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 FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the indictment charging petitioner with extorting private investors to buy land owned by petitioner's long-time friend and business partner, in exchange for petitioner's promise to support future federal land-exchange legislation, was based on petitioner's legislative acts in violation of the Speech or Debate Clause, U.S. Const. Art. I, § 6, Cl. 1.

2. Whether the court of appeals erred in finding that certain testimony concerning petitioner's extortionate promises to support land-exchange legislation did not violate the Speech or Debate Clause because it constituted rebuttal evidence narrowly confined to testimony petitioner had elicited in his own defense and, alternatively, because it was not evidence of petitioner's legislative acts.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-54a) is reported at 769 F.3d 731. An earlier interlocutory opinion of the court of appeals (Pet. App. 55a-106a) is reported at 651 F.3d 1012. The order of the district court denying petitioner's post-trial motions (Pet. App. 107a-151a) is unreported. The order of the district court denying petitioner's motion to dismiss the indictment (Pet. App. 152a-173a) is reported at 686 F. Supp. 2d 956.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 2014. A petition for rehearing was denied on December 1, 2014 (Pet. App. 174a-175a). The petition for a writ of certiorari was filed on February 27, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A grand jury in the United States District Court for the District of Arizona returned an indictment charging petitioner, then a United States Congressman, with public-corruption offenses and other crimes. 08-cr-212 Docket entry No. (Dkt. No.) 466 (Sept. 22, 2009). He moved to dismiss the public-corruption charges, arguing that they were based on his legislative acts in violation of the Speech or Debate Clause, U.S. Const. Art. I, § 6, Cl. 1. Adopting the report and recommendation of a magistrate judge, the district court denied the motion to dismiss. Pet. App. 152a-173a. On petitioner's interlocutory appeal, the court of appeals affirmed, *id.* at 55a-106a, and this Court denied certiorari. 132 S. Ct. 1097 (2012) (No. 11-557).

Following a jury trial, petitioner was convicted of conspiracy to commit honest-services wire fraud and extortion, in violation of 18 U.S.C. 371; six counts of honest-services wire fraud, in violation of 18 U.S.C. 1343 and 1346; two counts of extortion under color of official right, in violation of 18 U.S.C. 1951; conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h); concealing illegal proceeds, in violation of 18 U.S.C. 1956(a)(1)(B)(i); two counts of transacting in criminally derived funds, in violation of 18 U.S.C. 1957; conspiracy to make false statements to insurance regulators, in violation of 18 U.S.C. 371; two counts of making false statements to insurance regulators, in violation of 18 U.S.C. 1033(a)(1); and racketeering, in violation of 18 U.S.C. 1962(c). Pet. App. 14a n.15; Dkt. No. 1318 (Oct. 28, 2013). Petitioner was sentenced to 36 months of imprisonment, to be followed by three years of supervised release. Dkt. No.

1318, at 1-2. The court of appeals again affirmed. Pet. App. 1a-54a.

1. From 2001 to 2003, petitioner and his long-time friend James Sandlin were business partners in a real-estate development company based in Arizona. Pet. App. 8a-9a. In November 2002, petitioner was elected to the United States House of Representatives, serving Arizona's First Congressional District. *Id.* at 4a, 7a. In February 2003, Sandlin, who had campaigned on petitioner's behalf, purchased petitioner's share of the development company. *Id.* at 8a n.8, 9a. Sandlin paid in part with an $800,000 promissory note, payable to petitioner personally in annual installments through September 2007. *Id.* at 9a; see Gov't C.A. Br. 9.

By January 2005, petitioner had been reelected and had obtained a seat on the House Natural Resources Committee, which is responsible for approving legislation authorizing the exchange of federal land for privately owned land. Pet. App. 10a & n.10; see *id.* at 58a n.4. That month, petitioner met with representatives of Resolution Copper Company (RCC) to discuss the possibility of RCC acquiring a government-owned campground in Arizona through a land exchange for the purpose of mining copper. *Id.* at 10a; see Gov't C.A. Br. 11-12. Bruno Hegner, an RCC executive, asked petitioner which private lands RCC should consider buying to exchange for the campground. Pet. App. 10a. Petitioner "'nonchalant[ly]'" mentioned a tract that Sandlin owned. *Ibid.* (brackets in original) (quoting Supp. C.A. E.R. 224). But he did not mention his relationship with Sandlin, or that Sandlin still owed him $700,000 plus interest on a personal note. *Ibid.*

In February 2005, petitioner and Hegner met again in petitioner's Washington, D.C. office. Pet. App. 10a; Gov't C.A. Br. 12. Petitioner was now more "'stern'" that RCC needed to buy Sandlin's land for inclusion in the proposed land exchange. Gov't C.A. Br. 12 (quoting Supp. C.A. E.R. 224); see Pet. App. 10a (observing that petitioner was "insistent about the importance of RCC acquiring the Sandlin property"). When asked whether he had a business relationship with Sandlin, petitioner "became visibly aggravated and insisted that, although he had sold a piece of property to Sandlin many years ago, 'there was no business relationship.'" Pet. App. 11a (quoting Supp. C.A. E.R. 198).

Although RCC "would not have been interested in the Sandlin property absent [petitioner's] suggestion," it began negotiating with Sandlin to purchase the property. Pet. App. 10a. During those negotiations, Sandlin exchanged frequent personal phone calls with petitioner. Gov't C.A. Br. 13-14. Because Hegner suspected "'communication'" and possibly a "'connection'" between petitioner and Sandlin, he had a consultant search records for any relationship between the two. *Id.* at 14 (quoting Supp. C.A. E.R. 206).

In March 2005, Hegner told petitioner that "Sandlin was insisting upon unreasonable terms." Pet. App. 11a. Later that day, Hegner received a fax from Sandlin stating that petitioner's office had contacted him and that he "'want[ed] to cooperate.'" *Ibid.* (quoting Supp. C.A. E.R. 205). In April 2005, Hegner again communicated with petitioner to report "continuing * * * trouble" with the negotiations. *Ibid.* Petitioner "responded with the key ultimatum: 'No Sandlin property, no bill.'" *Ibid.* (quoting Supp.

C.A. E.R. 209). Hegner was "shock[ed]" by petitioner's comment, which he understood to mean that petitioner would not support RCC's proposed land exchange unless RCC bought Sandlin's land and included it in the deal. *Ibid.* The same day Hegner received that ultimatum, he learned that petitioner and Sandlin "had been joint shareholders in an Arizona business." *Ibid.* Because "'that was different'" from what petitioner had said when asked whether he had a business relationship with Sandlin, Hegner decided "'there was no way'" RCC would buy Sandlin's land. Gov't C.A. Br. 14 (quoting C.A. E.R. 246); see Pet. App. 11a.

Also in April 2005, the Aries Group, an investment group led by real-estate developer Philip Aries, approached petitioner's District Director, Joanne Keene, about a separate land exchange. Pet. App. 12a. Keene arranged for Aries to meet with petitioner. Gov't C.A. Br. 14-15. During that meeting, "Aries proposed to trade petrified-forest parcels in [petitioner's] district for federal land near Florence, Arizona." Pet. App. 12a. Petitioner was not interested in those parcels, which "'surprised'" Aries because Congress had mandated their acquisition. Gov't C.A. Br. 15 (quoting Supp. C.A. E.R. 239). Instead, petitioner proposed that Aries buy Sandlin's land and include it in the exchange, emphasizing that government acquisition of the land would help alleviate water shortages at a nearby military base. Pet. App. 12a; see Gov't C.A. Br. 9-10. Petitioner told Aries that, once every congressional term, "he could prioritize a single land exchange to pass directly through the Natural Resources Committee." Pet. App. 12a. Petitioner "promised" Aries: "'If you include the Sandlin piece in your exchange, I will give you my free pass.'" *Ibid.*

(quoting Supp. C.A. E.R. 241). Petitioner and Sandlin exchanged several personal phone calls around the time of petitioner's meeting with Aries. Gov't C.A. Br. 15. But petitioner did not tell Aries about his relationship with Sandlin. Pet. App. 12a.

"'[G]oing way out on a limb at the request of [petitioner]'" and "'putting [his] complete faith in [petitioner] and [Keene] that this [wa]s the correct decision,'" Aries negotiated with Sandlin to purchase the property. Pet. App. 12a (third and fifth sets of brackets in original) (quoting Supp. C.A. E.R. 244). Sandlin insisted on "'unusual'" and "'onerous'" terms, including a "'huge' earnest money payment of $1 million," which Sandlin wanted released immediately rather than remaining in escrow in case the sale fell through. Gov't C.A. Br. 16 (some internal quotation marks omitted) (quoting Supp. C.A. E.R. 253-254). Despite those terms, and although the Aries Group otherwise "'had no interest'" in Sandlin's land, it bought the land for $4.5 million based on petitioner's promise. Pet. App. 12a (quoting Supp. C.A. E.R. 253); see Gov't C.A. Br. 17-18.

In May 2005, immediately after Aries wired Sandlin a $1 million deposit on the land, Sandlin paid $200,000 on his note to petitioner. Pet. App. 12a-13a. Although the note was payable to petitioner himself, Sandlin made the $200,000 check payable to a wine company owned by petitioner, who in turn deposited the check into the account of an insurance agency petitioner also owned. *Id.* at 13a. Petitioner did not report Sandlin's payment in the 2005 financial disclosure form that he filed with Congress. *Ibid.*

In September 2005, shortly before Aries was set to pay Sandlin another $1.5 million for the land, Sandlin

paid petitioner the remaining $533,000 that he owed on the note. Pet. App. 13a. Sandlin paid petitioner that amount through an intermediary, and the money was again deposited into the account of petitioner's insurance agency, with a notation stating that the funds were for an "insurance payment." *Ibid.* (citation omitted). As with the earlier payment, petitioner did not report the $533,000 payment from Sandlin on his 2005 financial disclosure form. *Ibid.*

In October 2006, a reporter left Aries a message asking him about his dealings with petitioner and Sandlin. Pet. App. 13a. Sandlin exchanged several phone calls with petitioner and then instructed Aries "to call the reporter back, deny that '[petitioner] was the one pushing this land,' and instead state that it was The Nature Conservancy that was 'pushing the land deal.'" *Id.* at 13a-14a (citation omitted); see Gov't C.A. Br. 20. Sandlin also "falsely assured" Aries that petitioner had not "'receive[d] * * * proceeds from the closing' with the Aries Group" and that "'[petitioner] was involved in that land in no way, shape, or fashion.'" Pet. App. 14a; see Gov't C.A. Br. 20 (citation omitted).

2. a. In September 2009, following an extensive investigation, a grand jury in the United States District Court for the District of Arizona returned a second superseding indictment against petitioner. Pet. App. 14a. The indictment charged petitioner with 48 criminal counts, including conspiracy to commit honest-services wire fraud and extortion; substantive wire fraud; extortion; conspiracy to launder money; money laundering; conspiracy to commit insurance fraud; insurance fraud and making false statements; and racketeering. Dkt. No. 466, at 6-23, 25-26, 32-38. As

relevant here, the indictment alleged that from January 2005 to October 2006, petitioner and Sandlin schemed to use petitioner's position in Congress as leverage to compel RCC and the Aries Group to buy Sandlin's land so that Sandlin could immediately repay his debt to petitioner, who "was having financial difficulty throughout 2005 and needed a substantial infusion of funds." *Id.* at 6-7.[1]

b. Petitioner moved to dismiss the indictment, claiming, *inter alia*, that the charges relating to the land-exchange scheme were based on his legislative acts in violation of the Speech or Debate Clause. Pet. App. 152a-153a. Specifically, he argued that his "negotiations" with RCC and Aries—during which he promised to support the Aries Group's proposed land exchange if it bought Sandlin's property, and threatened to withhold support for RCC's proposed land exchange if it did not buy the property—were protected legislative acts. See *id.* at 65a, 158a.

Adopting the report and recommendation of a magistrate judge, the district court denied the motion. Pet. App. 152a-164a, 172a. The court rejected petitioner's argument that every communication he had

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[1] The counts charging petitioner with conspiring to make, and making, false statements to insurance regulators were based on a scheme mostly separate from the one involving Sandlin's land. Dkt. No. 466, at 19-23, 25-26. Specifically, those counts alleged that petitioner diverted money from his insurance agency to fund his first congressional campaign and that he then concealed the diversion of funds by sending false letters to insurance regulators. *Ibid.*; see Pet. App. 3a-8a. Petitioner was convicted on the insurance fraud counts and unsuccessfully challenged those convictions on appeal. Pet. App. 14a n.15, 36a-43a. Petitioner does not renew any challenge to his insurance fraud convictions in this Court. See Pet. 11 n.3.

about the land-exchange proposals was protected by the Speech or Debate Clause. *Id.* at 157a. Petitioner's discussions with RCC and Aries were not themselves legislative acts, the court reasoned, but instead involved unprotected "promises to perform future legislative acts." *Id.* at 159a. The court also rejected petitioner's contention that his communications with RCC and Aries constituted privileged "investigation and fact-finding." *Id.* at 158a. "[N]o[] matter how the communications are characterized," the court explained, the relevant question was whether they could "be said to be an integral part of the deliberative and communicative process by which Members participate in committee and House proceedings addressing the land exchange legislation at issue here." *Ibid.* (emphasis omitted). The court found that petitioner's communications did not meet that test, in light of this Court's precedent holding that the privilege does not apply "to conduct that violates an otherwise valid criminal law in preparing for or implementing protected legislative acts." *Id.* at 160a (citing *United States* v. *Brewster*, 408 U.S. 501, 526-527 (1972)).

c. Petitioner filed an interlocutory appeal and the court of appeals accepted jurisdiction under the collateral order doctrine. Pet. App. 62a-64a. As relevant here, the court affirmed the district court's denial of petitioner's motion to dismiss, concluding that his "negotiations" with RCC and Aries were not legislative acts protected by the Speech or Debate Clause. *Id.* at 56a-62a, 64a-80a.

At the outset, the court of appeals recognized that this Court has extended the Speech or Debate Clause's protections to acts beyond just "literal speech or debate" to include "things generally done *in*

a session of the House by one of its members in relation to the business before it." Pet. App. 67a-68a (quoting *Kilbourn* v. *Thompson*, 103 U.S. 168, 204 (1881); citing *Gravel* v. *United States*, 408 U.S. 606, 624 (1972)). But, the court noted, the reach of that protection is limited to acts that are "clearly a part of the legislative process—the *due* functioning of the process." *Id.* at 69a (quoting *Brewster*, 408 U.S. at 515). The court further noted that this Court had recognized a "marked distinction" between privileged legislative acts and "mere promises to perform future legislative acts." *Id.* at 70a (citing *United States* v. *Helstoski*, 442 U.S. 477, 489-490 (1979)) (internal quotation marks omitted). And when the "specific nature" of a communication involving a promise to perform a legislative act is alleged to be criminal—for example, the "solicitation and acceptance of a bribe"—the court observed that this Court had deemed the conduct "uniquely un-legislative" because "[t]aking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act." *Id.* at 73a (quoting *Brewster*, 408 U.S. at 526).

Applying those principles to petitioner's "negotiations" with RCC and Aries, the court of appeals concluded that those actions were not legislative acts entitled to protection under the Speech or Debate Clause. Pet. App. 70a-80a. The court explained that *Brewster* had already rejected petitioner's contention that all of "a Member's pre-legislative act negotiations with private parties are themselves 'legislative acts.'" *Id.* at 71a (citing *Brewster*, 408 U.S. at 516, 529). Congressman Brewster had made the identical argument that "his pre-legislative 'negotiations' were a regular and necessary part of the legislative process,"

the court observed, but this Court rejected that "sweeping reading" in part because extending the Clause to all matters similarly "related to the legislative process" would conceivably protect any activity by Members of Congress and thereby "make [them] super-citizens, immune from criminal responsibility." *Id.* at 72a (emphasis omitted) (quoting *Brewster*, 408 U.S. at 516).

The court of appeals further noted that, as in *Brewster*, petitioner's "negotiations" involved a criminal "promise[] to perform future 'legislative acts'" for personal gain. Pet. App. 70a-71a; see *id.* at 73a-74a (concluding that, because petitioner's negotiations were "exortion[ate]," they were not a "legitimate" "part of the legislative process or function") (quoting *Brewster*, 408 U.S. at 526). Although "[o]ne might think that this would be the end of the matter—that [petitioner] would concede that *Brewster* forecloses his claim," the court considered petitioner's argument "that *his* prelegislative 'negotiations' are not doomed to the same fate as Brewster's because he was charged with extortion, not bribery." *Id.* at 74a. Following the Third Circuit's lead, the court rejected petitioner's distinction, finding that *Brewster*'s reasoning applies equally to extortion. *Id.* at 74a-77a (citing *United States* v. *McDade*, 28 F.3d 283, 296 n.16 (1994) (Alito, J.), cert. denied, 514 U.S. 1003 (1995)).

The court of appeals also rejected petitioner's reliance on circuit precedent for the proposition that his extortionate communications with RCC and Aries constituted investigatory fact-finding entitled to protection under the Speech or Debate Clause. Pet. App. 77a-80a. The court recognized that the Ninth Circuit in *Miller* v. *Transamerican Press, Inc.*, 709 F.2d 524,

530 (1983), had "concluded that unofficial investigations by a single Member are protected from civil discovery to the same extent as official investigations by Congress as a body." Pet. App. 78a. The court "assum[ed]" that "*Miller* appropriately applied Supreme Court precedent" in that regard, *id.* at 77a, but emphasized that "*Miller* expressly limited its holding to circumstances in which no part of the investigation or fact-finding itself constituted a crime," *id.* at 78a (citing *Miller*, 709 F.2d at 530). That limitation, the court explained, "reflect[ed]" this "Court's own admonishments that the Clause does not protect unlawful investigations by Members—even if performed by Congress *as a body*." *Ibid.*; see *Gravel*, 408 U.S. at 621-622, 626. In light of this Court's precedent emphasizing that the Clause "does not privilege [a Member] to violate an otherwise valid criminal law in preparing for or implementing legislative acts," *Gravel*, 408 U.S. at 626, the court of appeals concluded that its decision in *Miller* did not support petitioner's argument. Pet. App. 79a.

d. Petitioner sought rehearing en banc, but the court of appeals denied his petition without any judge requesting a vote. Pet. App. 174a-175a. This Court likewise denied his petition for a writ of certiorari. 132 S. Ct. 1097 (2012) (No. 11-557).

3. a. A 24-day jury trial followed, at which 45 witnesses testified. Pet. App. 14a. As relevant here, Hegner and Aries testified during the government's case in chief about their negotiations with petitioner and Sandlin. See *id.* at 10a-14a, 26a, 28a; C.A. E.R. 227-251, 255-258; Supp. C.A. E.R. 173-292. In his cross-examination of Hegner, petitioner elicited testimony that petitioner "had 'signed on to sponsor [a]

bill'" supporting RCC's proposed land exchange "even though the bill no longer included the Sandlin property." Pet. App. 28a (citation omitted). Petitioner further elicited "that he did, in fact, introduce the bill in late May 2005," though no action was ever taken on it. *Ibid.*; see *id.* at 11a-12a. Similarly, when cross-examining Aries, petitioner elicited that he had "'cooled his support'" for legislation supporting the Aries Group's proposed land exchange, which included the Sandlin property, in 2006, "after RCC complained that Aries' exchange 'seemed to be moving more quickly than [RCC's].'" *Id.* at 26a (quoting Supp. C.A. E.R. 284, 288).

Keene took the stand after Hegner and Aries. Pet. App. 28a. To rebut the foregoing testimony that petitioner had elicited from Hegner and Aries, the government asked Keene questions on the same subjects. First, in response to the suggestion that petitioner "continued to support the RCC exchange even after Hegner refused to purchase the Sandlin property," the government elicited from Keene that petitioner "'did not seem very excited and interested in'" the RCC exchange once Sandlin's land was no longer part of the deal. *Id.* at 28a-29a (quoting C.A. E.R. 216); see Gov't C.A. Br. 31. Second, the government "elicited an alternative explanation as to why [petitioner's] ardor" for the Aries exchange "had cooled" by 2006: According to Keene, petitioner had told her that "'he wanted to put the brakes on' the Aries exchange because he had learned that Duke Cunningham," a sitting Congressman, "was being indicted" on unrelated corruption charges. Pet. App. 26a-27a (quoting C.A. E.R. 222); see Gov't C.A. Br. 31.

The jury returned a verdict finding petitioner guilty of 17 counts of public corruption, insurance fraud, and racketeering. Pet. App. 14a & n.15.

b. Petitioner moved for a new trial, arguing, *inter alia*, that the above-described portions of Keene's testimony were inadmissible evidence of his legislative acts. Pet. App. 148a. The district court denied the motion, concluding that petitioner had "opened the door" by eliciting legislative-act evidence that, in the absence of "a challenge or response," would have "create[d] an inaccurate picture for the jury." *Ibid.* The court subsequently sentenced petitioner to 36 months of imprisonment, to be followed by three years of supervised release. Dkt. No. 1318, at 1-2; Pet. App. 15a.

c. The court of appeals affirmed. Pet. App. 1a-54a. As relevant here, the court rejected petitioner's claim that admission of the two challenged portions of Keene's testimony violated the Speech or Debate Clause. *Id.* at 21a-29a.

The court of appeals began its analysis by underscoring that the "focus" of the Speech or Debate Clause "is on the improper *questioning* of a Congressman." Pet. App. 23a. No such questioning occurs, the court observed, when a Member "chooses to offer * * * evidence of legislative acts" in his own defense. *Id.* at 24a (quoting *McDade*, 28 F.3d at 294-295; citing *United States* v. *Myers*, 635 F.2d 932, 942 (2d Cir.), cert. denied, 449 U.S. 956 (1980)). And when a Member "find[s] it advantageous to introduce evidence of his own legislative acts," the court "agreed with the Second, Third, and D.C. Circuits" that "the government is entitled to introduce rebuttal evidence narrowly confined to the same legislative acts." *Id.* at

24a-25a (relying on *McDade*, 28 F.3d at 294-295, *Myers*, 635 F.2d at 942, and *United States* v. *Rostenkowski*, 59 F.3d 1291, 1303 (D.C. Cir. 1995)). "[S]uch rebuttal evidence," the court reasoned, "does not constitute questioning the member of Congress in violation of the Clause." *Id.* at 25a. Because "it was [petitioner] himself who injected [legislative-act evidence] into his trial" and Keene's "rebuttal testimony" was "narrow[ly]" "limited" and "directly responsive to" the testimony petitioner elicited, the court concluded that petitioner "was not impermissibly questioned in violation of the Clause." *Id.* at 26a-29a.

The court of appeals rejected petitioner's argument that it had improperly found that he "waived his Speech or Debate privilege" in violation of this Court's statement in *Helstoski* that a waiver must be "explicit and unequivocal." Pet. App. 25a (quoting *Helstoski*, 442 U.S. at 490-491). The court "underst[ood] *Helstoski*'s admonition," but held that "the limited rebuttal evidence at issue here [was] distinct from [the] waiver" at issue in *Helstoski*, which addressed whether a Member waives the privilege at trial "based on a willingness to testify before a grand jury." *Ibid.*; see *id.* at 26a. The court noted that *Helstoski* "had no occasion to decide whether a Member is 'questioned' in violation of the Clause where, as here, he has the opportunity to introduce testimony in his own defense and decides to open the door at trial by introducing evidence of his legislative acts." *Id.* at 25a-26a.

In a footnote, the court of appeals alternatively concluded that Keene's testimony did not constitute legislative-act evidence in any event. Pet. App. 27a n.24. The court explained that "the testimony concerned only [petitioner's] 'promise to perform an act

in the future,' which is not a legislative act." *Ibid.* (quoting *Helstoski*, 442 U.S. at 489); see *ibid.* (concluding that petitioner's stated desire "'to put the brakes on' the Aries exchange" related to his not-yet-executed "promise to introduce a federal land exchange bill that included tracts [sought] by the Aries Group," and that his "fading enthusiasm" for "introduc[ing] the RCC bill in the future" related to his not-yet-executed "promise" to RCC (citation omitted)). The court recognized that "*Brewster* suggests that a legislator's decision to vote against a bill after it has been introduced may be a protected legislative activity," but found that observation unhelpful to petitioner because Keene's challenged testimony related only to petitioner's mere "promise[s] to perform an act in the future." *Ibid.* (quoting *Helstoski*, 442 U.S. at 489).

d. Petitioner again sought rehearing en banc, but the court of appeals again denied his petition without any judge requesting a vote. Pet. App. 174a-175a.

ARGUMENT

Petitioner seeks review of the decisions in both his interlocutory appeal and his post-trial appeal. He renews his argument (Pet. 13-20) that the court of appeals erred by permitting a prosecution based on his extortionate negotiations with RCC and Aries because, he contends, that conduct constituted "legislative fact-finding" protected by the Speech or Debate Clause. Pet. i. He further contends (Pet. 20-32) that Keene's rebuttal testimony at trial violated the Clause. Petitioner asserts (Pet. 13-17, 21-23, 26-30) that the court of appeals issued broad rulings on those points in conflict with other circuits. But petitioner misreads the court of appeals' fact-bound decisions, which are correct on the merits and do not conflict

with any decision of this Court or another court of appeals. Further review is not warranted.

1. a. The court of appeals correctly rejected petitioner's argument (Pet. 13-20) that the indictment's charges related to the land scheme should have been dismissed because they were based on his allegedly protected "legislative fact-finding."

The Speech or Debate Clause provides that, "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. Const. Art. I, § 6, Cl. 1. The Clause strikes a balance within the separation of powers. It "is broad enough to insure the historic independence of the Legislative Branch, essential to our separation of powers, but narrow enough to guard against the excesses of those who would corrupt the process by corrupting its Members." *United States* v. *Brewster*, 408 U.S. 501, 525 (1972). It is well established that the Clause "does not purport to confer a general exemption upon Members of Congress from liability or process in criminal cases." *Gravel* v. *United States*, 408 U.S. 606, 626 (1972). Although the Clause shields the legitimate prerogatives of the Legislative Branch, it does not go so far as to "make Members of Congress super-citizens, immune from criminal responsibility." *Brewster*, 408 U.S. at 516.

This Court has interpreted the Speech or Debate Clause to preclude inquiry into any "legislative acts." See *Gravel*, 408 U.S. at 626. In defining the bounds of that term, the Court has made clear that the Clause "does not extend beyond what is necessary to preserve the integrity of the legislative process." *Brewster*, 408 U.S. at 517; see *Forrester* v. *White*, 484 U.S. 219, 224 (1988) (courts have "been careful not to ex-

tend the scope of [the Clause] further than its purposes require"). Consistent with its text, "[t]he heart of the Clause is speech or debate in either House." *Gravel*, 408 U.S. at 625. Beyond pure speech and debate, the Clause protects an act only when it is "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Ibid.* Such legislative acts include voting on legislation or on a resolution, see *Brewster*, 408 U.S. at 516 n.10, 525; subpoenaing records for production to a committee, see *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 504 (1975); conducting committee hearings, see *Gravel*, 408 U.S. at 624; and preparing and publishing committee reports, see *Doe* v. *McMillan*, 412 U.S. 306, 313 (1973). In contrast, "[p]romises by a Member to perform an act in the future," such as "to deliver a speech, to vote, * * * to solicit other votes[,] * * * [or] to introduce a bill," "are not legislative acts." *United States* v. *Helstoski*, 442 U.S. 477, 489-490 (1979).

This Court has further clarified that the Speech or Debate Clause does not extend to criminal acts like "[t]aking a bribe," which are "obviously[] no part of the legislative process or function." *Brewster*, 408 U.S. at 526; see *Gravel*, 408 U.S. at 620 (observing that this Court's decisions "reflect a decidedly jaundiced view towards extending the Clause so as to privilege illegal or unconstitutional conduct beyond that essential to foreclose executive control of legislative speech or debate and associated matters").

Such acts are "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. Nor does it "matter whether the promise for which the bribe was given was for the performance of a legislative act." *Ibid.* Because "[t]he illegal conduct is taking or agreeing to take money for a promise to act in a certain way," the government need not rely on legislative-act evidence, such as "performance of the illegal promise," to sustain a conviction. *Ibid.* Moreover, because the Clause "does not prohibit inquiry into illegal conduct simply because it has some nexus to legislative functions," a Member cannot claim "immunity from prosecution by asserting that the matter being inquired into was related to the motivation for" a legislative act. *Id.* at 528; see *id.* at 526 ("[A]n inquiry into the purpose of a bribe does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them." (citation and internal quotation marks omitted)).

Of particular salience here, extortion—which is closely related to bribery and involves a similar corrupt abuse of office for personal gain—also is not a protected legislative act. This Court has explained that the Speech or Debate Clause "provides no protection for criminal conduct threatening the security of the person or property of others," even when the act is "performed at the direction of [a Member] in preparation for or in execution of a legislative act." *Gravel*, 408 U.S. at 622; see *United States* v. *McDade*, 28 F.3d 283, 296 n.16 (3d Cir. 1994) (Alito, J.) (rejecting Member's argument that the Clause required dismissal of charges "based on * * * extortion," because that was "merely a variant" of the Member's meritless conten-

tion that the illegal acceptance of gratuities is protected), cert. denied, 514 U.S. 1003 (1995); *McDade*, 28 F.3d at 289-294.

The court of appeals correctly applied this Court's precedent to conclude that petitioner was not immune from prosecution based on his criminally extortionate promise to support a land exchange in the future only if RCC or Aries, to petitioner's personal benefit, bought property from Sandlin—his debtor, friend, and business partner. Pet. App. 70a-80a. As the court explained, that case-specific approach followed from *Brewster*, in which this Court "focused on the specific nature of Brewster's 'negotiations,' his solicitation and acceptance of a bribe, to determine whether the Congressman's *specific* conduct might fall within the Clause's protections." *Id.* at 72a-73a (citing *Brewster*, 408 U.S. at 526). As in *Brewster*, "an inquiry into the purpose of" petitioner's extortion did "not draw in question [his] legislative acts," and the government did not need to rely on any legislative-act evidence showing that petitioner carried out his illegal promise. 408 U.S. at 526 (citation omitted). Thus, the court of appeals correctly held that petitioner's criminal promise to support future legislation was "no part of the legislative process or function; it [wa]s not a legislative act." *Ibid.*; see Pet. App. 80a.

b. Petitioner does not dispute that the court of appeals correctly recited the principles this Court has articulated to define the bounds of what constitutes a legislative act. But he contends (Pet. 17-20) that the court of appeals erred in its application of those principles to his conduct. According to petitioner, his extortionate negotiations with RCC and Aries were protected legislative acts because they constituted

"information-gathering or fact-finding" "necessary for the drafting of legislation." Pet. 13, 17-18.

The court of appeals correctly rejected that argument. As the court explained, *Brewster* confronted a similar claim that "a Member's pre-legislative act negotiations with private parties [we]re themselves 'legislative acts,'" on the theory that "pre-legislative 'negotiations' were a regular and necessary part of the legislative process." Pet. App. 71a-72a (citing *Brewster*, 408 U.S. at 502, 516, 529). This Court rejected that "sweeping claim[]," which "would render Members of Congress virtually immune from a wide range of crimes simply because the acts in question were peripherally related to their holding office." 408 U.S. at 520. Because taking a bribe in exchange for a promise to perform a future legislative act was "no part of the legislative process or function," the Court held that a Congressman's act of "corruptly ask[ing for] * * * and agree[ing] to receive" a bribe in his discussions with private parties, "in return for being influenced in his performance of official acts in respect to his action, vote, and decision on * * * legislation," was "not a legislative act." *Id.* at 502, 526 (citation omitted); cf. *Gravel*, 408 U.S. at 621 (observing that "no prior case has held that Members of Congress would be immune * * * if, in order to secure information for a hearing, [they illegally] seized the property or invaded the privacy of a citizen"). So too here, the court of appeals correctly rejected petitioner's attempt to characterize his unprotected extortion as legislative fact-finding. See *Gravel*, 408 U.S. at 622 (explaining that the Clause "provides no protection for criminal conduct threatening the security of the per-

son or property of others," even if "performed * * * in preparation for or in execution of a legislative act").

Petitioner contends (Pet. 20) that "[t]he protections of the Clause would be meaningless if they could be stripped from an entire investigation simply because some part of it was alleged to be criminal." But, as the court of appeals emphasized, "the district court did not rule" that all "evidence related to [petitioner's] 'negotiations' with RCC and Aries * * * would be admissible." Pet. App. 62a. Rather, the lower courts "simply concluded that blanket suppression of all the Government's evidence was inappropriate" because petitioner was not immune from prosecution based on his extortionate promise to perform a future legislative act if RCC or Aries acquired Sandlin's property to include in a land-exchange proposal. *Ibid.* The court of appeals explained that the district court "would address the propriety of each piece of evidence 'as the Government moves to introduce it' at trial." *Ibid.* (citation omitted). Petitioner does not maintain that any particular piece of evidence introduced at trial constituted legitimate legislative fact-finding; instead, he renews his claim that he could not be prosecuted at all on the theory that the entire course of his extortionate negotiations qualified as a legislative act. For the reasons explained above, that claim lacks merit.

c. Petitioner further contends (Pet. 13-17) that this Court's review is necessary to resolve a circuit conflict about whether the Speech or Debate Clause protects informal "fact-finding" by an individual Member (rather than as part of a formal investigation by a congressional body). This case would not be an appropriate vehicle to consider that issue, however, because the court of appeals assumed that the Clause protects

such fact-finding and denied petitioner's claim on the ground that his acts of extortion did not constitute a legitimate fact-finding investigation.

As petitioner points out (Pet. 13), the courts of appeals disagree about whether the Speech or Debate Clause protects informal information gathering by individual Members. In holding that a former employee's claims of employment discrimination against a Senator were not precluded by the Clause, the Tenth Circuit in *Bastien* v. *Office of Senator Ben Nighthorse Campbell*, 390 F.3d 1301, 1315-1316 (2004), cert. denied, 546 U.S. 926 (2005), held that the Clause does not protect informal information gathering by a Member, at least when it is not "targeted to a specific hearing," because such acts are not legislative acts. In contrast, the Third, Ninth, and D.C. Circuits have held that informal information gathering by an individual Member can, in some circumstances, qualify as a legislative act entitled to the Clause's protections. See *Government of Virgin Is.* v. *Lee*, 775 F.2d 514, 519-521 (3d Cir. 1985); *Miller* v. *Transamerican Press, Inc.*, 709 F.2d 524, 530 (9th Cir. 1983); *McSurely* v. *McClellan*, 553 F.2d 1277, 1286-1287 (D.C. Cir. 1976) (per curiam) (en banc), cert. dismissed, 438 U.S. 189 (1978). The Second Circuit has suggested the same thing in dicta. *United States* v. *Biaggi*, 853 F.2d 89, 103 (1988), cert. denied, 489 U.S. 1052 (1989). Even in those cases finding the Clause applicable to informal fact-finding, however, the courts did not simply accept without inquiry a Member's assertion that the conduct in question qualified as a legislative act, and the D.C. Circuit was careful to point out that illegal methods of investigation are not protected by the Clause. See *McSurely*, 553 F.2d at 1288.

To the extent the courts of appeals disagree about what informal fact-finding actions of an individual Member, if any, qualify as legislative acts, resolution of that disagreement is not appropriate in this case. Here, the court of appeals "assum[ed]," based on its prior decision in *Miller*, *supra*, that the Speech or Debate Clause protects such informal fact-finding "to the same extent as official investigations by Congress as a body." Pet. App. 77a-78a. The court rejected petitioner's claim of privilege not because it deemed fact-finding unprotected, but because it found that petitioner was not actually engaged in any legitimate fact-finding when he made his extortionate promise. *Id.* at 70a-80a. Although petitioner asserts (Pet. 17) that "this case would have been decided differently" in the Second, Third, and D.C. Circuits, he cites no decision from those jurisdictions suggesting that the illegal activity he engaged in (extracting private actions that would personally benefit him in exchange for official action) is privileged under the Clause. Indeed, the D.C. Circuit has suggested just the opposite, ruling that although true "acquisition of knowledge through informal sources" may be protected as "a necessary concomitant of legislative conduct," "resort to criminal or unconstitutional methods of investigative inquiry is no part of the legislative process or function." *McSurely*, 553 F.2d at 1287-1288 (citation and internal quotation marks omitted).

Thus, without more, petitioner could not benefit from review of his claim that the Speech or Debate Clause protects informal fact-finding by individual Members. Whatever the merit of that claim, he would also have to show that the court of appeals—and the district court and magistrate judge as well (see Pet.

App. 159a-164a)—erred in concluding that his conduct was not in fact the type of informal investigation that qualifies as a legislative act. Given the record clearly demonstrating petitioner's corrupt conduct, petitioner cannot show that the lower courts' case-specific (and correct) determination on that issue warrants this Court's review. See *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) (the Court will not "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error"); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts.").

2. Review of petitioner's challenge to Keene's rebuttal testimony at trial (Pet. 20-32) is likewise unwarranted.

a. The court of appeals correctly concluded that the admission of Keene's testimony did not violate the Speech or Debate Clause. See Pet. App. 21a-29a & n.24. As the court explained, the Clause "focus[es] * * * on the improper *questioning* of a Congressman." *Id.* at 23a. Accordingly, the Clause is not violated when a Member himself chooses to introduce legislative-act evidence in his defense at trial. *Id.* at 24a ("[A] Congressman cannot claim the protections of the privilege when he himself introduces the violative evidence."). That conclusion holds even though the Member's decision to rely on evidence of his legislative acts permits the government "to introduce rebuttal evidence narrowly confined" to the same subject; in that situation, the rebuttal evidence, like the initial evidence, "does not constitute questioning the member of Congress in violation of the Clause." *Id.* at 25a.

Applying those principles to petitioner's case, the court of appeals determined that the challenged statements by Keene were permissible because they constituted "limited rebuttal testimony" that was "directly responsive" to the testimony petitioner himself had elicited concerning "whether and to what extent he supported" the RCC and Aries land-exchange legislation. Pet. App. 27a-29a. Because "it was [petitioner] himself who injected [that issue] into his trial," and because Keene's testimony was confined to the "narrow point[s]" raised by petitioner, the court was right to conclude that petitioner "was not impermissibly questioned in violation of the Clause." *Id.* at 27a, 29a.

As the court of appeals observed in a footnote, Keene's testimony also did not violate the Speech or Debate Clause for the alternative reason that it "concerned only [petitioner's] 'promise to perform an act in the future,' which is not a legislative act." Pet. App. 27a n.24 (quoting *Helstoski*, 442 U.S. at 489). Before Keene testified, petitioner introduced evidence designed to show that he had not made extortionate promises to RCC and Aries because he supported an RCC land exchange that did not include the Sandlin property and he "'cooled his support'" for the Aries exchange, which did include that property. *Id.* at 26a, 28a (quoting Supp. C.A. E.R. 288). Keene's testimony provided an alternative explanation for petitioner's actions, which further confirmed that his promises were indeed extortionate. *Id.* at 26a, 29a. Because the testimony focused on those promises, the court correctly observed that Keene's statements were not "protected by the Clause" "[e]ven if [petitioner] had not opened the door for the challenged testimony." *Id.* at 27a n.24.

b. Petitioner's objections (Pet. 20-32) to the court of appeals' analysis of Keene's testimony and his assertions of a circuit conflict lack merit.

i. Petitioner contends (Pet. 26-28, 30-32) that the court of appeals' decision conflicts with *Helstoski*, which held "that any waiver of the Clause's protections must be 'explicit and unequivocal.'" Pet. 27 (quoting *Helstoski*, 442 U.S. at 491). But the court did not hold that petitioner waived the Clause's protections; rather, it found that Keene's "narrow" and "limited rebuttal testimony" "d[id] not constitute questioning the member of Congress" within the meaning of the Clause. Pet. App. 25a, 28a-29a. Indeed, the court affirmatively acknowledged "*Helstoski's* admonition" that a waiver "can be found only after explicit and unequivocal renunciation of the [Speech or Debate Clause] protection." *Id.* at 25a (quoting *Helstoski*, 442 U.S. at 490-491). The court found "the limited rebuttal evidence at issue here *distinct* from a waiver of the Speech or Debate privilege." *Ibid.* (emphasis added). Because the court's analysis focused on the scope of the Clause's coverage, rather than on any waiver of that coverage, petitioner cannot establish a conflict with *Helstoski*.

That conclusion gains additional force from petitioner's apparent view that he should have been permitted to elicit legislative-act evidence as he saw fit while precluding the government from presenting limited rebuttal evidence on the very same subjects. *Helstoski* nowhere endorsed such a rule. Rather, the Court considered whether a Member had waived the Clause's protection at *trial* "based on a willingness to testify before *a grand jury*." Pet. App. 25a (emphasis added); see *id.* at 26a. *Helstoski* did not decide

whether a Member is "questioned" where, as here, he injects legislative-act evidence into his criminal trial and then seeks to prevent the government from eliciting, in front of the *same* jury, narrowly tailored rebuttal evidence providing a more complete picture of his conduct and mental state. This Court has held that an evidentiary privilege is not implicated in analogous circumstances. See, *e.g.*, *Kansas* v. *Cheever*, 134 S. Ct. 596, 601 (2013) (finding no violation of the Fifth Amendment privilege against self-incrimination when prosecution offered rebuttal evidence about a court-ordered mental evaluation after defendant elicited testimony "about his inability to form the requisite *mens rea*," because "[a]ny other rule would undermine the adversarial process, allowing a defendant to provide the jury * * * with a one-sided and potentially inaccurate view of his mental state") (citing *Buchanan* v. *Kentucky*, 483 U.S. 402, 422-424 (1987)). Petitioner errs in interpreting *Helstoski* to permit any Member charged with a crime to place his one-sided version of events before the jury, distorting the truth-seeking process and undermining the "central purpose of [the] criminal trial * * * to decide the factual question of * * * guilt or innocence." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986).[2]

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[2] Petitioner emphasizes (Pet. 28) *Helstoski*'s observation that the Speech or Debate Clause was designed not "to assure fair trials," but "to preserve the constitutional structure of separate, coequal, and independent branches of government." 442 U.S. at 491. That independence is not threatened when it is a Member himself who chooses to inject legislative-act evidence into his trial and so open the door to "rebuttal evidence narrowly confined" to the same subject. Pet. App. 25a. Indeed, precluding such rebuttal evidence would run afoul of this Court's teaching that the Clause "does not purport to confer a general exemption upon Members of Congress

Notably, no court of appeals has read *Helstoski* to support petitioner's view. To the contrary, the Third Circuit in *McDade*, speaking through then-Judge Alito, held that when a Member "chooses to offer rebuttal evidence of legislative acts" and "thereby subjects himself to cross-examination" on the same subjects, he "is not 'questioned'" within the meaning of the Clause. 28 F.3d at 294-295 (citation omitted). The Second and D.C. Circuits have reached the same conclusion. See *United States* v. *Rostenkowski*, 59 F.3d 1291, 1303 (D.C. Cir. 1995); *United States* v. *Myers*, 635 F.2d 932, 942 (2d Cir.), cert. denied, 449 U.S. 956 (1980).

Nor does the decision below conflict with the D.C. Circuit's decisions in *Howard* v. *Office of Chief Administrative Officer of United States House of Representatives*, 720 F.3d 939 (2013), and *Fields* v. *Office of Eddie Bernice Johnson*, 459 F.3d 1 (2006) (en banc), cert. denied, 550 U.S. 511 (2007), as petitioner contends (Pet. 28-29). Those decisions addressed a congressional office's invocation of the legislative privilege in an effort to dismiss a discrimination claim before trial. *Howard*, 720 F.3d at 941-943; *Fields*, 459 F.3d at 4. Neither decision discussed whether a Member on trial for criminal charges is "questioned" about a potentially privileged subject when he elicits evidence on that subject and the government offers limited rebuttal evidence confined to the same issue. And the decisions cannot be read to preclude such rebuttal evidence in light of the D.C. Circuit's earlier

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from liability *or process* in criminal cases." *Gravel*, 408 U.S. at 626 (emphasis added); see *Brewster*, 408 U.S. at 508 ("legislative independence" does not mean "supremacy").

decision in *Rostenkowski*, which observed "that the constitutional protection against [a Member's] being 'questioned' for his legislative acts does not prevent [him] from offering such acts in his own defense, *even though he thereby subjects himself to cross-examination*." 59 F.3d at 1303 (emphasis added; citation and internal quotation marks omitted). Petitioner's claimed circuit conflict is therefore illusory.

ii. Petitioner also cannot show (Pet. 20-26) that the court of appeals erred in alternatively concluding that Keene's testimony did not concern protected legislative acts.

Petitioner maintains (Pet. 20, 23) that the court of appeals' footnote discussing that point "imposed a new and indefensible categorical rule" that "the Speech or Debate Clause does not protect a Member's work on legislation before it is formally introduced." But the court did not adopt that sweeping rule. Rather, the court concluded on the particular facts of the case that Keene's testimony on petitioner's support for the RCC and Aries land exchanges was not covered by the Clause because the testimony "concerned only" petitioner's extortionate "'promise[s] to perform an act in the future,' which [are] not * * * legislative act[s]." Pet. App. 27a n.24. Thus, contrary to petitioner's assertion (Pet. 23), the court did not hold that a Member's "work on a bill before its introduction" can *never* be a legislative act. Petitioner does not appear to dispute the court's conclusion that "a *promise* to perform a legislative act is not itself a legislative act," *ibid.*; see *Helstoski*, 442 U.S. at 489 ("Promises by a Member to perform an act in the future are not legislative acts."), and any fact-bound contention that Keene's challenged testimony related to more than

such "promise[s]" lacks merit and would not warrant review. See *Johnston*, 268 U.S. at 227.

Petitioner's reading of the court of appeals' footnote as setting forth a categorical rule is particularly untenable in light of the court's earlier decisions in *Miller*, *supra*, and in petitioner's interlocutory appeal. In *Miller*, the court reiterated this Court's observation that the legislative privilege extends beyond pure speech or debate "to things generally done in a session of the House by one of its members in relation to the business before it." 709 F.2d at 529 (quoting *Kilbourn* v. *Thompson*, 103 U.S. 168, 204 (1881)). *Miller* further held that "[o]btaining information pertinent to *potential* legislation or investigation is one of the 'things generally done in a session of the House.'" *Id.* at 530 (quoting *Kilbourn*, 103 U.S. at 204) (emphasis added). Similarly, in petitioner's interlocutory appeal, the court noted that *Miller* had "protect[ed] a Member's *pre-legislation* investigation and fact-finding." Pet. App. 77a (emphasis added). In light of those prior precedents, the court's footnote discussing Keene's testimony cannot be read to hold that "the Speech or Debate Clause does not protect a Member's work on legislation before it is formally introduced." Pet. 20.

Petitioner's contention (Pet. 21-22) that the court of appeals' footnote created a circuit conflict rests on his mistaken premise that the court adopted a categorical rule that the Speech or Debate Clause does not apply to a Member's work on proposed legislation. See Stanley M. Brand Amicus Br. 3-6, 8-9 (making arguments premised on same erroneous interpretation of the court's opinion). Because the court adopted no such rule, no conflict exists. Further review of the

court's fact-bound assessment of Keene's testimony is not warranted.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2015

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[3] Notably, petitioner would not be entitled to a new trial unless he could demonstrate that *both* of the court of appeals' rulings about Keene's testimony were erroneous. In addition, the government argued below that Keene's challenged testimony did not subject petitioner to criminal liability in violation of the Speech or Debate Clause because it was tangential to the overwhelming proof of petitioner's "fraud and extortion, which were completed crimes as soon as he threatened Hegner and made a corrupt promise to Aries." Gov't C.A. Br. 37. The court of appeals had no occasion to address the contention that Keene's testimony did not affect the verdict (Pet. App. 21a-29a), but that alternative ground for affirmance renders this case a particularly poor vehicle for this Court's review. See *Schiro* v. *Farley*, 510 U.S. 222, 228-229 (1994) (explaining that a respondent may "rely on any legal argument in support of the judgment below"); accord *Bennett* v. *Spear*, 520 U.S. 154, 166-167 (1997); *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979).