's interactions with state officials included cajoling them to either throw out certain ballots or modify how they counted such ballots going forward. Applying that test, the district court sensibly concluded that prosecutors may ask precise questions concerning the objective nature of Senator Graham's statements.

Finally, Senator Graham offers virtually no evidence to support his contention that the subpoena's other topics are "simply backdoor ways to question [him] about his motives behind his legislative investigation." Emergency App. at 22. The district

court easily (and rightly) concluded that questions as to these topics—which include messages about logistics, communications with third parties and political campaigns, and public statements—do not implicate any Speech or Debate immunity. *See supra* at 14-16. Indeed, many of those questions may have little to do with the calls and may instead concern Senator Graham's knowledge of (or involvement in) broader efforts to influence the 2020 election in Georgia. *See* Stephanie Saul, *Lindsey Graham's Long-Shot Mission to Unravel the Election Results,* N.Y. Times (Nov. 17, 2020). Particularly in light of the limitations that the district court has imposed on inquiries about Senator Graham's motives in undertaking investigatory conduct, there is no reason to believe that questioning on these subjects will invade any privilege.

At bottom, Senator Graham's position misstates the facts and misapplies the law. If accepted, moreover, it would have startling implications: virtually any federal legislator could contact state or federal officials, and engage in all manner of cajoling or even improper or unlawful conduct, and then later claim total immunity from any questioning related not only to their calls but also to the broader subject matter of the communication (since, they would insist, some portion of the call involved their self-initiated informal individual investigation related to some legislative matter). That has never been the law. *See Brewster*, 408 U.S. at 516 (rejecting a view of the Speech or Debate Clause under which "there are few activities in which a legislator engages that he would be unable somehow to 'relate' to the legislative process"); *see also Gravel*, 408 U.S. at 625. Instead, courts have carefully separated legislative from non-legislative acts—and have recognized that federal legislators must stand ready

to offer evidence concerning their non-legislative activities, which (no matter how politically important) are not constitutionally exempted from grand jury inquiries.

In this case, the district court engaged in an exceptionally thorough analysis and drew clear lines of permissibility and impermissibility for any questioning of Senator Graham pursuant to the grand jury's subpoena. The District Attorney can be expected to honor those limits, and in all events Senator Graham remains free to raise Speech or Debate Clause objections (and to return to federal court) during his questioning if he believes that any of these lines have been crossed. Requiring the Senator to provide "every man's evidence" will not disturb any constitutional privilege he enjoys by virtue of his office. *See Trump v. Vance*, 140 S. Ct. 2412, 2420 (2020). And granting a stay would hinder a vital investigation into attacks on our democratic system. The Eleventh Circuit rightly denied a stay and this Court should do the same.

B. Sovereign Immunity

In the alternative, Senator Graham seeks to raise a sovereign immunity claim that he largely abandoned in the Eleventh Circuit, where he confined it to a footnote in his stay briefing after the district court issued its order on remand. *See* Senator Graham Suppl. to Emergency Motion, No. 22-12696, Doc. 30 at 3 n.1 (11th Cir. Sept. 22, 2022). This argument is meritless.

In short, the Senator contends that the subpoena offends sovereign immunity because it was issued to him in his official capacity. *See* Emergency App. at 26-27. To support his claim that the subpoena implicates his "official capacity," Senator Graham cites nothing except the caption of this case—which, it bears mention, his

own lawyers wrote when they drafted and filed the notice of removal. *See* Dkt. 1 at 1. The grand jury subpoena itself is addressed simply to "Senator Lindsey Graham," without reference to his official capacity. App. 69a. And for all the reasons given above, the subpoena seeks testimony from Senator Graham concerning substantial *non-legislative* conduct—which is just as fairly characterized as *private* or *personal* capacity conduct for these purposes. *See* Emergency App. at 27 (recognizing that sovereign immunity poses no bar to personal capacity testimony); *accord Lewis v. Clarke*, 137 S. Ct. 1285, 1291 (2017) (holding that sovereign immunity does not bar lawsuits against officials acting in their individual or private capacities).

Senator Graham resists that conclusion by invoking cases holding that "a federal employee may not be compelled to obey a subpoena contrary to his federal employer's instructions under valid agency regulations." *Boron Oil Co. v. Downie*, 873 F.2d 67, 69-70 (4th Cir. 1989) (collecting cases and citing the doctrine announced in *U.S. ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951)). He also cites a single-paragraph, unreasoned *per curiam* circuit court decision holding that sovereign immunity barred a suit seeking a writ of mandamus against Congress requiring it "to abandon the gold standard." *Keener v. Congress*, 467 F.2d 952, 953 (5th Cir. 1972). None of these cases interposes a sovereign immunity limitation on seeking testimony from Members of Congress. And Senator Graham offers no reason to expand or apply precedent (including cases issued in reliance on *Touhy*) in that novel way, nor does he cite any federal employer instructions or regulations governing his testimony.

We are unaware of any judicial authority holding that a Senator enjoys unilateral power to ignore state grand jury subpoenas concerning "official capacity" conduct. If such a limit existed, one might expect to see a reference to it in this Court's Speech or Debate Clause cases, yet no such reference exists. The district court rightly rejected Senator Graham's sovereign immunity argument and the Eleventh Circuit (to the extent this argument was even properly before it) rightly deemed it baseless.

II. This Court Is Unlikely to Grant Review

Because the decision below is correct, there is not a fair prospect that this Court will reverse it, and so Senator Graham's application should be denied. But there is yet another reason why his application cannot succeed: there is no reasonable probability that this Court will grant review of his appeal in the first place. There is no circuit split, Senator Graham seeks only factbound error correction, and this case would be a flawed vehicle for any broader reexamination of legislative privilege.

Senator Graham alleges the existence of two circuit splits, but he is mistaken as to both. The first supposed split concerns "whether courts may look beyond the face of an act to determine whether it is *actually* legislative." Emergency App. at 24. According to Senator Graham, the Fourth and D.C. Circuits prohibit any inquiry into facially legislative acts, whereas the Second, Third, and (now) Eleventh Circuits do allow such an inquiry. *See* Emergency App. at 24. That claim, however, misdescribes the cases, which instead stand for a clear rule: where acts are manifestly legislative in character, no further inquiry is proper (even where there is evidence of unlawful motives); when acts are not manifestly legislative in character, it is permissible to

conduct a limited further inquiry to see if they in fact involved protected legislative conduct and, if so, to limit any questioning to avoid such conduct. The D.C. and Fourth Circuit cases both involved manifestly legislative action alleged to arise from improper motives. *See Comm. on Ways & Means v. U.S. Dep't of Treasury*, 45 F.4th 324, 330 (D.C. Cir. 2022) (formal congressional request for information); *United States v. Dowdy*, 479 F.2d 213, 226 (4th Cir. 1973) (official investigative meetings arranged by a congressional subcommittee chair in preparation for a subcommittee hearing). In contrast, the Second and Third Circuit cases (like this one) involved conduct that was not manifestly legislative and instead required a closer look to determine whether it actually involved any legislative acts (in which event any questioning would have to avoid that protected subject matter). *See United States v. Menendez*, 831 F.3d 155, 170 (3d Cir. 2016) (meetings and discussions with Executive officials and employees); *United States v. Biaggi*, 853 F.2d 89, 105 (2d Cir. 1988) (flying to Florida during a holiday trip); *Gov't of Virgin Islands v. Lee*, 775 F.2d 514, 522, 524-25 (3d Cir. 1985) (flights and meetings with officials). These cases are easily reconciled and do not evince any disagreement requiring review.[5]

[5] Although *Dowdy* concerned manifestly legislative conduct and thus did not need to reach the issue, it stated that courts cannot inquire "into acts which are purportedly or apparently legislative." 479 F.2d at 213. That line in *Dowdy* was unnecessary to the holding and is *dicta*. The Third Circuit effectively recognized as much in *Lee*, where it read that language "narrowly in light of the particular facts involved in *Dowdy*" and, only after giving several reasons why *Dowdy* was distinguishable, said it would "decline to follow" that language under the very different circumstances before it. 775 F.2d at 514. No federal appellate court has ever interpreted or relied on *Dowdy* in the manner proposed by Senator Graham; indeed, the language he cites has been quoted only twice by federal courts since the opinion was issued in 1973, and in both cases (*Lee* and *Menendez*) it was distinguished. *See Menendez*, 831 F.3d at 167-68; *Lee*, 775 F.2d at 514. Simply put, no court has truly held that it cannot consider a factual dispute about whether an act is legislative when the act is not legislative on its face. Further, this Court denied review in *Menendez*, where the petitioner relied heavily on the same supposed circuit split in his cert. petition (though he placed the Second Circuit on the opposite side of the ledger). *See* Pet. for Writ of Cert., *Menendez v. United States*, No. 16-755, 2016 WL 7241294 at *20-*23 (U.S. 2016).

Senator Graham's second alleged circuit split fares no better. Here, he claims that the Eleventh Circuit created a split on who bears the burden of proof concerning Speech or Debate Clause immunity. *See* Emergency App. at 24-25. The most obvious difficulty for this claim is that the Eleventh Circuit said nothing at all about the burden of proof; yet another difficulty is that the district court expressly held that even if the District Attorney bore the burden of proof, it would not change the result because "that burden has been met." App. at 52a n.3. But that is just the start of the difficulties for Senator Graham's position. Every circuit to have directly addressed the issue has held that the legislator invoking the Clause "must show that such immunity is justified for the governmental function at issue." *Bryant v. Jones*, 575 F.3d 1281, 1304 (11th Cir. 2009); *see also United States v. Menendez*, 831 F.3d 155, 165 (3d Cir. 2016); *U.S. v. Rostenkowski*, 59 F.3d 1291, 1300 (D.C. Cir. 1995); 26A Wright & Miller, *Federal Practice & Procedure Evidence* § 5675 (1st ed. Apr. 2022 Update) ("The legislator . . . has the burden of proving the preliminary facts of the privilege."). This is consistent with more general principles governing common law immunities. *See Burns v. Reed*, 500 U.S. 478, 486 (1991) ("[T]he official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question."). It also tracks the law governing official immunity, *see, e.g.*, *Banneker Ventures LLC v. Graham*, 798 F.3d 1119, 1140 (D.C. Cir. 2015), judicial immunity, *see, e.g.*, *Forrester v. White*, 484 U.S. 219, 224 (1988), and prosecutorial immunity, *see, e.g.*, *Burns*, 500 U.S. at 486.[6]

[6] Senator Graham relies mainly on *Rangel v. Boehner*, 785 F.3d 19, 22 (D.C. Cir. 2015). But *Rangel* said nothing about the burden of proof. It merely described Speech or Debate Clause immunity as

Given the absence of a circuit split, this Court is unlikely to grant review. All that Senator Graham seeks is factbound error correction—and, as we have shown above, there is no error that requires correcting. Moreover, pronouncements on the subject of Speech or Debate Clause immunity are momentous in their own right. This case—which arrives amid an active investigation and presents both a wide range of non-legislative acts and an unusually thin evidentiary record—would be a deeply flawed vehicle for any broad revisitation of the doctrine of legislative privilege. That conclusion is only further bolstered by the novelty and extremity of Senator Graham's position, which seeks *de facto* immunity for all communications with state officials and virtually any other conduct related to the same subject matter. These considerations cut firmly against granting review, and thus against entering a stay.

III. Granting a Stay Would Injure Important Public Interests

The reasons given above are more than sufficient to deny Senator Graham's application. But one final consideration tilts the scales even more decidedly: the harm to public interests and equities that would result from granting a stay. *See, e.g.*, *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (*per curiam*).

This case arises from a weighty investigation into allegations of unprecedented attempts to interfere with a traditional prerogative of the states: administration of a presidential election. As the district court found, "it is important that citizens maintain faith that there are mechanisms in place for investigating any such

jurisdictional in nature. *See id.* Especially given the D.C. Circuit's earlier opinion in *Rostenkowski*, it is untenable to claim that *Rangel* thereby issued an (exceedingly) indirect holding that investigators seeking to overcome a Speech or Debate Clause claim must bear the burden of proof in doing so.

attempts to disrupt elections and, if necessary, to prosecute these crimes which, by their very nature, strike at the heart of a democratic system." App. at 44a-45a. Substantial delays in these investigative efforts may hinder the grand jury's work and undermine public confidence in the efficacy of mechanisms designed to ensure integrity in our elections. Indeed, given the nature of the evidence sought from Senator Graham, entering a stay in this case would deprive the grand jury of "investigative leads that the evidence might yield, allowing memories to fade and documents to disappear." *Vance*, 140 S. Ct. at 2430. A stay could also "frustrate the identification, investigation, and indictment of third parties," while "prejudic[ing] the innocent by depriving the grand jury of *exculpatory* evidence." *Id.* Further delay—especially the prolonged delay in obtaining Senator Graham's testimony that would inevitably result from a stay—would thus undermine core public interests in criminal justice and election integrity. *See id.* ("The public interest in fair and effective law enforcement cuts in favor of comprehensive access to evidence."). Particularly given the substantial safeguards established by the district court to protect Senator Graham's constitutional privileges in a grand jury setting, the balance of the equities and the public interest weigh decisively in favor of denying his application.

CONCLUSION

Senator Graham's emergency application should be denied.

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Respectfully submitted,
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