Case No. 22-12696

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FULTON COUNTY SPECIAL PURPOSE GRAND JURY,

Plaintiff-Appellee

v.

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

Defendant-Appellant.

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

AMICUS CURIAE BRIEF OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND AND THE ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS IN SUPPORT OF APPELLANT SENATOR LINDSEY GRAHAM AND IN SUPPORT OF REVERSAL BELOW

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CERTIFICATE OF INTERESTED PERSONS

The case number for this *amicus curiae* brief is No. 22-12696, *FULTON COUNTY SPECIAL PURPOSE GRAND JURY v. LINDSEY GRAHAM, IN HIS CAPACITY AS UNITED STATES SENATOR.*

Amicus Curiae Eagle Forum Education & Legal Defense Fund is a non-profit corporation which has no parent corporation, and no publicly held corporation owns 10% or more of its stock. Likewise, *Amicus Curiae* Association of American Physicians and Surgeons is a non-profit corporation which has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Pursuant to Eleventh Circuit Rule 26.1-1(a)(1), the undersigned counsel of record certifies that the parties', including *amici*'s, list of persons and entities having an interest in the outcome of this case is complete, to the best of the undersigned counsel's knowledge, with the following additions:

Eagle Forum Education & Legal Defense Fund, *Amicus Curiae*

Association of American Physicians and Surgeons, *Amicus Curiae*

Andrew L. Schlafly, counsel for *Amici Curiae*.

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

/s/ Andrew L. Schlafly
Andrew L. Schlafly
Counsel for Amici Curiae

Dated: September 21, 2022

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IDENTITY, INTEREST AND AUTHORITY TO FILE[1]

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF") is a non-profit corporation founded in 1981 by Phyllis Schlafly. It is a pro-family group that has consistently advocated for fidelity to the text of the U.S. Constitution, including its Speech or Debate Clause and its framework for election integrity. *See* U.S. CONST. Art. I, § 6, cl. 1. Like its founder, Eagle Forum ELDF has long opposed politically motivated prosecutions, and opposes interference caused by announcements of charges or investigations prior to future elections. Eagle Forum ELDF supports the longstanding policy of the U.S. Department of Justice to stand down for a period of 60 or 90 days prior to an election, in order to allow the voters to choose candidates without the distortion of unproven, and possibly politically motivated, accusations.

Over the past two decades, Eagle Forum ELDF has filed many amicus briefs in U.S. Courts of Appeal and the U.S. Supreme Court, as well as in state courts, and has been cited in federal decisions. *See, e.g.*, *C.N. v. Ridgewood Bd. of Educ.*,

[1] All parties have indicated that they do not oppose the accompanying motion for leave to file this brief. Pursuant to FED. R. APP. P. 29(a)(4)(E), undersigned counsel certifies that: counsel for the *Amici* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *Amici*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

430 F.3d 159, 169 n.11 (3d Cir. 2005) ("As the Eagle Forum Education and Legal Defense Fund, as *amicus curiae* in support of Plaintiffs, explains ….").

The founder of Eagle Forum ELDF and this organization were outspoken against election fraud for decades prior to the presidential election in 2020. *See, e.g.*, Phyllis Schlafly, "Some in Louisiana Voted 10 to 15 times; Landrieu's Phantom Votes," *Chattanooga Free Press* (Tennessee) A4 (April 25, 1997). Eagle Forum ELDF strongly opposes any attempt to burden, chill, or retaliate against such exercises of First Amendment rights to speak out against election fraud, and the right to criticize the reported outcomes of some elections for possible taint by fraud.

Amicus curiae Association of American Physicians and Surgeons ("AAPS") is a national association of physicians. Founded in 1943, AAPS has for nearly three decades been outspoken against unfair prosecutions of physicians, and has filed many amicus briefs in this Court and other appellate courts against prosecutions of physicians that AAPS considers to have been unjustified. AAPS was recently successful in urging the U.S. Supreme Court to reverse a conviction and 21-year prison sentence of an Alabama physician concerning his pain management practice. *See Xiulu Ruan v. United States*, 142 S. Ct. 2370 (2022). In other high-profile cases, AAPS's amicus briefs have been cited by Supreme Court

Justices. *See, e.g.*, *Stenberg v. Carhart*, 530 U.S. 914, 959, 963 (2000) (Kennedy, J., dissenting).

For the foregoing reasons, *Amici* Eagle Forum ELDF and AAPS have direct and vital interests in the issues presented here.

STATEMENT OF THE ISSUES

Amici fully adopt and incorporate herein any Statement of the Issues to be submitted by Appellant.

SUMMARY OF ARGUMENT

Politicization of unchecked prosecutorial authority is inevitable, and each political party has accused the opposing party of it. Policies in place at the U.S. Department of Justice restrict the timing of prosecutorial activity in proximity to an election, but those policies were not followed by the Fulton County Special Purpose Grand Jury ("Fulton County"). Multiple trial judges recently recognized and properly reined in aspects of investigations that have improper political consequences, as Fulton County Judge Robert McBurney did when he shut down Fulton County's investigation of Republican state Sen. Burt Jones by saying, "The District Attorney does not have to be apolitical, but her investigations do."[2]

[2] Dan Mangan, "Georgia prosecutor Fani Willis disqualified from investigating Trump 'fake elector' in criminal probe," *CNBC* (July 25, 2022) https://www.cnbc.com/2022/07/25/georgia-prosecutor-fani-willis-barred-from-investigating-trump-fake-elector.html (viewed Sept. 16, 2022).

Similarly, this Court should fully quash this unprecedented attempt by Fulton County to demand testimony by a prominent U.S. Senator, Lindsey Graham (R-SC).

The presence in this case of a campaign rival of Donald Trump, William Weld as an amicus party presenting himself as a former prosecutor, reinforces the reality that something is not right about this grand inquisition here. This is not merely an objective investigation of a real crime, but a wrongly timed persecution of anyone close to Trump, and then presumably Trump himself. This investigation was mostly quiet for 20 months, then on the eve of the hotly contested midterm elections suddenly became the source of a deluge of disparaging headlines against the Republican Party.

Our national elections have never before been at risk due to the decisions made by a grand jury in merely one partisan county. Now is not the time to start allowing this. Fulton County, controlled by one political party, should not be allowed to hold hostage, through reputation-harming subpoenas and recommendations of indictments, the other 3,141 counties and county equivalents across our nation. Indictments send a devastating message of reputational harm to the public, and this Court should not allow the prosecutorial process to degrade into a political game of darts. On the eve of these historic midterm elections, a grand jury in this solitary Democrat county should not be making headline-

grabbing demands for testimony by a U.S. Senator who is a leader of the opposite political party.

This is not to argue that Senator Lindsey Graham – or the real target of the Democrats' investigations, Donald Trump – is "above the law," but by the same token they should not be treated worse under the law by being made political target practice through a misuse of prosecutorial authority. Fulton County inexplicably waited 20 or so months after Lindsey Graham's alleged conversations with Trump in November 2020 before creating a flurry of unproven disparaging headlines against this prominent Republican leader on the eve of a national election. Is that how Democrats would have handled this matter if it involved leaders of their own party? If this were about a real crime, and if politics were not a factor, then this investigation would have concluded more than a year ago. The timing in this matter is more than suspect; it is patently unacceptable.

Fulton County has invoked the jurisdiction of this Court by insisting on Sen. Graham's testimony, and this Court should respond both by quashing the subpoena on him ***and*** staying the entire investigation. Such a ruling would be similar to how District Judge Aileen Cannon properly stayed the entire criminal investigation relating to materials seized from Trump's residence in Mar-a-Lago. *See Trump v. United States*, No. 22-81294-CIV, 2022 U.S. Dist. LEXIS 159738, at *32 (S.D. Fla. Sep. 5, 2022). This Court can and should act *sua sponte* to protect the First

Amendment rights of Americans to criticize past elections and participate in future ones without reputation-smearing, unjustified indictments. Fulton County has already violated the public policy to refrain from sparking disparaging political headlines near an election, and Fulton County is also chilling the First Amendment rights of an entire major political party. It is better for this Court to address these important national issues ***now***, perhaps through an Order to Show Cause, before this cancer metastasizes to the point that the Supreme Court would be unable to rectify it later. Improper influences caused by politicized prosecutions cannot be easily cured after a tainted election.

Abstention doctrine is not an obstacle, as there is no abstaining to state proceedings when First Amendment rights are at stake, as they are here. No deference is due to an improper attempt by one political faction to misuse a county procedure for national effect. In *Bush v. Gore*, 531 U.S. 98 (2000), the Supreme Court intervened and halted Florida proceedings on a state law issue that impacted the integrity of the national election, and this Court should likewise enjoin Fulton County from proceeding further to hinder and distort the unencumbered choices of American voters in our national elections.

A podcaster in Texas, Jacki Pick Deason, has received more protection by in Texas state court against this unhinged Fulton County proceeding than a U.S. Senator from South Carolina protected by the Constitution has received in federal

court. The Texas appellate court was so overwhelmingly in favor of quashing the subpoena against Ms. Pick Deason that even its dissent wrote at length about how the Fulton County proceeding is not really a legitimate grand jury. Sen. Graham should not have to move to Texas to realize the fundamental rights available to resident podcasters there, in order to end the harassment of him, and through him of Donald Trump, by a Georgia county grand jury.

ARGUMENT

Fulton County is interfering with the democratic process of future elections, and has already acted contrary to U.S. Department of Justice policy by generating disparaging political headlines in proximity to the upcoming midterm elections. Rather than allow the Fulton County proceeding to go forward against Republican leaders, this Court should order the Democrat-controlled Fulton County to stand down. At a minimum, the subpoena on Senator Lindsey Graham should be quashed in its entirety, with instructions to Fulton County not to attempt anything similar or recommend any indictments until further prior review by this Court.

Fulton County has had nearly two years to do any legitimate review of conduct that occurred shortly after the 2020 election, and apparently has nothing to show for it because no such real crimes occurred. Waiting until shortly before an historically significant midterm election to churn out subpoenas of high-profile Republicans with the effect of sparking biased headlines and baseless innuendo

against them, including even identifying one top Republican (Rudy Giuliani) as an actual target of the investigation, is plainly improper. Hauling an esteemed United States Senator before a county grand jury at such a sensitive time is grist for a political novel, not for a proper functioning of our constitutional Republic.

Fulton County violated public policy by waiting roughly 20 months and then, on the eve of the upcoming national election, becoming a factory of baseless accusations against leaders of only one major party. As in *Bush v. Gore*, partisan misconduct by state officials warrants no deference by federal courts, and this Court should enjoin the politicized proceeding below. This Court can do so by fully quashing the subpoena on Senator Lindsey Graham, and *sua sponte* ordering Fulton County to cease and desist. Then this Court can retain jurisdiction to monitor future overzealous activity by Fulton County that threatens to disrupt future elections nationwide.

The Fulton County proceeding should also be enjoined for an independent reason: it is an assault on First Amendment rights to criticize election fraud. The Fulton County prosecutors are chilling free speech rights of Sen. Graham and many other Republicans, by forcing them to appear before a grand jury based on their participation in the political process about political issues. Newspaper reports describe how virtually any Republican seen with Donald Trump or Rudy Giuliani in the context of objecting to election fraud is being burdened with having to

appear in Georgia before a Democrat prosecutor asking hostile questions in front of a grand jury. Nothing in the precedent of *United States v. Brewster*, 408 U.S. 501 (1972), relied on heavily by the two district court decisions below, supports hauling a U.S. Senator before a county grand jury in this matter. The chilling effect of this unusual proceeding is undeniable, and provides a further basis for enjoining the Fulton County proceeding.

I. The Timing by Fulton County Is Improper and Contrary to Public Policy as Recognized by U.S. Department of Justice Policy, and Thus Should Be Enjoined.

The upcoming closely contested midterm elections will occur in less than 60 days, and even sooner for those who vote early. The U.S. Senate is equally divided at 50-50, and the U.S. House is nearly so. Political control of both chambers is at stake. Most state governorships (36 plus 3 territories) and political control of state legislatures are likewise strongly contested. Referenda on nearly everything from abortion to legalizing marijuana are on the ballot. Many recognize that this imminent upcoming midterm election is one of the most important in our lifetimes.

Yet the underlying events at issue in the Fulton County subpoena occurred in November 2020, more than 22 months ago. The Democrat-controlled Fulton County[3] did almost nothing for two years, until the eve of this historic election, and

[3] The lopsided political views in Fulton County were officially reported as 73% for Joe Biden and only 26% for Donald Trump in the presidential election in 2020.

suddenly generated an avalanche of negative headlines about the opposing political party. Whether coincidental or deliberate, the effect is unacceptable: this conduct by Fulton County is distorting the upcoming election nationwide.

Policy at the U.S. Department of Justice prohibits the very kind of prosecutorial interference with the election process in which Fulton County presently engages. Voters should be picking candidates, rather than prosecutors tilting the outcome based on unproven, but headline-generating, accusations.

As confirmed by the former Justice Department Deputy Attorney General Sally Yates, "To me if it were 90 days off, and you think it has a significant chance of impacting an election, unless there's a reason you need to take that action now ***you don't do it***." *A Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election* 18.[4]

Recently the home of Donald Trump was raided at Mar-a-Lago, 91 days before the midterm elections, and it was widely reported that the timing was due to this public policy against generating such headlines any closer to voting. As explained by a former federal and state prosecutor, Elie Honig, who:

> told CNN the decision to execute the raid on August 8 is likely because midterm elections were coming up in exactly three months — on November

https://results.enr.clarityelections.com/GA/Fulton/105430/web.264614/#/summary (viewed Aug. 23, 2022).

[4] https://www.justice.gov/file/1071991/download (emphasis added, viewed Aug. 23, 2022).

> 8. "Today is just about 90 days out exactly from the midterms, I think maybe 91 or 92 days out," Konig told CNN. "That policy, that may be a reason why they did it today because they want to stay clear of that if they're interpreting that as a 90 day rule."

Kenneth Niemeyer and C. Ryan Barber, "The 90-day policy the FBI was probably following when it raided Trump's Mar-a-Lago home," *Business Insider* (Aug 9, 2022).[5]

Many additional knowledgeable former DOJ officials, too many to list and quote here, have made similar statements confirming this longstanding policy by the DOJ of not acting in proximity to an election. For example, former Attorney General Loretta Lynch stated, "in general, ***the practice has been not to take actions that might have an impact on an election***, even if it's not an election case or something like that." *A Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election* 18 (emphasis added). Former Principal Associate Deputy Attorney General Matt Axelrod described the policy this way:

> DOJ has policies and procedures on ... how you're supposed to handle this. And remember ... those policies and procedures apply to ... every election at whatever level .... They apply, you know, months before .... [P]eople sometimes have a misimpression there's a magic 60-day rule or 90-day rule. There isn't. But ... the closer you get to the election the more fraught it is."

Id.

[5] https://www.insider.com/the-fbis-timing-for-the-mar-a-lago-trump-raid-is-likely-based-on-this-90-day-policy-2022-8 (viewed Aug. 22, 2022).

Didn't Fulton County get the memo about this important public policy against using prosecutions to cause headlines near elections? Of course it did, yet it improperly insisted on doing what the U.S. Department of Justice and anyone respectful of our election process would refrain from doing. This Court should not allow such a flagrant violation of public policy by Fulton County now, or allow it to continue to manipulate its authority after the midterm elections.

Everyone familiar with politics knows the value of timing. For those old enough to remember, there was a carefully timed release to the public, merely the Thursday before the 2000 presidential election, of information about a drunk driving arrest of candidate George W. Bush in his distant past. Political enemies of candidate Bush apparently manipulated this timing for maximum political impact, in the era before early voting.[6] That election was then closer than predicted, after polls indicated a victory for Bush by a wider margin than the outcome reported and contested for weeks. Some attribute the carefully timed incitement of last-minute disparaging headlines against candidate Bush as a reason why the election was closer than the polling.

[6] James P. Pinkerton, "Gore, Bush Offer Little to Stir Hears, Fear," *Newsday (New York)* (Nov. 7, 2000) ("If Al Gore wins, Republicans will never forget that George W. Bush was three to five points ahead in the polls on the Thursday before the election, when the Texan's long-ago drunk-driving arrest was disclosed" and Bush's lead then evaporated).

Similarly, the nearly two years of silence and then sudden headline-generating work by the Fulton County Democrats in this case cannot credibly be described as a mere coincidence. For more than 20 months the officials in Fulton County generated few headlines, and then on the brink of the midterm election there has been a flurry of activity to generate very disparaging headlines against top Republican leaders.

Our constitutional system has a check-and-balance on every potential abuse of power. This federal court is the primary check-and-balance against a county proceeding that contravenes public policy and the democratic process for elections to federal offices. This Court should exercise its authority to rein in Fulton County both to quash its subpoena of Lindsey Graham and end its irresponsible interference with any future election.

II. Fulton County Is Chilling First Amendment Rights, and Abstention Is Not Appropriate Here.

There is a First Amendment right to criticize election results, investigate election results, assert that there was election fraud, claim that an election was stolen, and use the political processes to attempt to correct a perceived election wrong. Sharply criticizing and questioning reported election results has been a recognized right dating back as least as far as the 1800s, such as the hotly disputed reported results of the Hayes-Tilden presidential election in 1876.

It chills this First Amendment right to threaten prosecution or haul someone

before a distant grand jury for hostile questioning based on disputing a reported election result. Abstention does not apply where, as here, First Amendment rights are burdened or chilled by an ongoing state court proceeding. Indeed, the Ninth Circuit has found there is only one decision in that circuit where *Pullman* abstention was appropriate concerning a First Amendment issue, and that case concerned a matter already pending before the California Supreme Court. *See Porter v. Jones*, 319 F.3d 483, 492-94 (9th Cir. 2003) ("Our special concern with abstention in the First Amendment context arises in part from the fact that in many cases, ***the delay that comes from abstention may itself chill the First Amendment rights at issue***.") (emphasis added). Allowing the Fulton County proceeding to continue would profoundly chill First Amendment rights of Trump supporters, critics of election fraud, and many others who exercise their rights to participate in the political processes. Moreover, "*Pullman* abstention is … the exception rather than the rule." *Rindley v. Gallagher*, 929 F.2d 1552, 1555 (11th Cir. 1991) (cleaned up, citations omitted).

Abstention by this Court to the state proceeding is also inapplicable under *Younger v. Harris*, 401 U.S. 37 (1971). Even if *Younger* would otherwise apply, this case plainly implicates "a uniquely important national interest" in holding national elections without interference, thereby triggering the type of extraordinary circumstance warranting federal intervention even if a state judicial proceeding

were ongoing. *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring).

The recent hearing to compel the testimony in Fulton County by Colorado resident Jenna Ellis is illustrative of how unhinged the Fulton County proceeding is, and how it impermissibly infringes on First Amendment rights to the extent that Fulton County should be enjoined. The proceeding to compel Ms. Ellis's testimony was reported on in detail by an observer who was unsympathetic to Ellis. *See* Anna Bower, "She's Sitting There With Rudy Giuliani": Fulton County Comes to Colorado (Aug. 22, 2022).[7] Jenna Ellis was ordered to testify before the Fulton County grand jury based on:

- her appearances at state legislative hearings;
- documents she authored as a legal adviser;
- her social media posts alleging election fraud; and
- her promotion of election fraud claims in media appearances and public interviews.

Id. When Ellis's counsel questioned a Fulton County official on cross-examination, the "core member of the Fulton election probe team" responded, "She's sitting there with Rudy Giuliani, so I would say that connects her." *Id.* (referencing a legislative hearing in Georgia on Dec. 30, 2020).

These are all fundamental First Amendment activities by Ms. Ellis, and yet

[7] https://www.lawfareblog.com/shes-sitting-there-rudy-giuliani-fulton-county-comes-colorado (viewed Aug. 23, 2022).

Fulton County insisted on burdening her, and thereby chilling these First Amendment rights for all. This Court is the authority that should stop this First Amendment infringement.

The message being broadcast by the Fulton County proceeding causes a clear violation of the First Amendment: those who publicly question a reported election result in favor of a Democrat candidate for president can expect to be hauled before a grand jury in a Democrat-dominated county to answer hostile questions by a Democrat prosecutor. There has never been any real crime here to investigate. This is about chilling the free speech of those who dispute a reported election result, which of course every American has a full right to do without being burdened with having to testify in a Democrat-controlled county about it.

Top legal advisers to Democrats publicly urge use of the Fulton County proceeding in order to indict Donald Trump for statements plainly protected by the First Amendment as a matter of law. "I expect an indictment from Fani Willis in Fulton County, Georgia," an adviser to Democrats, Professor Laurence Tribe, was quoted in July as saying. Jason Lemon, "Trump Indictment in Georgia Expected Before DOJ Charges: Legal Expert," *Newsweek* (July 21, 2022).[8] There should not be any abstention by this federal court in favor of misuse of a county grand jury

[8] https://www.newsweek.com/donald-trump-georgia-indictment-prediction-laurence-tribe-1726833 (viewed Aug. 23, 2022).

proceeding. Instead, this Court should enjoin the Fulton County from continuing to pursue its politically tainted investigation.

III. As in *Bush v. Gore*, No Deference Is Due to an Improper Attempt by a Political Faction to Misuse a State Procedure for National Effect.

There is a distinctly federal interest in the 2022 and 2024 elections, which warrants federal court intervention in the Fulton County proceedings impacting the top of the ticket of one of the two major political parties. *See, e.g.*, *Bush v. Gore*, 531 U.S. 98, 112 (2004) (Rehnquist, C.J., concurring) (enjoining a recount ordered by state court, and intervening against the state court proceeding).

James Madison recognized that at times federal power is necessary to check-and-balance a political faction that has tightened its grip at a state level. James Madison's famous *Federalist No. 10* emphasized this occasionally beneficial effect of federal power as a reason for ratifying the Constitution. "Madison thought it a principal task of the new Constitution to hold the 'mischiefs of faction' in check." *Ripon Soc'y v. Nat'l Republican Party*, 525 F.2d 567, 581 (D.C. Cir. 1975) (en banc) (citing J. Madison, *The Federalist No. 10*, reprinted in *The Federalist*, 56, 58 (Cooke ed. 1961)).

Fulton County is an example of the "mischiefs of faction" that our federal government, acting through this Court, should hold "in check." The retaliation against Trump supporters which is emanating from the Fulton County proceeding

has now reached the U.S. Senate, and thereby come to this Court. Before it spreads further and becomes more difficult to rein in, this Court should act swiftly and decisively as the Supreme Court did in *Bush v. Gore*, by eliminating the factional mischief. There the Supreme Court held:

> None are more conscious of the vital limits on judicial authority than are the members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.

Bush v. Gore, 531 U.S. 98, 111 (2000). This Court should decline to defer to Fulton County just as the Supreme Court declined to defer to the Florida Supreme Court in *Bush v. Gore.*

In its first decision below, the district court expressly held in its opening paragraph on the first page of its Order that:

> the Court finds that the District Attorney has shown extraordinary circumstances and a special need for Senator Graham's testimony on issues relating to alleged attempts to influence or disrupt the lawful administration of Georgia's 2022 elections.

In re Jury, No. 1:22-cv-03027-LMM, 2022 U.S. Dist. LEXIS 146741, at *2 (N.D. Ga. Aug. 15, 2022). We are indeed nearing the 2022 elections, and if this investigation were about that then it might have a plausible basis. But instead this investigation is about the ***2020*** elections, whose reported outcomes did not change

and about which no plausible basis for an investigation into post-election criticisms of nearly two years ago exists now, on the eve of the 2022 elections.

IV. The Amicus Brief Below and Here by Trump's Political Rival William Weld and other Former Prosecutors Reinforces the Need to Enjoin Fulton County.

An amicus brief below and here was submitted by Trump rival William Weld and other former prosecutors, which merely serves to illustrate the need to enjoin Fulton County. (Dist. Ct. Dkt. 21) Their amicus brief here (their leave to file has not yet been granted) repeatedly mentions Trump, as though obsessed with trying to implicate Trump in this. (Weld Amicus Br. 5, 6, 7) As recently as last year, Weld joined with 150 other opponents of Trump and threatened to split off from the Republican Party in protest of Trump's opposition to Rep. Liz Cheney (R-WY), who subsequently lost, buried in a landslide in her own primary by her opponent this year. Benjamin Kail, "Former Massachusetts Gov. Bill Weld joins 150 conservatives threatening to leave Republican Party or start new political party," *The Republican: Web Edition Articles* (Springfield, Massachusetts, May 13, 2021). In 2020, after unsuccessfully challenging Trump for the Republican Party nomination for president, Weld joined 19 others in endorsing Joe Biden and asserting that Trump is somehow "a threat to the rule of law." John L. Dorman, "Reagan's FBI director and 19 other former GOP-appointed US attorneys endorse Biden, saying Trump is 'a threat to the rule of law,'" *The Business Insider* (Oct. 27,

2020).

Politicized prosecutions are not the "rule of law," but the opposite; such prosecutions are an egregious interference with the democratic process. The American people overwhelmingly disagree with Weld and the other former prosecutors, as reflected by election outcomes. The notion advanced by these former prosecutors as they urge an unlimited inquisition by a Fulton County grand jury boils down to this: some prosecutors think they should be able to veto a candidate for president supported by the American people. Former prosecutors do not properly run our country, and county prosecutors do not properly have that authority either. The president elected by the people without improper interference by unhinged investigations is who the Constitution says should be the Commander-in-Chief. This Court should rein in Fulton County before any further smears occur.

V. *United States v. Brewster* Requires Quashing the Subpoena, as Does the Reasoning by a Texas Court in Rejecting a Similar Subpoena.

Both of the district court decisions below held in favor of enforcing the subpoena by relying repeatedly on dicta in *United States v. Brewster*, 408 U.S. 501 (1972). But a fair reading of the entirety of that ruling requires the opposite conclusion. The 6-3 majority decision in *Brewster* held the following:

> Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act. It is not, by any conceivable interpretation, an act performed as a part of or even incidental to the role of a legislator.

Brewster, 408 U.S. at 526. Congress itself enacted a statute to police itself against bribery, 18 U.S.C. § 201, which applied to "public officials" defined expressly to include Members of Congress. 408 U.S. at 505-06.

The *Brewster* Court discussed at length the purpose of the Speech or Debate Clause, which was "to protect the integrity of the legislative process by insuring the independence of individual legislators." *Id.* at 507. "'Since the Glorious Revolution in Britain, and throughout United States history, the privilege has been recognized as an important protection of the independence and integrity of the legislature.'" *Id.* at 508 (quoting *United States v. Johnson*, 383 U.S. 169, 178 (1966) (footnote omitted)). The *Brewster* court concluded:

> Our speech or debate privilege was designed to preserve legislative independence, not supremacy. ***Our task, therefore, is to apply the Clause in such a way as to insure the independence of the legislature without altering the historic balance of the three co-equal branches of Government***.

Brewster, 408 U.S. at 508 (emphasis added).

That "task" is straightforward here. The independence of Congress would be shattered if any local county in our Nation could convene a grand jury and demand that Senators testify before it about matters related to their official duties. The Constitution requires supremacy by Congress over county government, *see* U.S. CONST. Art. VI, cl. 2, so the concern about supremacy expressed in *Brewster* is reversed here, but that regarding independence remains. Safeguarding the

independence and supremacy of Congress over a partisan county proceeding requires ruling in favor of Sen. Graham here.

Other precedents, and some dicta in *Brewster* itself, speak generally about limits on the privilege enjoyed by members of Congress under the Speech or Debate Clause, but none of those limits can be permitted to undermine the independence and supremacy of Congress. The Fulton County subpoena on Sen. Graham strikes at the heart of the independence and the supremacy of the U.S. Senate over a county proceeding. There is no way to salvage any part of the subpoena without opening the floodgates to future partisan county proceedings trying similar tactics against members of Congress in politically sensitive ways. Allowing any part of this subpoena to go forward, such that Sen. Graham is questioned by county investigators under the supervision of the opposing political party, would chill the activities of future U.S. Senators contrary to their core independence as safeguarded by the Constitution.

In its second, most recent decision below, the district court tries to split something that is indivisible – Sen. Graham's work-related efforts – and declares some but not all of it is subject to questioning under the subpoena. (Dist. Ct. Dkt. 44, pp. 1-2) But the district court misses the point of *Brewster* and all Speech or Debate Clause precedents: the independence and supremacy of Congress must be fully protected against interference. If a Senator libels someone in newsletters and

a press release outside of Congress, as Senator William Proxmire allegedly did, then it is easy to see that it would not implicate the independence of Congress to allow such a libel lawsuit to go forward. (*Id.* at 17-18, citing *Hutchinson v. Proxmire*, 443 U.S. 111, 127–30 (1979)) A civil plaintiff does not usurp the independence of Congress. But a grand jury subpoena by a rival part of government – indeed, a subservient one in light of the Supremacy Clause – is like a state court being allowed to require the U.S. Supreme Court to answer to the state court about how the Supreme Court is conducting its proceedings. Allowing that would change the relationship, and in this case erode the independence of Congress contrary to the Speech or Debate Clause. If permitted for Fulton County against Sen. Graham here, then it would have to be permitted for every county against every Senator, thereby undermining the U.S. Senate.

The Fulton County proceeding is so irregular and unjustified that the Texas Court of Criminal Appeals quashed a subpoena on a Texas resident, podcaster Jacki Pick Deason. Although the court majority there rejected the subpoena on mootness grounds because the time to compel had passed, multiple judges in that case observed at length how unworthy of comity the Fulton County subpoena was:

> The "special grand jury" in Georgia that seeks to compel Relator's attendance and submission to that state's compulsory process laws lacks the authority to indict. This suggests to me that it is not an actual "grand jury" in contemplation of the Uniform Act [to Secure the Attendance of Witnesses from without State in Criminal Proceedings].

In re Pick, No. WR-94,066-01, 2022 Tex. Crim. App. LEXIS 581, at *19 (Crim. App. Sep. 1, 2022) (Yeary, J., dissenting from the finding of mootness, joined by Keller, P.J., and Walker and Slaughter, JJ.).

Is Lindsey Graham, as a prominent U.S. Senator from South Carolina, to be afforded less protection in federal court than Texas state courts give to their own resident podcaster? Certainly not. The subpoena on Sen. Graham should be quashed in its entirety, and Fulton County should be enjoined from taking any further actions at this time.

CONCLUSION

For the foregoing reasons, the subpoena on Senator Graham should be fully quashed and the Fulton County proceeding should be enjoined.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on September 21, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Eleventh Circuit by using the Appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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CERTIFICATE OF COMPLIANCE

1. This brief has been prepared using 14-point, proportionately spaced, serif typeface, in Microsoft Word.

2. This brief complies with FED. R. APP. P. 27(d)(2)(A), 29(a)(5), and 32(a) because it contains a total of 5,601 words, excluding material not counted under Rule 32(f).

Dated: September 21, 2022

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