IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FULTON COUNTY SPECIAL PURPOSE GRAND JURY, PLAINTIFF-APPELLEE, v. *LINDSEY GRAHAM*, DEFENDANT-APPELLANT.	No. 22-12696

MOTION BY FORMER FEDERAL PROSECUTORS AS *AMICI CURIAE* FOR LEAVE TO FILE AMICUS BRIEF IN OPPOSITION TO APPELLANT LINDSEY GRAHAM'S EMERGENCY MOTION TO STAY DISTRICT COURT'S ORDER AND ENJOIN SELECT GRAND JURY PROCEEDINGS PENDING APPEAL

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Counsel for Amici Curiae

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-3, *Amici* former federal prosecutors ("*amici*") provide this Certificate of Interested Persons and Corporate Disclosure Statement. To the best of *amici*'s knowledge, the following persons and entities may have an interest in the outcome of this case:

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Graham, Senator Lindsey O.

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Wakeford IV, Francis McDonald

Wells, Mary Elizabeth

Williams, Jonathan Lentine

Willis, Fani T.

To the best of *amici*'s knowledge, no other persons, associations of persons, firms, partnerships, or corporations have an interest in the outcome of this case or appeal.

Dated: August 20, 2022

Respectfully submitted,

/*s/ Jonathan L. Williams*

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Counsel for Amici Curiae

Former federal prosecutors Donald B. Ayer, John Farmer, Renato Mariotti, Sarah R. Saldaña, William F. Weld, and Shan Wu respectfully move for leave to file the accompanying brief as *amici curiae* in opposition to Senator Lindsey Graham's emergency motion to stay the district court's order and enjoin certain select grand jury proceedings pending appeal.

In support of their motion, *amici* state the following:

Amicus briefs can assist the Court "in cases of general public interest by making suggestions to the court, by providing supplementary assistance to existing counsel, and by [e]nsuring a complete and plenary presentation of difficult issues so that the court may reach a proper decision." *Mobile Cty. Water, Sewer & Fire Prot. Auth., Inc. v. Mobile Area Water & Sewer Sys., Inc.*, 567 F. Supp. 2d 1342, 1344 n.1 (S.D. Ala. 2008) (internal citations omitted), *aff'd*, 564 F.3d 1290 (11th Cir. 2009). Courts have also recognized that amicus briefs are appropriate where "the amicus has a unique perspective or specific information that can assist the court beyond what the parties can provide." *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003) (in chambers). *Amici* respectfully submit that their proposed amicus brief may assist the Court in its decisional process and in its evaluation of the legal issues raised by the motion for stay.

Amici curiae are former federal prosecutors. They collectively have many decades of experience with subpoenas, including to public officials, and with claims

of testimonial privileges under the Constitution. They also have substantial personal experience with the structure and process of law enforcement investigations—once again, including in the context of public officials. And they are represented on this brief by attorneys who include two former Counsel to the Committee on the Judiciary of the House of Representatives, both of whom have substantial experience with issues under the Speech or Debate Clause and both of whom have published scholarly works on constitutional privileges. *Amici* seek leave to file this brief because, given their decades of public service, their personal familiarity with the law enforcement and constitutional claims at issue here, and their commitment to the integrity of our democratic system, they have a unique perspective that can inform the Court's consideration of the important questions raised by Senator Graham's pending motion.

Amici respectfully submit that their proposed amicus brief may assist the Court in its decisional process and in its evaluation of the legal issues raised by the motion for stay. Their proposed amicus brief is narrowly tailored to key issues before the Court: the substantive standard for legislative privilege under the Speech or Debate Clause, the appropriate methodology for evaluating a claim of Speech or Debate Clause privilege, and the application of those standards to the subpoena here at issue (relying solely on the text of the subpoena itself, the public record, and the record before the district court). *Amici* approach these questions with careful

attention to law and prior practice, and in so doing have drawn on their own professional experience. Furthermore, granting leave would not cause any delay or prejudice to the parties.

For the foregoing reasons, *amici* respectfully request that this Court grant them leave to file the accompanying brief.

Dated: August 20, 2022

Respectfully submitted,

/*s/ Jonathan L. Williams*

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/s/ Jonathan L. Williams
Jonathan L. Williams

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I hereby certify that on August 20, 2022, I electronically filed the foregoing using the Court's PACER system, which will automatically send e-mail notification of such filing to the attorneys of records who are registered participants in the Court's electronic notice and filing system.

/s/ Jonathan L. Williams
Jonathan L. Williams

APPENDIX: LIST OF *AMICI*

The *amici* listed below listed below join this brief as individuals; institutional affiliation is noted for informational purposes only and does not indicate endorsement by institutional employers of the positions advocated in this brief.

Donald B. Ayer, who served as Deputy Attorney General at the U.S. Department of Justice from 1989 to 1990, Principal Deputy Solicitor General of the United States from 1986 to 1989; and U.S. Attorney for the Eastern District of California from 1981 to 1986. He has argued nineteen cases in the U.S. Supreme Court.

John Farmer, who has served as an Assistant U.S. Attorney, New Jersey Attorney General, Senior Counsel to the 9/11 Commission, Dean of Rutgers Law School, and now serves as Director of the Eagleton Institute of Politics. He has also served on New Jersey's Executive Commission on Ethical Standards, Advisory Committee on Judicial Conduct, and the State Commission of Investigations.

Renato Mariotti, who served in the U.S. Attorney's Office for the Northern District of Illinois from 2007 to 2016.

Sarah R. Saldaña, who served as the U.S. Attorney for the Northern District of Texas (Dallas) from 2011 to 2014 and was appointed to the Attorney General's Advisory Committee during her tenure. Since 2004, she had served as an Assistant U.S. Attorney in the same office, both as a line prosecutor, including service as the District's Election Officer, and as Deputy Criminal Chief of the Major Fraud and Public Corruption unit. Most recently, she served as Director of U.S. Immigration and Customs Enforcement from 2014 to 2017.

William F. Weld, who served as the U.S. Attorney for Massachusetts from 1981 to 1986, as the Assistant U.S. Attorney General in charge of the Criminal Division from 1986 to 1988, and as Governor of Massachusetts from 1991 until 1997.

Shan Wu, who previously served as Counsel to Attorney General Janet Reno. As an Assistant United States Attorney in Washington, D.C., he supervised a trial section, headed a Police Corruption Task Force, and prosecuted political corruption & sexual assault cases. He was Senior Associate Independent Counsel in the investigation of former Interior Secretary Bruce Babbitt and has received numerous Department of Justice Special Achievement awards.

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INTEREST AND IDENTITY OF *AMICI CURIAE*[1]

Amici are former federal prosecutors Donald B. Ayer, John Farmer, Renato Mariotti, Sarah R. Saldaña, William F. Weld, and Shan Wu.

Through various forms of experience, including their work as prosecutors, *amici* have substantial knowledge and experience relating to subpoenas, including those issued to public officials, and with claims of testimonial privileges raised under the Constitution and on other grounds. They also have substantial knowledge and experience with the structure and process of law enforcement investigations—once again, including in the context of public officials.

Given their decades of public service, their personal familiarity with the law enforcement and constitutional claims at issue here, and their commitment to the integrity of our democratic system, *Amici* maintain an active interest in the proper resolution of the important questions raised by Senator Graham's pending motion.

[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* or their counsel made a monetary contribution to the preparation or submission of this brief.

ARGUMENT

The Superior Court of Fulton County authorized a targeted subpoena compelling Senator Lindsey O. Graham to testify about possible attempts to disrupt the lawful administration of the 2020 elections in Georgia. Instead of complying with that subpoena, Senator Graham removed this case to federal court and moved to quash the subpoena in its entirety. He rested that extraordinary request principally on the Speech or Debate Clause of the United States Constitution. But the district court deemed his arguments meritless. In thorough and well-reasoned opinions, the district court rejected Senator Graham's novel immunity theories, denied his motion to quash, remanded the matter back to the state court, and subsequently denied his request for a stay pending appeal. Importantly, the district court only ruled on the record "as [it] presently exists." Dkt. 27, at 13. The district court's order allows Senator Graham to raise more targeted immunity objections based on a "more fully developed" record, and the district court can "address the applicability of the Speech or Debate Clause to specific questions or lines of inquiry" as needed—just as courts routinely do when addressing privilege objections to questioning. *See id.* at 21-22.

Those rulings were plainly correct: Senator Graham is not categorically immune from testifying under the Speech or Debate Clause because the subpoena at issue seeks information that is wholly unrelated to any conceivable legislative

function or act. Thus, even if legislative immunity covers *some* of the testimony contemplated by the subpoena, it most certainly does not cover all of it.

Senator Graham now asks this Court to stay the district court's order and enjoin his upcoming grand jury proceedings based on the same sweeping immunity arguments that he presented below. As we explain in this brief, Senator Graham has failed to show a likelihood of success on appeal or raise "serious questions" going to the merits of his primary claim under the Speech or Debate Clause. The Court should deny Senator Graham's motion.

I. Senator Graham Bears the Burden of Showing that the Privilege Applies.

As a threshold matter, Senator Graham briefly asserts (at 11-12) that the District Attorney bears the burden of defeating his immunity defense. But the district court correctly held otherwise. Dkt. 27, at 6 n.3. As this Court explained in *Bryant v. Jones*, the official claiming protection "must *show*"—not simply assert—that Speech or Debate Clause "immunity is justified for the governmental function at issue." 575 F.3d 1281, 1304 (11th Cir. 2009) (emphasis added). The Third Circuit agrees: "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.'" *United States v. Menendez*, 831 F.3d 155, 165 (3d Cir. 2016) (citations omitted). This rule is also consistent with the burdens for other immunities and privileges. *See, e.g.*, *Weissman v. Nat'l Ass'n of Sec. Dealers, Inc.*, 500 F.3d 1293,

1296 (11th Cir. 2007) (en banc) ("[A] party claiming immunity from suit bears the burden of proof."); *United States v. Schaltenbrand*, 930 F.2d 1554, 1562 (11th Cir. 1991) (same as to attorney-client privilege).

II. Legislative Privilege Does Not Apply to Non-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. Although the terms "Speech" and "Debate" have been read to reach beyond "pure speech or debate in each House," that reading does not "encompass everything a Member of Congress may regularly do." *Doe v. McMillan*, 412 U.S. 306, 311, 313 (1973). The Supreme Court rejected creating such a "sweeping" protection "simply out of an abundance of caution to doubly insure legislative independence." *United States v. Brewster*, 408 U.S. 501, 517, 521 (1972). Instead, the Clause protects 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. Thus, "Members of the Congress engage in many activities" that are not protected by the Clause, and those acts receive no protection even though they are "entirely legitimate" and "within the scope of [a Member's] employment." *Gravel v. United States*, 408 U.S. 606, 622 (1972); *Brewster*, 408 U.S. at 501.

Applied here, those principles confirm that Senator Graham's request for wholesale immunity from compliance with the subpoena—which seeks information that has nothing to do with his legislative duties—is meritless.

III. The Subpoena Targets Non-Legislative Acts Other Than Senator Graham's Phone Calls.

Senator Graham's Speech or Debate argument rested on the premise that every subject about which the subpoena seeks testimony is shielded by legislative privilege. In other words, he asked the district court to hold that virtually every aspect of his behavior relating to the 2020 election in Georgia was legislative in character—including making calls to Georgia election officials, arranging those calls, communicating with third parties about the planning and execution of those calls, making public statements about his calls and about conduct respecting the Georgia election, and communicating with the Trump Campaign and other parties about any efforts to influence the election results.

That categorical claim is at odds with the law of legislative privilege and with the applicable methods of analysis. Setting aside the phone calls, for the moment, there are at least three additional areas of inquiry that Senator Graham has not challenged and that are not privileged.

1. Public Statements. In *Hutchinson v. Proxmire*, the Supreme Court held that public statements—issued outside official congressional proceedings—are not legislative. 443 U.S. 111, 127-28 (1979). Senator Graham has made many public

statements about his calls with Georgia officials describing his conduct respecting the election in Georgia. *E.g.*, Gregorian, *supra* (commenting to a reporter about the calls). These statements are beyond any privilege. *See, e.g.*, *Texas v. Holder*, No. 12 Civ. 128, 2012 WL 13070060, at *3 (D.D.C. June 5, 2012) ("[V]erifying that a public speech was given, where it was given, and even why it was given are all permissible questions").

2. Connections to Third Parties. In general, "communications between legislators and constituents, lobbyists, and interest groups are not entitled to protection under a legislative privilege." *Texas*, 2012 WL 13070060, at *2; *accord Bastien v. Office of Senator Ben Nighthorse Campbell*, 390 F.3d 1301, 1316 (10th Cir. 2004). Similarly, 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* Dkt. 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-cv-00586-APM at 9-14 (D.D.C. July 27, 2021) (summarizing judicial, executive branch, and legislative authority).

The subpoena states that Senator Graham possesses unique knowledge concerning "any communications between himself, others involved in the planning and execution of the telephone calls, the Trump Campaign, and other known and

unknown individuals" with relevant information. To the extent the subpoena seeks testimony about Senator Graham's communications with interest groups, his own constituents, Trump campaign officials, journalists, or other third parties related to the subject of the District Attorney's investigation, Senator Graham likely lacks any valid claim of legislative privilege (and he has offered no evidence to the contrary).

3. Arranging Meetings. "[M]eeting 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. WDQ-07-1936, 2007 WL 9780552, at *3 (D. Md. Dec. 13, 2007) (quoting *Brewster*, 408 U.S. at 528). The Speech or Debate Clause offers no basis to prohibit questions about the logistics involved in calls to Georgia officials.

IV. Senator Graham Failed to Show That His Calls to Secretary Raffensperger Were Legislative Acts.

Senator Graham claims (at 8) that the "facts uniformly point" to the calls with Secretary Raffensperger being legislative acts because they involved only investigation into the conduct of elections in Georgia. But as the district court recognized, there is significant dispute about the nature of these phone calls, in part due to Senator Graham's own public statements long before he was subpoenaed.

Dkt. 27 at 12-13.[2] In addition, Secretary Raffensperger and his colleague Gabriel Sterling have testified to the grand jury and Secretary Raffensperger has publicly stated that Senator Graham was encouraging him to "[discard] ballots for counties who have the highest frequency error of signatures." Dkt. 9, at 2. Based on this evidence, the district court determined that "as the record presently exists, the Court cannot simply accept Senator Graham's conclusory characterizations of these calls" as legislative activity. Dkt. 27, at 13. That conclusion was not clear error. *See Menendez*, 831 F.3d at 169 (legislative nature of act is factual issue reviewed for clear error).

Indeed, that conclusion was correct under governing precedent. The Speech or Debate Clause "does not protect attempts to influence the conduct of executive agencies," including through "telephone calls to executive agencies." *Hutchinson*, 443 U.S. at 121 n.10. Nor does it shield efforts to "cajole, and exhort with respect to

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[2] In November 2020, Senator Graham told a reporter on video that he contacted Secretary Raffensperger to encourage him to alter the process for verifying signatures on absentee ballots, not simply to gather information:

> 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's a dispute, come up with an appeal process.

Dkt. 9, at 3-4; Dareh Gregorian *et al.*, NBC NEWS, *Georgia Officials Spar with Sen. Lindsey Graham over Alleged Ballot Tossing Comments*, https://nbcnews.to/3CdRBmp (Nov. 17, 2020) (emphasis added).

the administration" of the law. *Gravel*, 408 U.S. at 625. Consistent with this precedent, the district court carefully determined that, even assuming the calls contained some protected legislative activity, the grand jury would not "necessarily be precluded from *all* inquiries about the calls." Dkt. 27, at 14.

Senator Graham alternatively argues (at 9-11) that the district court had no authority to question whether the calls were legislative activities because that is a forbidden inquiry into motive. But as the district court explained, "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." Dkt. 27, at 14 n.5; *Government of the Virgin Islands v. Lee*, 775 F.2d 514 (3d Cir. 1985); *Menendez*, 831 F.3d at 168.

That context-driven approach makes good sense. When a Member of Congress speaks to a government official, or takes a meeting, the applicability of legislative privilege is highly fact dependent. *See Menendez*, 831 F.3d at 168. In such cases, courts do not merely accept conclusory assertions from legislators that they were engaged in investigation (or other legislative activity). *See id.* at 172; *Lee*, 775 F.2d at 522. Rather, they apply the Speech or Debate Clause and its protections only "once it is determined that members are acting within the 'legitimate legislative sphere.'" *Lee*, 775 F.2d at 522 (citation omitted); *accord United States v. Helstoski*,

442 U.S. 477 (1979). Indeed, were the rule otherwise, a Member could simply claim that he was involved in informal investigation and declare victory. But, as *Lee* and *Menendez* show, that is not, and has never been, the law.

Senator Graham's citations (at 9-10) are not to the contrary. Those cases merely confirm the settled proposition—acknowledged by the district court—that *if* an act is legislative, it does not lose protection under the Speech or Debate Clause because of impure motives. *See Cmte. on Ways and Means v. U.S. Dep't of the Treasury*, 2022 WL 3205891, at *4-6 (D.C. Cir. Aug. 9, 2022) (holding that a House Committee's request for documents was legislative notwithstanding allegedly political motives underlying the request); *Tenney v. Brandhove*, 341 U.S. 367, 371 (1951) (rejecting argument that a committee proceeding was not legislative because it was designed "to intimidate and silence plaintiff . . . from effectively exercising his [] rights"); *Scott v. Taylor*, 405 F.3d 1251, 1253 (11th Cir. 2005) (holding that enacting legislation was protected by legislative immunity regardless of the motive); *Bogan v. Scott-Harris*, 523 U.S. 44, 48 (1998) (same as to voting); *Bryant*, 575 F.3d at 1306-07 (same as to legislative elimination of public employment position). None of these cases prohibit a district court from undertaking the fact-intensive analysis of whether an ambiguous act like calling an executive branch official is legislative in the first place.

The only case that Senator Graham cites that says that a court cannot inquire whether "[acts] are legislative in fact" is *United States v. Dowdy*, 479 F.2d 213, 226 (4th Cir. 1973). But in *Lee*, the court explained why, although *Dowdy*'s "language appears to have broad implications," it does not apply when there is a dispute about whether an ambiguous act is legislative in nature. *Lee*, 775 F.2d at 524. As *Lee* explains, *Dowdy* involved a charge of a "sham investigation" orchestrated by a subcommittee chairman. *Id.* But conducting an investigation was "clearly within the scope of his authority," so the motive for conducting the investigation was irrelevant, "[n]o matter how illicit Dowdy's motives were." *Id.* Whether it was appropriate to probe whether Speech or Debate protection applied to an act that was not on its face legislative was thus not at issue in *Dowdy*. Insofar as *Dowdy* could be read as opining about that question not before it, the statement is *dicta* that the Third Circuit has properly rejected and that no other case Senator Graham cites has applied.

In short, the district court did not err, and the Speech or Debate Clause provides no basis to delay Senator Graham's appearance, at which he can answer questions or assert objections based on the Speech or Debate Clause, or other possible grounds.

CONCLUSION

For these reasons, the Court should deny Senator Graham's motion.

Dated: August 20, 2022

Respectfully submitted,

/*s/ Jonathan L. Williams*

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