No. 14-1082

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD G. RENZI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF *AMICI CURIAE* JOHN T. DOOLITTLE, TOM DELAY, JOSIAH BONNER, DAN BURTON and CHARLES TAYLOR IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether legislative fact-finding by an individual Member of Congress is a legislative act protected by the Speech or Debate Clause.

2. Whether a Member of Congress' official actions to develop, evaluate, and draft legislation that are undertaken prior to the formal introduction of a bill are legislative acts protected by the Speech or Debate Clause.

3. Whether a Member of Congress can waive the protections of the Speech or Debate Clause only by explicitly and unequivocally renouncing them.

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INTEREST OF *AMICI CURIAE*[1]

Amici are former Members of the United States House of Representatives. John T. Doolittle (R-CA) served in the House from 1991 to 2009, representing California's 14th District and then its 4th District. He served as the Secretary of the House Republican Conference from 2002 to 2006 and as a Deputy Whip from 1995 to 2009. Tom DeLay (R-TX) represented Texas's 22nd District from 1985 to 2006. He served as the House Majority Leader from 2003 to 2005, and also held the posts of House Majority Whip and Deputy Minority Whip. Josiah Bonner (R-AL) represented Alabama's 1st District from 2003 to 2013, and served for a time as Assistant Whip. Dan Burton (R-IN) served in the House from 1983 to 2013, representing Indiana's 5th District and then its 6th District. He was Chairman of the House Oversight and Government Reform Committee from 1997 to 2003. Charles Taylor (R-NC) represented North Carolina's 11th District in Congress from 1991 to 2007. From 1993 to 2007, he served as Chairman of the Subcommittee on Interior, Environment and Related Agencies of the House Appropriations Committee.

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[1] Timely notice of intent to file this brief was provided to counsel of record for all parties. All parties have consented to this *amici curiae* brief and letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

Amici have first-hand knowledge of how the House functions and the means by which Congressmen develop and propose legislation. They have a strong interest in preserving the separation of powers and the institutional independence of Congress. They believe that the Speech or Debate Clause must be interpreted broadly to achieve these goals.

SUMMARY OF ARGUMENT

The Speech or Debate Clause protects legislators from being questioned about "acts that occur in the regular course of the legislative process and … the motivation for those acts." *United States v. Brewster*, 408 U.S. 501, 525 (1972). In this case, evidence of former Congressman Renzi's motives and attitudes regarding pending and potential legislation was introduced against him at trial, over his objections. The testimony came from one of his former senior staff persons, and was based on her conversations with Renzi. The Ninth Circuit concluded that admission of this evidence was permissible on the grounds that (1) Renzi had waived his right to object to the evidence as the result of questions his counsel asked of other witnesses, and (2) in any event, the Clause does not protect any activities by individual congressmen undertaken prior to the introduction of legislation. *United States v. Renzi*, 769 F.3d 731, 748-49 and 748 n. 24 (9th Cir. 2014)(*"Renzi II"*). In the prior interlocutory appeal in this case, the Ninth Circuit also found that while the Clause protects

investigations carried out by congressional committees, it does not protect fact-finding or investigations by individual congressmen. *United States v. Renzi*, 651 F.3d 1012, 1025-26 and 1026 nn. 10, 12 (9th Cir. 2011)(*"Renzi I"*), *cert. denied*, 132 S.Ct. 1097 (2012).

The Ninth Circuit's conclusions about the scope of the Speech or Debate Clause are wrong. The Ninth Circuit has misapplied this Court's rulings regarding the Clause, and its holdings are also in conflict with decisions of other circuits. The Ninth Circuit's finding that investigation and fact-gathering by individual congressmen relating to potential legislation is not an "integral part" of the legislative process denigrates the activities of individual legislators and ignores the way legislation is developed. Its conclusion that the Clause only applies after a bill has been introduced similarly ignores the significance of the activity that goes into the creation of legislation. Its conclusion about waiver is squarely at odds with this Court's decision in *United States v. Helstoski*, 442 U.S. 477 (1979).

Allowing the Ninth Circuit's ruling to stand would carve a large swath of legitimate legislative activity – all information gathering by individual members with respect to legislation, and all activity by individual members taken prior to the introduction of a bill, or with respect to legislation that was considered but not introduced – out of the scope of the Speech or Debate Clause. This would significantly undermine the protections offered to Congress by the Clause, endangering the

institutional independence of the legislature and threatening the separation of powers. It would inhibit fact gathering by individual members and create the danger that bills would be proposed based on inadequate or incomplete information. The ruling has serious implications not only for criminal cases, but also for civil cases involving Congressmen and their staffs. It would open Congressmen up to suit, and all the time-consuming and intrusive discovery that litigation entails. It could also enmesh them in discovery even in cases in which they were not parties.

This Court's case law defines certain activities that clearly fall within the protections of the Clause, such as voting and speaking on the floor of the House, and certain activities that clearly fall outside its parameters, such as communicating with Executive branch agencies and sending out newsletters. But this Court has not specifically addressed whether legislative fact-gathering by an individual member or activities that take place prior to the introduction of legislation are within the "legitimate legislative sphere." *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503 (1975). Nor has the Court addressed whether the cross-examination of third party witnesses by a member's counsel can constitute the "explicit and unequivocal renunciation" required before Speech or Debate privileges can be waived. *Helstoski*, 442 U.S. at 490-91. *Amici* respectfully submit that the Court should grant review in this case to address these fundamentally important Constitutional issues.

ARGUMENT

A. Background[2]

This case stems from former Congressman Renzi's actions with regard to potential land exchange legislation, under which federal land would be traded for private property. Renzi dealt with two private groups interested in such a trade, the Resolution Copper Company (RCC) and the Aries investment group. Pet. at 7. Renzi and his staff had discussions with each group about the private and federal properties that would be included in the exchange to be authorized by legislation. *Id.* The indictment and conviction were based, in part, on allegations that Renzi attempted to compel RCC and Aries to purchase a particular piece of property (the Sandlin farm) to be included in the land swap in return for his support for their proposals. Pet. at 9. RCC refused to purchase the Sandlin farm. Pet. at 8. Renzi introduced a bill for the land exchange RCC sought, but the bill did not move forward. *Renzi II*, 769 F.3d at 740. Aries did buy the Sandlin farm, but Renzi did not introduce legislation relating to Aries. Pet. at 8.

At trial, the prosecution introduced testimony from Renzi's former District Director, over Renzi's objection, about his motives with regard to the proposed legislation. The District Director testified

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[2] The material in this section is drawn from the Petition and the Ninth Circuit decisions in Renzi's two appeals.

that Renzi "did not seem very excited and interested" in the RCC exchange legislation, even though he "should have been." *Renzi II*, 769 F.3d at 745 n.21. She also testified about a conversation in which Renzi said that he did not want to move forward with the Aries land exchange because of the indictment of Duke Cunningham. 769 F.3d at 746 n.22.

Prior to trial, Renzi moved to dismiss his indictment on the grounds that the prosecution involved legislative acts. *Renzi I*, 651 F.3d at 1016. In affirming the trial court's denial of the motion, the Ninth Circuit held that Renzi's "negotiations" with RCC and Aries were not legislative acts protected by the Clause. 651 F.3d at 1020. The Ninth Circuit based its holding on the assertion that this Court has never "extended Clause protection to prelegislative investigations and fact-finding by individual Members," 651 F.3d at 1026 n.12, and its conclusion that allegedly illegal investigative or preparatory acts could not be protected legislative activity. *Id.* at 1025-26.

On appeal after trial, the Ninth Circuit held that Renzi had waived his Speech or Debate privilege and opened the door to the evidence elicited by the government by questioning other witnesses about the fact that the RCC bill was introduced and the Aries bill was not. *Renzi II*, 769 F.3d at 747-49. The court also stated that even without a waiver, it would conclude that the District Director's testimony was not protected by the Clause because both of her

statements related to conversations or observations that took place before any bill was introduced. 769 F.3d at 748 n.24.

B. The Speech or Debate Clause Protects Legislative Fact Gathering by Individual Legislators.

The purpose of the Speech or Debate Clause, U.S. Const., art. I, § 6, cl. 1, is to "preserve the independence and thereby the integrity of the legislative process." *Brewster*, 408 U.S. at 524. It also serves the function of reinforcing the separation of powers among the three branches of the federal government. *Eastland*, 421 U.S. at 502. The Speech or Debate Clause is not interpreted with a "literalistic approach." *Gravel v. United States*, 408 U.S. 606, 617 (1972). Instead, it is to be read "broadly to effectuate its purposes." *Eastland*, 421 U.S. at 501. When the Clause applies, it is "absolute," *Eastland*, 421 U.S. at 509, and "balancing plays no part." *Id.* at 510 n.16.

The protections of the Clause apply to all activities within the "legitimate legislative sphere." *Eastland*, 421 U.S. at 503. That sphere includes all activities that are:

> 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.

Gravel, 408 U.S. at 625.

As this Court has made clear, investigations and information-gathering plainly fall within the legislative sphere:

> This Court has often noted that the power to investigate is inherent in the power to make laws because '(a) legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change.'

Eastland, 421 U.S. at 504, *quoting McGrain v. Daugherty*, 273 U.S. 135, 175 (1927). Indeed, "[t]o conclude that the power of inquiry is other than an integral part of the legislative process would be a miserly reading of the Speech or Debate Clause in derogation of the 'integrity of the legislative process.'" *Eastland*, 421 U.S. at 505.

Despite the Court's emphasis on the critical importance of information gathering to the legislative process, the Ninth Circuit, citing *Eastland* and *Doe v. McMillan*, 412 U.S. 306 (1973), stated that this Court has held that only "official

investigations" – that is, investigations carried out by Congress acting as a body – are legislative acts. *Renzi I*, 651 F.3d at 1026 n.10. The Ninth Circuit found it "significant that the Supreme Court has never recognized investigations by an individual Member to be protected." *Id.* But the Ninth Circuit reads too much into *Eastland* and *McMillan*. While those cases focused on committee investigations, there is no reason to confine their holdings to formal investigations. There is no logical distinction for Speech or Debate purposes between investigations carried out by a committee and fact gathering related to potential legislation conducted by individual members. The Constitution vests legislative power in the House of Representatives, which is composed of its Members. U.S. Const., art. I, § 1 and 2.1. No mention is made of committees. Each individual member has the power to propose legislation, and they should be encouraged to be as well informed as possible when they do so. If a committee investigation about potential legislation is integral to the legislative process, so is an individual member's investigation.

Even when carrying out committee work, a member's ability to gather information cannot be limited to information obtained by the committee. Committees do not always proceed in a manner that an individual member may desire or obtain the information that a member requires. A member of the minority party may have little say in directing a committee's investigation. Moreover, individual members must decide how to vote on numerous bills

introduced by other individual members, or through committees on which they do not serve. A member may desire to gather facts to aid him or her in deciding how to vote on such a bill. This process is necessarily "informal" since individual members do not have authority to compel production of information in the name of the House or its committees. Members also use other "informal" means of developing information relating to potential legislation, such as participation in caucus activities or other ad hoc groups of members. All of these activities are important to a member's ability to develop sound legislation and make sound decisions when voting in committee or the House.

Protecting an individual member's fact gathering is fully consistent with the purposes of the Speech or Debate Clause and its root concern that the executive will retaliate against legislators for their legislative activity. Suppose a congressman seeks information from an unpopular group with the thought of introducing legislation to help them. Why should that inquiry receive any less protection than the same inquiry made by a committee?

This Court has cautioned against drawing illogical lines in interpreting the Clause. In *Eastland*, the Court observed that finding that authorizing a committee investigation was a protected activity, but issuing a subpoena in the investigation was not, "would be a contradiction denigrating the power granted to Congress in Art. I and would indirectly impair the deliberations of

Congress." *Eastland*, 421 U.S. at 505. It would be a similarly untenable contradiction to conclude that committee investigations are legislative acts but that members' individual investigations and fact gathering in connection with potential or proposed legislation are not.

Other circuit courts have recognized that the Speech or Debate Clause protects members gathering information in furtherance of their legislative responsibilities. The D.C. Circuit has stated that:

> We have no doubt that information gathering, whether by issuance of subpoenas or field work by a Senator or his staff, is essential to informed deliberation over proposed legislation. . . . 'A congressman cannot subpoena material unless he has enough threshold information to know where, to whom, or for what documents he should direct a subpoena. The acquisition of knowledge through informal sources is a necessary concomitant of legislative conduct and thus should be within the ambit of the privilege so that congressmen are able to discharge their constitutional duties properly.'

McSurely v. McClellan, 553 F.2d 1277, 1286-87 (D.C. Cir. 1976). *See also In re Grand Jury Subpoenas*, 571

F.3d 1200, 1202 (D.C. Cir. 2009)("[l]egislative fact-finding is … a protected activity"); *Government of the Virgin Islands v. Lee*, 775 F.2d 514, 521 (3d Cir. 1985)(relying on Speech or Debate authorities in considering legislative immunities for a Virgin Island legislator, the court found that "fact-finding, information gathering, and investigative activities are essential prerequisites to the drafting of bills and the enlightened debate over proposed legislation. As such, fact-finding occupies a position of sufficient importance in the legislative process to justify the protection afforded by legislative immunity."); *United States v. Biaggi*, 853 F.2d 89, 103 (2d Cir. 1988)(finding that individual congressman's legislative fact-finding activity was protected by the Clause). *But see Bastien v. Office of Campbell*, 390 F.3d 1301 (10th Cir. 2004)(only official or formal investigations are covered by the Clause).

In fact, in an earlier case, the Ninth Circuit concluded that legislative fact-gathering by individual members *was* protected by the Clause. "Obtaining information pertinent to potential legislation or investigation is one of the 'things generally done in a session of the House.'" *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 530 (9th Cir. 1983), quoting *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881)(emphasis added).[3] In the

[3] The *Miller* court further noted that "Constituents may provide data to document their views when urging the Congressman to initiate or support some legislative action." *Miller*, 709 F.2d at 530.

interlocutory appeal here, however, the Ninth Circuit held that *Miller* only applied "to circumstances in which no part of the investigation or fact-finding itself constituted a crime." *Renzi I*, 651 F.3d at 1026 (footnote omitted). But this circular limitation assumes the result and would essentially write the Speech or Debate Clause out of future prosecutions. It also suggests that if any portion of a legislator's investigation is alleged to be criminal, the Clause does not come into play at all with respect to the member's other activities. This is at odds with how the Clause has been interpreted and applied in criminal cases.

The Ninth Circuit's conclusion that individual members' legislative fact gathering is not an integral part of the legislative process is a "cramped construction" of the Clause, *Gravel,* 408 U.S. at 618, rather than the broad reading mandated by this Court. It ignores the central importance of individual members in the Constitutional design of the House of Representatives. As this Court has stated, the Clause "protect[s] the integrity of the legislative process by insuring the independence of *individual legislators*." *Brewster*, 408 U.S. at 507 (emphasis added). Because the Ninth Circuit's decision is inconsistent with this Court's case law and in conflict with the decisions of other circuits, this Court should grant review to resolve this issue.

C. The Speech or Debate Clause Applies to Activities Undertaken Before Legislation is Introduced.

The Ninth Circuit held that a member's activities directly related to legislation but undertaken *before* legislation is introduced are not legislative acts protected by the Speech or Debate Clause. *Renzi II*, 769 F.3d at 748 n.24. But having the Clause's application turn on whether a bill has been introduced has no basis in the decisions of this Court. The Court has not required a member asserting the Speech or Debate privilege to tie that assertion to specific pending legislation. Instead, in considering the application of the Clause to committee investigations, the Court has recognized that "[t]o be a valid legislative inquiry there need be no predictable end result." *Eastland*, 421 U.S. at 509.

Committee investigations often take place prior to the introduction of litigation. The inquiry at issue in *Eastland*, for example, "was intended to inform Congress in an area where legislation *may be had*." 421 U.S. at 506 (emphasis added). There was no suggestion in *Eastland* that the Speech or Debate Clause did not apply to committee activities occurring in advance of the introduction of legislation.

The Ninth Circuit's decision appears to be based on a misreading of *Brewster* and *Helstoski*. In considering the bribery prosecution at issue in

Brewster, the Court stated that "[t]he illegal conduct is taking or agreeing to take money for a promise to act in a certain way." 408 U.S. at 526. The Court explained that proving an illegal promise does not require proof that the promise was carried out, and therefore does not involve any inquiry into legislative acts or the motives for them. *Id.* *Helstoski* reiterated that "[p]romises by a Member to perform an act in the future are not legislative acts." 442 U.S. at 489. *Helstoski* further stated that the protections of the Clause only extend "to an act that has already been performed." 442 U.S. at 490.

But the Ninth Circuit incorrectly concludes that no legislative acts are performed until a bill has been introduced. To the contrary, many significant acts are performed in the legislative process before legislation is introduced, and the process would suffer in their absence. For example, obtaining information from a constituent about the need for legislation is an act in the legislative process, whether the legislation ever takes shape or not. The same is true of drafting a bill, and of making a decision not to introduce legislation. All of these things are plainly "acts that occur in the regular course of the legislative process," *Brewster*, 408 U.S. at 525, despite the fact that they occur before a bill is formally submitted. This Court's decisions recognizing that committee investigations are protected legislative acts demonstrate that the legislative process does not begin only when a bill is introduced.

Moreover, this Court's case law makes clear that the Speech or Debate Clause covers not only legislative acts but also "the motivation for those acts." *Brewster*, 408 U.S. at 525. *See also Helstoski*, 442 U.S. at 489 (describing *Johnson* as holding that "the Clause was violated by questions about motive addressed to others than Johnson himself."). Motives are usually developed before an action is taken. The Clause prohibits a legislator from being questioned about his motives for introducing a bill. The same prohibition should apply to questioning about a member's motives in drafting a bill or deciding not to introduce legislation.

In addition to misapplying this Court's precedents, the Ninth Circuit's decision that the Speech or Debate clause does not cover any actions by legislators before a bill is introduced is in conflict with decisions of the Third and Eleventh Circuits. *See Baraka v. McGreevey*, 481 F.3d 187, 196-97 (3d Cir. 2007)(resolving an issue of state legislative immunity, the court found that advocating for legislation is a legislative act); *Yeldell v. Cooper Green Hospital, Inc.*, 956 F.2d 1056, 1063 (11th Cir. 1992)(addressing legislative immunity for state legislators, court found that "the decision whether or not to introduce legislation is one of the most purely legislative acts that there is."). The Court should grant review to resolve this split in the circuits and clarify this important question.

D. The Protections of the Speech or Debate Clause Can Only Be Waived By Means That Are "Explicit and Unequivocal."

The Ninth Circuit found that Renzi had waived his objections to the testimony from his former District Director as the result of his lawyers' cross-examination of government witnesses. The court applied traditional evidentiary principles in concluding that the questioning by Renzi's counsel had "opened the door" to the introduction of Renzi's legislative motivations as rebuttal evidence for the prosecution. But this analysis stands in direct conflict with this Court's holding that in the Speech or Debate context, "waiver can be found only after *explicit and unequivocal* renunciation of the protection." *Helstoski*, 442 U.S. at 490-91 (emphasis added). The Court emphasized that "[t]he ordinary rules for determining the appropriate standard of waiver do not apply in this setting." *Id.*

As this Court has recognized, the Speech or Debate Clause was not designed to assure "fair trials." *Helstoski*, 442 U.S. at 491. Instead, it serves the structural function of preserving the independence of the legislature and the separation of powers, *id.*, and so must be applied regardless of its impact on any given trial. If allowed to stand, the Ninth Circuit's ruling would undermine the Clause's effectiveness in protecting legislative independence. It would result in significant uncertainty for legislators facing litigation of any kind. Instead of

controlling the decision whether or not to waive the privilege, they would be faced with the possibility that questions their counsel believed did not "open the door" would nonetheless be treated as a waiver by the court.

The Clause must be interpreted broadly and clearly so that members can rely on its protections in conducting their legislative activities without fearing that they will discover later that the protections they relied on were illusory. The Ninth Circuit's decision runs directly counter to this imperative.

E. The Ninth Circuit's Ruling Will Interfere With the Independence of Individual Legislators and Their Ability to Carry Out Their Constitutional Functions.

The Speech or Debate Clause was written into the Constitution "to protect the integrity of the legislative process by insuring the independence of *individual legislators*." *Brewster*, 408 U.S. at 507 (emphasis added). It frees legislators to act contrary to the wishes of the Executive, or on behalf of powerless or unpopular constituents, without fear that they will be subject to prosecution, investigation or suit based on their activities.

The Clause "provides protection against civil as well as criminal actions, and against actions brought by private individuals as well as those initiated by the Executive Branch." *Eastland*, 421

U.S. at 502-503. While civil litigation may not have been the original focus of the Clause, courts have recognized that one of its purposes is to "shield legislators from private civil actions that 'create [ ] a distraction and force[ ] Members to divert their time, energy, and attention from their legislative tasks to defend the litigation.'" *MINPECO, S.A. v. Conticommodity Services, Inc.*, 844 F.2d 856, 859 (D.C. Cir. 1988), quoting *Eastland*, 421 U.S. at 503. Even if a member is not named as a party to a suit, "[d]iscovery procedures can prove just as intrusive" and distracting. *MINPECO*, 844 F.2d at 859.

The Ninth Circuit's ruling puts a significant part of a member's ordinary activities in connection with legislation outside of the protections of the Clause. This is bound to have a chilling effect on the conduct of legislators. They will be reluctant to collect information about potential legislation on their own, or through any other "informal" means such as caucus activity, out of concern that their activities could be used against them by the Executive, or subject them to time-consuming and distracting civil litigation and discovery. Confining information gathering to "official" channels will make legislators less informed and their debate less robust.

This Court has defined certain activities that are clearly within the legislative sphere, including voting by members, committee reports, and members' conduct at legislative committee hearings. *Gravel*, 408 U.S. at 624. It has also defined certain

activities as clearly outside that sphere, including communications with the Executive Branch and administrative agencies, *Gravel*, 408 U.S. at 625, preparation of constituent newsletters and speeches outside of Congress. But the Court has not expressly addressed the status of the activities at issue here, which occupy a significant portion of a member's time and relate directly to the formulation of legislation. The Court should grant review in this case to resolve these issues and remove a very real threat to legislative independence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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