IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Fulton County Special Purpose Grand Jury

v. Case No. 22-12696

Lindsey Graham

RESPONSE IN OPPOSITION TO SENATOR LINDSEY O. GRAHAM'S EMERGENCY MOTION TO STAY DISTRICT COURT'S ORDER AND ENJOIN SELECT GRAND JURY PROCEEDINGS PENDING APPEAL

On Monday, August 15, 2022, the U.S. District Court for the Northern District of Georgia denied Senator Lindsey O. Graham's Motion to Quash his subpoena to appear and provide testimony before the Fulton County Special Purpose Grand Jury ("SPGJ") and remanded this matter to the Fulton County Superior Court. On Wednesday, August 17, 2022, Senator Graham filed an Emergency Motion praying that this Court stay its Order and enjoin the SPGJ from receiving testimony from the Senator, or any further proceedings regarding his appearance, pending his appeal to the Eleventh Circuit. Also on that day, Senator Graham filed a Notice of Appeal to this Court, and on Friday, August 19, 2022, filed the instant Motion to Stay. Later that day, the district court denied the Senator's Motion to Stay in that Court. The District Attorney, having been ordered to reply to the Senator's motion in this Court by 3:00 pm today, and in her capacity as the legal advisor to the SPGJ, here responds in opposition to the Senator's

motion and any additional delay in his appearance before this lawfully constituted grand jury.

ARGUMENT

The applicable standard for the matter before the Court consists of a four part test: "(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." *Hand v. Scott*, 888 F.3d 1206, 1207 (11th Cir. 2018). These factors "contemplate individualized judgment in each case, [and] the formula cannot be reduced to a set of rigid rules." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). The Senator also argues that his Motion should be subject to an appreciably lower standard, requiring him to "only present a substantial case on the merits." *See League of Women Voters of Fla., Inc. v. Fla. Sec'y of State*, 32 F.4th 1363, 1370 (11th Cir. 2002). However, as the district court has held, this lower standard should not apply here because the "balance of the equities"[1] does not "weigh[] heavily in favor of granting the stay." *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981).

[1] The Senator presents to this Court a series of communication with counsel at the District Attorney's Office where, on Wednesday, counsel indicated that the Office might consent to postponing the Senator's appearance before, on Friday morning, indicating that "after additional consideration, research, and review of

A. Senator Graham has not made a strong showing that his appeal is likely to succeed on the merits.

Far from making a "strong showing" that he is likely to prevail on appeal, Senator Graham's arguments demonstrate that he cannot respond to the district court's order on its own terms. Instead, the Senator continues, as the district court observed in its own words, to "misconstrue the Court's holdings" (Doc. 37 at 3) and rely upon conclusory arguments without a basis in the record.

1. Speech or Debate Clause

Senator Graham first insists that phone calls he placed to Georgia's Secretary of State in the midst of an election recount are unquestionably legislative acts, simply because the Senator declares them as such, and any evidence to the contrary should therefore be discarded. The Senator also insists that any additional lines of questioning which the grand jury could explore are merely fabricated "back doors" intended to question him about those phone calls and the reasons for them.

First, regarding the phone calls, the district court reviewed the record and came to a conclusion which the Senator chooses to ignore:

> [T]he 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**

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the applicable standard," the Office intended to oppose postponing the Senator's appearance. This final decision, which was provided in less than approximately 40 hours, does not appear to have any relevance to the proceedings or to the equities under consideration.

> **legislative act."** *See Gov't of the Virgin Islands v. Lee*, 775 F.2d 514, 522 (3rd 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).

Doc. 27 at 12. Cases previously cited by the Senator likewise consider activities which are unquestionably legislative on a cursory review. *See Bryant v. Jones*, 575 F.3d 1281, 1307 (11th Cir. 2009) (involving the drafting of a budget resolution); *Scott v. Taylor*, 405 F.3d 1251, 1256 n.7 (11th Cir. 2005) (involving the enactment of a law); *Committee on Ways & Means v. U.S. Dep't of Treasury*, 2022 WL 3205891 (statutorily authorized letter of request from committee chairman, functionally indistinguishable from a committee subpoena). Even *United States v. Dowdy*, 479 F.2d 213 (4th Cir. 1973), upon which the Senator heavily relies, involved a committee investigation authorized by a resolution of the House of Representatives. In *Lee*, a United States senator presented extremely similar arguments, based on *Dowdy*, to the arguments of Senator Graham in this matter; the Third Circuit distinguished the facts in *Dowdy* and opting to read it "narrowly" in light of those facts, a position "supported by the decision in *Helstoski*, *Eastland*, and *Grand Jury*, all of which would conflict with the expansive interpretation of Dowdy pressed by" the Senator. *Lee*, 775 F.2d at 523-24.

The Senator, just as he did in his Motion to Quash and in his Motion for Stay below, continues to simply declare that "[t]he facts uniformly point to Senator Graham's calls being 'legislative.'" Mtn. at 8. It is bizarre for the Senator to continue to suggest that the material facts concerning the phone calls are not disputed, since the nature of the phone calls has been a subject of very public dispute since November of 2020. His assertion would be true only if one were to completely discard the Certificate of Material Witness, ignore the public statements of Secretary Raffensperger and Gabriel Sterling,[2] and accept a generous interpretation of Senator Graham's own public statements regarding his exhortation of Secretary Raffensperger to change voting processes during the call. This would leave only the Senator's assertions that his explanation of his actions ends the inquiry. As detailed by the district court and by the Third Circuit in *Lee*, a conclusory assertion of legislative purpose about a facially non-legislative act *begins* the inquiry rather than *ending* it. Doc. 27 at 12-16; *Lee*, 775 F.2d at 524.

Second, Senator Graham argues, as he has before, that any additional lines of questioning pertaining to unquestionably *non*-legislative activities should still be enjoined because they are ruses designed to allow a "back door" inquiry into the

[2] These would include, among others, Raffensperger's statements that the Senator suggested discarding ballots improperly for the benefit of former President Donald Trump as well as Sterling's statements that Graham asked about ways that ballots might be discarded to support a possible "court challenge."

Senator's motives for legislative acts. "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." Doc. 37 at 7. As the district court observed, the Certificate of Material Witness, the District Attorney's response below, and the District Attorney's oral argument all demonstrated that the grand jury intended to question Senator Graham about matters independent of the phone calls. The phone calls, as described in the Certificate of Material Witness, merely provided the most direct and publicly acknowledged information demonstrating why Senator Graham was a necessary and material witness for the investigation.

The Senator, time and again, insists that any inquiry into the phone calls must be an inquiry into the motivation for legislative acts. The argument presupposes that the calls were legislative in the first place, and supplies only the Senator's own declarations of his motives as definitive proof of the calls' legislative nature. He ignores all contradictory information in the record in order to claim that the facts are somehow undisputed, and then he ignores the record again to claim that any and all inquiries will necessarily involve the phone calls. These arguments cannot withstand even casual scrutiny and do not demonstrate that the Senator has a strong likelihood of success on appeal.

2. Sovereign Immunity

The Senator's arguments regarding sovereign immunity likewise does not address at all a central point raised by the district court: that the logical endpoint of the Senator's argument is absolute immunity for Senators from state grand juries, in all circumstances, without exception. The Supreme Court has affirmed that even *sitting Presidents* can be required to comply with and provide evidence for state-level grand jury subpoenas. *See Trump v. Vance*, 140 S. Ct. 2412 (2020).[3] Put simply, the argument is "bereft of any meaningful support." Doc. 37 at 9-10. The vast consequences of the Senator's arguments indicate that he cannot make a "strong showing" of likely success on appeal, and this factor also mitigates in favor of the denial of a stay or injunction.

3. Partial Quashal

Senator Graham also fails to respond to the district court's holding that he failed to request partial quashal in his motion and therefore was not entitled to partial quashal as relief. The Senator's Motion to Quash below demanded total quashal due to his expansive reading of the Speech or Debate Clause *and* his

[3] The Senator's insistence that this decision concerns only "the accountant of an official sued in his private capacity" (Mtn. at 16) contradicts the explicit language of that decision: "While the subpoena was directed to the President's accounting firm, the parties agree that the papers at issue belong to the President and that Mazars is merely the custodian. Thus, for purposes of immunity, it is functionally a subpoena issued to the President." *Id.* at 2425 n.5.

assertion of sovereign immunity, and to suggest that the court below should have understood his arguments to pray for partial quashal would require the court to ignore both the tenor and content of his arguments. Finally, the Senator cites to no case where partial quashal is explicitly recognized as a "lesser-included" form of relief in place of total quashal. The matter was not briefed or factually developed, and his insistence that his late assertion of the request somehow supports his emergency motion for a stay should be discarded.

B. Senator Graham will not be "irreparably injured" absent a stay or injunction.

The Senator insists that he will suffer irreparable harm if his stay is denied. However, this requires this Court to determine that the grand jury may not question Senator Graham about anything at all, regardless of its relevance to their inquiry, and such a holding has no support in the law or likelihood of success. Additionally, the district court will ensure that Senator Graham's privileges and immunities will be well-guarded and subject to judicial oversight. Once this matter is remanded to Superior Court, after further factual development, the Senator will be able to elevate any points of contention back to this federal forum for resolution. This process, as described in *Gov't of Virgin Islands*, ensures that no "irreparable harm" will take place. Quite the contrary: the SPGJ will continue to await this Court's determination of how testimony should proceed based on the

Senator's privileges. When compared to the inevitable harm occasioned by the delays of appeal, this factor mitigates in favor of the denial of the Senator's motion.

C. A stay would result in substantial injury to the Special Purpose Grand Jury.

The District Attorney repeats the arguments which it presented to the district court below. The District Attorney initiated proceedings to ensure Senator Graham's appearance before the SPGJ on July 5, 2022. Six weeks later, after litigation in three separate jurisdictions, the District Attorney is still attempting to provide the SPGJ with the Senator's crucial testimony. If this Court orders a stay, that six-week delay could be doubled or worse, even if the parties seek to expedite the appeal. As this Court recognized in its Order, Senator Graham's testimony is sought by the SPGJ not simply because he possesses necessary and material information but also because he is expected to provide information regarding *additional* sources of relevant information. As a result, delaying the Senator's testimony would not simply postpone his appearance; it would also delay the revelation of an entire category of relevant witnesses or information, each of whom would require additional time and resources to secure on behalf of the SPGJ. Finally, as noted above, the resolution of Senator Graham's appeal would almost certainly not end the litigation related to his appearance. Once this matter is remanded to Superior Court for further factual development, he could make

additional assertions of his rights under the Speech or Debate Clause with regard to specific questions, requiring additional review by this Court and subject to possible *additional* appeal at that time. If remand is delayed pending the Senator's appeal, it will ensure that the Senator's involvement with the SPGJ will not be resolved for *months*. Given the possibility that Senator Graham's testimony could reveal additional routes of inquiry, staying remand and enjoining his appearance at this stage could ultimately delay the resolution of the SPGJ's entire investigation. This would significantly harm the interests and administration of the SPGJ and mitigates in favor of denying the Senator's motion.

D. The public interest is served by allowing Senator Graham's appearance to proceed, ensuring the efficient continuation of the Special Purpose Grand Jury's investigation.

As the District Attorney argued before the district court, delaying Senator Graham's testimony before the special purpose grand jury cuts against the public's interest in the circumstances of this case. "Since the founding of the United States, grand juries have been accorded wide latitude to gather all relevant material because the public . . . has a right to every man's evidence." *In re Grand Jury Proceedings*, 995 F.2d 1013, 1015 (11th Cir. 1993) (internal citations and quotations omitted). Senator Graham has a right to an appeal from this Court's Order and should be free to pursue it. However, his stance with regard to his subpoena has already significantly delayed grand jury proceedings, and he should

not be afforded the opportunity to increase that delay while he continues to advance arguments that he is not subject to subpoena at all. Even if the Senator were to forego appealing this Court's Order, the mechanics of the Senator's appearance will require additional negotiation, argument, and possibly, litigation. While this is perhaps unavoidable in the context of an invocation of the Speech or Debate Clause, it is also true that "[a]ny holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 298-99 (1991), quoting *United States v. Dionisio*, 410 U.S. 1, 17 (1973). Given the necessary care and time that the Senator's appearance will require, postponement due to a stay would compound the frustration of the SPGJ's purposes in order for the Senator to continue argue that he is not subject to a lawful subpoena.

As the district court observed in its order denying the Senator's motion to stay,

> 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).

Doc. 37 at 13-14.

Given the appropriate deliberation and deference the district court has demonstrated with regard to the Speech or Debate Clause, and the safeguards in place for the Senator's testimony going forward, his concerns regarding the separation of powers must give way to the public's interest in the efficient administration of a grand jury investigation into matters of local, state, and nationwide importance.

CONCLUSION

Senator Graham continues to make the same assertions, and the District Attorney requests that this Court accordingly provide him with the same answer. The Senator's arguments to this Court fail to address the arguments of the District Attorney below, the holdings of the district court, the facts, or the applicable law. As a result, the District Attorney respectfully requests that this Court deny the Senator's requests for a stay or an injunction in order to delay his appearance before the Special Purpose Grand Jury.

Respectfully submitted, this 20th day of August 2022.

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CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f) and Eleventh Circuit Rule 26.1-3(c), this document contains 3156 words.

2. This motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

This 20th day of August 2022.

s/ Will Wooten
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CERTIFICATE OF SERVICE

I hereby certify the foregoing was served upon the following by the PACER electronic filing system, as well as by email and US Mail:

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Dated this 20th day of August, 2022.

s/ Will Wooten

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