No. 14-1082

In the Supreme Court of the United States

RICHARD G. RENZI, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF STANLEY M. BRAND, MORTON ROSENBERG, THOMAS J. SPULAK, AND CHARLES TIEFER AS AMICI CURIAE IN SUPPORT OF PETITIONER

BRENT J. MCINTOSH
JEFFREY B. WALL
Counsel of Record
SULLIVAN & CROMWELL LLP
1700 New York Avenue, N.W.
Suite 700
Washington, DC 20006
(202) 956-7500
wallj@sullcrom.com

W. RUDOLPH KLEYSTEUBER
ALEXANDER B. LEMANN
LEONID TRAPS
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004
(212) 558-4000

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued:

Other authorities:

Other authorities—Continued:

INTEREST OF AMICI CURIAE

Amici are a bipartisan group of scholars and former counsel to the United States House of Representatives who have focused during their careers in the legislative branch on the scope of the Speech or Debate Clause.[1] As former lawyers for the House of Representatives, they have participated as counsel or amici in numerous criminal cases before this Court or the lower courts that implicate the Speech or Debate Clause. Amici are concerned that the decision below interprets the Speech or Debate Clause in a way that will unduly impair legislative deliberation and independence, and they have a substantial interest in this Court's resolution of that question.

SUMMARY OF ARGUMENT

I. The Court's guidance to legislators and lower courts on the scope of the Speech or Debate Clause is urgently needed. In the 35 years since this Court addressed that Clause, several federal courts of appeals have construed it broadly to protect conduct that occurs in developing, evaluating, and drafting legislation—or what lower courts have referred to as the "fact-finding" phase of legislation. In the decision below, the Ninth Circuit departed sharply from its sister circuits, holding that prelegislative investigations and

[1] Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel contributed any money to fund its preparation or submission. Amici provided timely notice of their intent to file this brief, and the parties have consented to this filing.

fact-finding by individual Members of Congress are not protected. The Ninth Circuit's approach reintroduces an inquiry into the motivation for legislative action that this Court has consistently rejected, and it allows Members to be stripped of the Clause's protections based on a mere allegation of wrongdoing by the Executive. The Court's review is necessary to safeguard the separation of powers and to ensure that Members are subject to a uniform level of protection for fact-finding in advance of legislation.

II. The Ninth Circuit's approach unnecessarily undermines the work of Congress. In the modern era, Congress's work is increasingly decentralized, informal, and driven by individual Members. The decision below thus threatens to chill a vital part of today's legislative process, and to do so precisely when the Framers would have considered the Clause's protections most important, *i.e.*, in times of heightened tensions between the coordinate branches. Moreover, incurring those harms is entirely unnecessary. Internal congressional discipline is increasingly robust; the government has successfully prosecuted dozens of Members without impinging on the Clause's legislative privilege; and, of course, elections and public scrutiny monitor and penalize misconduct by Members. The decision below sacrifices the Clause's enduring protections in a short-sighted effort to punish a Member's apparent breach of the public trust.

ARGUMENT

Petitioner Richard G. Renzi has been found guilty of agreeing to support federal land-exchange legislation only if it included a parcel of land owned by one of petitioner's friends and business associates. See Pet. App. 8a-15a. Based on that verdict, there should

be no question that petitioner's behavior is not in the finest traditions of our democracy, but there should likewise be no question that it is protected from prosecution by the Speech or Debate Clause. Other federal courts of appeals have held as much, and the decision below needlessly departs from those of its sister circuits. The answer for petitioner's conduct lies in internal congressional discipline, in criminal prosecution that does not rely on evidence of a Member's legislative acts, or of course with the voters at the ballot box. This Court's guidance is needed to provide clarity to legislators and lower courts, and to ensure that the rush to condemn unscrupulous conduct does not undermine the important protections of the Speech or Debate Clause.

I. THIS COURT'S GUIDANCE TO LEGISLATORS AND LOWER COURTS ON THE SCOPE OF THE SPEECH OR DEBATE CLAUSE IS URGENTLY NEEDED.

As the petition explains (at 13-23), the courts of appeals are divided over the application of the Speech or Debate Clause to preparatory fact-finding and investigation by a Member of Congress prior to the introduction of formal legislation. The Ninth Circuit's approach deepens that divide and reflects a misunderstanding of the purposes of the Speech or Debate Clause.

A. Other Federal Courts of Appeals Have Construed The Clause To Cover Preparatory Fact-Finding By Individual Members.

In a long line of decisions, this Court has held that the Speech or Debate Clause prevents the criminal prosecution of a Member of Congress for various acts

undertaken in his or her official capacity. Members may not face prosecution for "conspiring to give a particular speech in return for remuneration," see *United States* v. *Johnson*, 383 U.S. 169, 180, 184-185 (1966); they may not "be made to answer" questions regarding legislative activities, *Gravel* v. *United States*, 408 U.S. 606, 616 (1972); they may not face "inquiry into * * * the motivation" for "acts that occur in the regular course of the legislative process," *United States* v. *Gillock*, 445 U.S. 360, 366-367 (1980) (quoting *United States* v. *Brewster*, 408 U.S. 501, 525 (1972)); and they may waive those protections, if at all, only by "explicit and unequivocal renunciation of the privilege," *United States* v. *Helstoski*, 442 U.S. 477, 491 (1979).

Nor do the Clause's protections extend only to the criminal sphere, because "whether a criminal action is instituted by the Executive Branch, or a civil action is brought by private parties, judicial power is still brought to bear on Members of Congress and legislative independence is imperiled." *Eastland* v. *U.S. Servicemen's Fund*, 421 U.S. 491, 503 (1975). The Court has therefore held that "once it is determined that Members are acting within the 'legitimate legislative sphere'"—even if, as in *Eastland*, the legislative action is alleged to be unconstitutional—"the Speech or Debate Clause is an absolute bar to interference." *Ibid.* (quoting *Doe* v. *McMillan*, 412 U.S. 306, 314 (1973)). This is so "even though the[] conduct [in question], if performed in other than legislative contexts, would * * * be unconstitutional or otherwise contrary to criminal or civil statutes." *Id.* at 312-313.

In *United States* v. *Brewster*, however, this Court held for the first time that the Speech or Debate Clause did not apply to bar a criminal prosecution.

Although the Court did not address which specific actions or evidence could form the basis of a conviction for corruption, the Court held that the Clause does not preclude the prosecution of a Member of Congress for accepting a bribe, because it protects only "legislative act[s]" and "[t]aking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act." 408 U.S. at 526. Although the Court thus agreed that the Clause prevents any "inquiry into * * * the motivation for a legislative act," it reasoned that a bribe is not by its nature a legislative act—*i.e.*, "an 'act resulting from the nature and in the execution, of the office.'" *Ibid.* (quoting *Coffin* v. *Coffin*, 4 Mass. 1, 27 (1808)).

In the wake of *Brewster*, lower courts have struggled to define the limits of its holding. That difficulty has been particularly acute in criminal prosecutions alleging corruption on the part of Members. Those cases typically implicate at least some conduct that occurs in developing, evaluating, and drafting legislation—or what lower courts have referred to as the "fact-finding" phase of legislation. As the petition explains (at 13-17), the majority of the federal courts of appeals to address the question—the Second, Third, and D.C. Circuits—have held that such fact-finding by individual Members falls within the protection of the Clause. See *United States* v. *Biaggi*, 853 F.2d 89, 102-103 (2d Cir. 1988); *Government of the Virgin Islands* v. *Lee*, 775 F.2d 514, 521 (3d Cir. 1985); *In re Grand Jury Subpoenas*, 571 F.3d 1200, 1202-1203 (D.C. Cir. 2009). On that approach, petitioner never would have faced trial here, let alone been convicted on the basis of the evidence that the government offered. See Pet. 17.

Moreover, fact-finding by individual Members often occurs (as it did in this case) before any proposed legislation on the given subject has been introduced. Indeed, the purpose of such fact-finding may be to determine *whether* any bill should be introduced at all. The Third, Fourth, and Eleventh Circuits accordingly have held that the timing of legislation is irrelevant; a Member's fact-finding is no less protected when it is in preparation for, rather than being the product of, the introduction of legislation. See *Baraka* v. *McGreevey*, 481 F.3d 187, 197 (3d Cir. 2007) (actions of governor in proposing legislation were properly characterized as legislative); *United States* v. *Dowdy*, 479 F.2d 213, 223-224 (4th Cir. 1973) (member's investigation of complaint to determine whether formal hearings should be held constituted "protected legislative act[]"); *Yeldell* v. *Cooper Green Hospital, Inc.*, 956 F.2d 1056, 1063 (11th Cir. 1992) (decision whether or not to introduce legislation is a legislative act).

In sum, most federal courts of appeals to address the Speech or Debate Clause have afforded it a broad scope that covers Members' fact-finding prior to the introduction of legislation. Those courts have largely confined *Brewster* to the particular act of accepting a bribe. See, *e.g.*, *Yeldell*, 956 F.2d at 1062 ("[T]he acceptance of bribes in return for votes on pending legislative business" is "generally not protected by the doctrine of legislative immunity."). Of course, nothing prevents the government from prosecuting other types of conduct in which Members might engage, but it must do so without "inquiring into legislative acts," *Dowdy*, 479 F.2d at 224, or "inquir[ing] into the motives for those particular acts," *Lee*, 775 F.2d at 525.

B. The Ninth Circuit's Approach Construes The Clause To Exclude Preparatory Fact-Finding By Individual Members.

The decision below stretches *Brewster's* narrow holding for accepting a bribe to cover all manner of legislative acts. Petitioner has been prosecuted for conduct that occurred during the legislative process: discussing possible legislative bargains with constituents, planning for that legislation with staff, and ultimately introducing the legislation. The decision below thus departs from existing Speech or Debate Clause jurisprudence in new and troubling ways.

1. In refusing to dismiss the indictment, the Ninth Circuit reasoned that the Speech or Debate Clause does not protect "prelegislative investigations and fact-finding by individual Members." Pet. App. 79a n.12. In the Ninth Circuit's view, only "when Congress, acting as a body, employs its constitutional power to investigate" is its fact-finding subject to the Clause's protections. *Id.* at 78a n.10. The Tenth Circuit likewise has agreed that an individual Member's fact-gathering is not a protected legislative act, see *Bastien* v. *Office of Campbell*, 390 F.3d 1301, 1315-1316 (10th Cir. 2004), although as explained above, the Second, Third, and D.C. Circuits disagree, see *supra*, p. 5.

The Ninth Circuit's approach is inconsistent with this Court's precedents in two respects. First, it makes the protections of the Speech or Debate Clause turn on whether a Member engages in a legislative act for some illicit purpose or motivation. As the Ninth Circuit put it, petitioner "[wa]s alleged to have * * * violated an otherwise valid criminal law in preparing for or implementing his legislative acts." Pet. App. 79a (alterations omitted). In other words, the Ninth

Circuit accepted that petitioner's actions would have been legislative but for their alleged criminality. *Id.* at 77a-79a. Yet the only way for the Ninth Circuit to determine criminality was to inquire into petitioner's motives (because extortion requires *knowing* receipt of an undeserved benefit, see *Evans* v. *United States*, 504 U.S. 255, 268 (1992)). And this Court has repeatedly emphasized that the Clause forecloses any inquiry into the motivations for legislative action. See, *e.g.*, *Eastland*, 421 U.S. at 508; *Brewster*, 408 U.S. at 525; *Johnson*, 383 U.S. at 180; *Tenney* v. *Brandhove,* 341 U.S. 367, 377 (1951).

Second, the Ninth Circuit's approach allows the protections of the Speech or Debate Clause to be stripped on the mere allegation that a Member has violated the criminal law. Pet. App. 78a. But "[i]f the mere allegation that a valid legislative act was undertaken for an unworthy purpose would lift the protection of the Clause, then the Clause simply would not provide the protection historically undergirding it." *Eastland*, 421 U.S. at 508-509. Indeed, it would place a quintessentially legislative privilege in the hands of the Executive—which is precisely what the Clause was meant to prevent. See *Johnson*, 383 U.S. at 182 ("[T]he instigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege in England and, in the context of the American system of separation of powers, is the predominate thrust of the Speech or Debate Clause.").

2. In affirming petitioner's conviction, the Ninth Circuit also reasoned that the Speech or Debate Clause does not protect "promises or actions associated with future legislation." Pet. App. 23a. The Ninth

Circuit therefore drew a firm line at the formal introduction of legislation: because the discussions between petitioner and his legislative director occurred "before [petitioner] made good on his promise to introduce a federal land exchange bill," those discussions are not protected by the Clause. *Id.* at 27a n.24. No other court of appeals has adopted that distinction, and as explained above, the Third, Fourth, and Eleventh Circuits have rejected it. See *supra*, p. 6; see also *Gravel*, 408 U.S. at 624 (describing Member's disclosures at a subcommittee hearing as "legislative activity," even though no bill had been introduced).

As this Court implicitly recognized in *Gravel* and other courts of appeals have explicitly held, the work of legislators does not necessarily begin or change in character with the introduction of a bill. There is no basis to distinguish between activity by a Member in researching, drafting, and gathering support for possible legislation, and activity in ushering legislation through Congress after it has been introduced. Indeed, "the decision whether or not to introduce legislation is one of the most purely legislative acts there is." *Yeldell*, 956 F.2d at 1063; see *Lee*, 775 F.2d at 521 ("[F]act-finding, information gathering, and investigative activities are essential prerequisites to the drafting of bills and the enlightened debate over proposed legislation."). At the very least, there is no reason why criminal prosecution should vary depending on whether a Member's home State falls within one federal circuit or another. This Court's review is needed to ensure that Members enjoy a uniform level of protection for fact-finding in advance of legislation.[2]

---

[2] The Ninth Circuit further held that petitioner's legislative director could testify about petitioner's motivations for the land ex-

II. THE NINTH CIRCUIT'S APPROACH UNNECESSARILY UNDERMINES THE WORK OF CONGRESS.

In the modern era, the work of Congress is increasingly decentralized, informal, and Member-driven. Because fact-finding investigations by individual Members play an ever-greater role in Congress, it is imperative that legislators and lower courts have clarity on the extent to which the Speech or Debate Clause protects their conduct. The decision below offers scant protection, and thereby threatens to chill a vital part of today's legislative process. Moreover, the Ninth Circuit's approach is wholly unnecessary. As the headlines commonly attest, other types of sanctions—internal congressional discipline, criminal prosecution that does not rely on evidence of a Member's legislative acts, and, of course, elections—monitor and punish unscrupulous conduct by Members of Congress.

A. The Work of Congress Is Increasingly Decentralized And Member-Driven.

Fact-finding by individual Members—in the form of both research and engagement with interested par-

---

change because petitioner had cross-examined other witnesses on the subject and thereby "opened the door" to the government's elicitation of testimony regarding his legislative acts. Pet. App. 27a. Of course, petitioner never should have faced criminal prosecution, rendering any question of waiver at trial irrelevant. In any event, the Ninth Circuit's waiver analysis is inconsistent with this Court's observation in *Helstoski* that if waiver of the Clause's protection is possible at all, it "can be found only after explicit and unequivocal renunciation of the protection." 442 U.S. at 491. This case is therefore an especially good vehicle for review because it also presents the opportunity to clarify the meaning of *Helstoski*.

ties—is increasingly commonplace and central to the work of Congress. Indeed, many of Congress's formal investigations begin as informal investigations by individual Members. To take one recent example, the probe into the "Fast and Furious" Operation was first initiated by Members acting without committee authorization, long before the introduction of any legislation. See Sari Horwitz, *Operation Fast and Furious: A Gunrunning Sting Gone Wrong*, Washington Post (July 26, 2011) (describing how letter from Senator Chuck Grassley led to agency's denial of program's existence and eventually to committee investigation). That led in time to an investigation by the Justice Department that found oversight errors in the Executive Branch. See Sari Horwitz, *Inspector General Critical of Justice Dept., ATF in "Fast and Furious" Operation*, Washington Post (Sept. 19, 2012).

As with the investigation into Operation Fast and Furious, Members' fact-gathering often occurs well in advance of the introduction of any proposed bill or even in instances in which no Member ultimately decides to introduce a bill. To take another recent example, the congressional investigation into the Central Intelligence Agency's detention and interrogation program was not tied to pending legislation. The contentious nature of that investigation—which involved allegations that the Agency had penetrated a computer network used by staff of the Senate Select Committee on Intelligence—highlights both the importance of fact-gathering in advance of legislation and the need for a strong bulwark against potential Executive interference. See *Johnson*, 383 U.S. at 179 ("The legislative privilege, protecting against possible prosecution by an unfriendly executive and conviction by a hostile judiciary, is one manifestation of the 'practical

security' for ensuring the independence of the legislature.") (quoting James Madison, Federalist No. 48).[3]

The decision below thus risks chilling the work of Congress. In amici's experience, Members' willingness to engage in independent fact-gathering is influenced by the scope of the Clause's protections, just as an attorney's willingness to discuss a legal matter with a client is influenced by the scope of the attorney-client privilege. "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *In re Grand Jury Subpoenas*, 571 F.3d at 1206 (Kavanaugh, J., concurring) (quoting *Upjohn Co.* v. *United States*, 449 U.S. 383, 393 (1981)). Under the Ninth Circuit's approach, Members of Congress—or at least those who represent the States of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington—can no longer be sure whether their preparatory fact-finding is protected from *ex post* questioning by the Executive, the Judiciary, or indeed even private plaintiffs in civil suits. Rather, those Members may find themselves stripped of the Speech or Debate Clause's protections precisely when they need them most: in the face of accusations of criminal conduct by the Executive. See *Johnson*, 383 U.S. at 182.

---

[3] Notably, it is considered a criminal offense to obstruct a congressional investigation regardless of whether that investigation has yet been formally authorized by the investigating committee itself. See *United States* v. *Mitchell*, 877 F.2d 294, 300-301 (4th Cir. 1989).

B. Other Sanctions Amply Deter Members From Abusing Their Offices.

Although there is no warrant for narrowing the scope of the Speech or Debate Clause as a matter of history or purpose, it is not even necessary as a matter of policy. Internal congressional discipline, criminal prosecution that does not rely on evidence of a Member's legislative acts, and elections monitor and punish misconduct by Members. Each House of Congress, for instance, has a committee that disciplines its Members. See, *e.g.*, *In re Grand Jury Subpoenas*, 571 F.3d at 1204 (Kavanaugh, J., concurring) (citing U.S. Const. art. I, § 5, cl. 2 ("Each House may . . . punish its Members for disorderly Behaviour") and discussing "expansive authority for each House to discipline and sanction its Members for improper behavior"); Jack Maskell, Congressional Research Serv., *Expulsion, Censure, Reprimand, and Fine: Legislative Discipline in the House of Representatives*, Pub. No. RL31382, at 11 (May 2, 2013) (self-discipline by the House of Representatives has extended to former Members); U.S. House of Representatives, Committee on Standards of Official Conduct, Historical Summary of Conduct Cases in the House of Representatives 1798-2004, http://ethics.house.gov/publication/historical-summary.

Moreover, the House of Representatives has created by resolution an independent office responsible for its self-disciplinary process: the Office of Congressional Ethics (OCE). See H.R. Res. 895, 110th Cong. (2008). That office reviews conduct and complaints and makes recommendations to the standing Ethics Committee. *Id.* at § 1(c). It is led by a board of non-Members, is fully staffed and funded, and may consider any conduct involving rules or standards that

govern Members and their staff. *Id.* at §§ 1(b)(B), (c), (h), and (*l*). In the experience of amici, who have represented several dozen Members or staff in OCE investigations, there has been a dramatic increase in scrutiny and discipline of Members, and a large number of cases result in referral and criminal prosecution—without raising concerns under the Speech or Debate Clause.[4]

In fact, there have been dozens of successful prosecutions of Members without any need to impinge on the Clause's legislative privilege. See, *e.g.*, Philip Bump, *A Brief History of Members of Congress Breaking the Law*, The Wire—The Atlantic (Nov. 19, 2013). In many cases, a conviction is obtained (and affirmed) even though the Clause operates to block the introduction of certain evidence. In *Johnson*, for example, this Court remanded for retrial without the use of evidence protected by the legislative privilege, see 383 U.S. at 186, and at that retrial, Representative Johnson again was convicted, see *United States* v. *Johnson*, 419 F.2d 56, 57 (4th Cir. 1969); see also *United States* v. *Jefferson*, 674 F.3d 332, 335 (4th Cir. 2012) (affirming all but one of Representative Jefferson's convictions obtained after D.C. Circuit held that search of Jefferson's office violated Speech or Debate Clause). Existing types of sanctions thus obviate any need to narrow the Clause's legislative privilege in order to penalize misconduct by Members.

---

[4] See U.S. House of Representatives, Office of Congressional Ethics, Fourth Quarter 2014 Report (Jan. 29, 2015), available at http://oce.house.gov/disclosures/OCE_Fourth_Quarter_2014_Report.pdf (reporting that fifty-one cases have been referred to the Committee on Ethics for further review since the OCE began conducting investigations in February 2009).

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted.

BRENT J. MCINTOSH
JEFFREY B. WALL
Counsel of Record
SULLIVAN & CROMWELL LLP
1700 New York Avenue, N.W.
Suite 700
Washington, DC 20006
(202) 956-7500
wallj@sullcrom.com

W. RUDOLPH KLEYSTEUBER
ALEXANDER B. LEMANN
LEONID TRAPS
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004
(212) 558-4000

APRIL 8, 2015

APPENDIX

LIST OF AMICI CURIAE

Stanley M. Brand served as General Counsel to the U.S. House of Representatives from 1976 to 1983, and was the House's chief legal officer responsible for representing the House and its members, officers, and employees in connection with legal procedures and litigation arising from the conduct of their official activities.

Morton Rosenberg served as a researcher and specialist in American public law at the Congressional Research Service for over 35 years.

Thomas J. Spulak served as General Counsel to the U.S. House of Representatives and as Staff Director and General Counsel of the House Committee on Rules for 13 years.

Charles Tiefer served as Solicitor and Deputy General Counsel of the U.S. House of Representatives for 11 years.