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.

Application from the United States Court of Appeals for the Eleventh Circuit (No. 22-12696)

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR STAY AND INJUNCTION PENDING APPEAL

BRIAN C. LEA
JONES DAY
1221 Peachtree Street, N.E.,
Suite 400
Atlanta, GA 30361
(404) 521-3939
blea@jonesday.com

DONALD F. MCGAHN II
Counsel of Record
ROBERT LUTHER III
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
(202) 879-3939
dmcgahn@jonesday.com
rluther@jonesday.com

Counsel for U.S. Senator Lindsey O. Graham

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INTRODUCTION

The importance of this case comes not so much in the underlying events—Senator Graham's phone-call investigation into Georgia's election process in the leadup to his vote under the Electoral Count Act certifying President Biden's election. The importance comes instead in the separation-of-powers, federalism, and institutional interests that will be harmed without adjudication if the District Attorney's state-court inquisition goes forward without the chance for full appellate review.

A sitting United States Senator asks this Court to temporarily halt proceedings based on two neutral doctrines of constitutional law: Speech or Debate Clause immunity; and sovereign immunity. These doctrines apply without respect to the party of the legislator. And they apply—indeed, they are most critical—when the legislator engaged in conduct that may cause "resentment" or "occasion offence," as Senator Graham's investigation apparently did to some. 1 WORKS OF JAMES WILSON 421 (R. McCloskey ed. 1967). "In times of political passion," after all, perceived bad "motives," even when untrue, "are readily attributed to legislative conduct and as readily believed." *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951). "Self-discipline and the voters must be the ultimate reliance for discouraging or correcting [these perceived] abuses." *Id.* Courts, state prosecutors, and special grand juries are not. No matter the motives the district court or District Attorney place on Senator Graham's legislative investigation into the 2020 election in Georgia, therefore, the Constitution protects Senator Graham from questioning about it.

The District Attorney nevertheless wants to rush her interrogation of Senator Graham—set to take place on November 17—before any appellate court has had the chance to finally resolve the merits of this indisputably important case. The District Attorney wants to rush despite her special grand jury being empaneled through April 2023, and despite it being able to "exten[d] its term" at will. DA Opp. 19. She wants to rush despite having previously agreed to a voluntary stay (before backing out the day before her opposition to a stay was formally due, via 4 am voicemail), and having said she is "not in a rush" to finish her investigation. Application at 30. And, most importantly, she wants to rush her interrogation despite this meaning that Senator Graham will lose his statutorily guaranteed right to appeal—and face the precise questioning he argues the Constitution prevents. *See Chafin v. Chafin*, 568 U.S. 165, 178 (2013) ("[I]ssuance of a stay is warranted" when "the normal course of appellate review might otherwise cause the case to become moot.").

There is no need to sacrifice this appeal and the immunities it presents for the sake of the District Attorneys' now-preferred timeline. This Court should instead grant this application and either permit the Eleventh Circuit to decide the merits, *see, e.g.*, *Louisiana v. Am. Rivers*, 142 S. Ct. 1347 (2022); or decide the merits itself, *see, e.g.*, *NFIB v. OSHA*, 142 S. Ct. 661 (2022). There is at least a "fair prospect" of reversal under the Speech or Debate Clause and sovereign immunity. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). If the Eleventh Circuit does not reverse, this Court is "reasonab[ly]" likely to grant certiorari and reverse on these important questions of federal law that conflict with this Court's and other appellate

courts' decisions. *Id.* And without a stay, there is not just a "likelihood," but a certainty, that "irreparable harm will result." *Id.* A stay is therefore warranted.

ARGUMENT

A. This Court Is Likely To Grant Review And Reverse.

The District Attorney opens her argument with a plea that "the public has a right to every man's evidence." DA Opp. 8 (quoting *Trump v. Vance*, 140 S. Ct. 2412, 2420 (2020)). But that misses a critical caveat: not when the Constitution immunizes that "man" from questioning. It does so here in two ways—both under the Speech or Debate Clause and by sovereign immunity.

1. Speech or Debate Clause

This Court is likely to grant review, and reverse, on the question whether the Speech or Debate Clause permits "an orderly process of questioning" (DA Opp. 1) to determine whether the Clause immunizes a legislator from "questioning." U.S. Const. art. I, § 6, cl. 1. The district court held yes—and will thus allow a state-court investigatory body to "prob[e]" Senator Graham's conduct and motives to determine whether his actions were "actually" legislative. App. 59a–60a & n.5. But the Speech or Debate Clause forecloses that "probing" (*id.*), as this Court is likely to hold.

Likelihood of success.

After pages and pages of briefing, here and below, the parties now agree that the Speech or Debate Clause immunizes legislators at least from questioning about conduct taken in "connect[ion] to pending legislation or a current legislative enterprise." DA Opp. 8; *see Kilbourn v. Thompson*, 103 U.S. 168, 202–03 (1880). And

they agree that the objective conduct at issue here consisted of Senator Graham "ask[ing] about Georgia's voting procedures" before "vot[ing] [to] certif[y] the 2020 election and propos[ing] amendments to the Electoral Count Act." DA Opp. 9; *see also, e.g.*, Doc. 2-3, ¶ 2.[1] Because that conduct was in connection with a "legislative enterprise," indeed a fundamental one under the Electoral Count Act, it follows that Senator Graham is immune from questioning about his investigatory phone calls. *See Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 508–09 (1975) (extending the Speech or Debate immunity to efforts to "gather information about a subject on which legislation may be had," even if the investigation "takes the searchers up some 'blind alleys' and into nonproductive enterprises").[2]

The parties' disagreement, though, is fundamental. It is about whether, despite this "apparently" legislative activity (DA Opp. 9), courts may "probe the motives of [the] individual legislator[]" to determine whether the activity was *actually* or *purely* legislative. *Comm. on Ways & Means v. U.S. Dep't of Treasury*, 45 F.4th 324, 333 (D.C. Cir. 2022).

This Court's precedent dictates the answer: No. Motive may play no role in the Speech or Debate inquiry. The court must consider only "the nature of the act,"

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[1] Citations to "Doc. __" refer to docket filings in *Fulton County Special Purpose Grand Jury v. Graham*, No. 1:22-cv-03027 (N.D. Ga.).

[2] The District Attorney in a footnote (DA Opp. 9 n.12) seems to argue that Senator Graham's phone-call investigation would not be protected if it did not produce tangible results—if he does not "show[] how his phone call" relates to his introduction of the Electoral Count Reform Act of 2022. But "the legitimacy of a congressional inquiry" is not "defined by what it produces." *Eastland*, 421 U.S. at 509. And, at any rate, the District Attorney concedes that Senator Graham's investigation helped produce something fruitful: his certification vote of Joe Biden as "the legitimate President of the United States." 167 Cong. Rec. S31 (daily ed. Jan. 6, 2021) (Graham).

"stripped of all considerations of intent and motive." *Bogan v. Scott-Harris*, 523 U.S. 44, 54–55 (1998). And that remains the case even when confronting conduct that is not "so clearly legislative in nature" as to be beyond dispute, such as voting or speaking on the house floor. DA Opp. 9. This Court's "cases make clear that in determining the legitimacy of a congressional act," no matter the conduct, "we do not look to the motives alleged to have prompted it." *Eastland*, 421 U.S. at 508. The latest decisions of the lower courts (this one excluded) thus hold that it is not a court's "place to delve deeper" when confronted with facially legislative conduct—here, Senator Graham's "request for information." *E.g.*, *Ways & Means*, 45 F.4th at 333 ("The mere fact that individual members of Congress may have political motivations as well as legislative ones is of no moment."); *see, e.g.*, *AAPS v. Schiff*, 518 F. Supp. 3d 505, 517 (D.D.C. 2021) (immunizing Congressman Schiff's informal legislative investigation (via letters) that also "encourage[d]" recipients to act in a certain way). The Clause, in short, "forbids inquiry into acts which are *purportedly or apparently legislative*, even to determine if they are legislative in fact." *United States v. Dowdy*, 479 F.2d 213, 226 (4th Cir. 1973) (emphasis added); *accord McSurely v. McClellan*, 753 F.2d 88, 106 (D.C. Cir. 1985). Courts may "not go beyond the narrow confines of determining that a [legislator's] inquiry may fairly be deemed within [his] province." *Tenney*, 341 U.S. at 378.

It was here. The *objective* nature of the act—without considering anyone's characterization of motives—cannot be disputed. Senator Graham asked questions concerning Georgia's processes for ensuring election security in the leadup to his

Electoral Count Act vote and before co-sponsoring amendments to the Electoral Count Act. *See* Doc. 2-3, ¶ 2 (District Attorney alleging this). Is *that*, on its face and by its nature, conduct taken in "connect[ion] to pending legislation or a current legislative enterprise," DA Opp. 8? Yes, of course. "[T]he power of inquiry" is "an integral part of the legislative process," which is why investigations "plainly fall[] within th[e] definition" of 'Speech or Debate.'" *Eastland*, 421 U.S. at 504–05; *cf., e.g.*, *Gravel v. United States*, 408 U.S. 606, 615 (1972) (immunizing conduct taken and communications had "in preparation for [a] subcommittee hearing"); *see also* Br. of Separation of Powers Clinic as *Amicus Curiae*, at 2–12 (showing how text and history support protecting "preparatory" and "investigative" actions). And that means that Senator Graham is immune from all questioning about his investigation.

The District Attorney nevertheless insists that "the phone calls were [not] *entirely* legislative." DA Opp. 9 (emphasis added). But she offers nothing more than "speculation as to motive" for that assertion. *Tenney*, 341 U.S. at 377. Her only "evidence" (loosely defined) is that two Georgia state officials speculated that "Senator Graham brought up Georgia's signature verification process on the call" *for an illegitimate reason*: "in order to explore the viability of a 'potential court challenge'" or "to 'help defend' President Donald Trump." DA Opp. 3. The District Attorney's petition, which began this whole case, alleged the same thing—that Senator Graham investigated in order "to explore the possibility of a more favorable outcome for former President Donald Trump." Doc. 2-3 at 2–3. There is a word for what the District

Attorney is after by speculating about *why* Senator Graham made the calls. It is motive.

The District Attorney's own characterization of this "evidence" before this Court is only that these two state officials "said that Senator Graham *suggested* that Georgia could discard or invalidate large numbers of mail-in ballots," DA Opp. 3 (emphasis added)—not that he actually said that. And even that overstates this "evidence": A review of the Georgia state officials' statements confirms that they spoke only of what Senator Graham's objectively legislative questions about the election security "process" "*seemed to suggest" or "implied."*[3] If there were any doubt about this, it would be dispelled by the reality that these Georgia officials based their speculation, in part, on completely unconnected lawsuits and even *tweets*. DA Opp. 3. What this record at most shows, therefore, is that one or two people thought a U.S. Senator's facially legitimate investigation "seemed to imply" an illegitimate purpose.

But that is irrelevant under the Speech or Debate Clause. The reasons why Senator Graham engaged in his investigation are as protected as the investigation itself. "It is beyond doubt that the Speech or Debate Clause protects against inquiry

[3] Throughout this litigation, the District Attorney has relied on a smattering of news articles and the like—all of which reinforce that she has offered only speculation as to motive. *See, e.g.*, Amy Gardner, *Ga. secretary of state says fellow Republicans are pressuring him to find ways to exclude ballots*, Washington Post (Nov. 16, 2020) (quoting Raffensperger as saying, "It sure looked like he wanted to go down that road"); Melissa Quinn, *Georgia's secretary of state says Lindsey Graham suggested throwing out certain ballots*, CBS News (Nov. 17, 2020), https://cbsn.ws/3rGCCLb (Secretary Raffensperger speaking about what, to him, Senator Graham's objective questions "seemed to suggest" or "implied"); Caroline Kelly, *Washington Post: Georgia prosecutor looking into phone call between Lindsey Graham and Brad Raffensperger*, CNN Politics (Feb. 13, 2021), https://cnn.it/3T5eHkj (in embedded video, Raffensperger saying that he "got the sense [from Senator Graham's objective question] that he implied…."; and "just an implication"); Brad Raffensperger, *Integrity Counts* 113 (2021) ("seemed to imply").

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) (emphasis added). Even with a "deluge" of evidence showing that the "true purpose" is unworthy, *Ways & Means*, 45 F.4th at 331, "[t]he claim of an unworthy purpose does not destroy the privilege." *Tenney*, 341 U.S. at 371, 377. What someone inferred Senator Graham "suggested" (DA Opp. 3) thus does not open up Senator Graham to questioning. By nonetheless placing these subjective "suggest[ions] [and] impli[cations]" about the "purpose of the calls" on par with the objective facts showing that the calls were legislative acts (Doc. 44 at 6 n.1), the district court erred and will likely be reversed.

Likelihood of review.

This case would be no mere error correction, either. It would provide the lower courts much needed clarity on indisputably important issues of federal law on which the courts are split.

No one disputes that this case and the questions it presents are "important." *See* S. Ct. R. 10. Indeed, the whole reason the District Attorney set up her "grand jury" is because she thinks the underlying issues are existential. And the District Attorney also admits that this case involves a context not directly addressed in this Court's Speech or Debate cases—which confirms that this Court's review would be helpful. DA Opp. 9. Already, then, there is a "compelling reason[]" for granting certiorari: this case presents an "important question of federal law that has not been, but should be, settled by this Court." S. Ct. R. 10(c).

And there is more. For one thing, the district court's decision "conflicts with relevant decisions of this Court," properly applied, as explained above. *Id.* For another, the Eleventh Circuit's implicit endorsement of that decision, in denying a stay, creates or deepens circuit splits on the Speech or Debate Clause.

The first split is about when, if ever, a court may consider motive to determine whether an act is legislative. Most circuits categorically forbid consideration motives—even for acts that are not "clearly" or "officially" legislative (DA Opp. 9, 15); and "even to determine if th[ose acts] are legislative in fact." *E.g.*, *Dowdy*, 479 F.2d at 226; *see id.* at 219, 224 (holding the Clause immunized, among other things, a defendant's individual, informal discussions with Department of Justice and Federal Housing Administration officials in advance of a hearing); *see also, e.g.*, *Leapheart v. Williamson*, 705 F.3d 310, 313–15 (8th Cir. 2013) (motives "wholly irrelevant," even for non-obvious "legislative activity" (the elimination of a staffing position)). *Accord* Br. of Professor Muller as *Amicus Curiae*, at 2 (listing cases from the First, Second, and Eighth Circuit taking this objective approach). That is why courts in those circuits have, for example, immunized questioning about informal "information gathering letters," *AAPS*, 518 F. Supp. 3d at 517–20; and have rejected "prob[ing]" beneath the surface to discern a legislator's "true purpose" for an investigation, *Ways & Means*, 45 F.4th at 331, 333.

The Third Circuit, though, has expressly "decline[d] to follow" this principle, as first expressed by the Fourth Circuit in *Dowdy*. *E.g.*, *Gov't of V.I. v. Lee*, 775 F.2d 514, 524 (3d Cir. 1985). And the Eleventh Circuit appeared to endorse the Third

Circuit's contrary approach here. So while most courts prohibit "delv[ing] deeper" even when faced with a "deluge" of evidence of "an unconstitutional ulterior motive," *e.g.*, *Ways & Means*, 45 F.4th at 331–33, the district court here *permitted* certain "probing" into motives "of alleged legislative acts to determine *what* these acts actually are"—legislative, or not. App. 60a.

The second split has to do with burden. Recall that the District Attorney does not just want testimony about why Senator Graham made his phone calls. She also wants wide, sweeping testimony purportedly unrelated to the phone calls—for example, about Senator Graham's communications with the Trump campaign. *See* Application at 22–23. These lines of inquiry are impermissible as a transparent backdoor way to ascertain, in the words of the District Attorney, "the motivation, preparation, and/or aftermath of those calls." Doc. 9 at 26. But the lines of inquiry suffer from another defect too: The District Attorney offered no evidence, not even speculation as to motives, about anything other than the phone calls. For example, while the District Attorney claims to seek communications with the Trump Campaign (DA Opp. 12), she offers no evidence shedding light on whether the communications were investigatory or about something else entirely.

Burden can thus resolve this issue: If the District Attorney has the burden of offering evidence to pierce Senator Graham's immunity, she fails it. So if the ordinary rule applies—whereby the party seeking to pierce the constitutional (and jurisdictional) immunity bears the burden to produce facts proving the immunity does not apply, *see Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)—

Senator Graham will prevail. Whether that ordinary rule applies in the Speech or Debate context is well worth this Court's review—as perhaps best evidenced by the district court's imposition of a novel "process of questioning," with some unspecified "supervision of the federal courts," and the Eleventh Circuit's failure to "even refer to any burden of proof" (DA Opp. 1, 17) while necessarily if implicitly relying on it.

* * *

The District Attorney ends this section by calling this an "extremely unusual" case, as if that were a reason to deny certiorari. DA Opp. 18. While it is no doubt unusual for a local prosecutor to conduct a far-reaching investigation into a federal election and, in the process, seek to compel testimony from a sitting U.S. Senator concerning his legislative actions, the legal issues in this case are far from unusual. For confirmation, one need only consider the cases cited here and in the Application, which show that these issues concerning the Speech or Debate Clause perennially recur. *See, e.g.*, Application at 17–18 (collecting four cases from the past year protecting legislators from both parties despite similar allegations of illegitimate motives); *cf., e.g.*, *Vance*, 140 S. Ct. 2412.

In point of fact, moreover, the unusual features of this case underscore why this Court is likely to grant review. If this Court does not intervene, others of the Nation's 2,300+ local prosecutors may well do similar things against legislators of both parties. And they will be buoyed to do so based on mere "conclusion[s]" and "speculation as to motives." *Tenney*, 341 U.S. at 377. Yet the Speech or Debate Clause exists to protect legislators of all parties "from the resentment of every one,

however powerful, to whom the exercise of [their] liberty may occasion offense." *Id.* at 373. This Court should ensure that the Clause serves that purpose here.

There is at least a fair prospect that the Court would grant review here. And after it does, there is a high likelihood that it would reverse. A stay is thus warranted.

2. Sovereign Immunity

There is a strong likelihood of review and reversal on sovereign immunity too—an independent argument "the Eleventh Circuit did not [even] address." DA Opp. 13. The district court barely addressed it either. But it is as fundamental as Speech or Debate: Absent express waiver, a sitting United States Senator cannot be forced into state court to face questioning about his official acts. *See FDIC v. Meyer*, 510 U.S. 471, 475 (1994); *Kentucky v. Graham*, 473 U.S. 159, 166 (1985).

The District Attorney notably begins by trying to excuse the Eleventh Circuit's failure to confront this aspect of Senator Graham's argument. She insists that the argument "was arguably abandoned," because it was "contained" only in "a single footnote of his brief to the Eleventh Circuit." DA Opp. 13. But that is not true. Senator Graham's motion for a stay, both at the district court and the Eleventh Circuit, prominently featured sovereign immunity as an independent basis for a stay. Emergency Motion to Stay, *Fulton Cnty. Special Purpose Grand Jury v. Graham*, No. 22-12696 (11th Cir. Aug. 19, 2022), at 15–16; Doc. 29-1 at 19–21. The footnote the District Attorney is referring to is instead from Senator Graham's *supplemental* brief, which the Eleventh Circuit requested following a limited remand confined to "protections afforded by the Speech or Debate Clause of the United States

Constitution," not sovereign immunity. *See Fulton Cnty. Special Purpose Grand Jury v. Graham*, No. 22-12696, 2022 WL 3581876, at *1 (11th Cir. Aug. 22, 2022).

The District Attorney next argues (at 13–14) that the Eleventh Circuit was justified in ignoring sovereign immunity because the cases Senator Graham cited are supposedly distinguishable. But her two distinctions are not persuasive.

Her first distinction is that many of the cases involved "executive branch regulations" that independently "barred enforcement of a subpoena on a federal employee." DA Opp. 13. But insisting on a regulation clearly barring the subpoena gets things exactly backward: Sovereign immunity applies unless clearly *waived*, and there are no regulations here *waiving* sovereign immunity. *See Louisiana v. Sparks*, 978 F.2d 226, 234 (5th Cir. 1992) (affirming dismissal based on sovereign immunity, using regulations only as confirmation that sovereign immunity had not been waived)). Even if the cases were unclear, moreover, that would only help *Senator Graham*, for the District Attorney, not Senator Graham, has the burden of showing that she can force a United States Senator in his official capacity into state court to testify. *See* Application at 27.

The District Attorney's second distinction is that this is a "criminal case," where a subpoena supposedly can issue. DA Opp. 14 (citing *Gravel*, 408 U.S. at 615). The District Attorney's argument fails even on its own terms, because, as the Georgia Court of Appeals has clearly held, Georgia "special purpose grand juries conduct only civil investigations." *Kenerly v. State*, 715 S.E.2d 688, 692 (Ga. Ct. App. 2011). Regardless, though, the District Attorney's cited case involved a *federal* investigation,

where sovereign immunity had no role to play. And at all events, any claimed criminal exception is contrary to both case law and common sense: The violation of immunity is the same no matter the nature of the proceeding because it is the compulsion that offends the immunity. *See Smith v. Cromer*, 159 F.3d 875, 879–81 (4th Cir. 1999) (quashing subpoena issued in connection with state criminal action based on sovereign immunity (collecting cases)); *Sparks*, 978 F.2d at 234–35 (same).

Finally, the District Attorney insists that her subpoena was issued not to "Senator Graham" but to "citizen Graham." DA Opp. 14. But the subpoena itself, addressed to "Senator Lindsey Graham," dispels that argument. App. 69a. The District Attorney's fallback response—that Senator Graham will not be questioned about his "indisputably legislative actions," DA Opp. 14—conflates "legislative activity" for Speech or Debate purposes with "official acts" for sovereign-immunity purposes. *See Brewster*, 408 U.S. at 512 ("Members of the Congress engage in many activities other than the purely legislative activities protected by the Speech or Debate Clause," which are "entirely legitimate" official actions taken as legislators even if not protected by the Speech or Debate Clause). Here, regardless whether the Senator's actions qualify as "legislative," they qualify as "official acts" for sovereign immunity. Indeed, the District Attorney has never disputed that. And that, coupled with the reality that this testimony will occur in state court without waiver by the federal government, resolves this case in favor of Senator Graham.

B. Senator Graham Will Suffer Irreparable Harm Absent A Stay, And The Equities Favor This Relief

There can be no serious dispute that Senator Graham satisfies the final factor—irreparable harm absent a stay. The district court thought so: If Senator Graham "is correct on the merits," it held, he will "suffer irreparable harm by being subjected to questioning before the grand jury." App. 42a. The Eleventh Circuit did not say anything to the contrary (it said nothing at all on the equities). And this Court's cases easily show why. *First*, Senator Graham needs a stay of proceedings "to prevent the loss of [his] right to appeal." *Chafin*, 568 U.S. at 178. (The testimony that will moot the appeal is set before Senator Graham's reply brief is even due.) And *second*, Senator Graham faces questioning he argues is unconstitutional, and the loss of constitutional rights qualifies as irreparable harm. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Yeshiva Univ. v. Yu Pride All.*, No. 22A184, 2022 WL 4232541, at *2 (U.S. Sept. 14, 2022) (Alito, J., dissenting).

The District Attorney focuses her response not on Senator Graham's irreparable (constitutional) harm, but instead on her own inconveniences. *See* DA Opp. 18–22. She says not a word about this Court's line of cases holding that loss of appellate review is "[p]erhaps the most compelling justification" for relief. *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers); *see Chafin*, 568 U.S. at 178. She cannot dispute that, if this Court does not intervene, this case will become moot in a few short weeks. Alone, that justifies a stay. *See, e.g.*, *In re Roche*, 448 U.S. 1312, 1317 (1980) (Brennan, J., in chambers) (staying enforcement of a state civil contempt citation because refusing a stay would "moot

[the] claim of right" being litigated); *Garrison v. Hudson*, 468 U.S. 1301, 1302 (1984) (Burger, C.J., in chambers) (granting stay of state criminal trial because "the normal course of appellate review might otherwise cause the [federal] case to become moot").

Nor should the District Attorney's convenience enter into the equation anyway. The factor looks at the irreparable harm faced by the applicant, not at the other side's inconvenience in imposing that harm. *See Hollingsworth*, 558 U.S. at 190. And the Constitution trumps the other side's convenience regardless. But even weighing both side's equities, the District Attorney's concerns are greatly overstated. She has publicly admitted she is "not in a rush" to finish her investigation, and in fact once agreed to a stay before backing out the day her opposition to a stay was formally due, via a 4am voicemail. *See* Application at 30. And while the District Attorney now points to the fact that her "special grand jury" is scheduled to run through April 2023, that is of no moment: By that point there can easily be an expedited decision by the Eleventh Circuit or even by this Court. If not, moreover, the District Attorney concedes she can get "an extension of its term." DA Opp. 19. An extendable end date for an investigation provides no basis for subjecting a sitting U.S. Senator to irreparable harm in violation of two of the Constitution's structural safeguards. If this were a balancing test, therefore, the scale would tip decidedly in favor of the right to appeal and the Constitution—and thus the Senator.

* * *

The few words the District Attorney does say about Senator Graham's irreparable harm only betrays her deep misunderstanding of the importance of what

is about to happen if this Court does not intervene. She actually says that "the Senator will *benefit* from the framework put in place by the district court." DA Opp. 18 (emphasis added). That is cold comfort: It amounts to a claim that the violation of constitutional immunities could be worse, because at least a federal court will (somehow) serve as a backstop. Senator Graham, the District Attorney goes on, "will not suffer 'irreparable harm' but will instead be subjected to questioning" in the "orderly" way as provided by the district court. DA Opp. 21.

The questioning, though, *is* the irreparable harm. *See* DA Opp. 5 (conceding likelihood of irreparable harm must "assum[e] the correctness of the applicant's position" on the merits). After all, the text of the Clause says that "Senators and Representatives … shall not be questioned in any other Place" about their Speech or Debate. U.S. Const. art. I, § 6, cl. 1. That text cannot reasonably be interpreted to allow the District Attorney to question Senator Graham for the purpose of determining whether the Constitution allows him to be questioned—effectively turning an express constitutional immunity into a question-by-question common-law privilege. Needless to say, then, the point of this emergency application is to prevent that questioning—questioning from which the Constitution immunizes Senator Graham.

CONCLUSION

For these reasons, this Court should grant this application and stay the proceedings pending appeal.

Date: October 28, 2022

Respectfully submitted,

/s/ Donald F. McGahn II

DONALD F. MCGAHN II
Counsel of Record
ROBERT LUTHER III
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
(202) 879-3939
dmcgahn@jonesday.com
rluther@jonesday.com

BRIAN C. LEA
JONES DAY
1221 Peachtree Street, N.E.,
Suite 400
Atlanta, GA 30361
(404) 521-3939
blea@jonesday.com

Counsel for U.S. Senator Lindsey O. Graham