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 *AMICUS CURIAE* THE BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Amicus curiae the Bipartisan Legal Advisory Group of the U.S. House of Representatives – currently composed of the Honorable John A. Boehner, Speaker; the Honorable Kevin McCarthy, Majority Leader; the Honorable Steve Scalise, Majority Whip; the Honorable Nancy Pelosi, Democratic Leader; and the Honorable Steny H. Hoyer, Democratic Whip – "speaks for, and articulates the institutional position of, the House in all litigation matters." Rule II.8(b), Rules of the House of Representatives, 114th Cong. (2015), *available at* http://clerk.house.gov/legislative/house-rules.pdf.[1]

This case concerns the Constitution's Speech or Debate Clause: "[F]or any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place." U.S. Const. art. I, § 6, cl. 1. This Clause – the protections of which apply absolutely to all Member activities within the "legislative sphere" – is a fundamental pillar of Congress's independence. It enables Congress to serve the American people free from interference and intimidation by the Executive and Judicial Branches, and it is critically important, not only to Congress's relationship with the other branches of the federal government, but also to its ability to

[1] The Solicitor General and counsel of record for petitioner Richard G. Renzi received notice, at least 10 days before the due date for this brief, of the House's intention to file. All parties consented to the filing, and letters of consent are being lodged with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than the House has made a monetary contribution to its preparation or submission.

perform independently its assigned constitutional role in our system of separated powers. *See* The Federalist No. 51 (James Madison) ("[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.").

The Speech or Debate Clause issues arise here in the context of the conviction of Richard Renzi, former U.S. Representative for the 1st congressional district of Arizona (during the 108th-110th Congresses (Jan. 2003 - Jan. 2009)), for violation of certain criminal statutes in connection with his consideration, while a Member, of proposed federal land-exchange legislation.

Mr. Renzi seeks review of three rulings by the Ninth Circuit Court of Appeals, each adverse to his Speech or Debate Clause rights: (i) The Clause does not protect fact-finding by individual Members (thereby justifying the denial of Mr. Renzi's pretrial motion to dismiss), *see* Pet. for a Writ of Cert. (filed Feb. 27, 2015; docketed Mar. 9, 2015) ("Renzi Petition") App. B, at 79a n.12 (reported at *United States v. Renzi*, 651 F.3d 1012, 1026 n.12 (9th Cir. 2011) ("*Renzi I*")); (ii) The Clause does not protect Member activity predating the introduction of relevant legislation (thereby justifying the rejection of Mr. Renzi's post-trial appeal), *see* Renzi Pet. App. A, at 27a n.24 (reported at *United States v. Renzi*, 769 F.3d 731, 748 n.24 (9th Cir. 2014) ("*Renzi II*")); and (iii) Mr. Renzi waived the protections of the Clause, notwithstanding the absence of any "explicit and unequivocal" waiver, *United States v. Helstoski*, 442 U.S. 477, 490-94 (1979) (thereby further justifying the rejection of Mr. Renzi's

post-trial appeal), *see* Renzi Pet. App. A, at 21a-28a (reported at *Renzi II*, 769 F.3d at 745-48).

The House has no institutional interest in shielding Mr. Renzi from criminal liability – and it does not file this brief for that purpose. The House, however, has a very great interest in ensuring that, in reconciling the Speech or Debate Clause with the Executive Branch's legitimate interest in investigating and prosecuting legislators who may have engaged in criminal activities, the Courts construe the Clause in a manner that protects Congress and its Members in the conduct of their legislative duties, and thereby safeguards the independence of the Legislative Branch so essential to our system of government. The Ninth Circuit did not do that in this case.

Accordingly, the House joins Mr. Renzi in urging the Court to accept this case for review.[2]

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[2] The Bipartisan Legal Advisory Group has not hesitated to file as *amicus curiae* in cases, such as this one, that raise significant Speech or Debate Clause issues where the House General Counsel does not already represent a party. *See, e.g.*, Br. of Amicus Curiae the Bipartisan Legal Advisory Grp. of the U.S. House of Representatives in Supp. of Pet'r, *Renzi v. United States*, No. 11-557 (U.S. Dec. 2, 2011), 2011 WL 6019914; *In re Search of Rayburn House Office Bldg.*, 432 F. Supp. 2d 100, 105 (D.D.C. 2006), *rev'd sub nom.*, *United States v. Rayburn House Office Bldg.*, 497 F.3d 654 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1295 (2008); *Fields v. Office of Eddie Bernice Johnson*, 459 F.3d 1, 3 (D.C. Cir. 2006) (en banc).

INTRODUCTION AND BACKGROUND

I. THE COURT'S SPEECH OR DEBATE CLAUSE JURISPRUDENCE

The Speech or Debate Clause is rooted historically in the suppression and intimidation, by criminal prosecution, of Members of Parliament by English monarchs in the 16th and 17th centuries. *See United States v. Johnson*, 383 U.S. 169, 178 (1966); *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951).[3] As a result of the English experience, "[f]reedom of speech and action in the legislature was taken as a matter of course" by the Founders, and included by them in the Constitution in the form of the Speech or Debate Clause, with little discussion or debate. *Tenney*, 341 U.S. at 372-73.

"The purpose of the Clause is to [e]nsure that the legislative function the Constitution allocates to Congress may be performed independently." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 502 (1975). Its "'central role'" is to "'prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary.'" *Id.* (quoting *Gravel v. United States*, 408 U.S. 606, 617 (1972)). The Clause thus "reinforc[es] the separation of powers so

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[3] The historical record confirms the Clause's roots in the criminal context. *See, e.g.*, Conrad Russell, *Parliaments & English Politics, 1621-1629* at 122 (1979); Christopher Thompson, *The Reaction of the House of Commons in Nov. & Dec. 1621 to the Confinement of Sir Edwin Sandys*, 40 Hist. J. 779, 781-82, 785 (1997); John Reeve, *The Arguments in King's Bench in 1629 Concerning the Imprisonment of John Selden & Other Members of the House of Commons*, 25 J. Brit. Stud. 264, 265 (1986); Harold Hulme, *The Winning of Freedom of Speech by the House of Commons*, 61 Am. Hist. Rev. 825, 836 (1956).

deliberately established by the Founders." *Johnson*, 383 U.S. at 178; *see also United States v. Brewster*, 408 U.S. 501, 507-08 (1972) ("The immunities of the Speech or Debate Clause were . . . written into the Constitution . . . to protect the integrity of the legislative process by insuring the independence of individual legislators."; "[T]hroughout United States history, the privilege has been recognized as an important protection of the independence and integrity of the legislature." (quotation marks omitted)).

Because the values the Speech or Debate Clause serves are so "vitally important to our system of government," the Court has insisted that the Clause "be treated by the courts with the sensitivity that such important values require." *Helstoski v. Meanor*, 442 U.S. 500, 506 (1979). Accordingly, the Court has required, "[w]ithout exception, . . . [that the Clause be] read . . . broadly to effectuate its purposes." *Eastland*, 421 U.S. at 501; *see also Doe v. McMillan*, 412 U.S. 306, 311 (1973) (same); *Gravel*, 408 U.S. at 624 (same); *Johnson*, 383 U.S. at 180 (same); *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880) (similar). In keeping with this sweeping mandate, and to ensure that the Clause's underlying purpose is fulfilled, the Court construed the Clause, in a series of decisions spanning a 30-year period from the early 1950s to the late 1970s, to encompass at least the following enduring features and elements:

1. The Court has held that, when applicable, the Speech or Debate Clause provides to Members three distinct protections: (i) an immunity from prosecutions and lawsuits for all "actions within the 'legislative sphere,'" *McMillan*, 412 U.S. at 312 (quoting *Gravel*, 408 U.S. at 624-25); *see also, e.g.*, *Eastland*, 421 U.S. at 503 (same); (ii) a non-evidentiary use

privilege that bars prosecutors and parties from advancing their cases or claims against Members by "[r]evealing information as to a legislative act," *Helstoski*, 442 U.S. at 490; *see also Johnson*, 383 U.S. at 173-77 (same); and (iii) a testimonial or discovery privilege against being compelled to testify about legislative matters, *see, e.g.*, *Gravel*, 408 U.S. at 615-16 (quashing subpoena insofar as it sought testimony regarding legislative matters).[4]

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[4] With respect to the testimonial/discovery privilege, the Court has not had occasion to consider whether that privilege extends to documentary materials that reflect legislative activities. The lower courts, however, almost without exception have concluded that the privilege does apply to such materials, because (i) "[d]ocument[s] . . . can certainly be as revealing as oral communications," and (ii) there is no logical reason why a Member should be constitutionally protected against being compelled to testify about his or her legislative activities, but constitutionally defenseless in the face of a subpoena or warrant for documentary materials that memorialize, reflect, or analyze those very same legislative activities. *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 420 (D.C. Cir. 1995) (affirming lower court order quashing document subpoena for committee documents); *see also, e.g.*, *In re Grand Jury Subpoenas*, 571 F.3d 1200, 1203 (D.C. Cir. 2009) (reversing lower court order that declined to quash document subpoena for Member records directed to Member's lawyers); *Rayburn House Office Bldg.*, 497 F.3d at 655, 660, 662 (Clause encompasses "non-disclosure privilege for written materials"; "[T]here is no distinction between oral and written materials within the legislative sphere . . . ."); *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 859-61 (D.C. Cir. 1988) (affirming lower court order quashing document subpoena to House subcommittee); Order at 1, *United States v. McDade*, No. 96-1508 (3d Cir. July 12, 1996) (reversing lower court order that had directed House committee to produce to Executive Branch documents reflecting legislative activity; "It was error for the district court to require production of the documents . . . .") (Add. at 2a).

The Court has drawn no distinctions among the three protections in terms of effect. Rather, it has held unequivocally that when the Clause applies, it is "absolute." *Eastland*, 421 U.S. at 501, 503, 509-10 & n.16; *accord Gravel*, 408 U.S. at 623 n.14.

2. The Court has held that the three protections apply to all activities "within the 'legislative sphere,'" *McMillan*, 412 U.S. at 312 (quoting *Gravel*, 408 U.S. at 624-25), which it broadly has defined to encompass 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."

Eastland, 421 U.S. at 504 (quoting *Gravel*, 408 U.S. at 625); *see also Gravel*, 408 U.S. at 617 (Court has "not taken a literalistic approach in applying the privilege"); *see also infra*, Introduction & Background, Part II.

3. The Court has held that, beyond legislative activities themselves, the Clause also protects "'against inquiry into . . . the motivation for those [legislative] acts.'" *Helstoski*, 442 U.S. at 489 (quoting *Brewster*, 408 U.S. at 525); *see also Brewster*, 408 U.S. at 538 (whether legislative activity improperly motivated "'is precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry'" (quoting *Johnson*, 383 U.S. at 180)); *Johnson*, 383 U.S. at 184-85 (similar).

4. The Court also has held that the protections of the Clause apply "to [a Member's] aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself." *Gravel*, 408 U.S. at 618. The Court has so held because:

> it is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos . . . .

Id. at 616-17; *see also, e.g.*, *Eastland*, 421 U.S. at 507 (Senate committee aide, as well as Senators themselves, immune from suit under Clause; "We draw no distinction between the Members and the Chief Counsel.").

5. Finally, the Court has held that the protections of the Clause apply "even though the[] conduct [in question], if performed in *other* than legislative contexts, would . . . be unconstitutional or otherwise contrary to criminal or civil statutes." *McMillan*, 412 U.S. at 312-13 (emphasis added). In so holding, the Court has acknowledged the potential costs associated with this broad constitutional protection. "[W]ithout doubt the exclusion of [legislative act] evidence will make prosecutions more difficult." *Helstoski*, 442 U.S. at 488. "[T]he broad protection granted by the Clause creates a potential for abuse." *Eastland*, 421 U.S. at 510. Nevertheless, the Court steadfastly and repeatedly has held that the Clause *must* be broadly

construed and applied because that was "'the conscious choice of the Framers' buttressed and justified by history." *Id.* (quoting *Brewster*, 408 U.S. at 516).

II. CONGRESSIONAL LEGISLATIVE ACTIVITY, GENERALLY

As noted *supra*, Introduction & Background, Part I.2-3, the Speech or Debate Clause encompasses all conduct "within the sphere of legitimate legislative activity," including particularly "the motivation for [that conduct]." *Eastland*, 421 U.S. at 501, 503, 508 (quotation marks omitted); *see also, e.g.*, *Helstoski*, 442 U.S. at 487-88 (Clause protects "legislative acts [and] the motivation for legislative acts").

As the Court further has recognized, investigative activity, or fact-finding, is essential to a Member's ability to participate in the legislative process and thus constitutes a core type of legislative activity. "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, "'the power of inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.'" *Id.* at 504 n.15 (ellipsis in original; quoting *Barenblatt v. United States*, 360 U.S. 109, 111 (1959); *Sinclair v. United States*, 279 U.S. 263, 291-92 (1929)).

This is so because a Member cannot understand the societal conditions that require, or do not require, legislative action – and thus cannot know whether to introduce legislation, much less the appropriate

content of any such legislation – without preliminary fact-finding. *See, e.g.*, *Eastland*, 421 U.S. at 504-05 ("[W]here the legislative body does not itself possess the requisite information – which not infrequently is true – recourse must be had to others who do possess it." (brackets in original; quotation marks omitted)). And, by the same token, a Member considering a bill suggested by another Member cannot know whether to join the first Member in sponsoring that bill, vote in favor of it, seek to amend it, or oppose it without likewise engaging in fact-finding. *See id.*; *see also id.* at 505 ("To 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.'" (quoting *Brewster*, 408 U.S. at 524; *Johnson*, 383 U.S. at 172)).

While congressional investigations, to fall within the Speech or Debate Clause protection, must "concern[] a subject on which 'legislation could be had,'" *Eastland*, 421 U.S. at 506 (holding Clause applicable upon determining that relevant investigation concerned such subject; quoting *McGrain*, 273 U.S. at 177), the Court's inquiry in this regard "is narrow," *id.* at 506-07 (concluding that "the inquiry was intended to inform Congress in an area where legislation may be had," and thus: "We conclude that the the Speech or Debate Clause provides complete immunity for the Members . . . .").

One subject, particularly relevant here, on which legislation could be had – indeed, an area in which Congress's power is plenary – is that of the distribution and use of federal land. *See* U.S. Const. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of

and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."). "The power over the public land thus entrusted to Congress is without limitations. 'And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.'" *United States v. City & Cnty. of S.F.*, 310 U.S. 16, 29-30 (1940) (quoting *Light v. United States*, 220 U.S. 523, 537 (1911)); *accord Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976).

"Throughout the history of the West, the federal government has used land exchanges with states, local governments, and private individuals to address various land management issues." Daniel Dansie, Comment, *The Washington County Growth and Conservation Act of 2006: Evaluating a New Paradigm in Legislated Land Exchanges*, 28 J. Land Resources & Envtl. L. 185, 187 (2008). Such exchanges often, and increasingly, take place via direct legislation (as opposed to via administrative action undertaken by a federal agency pursuant to a statutory delegation of authority). *See, e.g.*, *id.* at 187 ("In recent years, Congress has increasingly addressed land management issues through [direct] legislation."); Carol Hardy Vincent, Cong. Research Serv., R41509, *Land Exchanges: Bureau of Land Management Process and Issues* 1, 7 (2010). Accordingly, congressional information-gathering in support of such legislation – i.e., the conduct at issue in this case, as discussed immediately below – has become increasingly important.

III. MR. RENZI'S LEGISLATIVE ACTIVITY, AND THE NINTH CIRCUIT RULINGS REGARDING THAT ACTIVITY

While a Member of the House, Mr. Renzi served a vast congressional district comprising most of the landmass of the State of Arizona, which district included extensive federal lands. *See* 109th Congress of the United States – Arizona, U.S. Census Bureau, http://www2.census.gov/geo/maps/cong_dist/cd109_gen/st_based/cd109_AZ.pdf (last visited Apr. 8, 2015). Mr. Renzi also served on the House Committee on Resources, including during the time period at issue here. *See* H. Res. 48, 109th Cong. (2005) (appointment to Committee); *see also* Rule X.1(m)(19), Rules of the House of Representatives, 109th Cong. (2005) (providing Committee jurisdiction over "[p]ublic lands generally"), *available at* http://www.gpo.gov/fdsys/pkg/HMAN-109/pdf/HMAN-109-pg424.pdf. Accordingly, he was active in considering land exchange legislation. *See supra*, Introduction & Background, Part II.

More particularly, Mr. Renzi considered legislation involving at least two proposed land exchanges: one sought by Resolution Copper Company ("RCC Bill"), and a second pressed by developer Philip Aries ("Aries Bill"). *See* Appellant's Excerpts of R. at 210, 255-56, *United States v. Renzi*, No. 13-10588 (9th Cir. Apr. 8, 2014) (ECF No. 21-3) ("Petitioner's C.A.E.R."). Mr. Renzi initially encouraged both RCC and Mr. Aries to acquire the "Sandlin property" and to include it in their proposed exchanges. *Id.* at 227-28, 257.

The RCC Bill, which ultimately did not include the Sandlin property, was in draft form by March 2005, and introduced by Mr. Renzi in May 2005. *See Amicus Curiae*'s Suppl. Excerpts of R. at A66-67, A172-76, *United States v. Renzi*, No. 13-10588 (9th Cir. Apr. 16,

2014) (ECF No. 39) ("Amicus C.A.E.R."); Southeast Arizona Land Exchange and Conservation Act of 2005, H.R. 2618, 109th Cong. (2005) (bill, as introduced); 151 Cong. Rec. E1093 (daily ed. May 25, 2005) (floor speech introducing bill); Def.'s Trial Ex. 3568, *United States v. Renzi*, No. 4:08-cr-00212 (D. Ariz. May 15 2013) (bill sponsorship and drafting). The Aries Bill, which did include the Sandlin property, was drafted by April 2005, but not introduced. Amicus C.A.E.R. at A115-19. Neither bill was enacted. *Id.* at A175.

Mr. Renzi's trial centered on whether he initially pressed for inclusion of the Sandlin property because federal acquisition of that property would benefit a particular military installation (Fort Huachuca), the surrounding community, the environment, and the national defense (all of which benefits were undisputed), or because the property was owned by an individual indebted to Mr. Renzi. *See, e.g.*, Pet. C.A.E.R. 127; Trial Tr. Day 20 at 5-7, 238-43, *United States v. Renzi*, No. 4:08-cr-00212 (D. Ariz. June 5, 2013).

In pressing the latter theory (that Mr. Renzi acted solely out of criminal self-interest, rather than the public interest), the Executive Branch introduced in its case-in-chief the testimony of Mr. Renzi's then-District Director regarding (i) one or more conversations between Mr. Renzi and the District Director as to whether RCC's proposed legislation, even absent the Sandlin property, amounted to good public policy (it did, according to the District Director); (ii) Mr. Renzi's level of enthusiasm for such proposed legislation (not appropriately enthusiastic, according to the District Director); and (iii) Mr. Renzi's motivation for declining to introduce Mr. Aries's proposed legislation at a particular time (motivation affected by ongoing public discussion of a then-pending Executive Branch

investigation of a different Member, according to the District Director). *See* Pet. C.A.E.R. at 215-16, 222; *see also id.* at 220-21 (Mr. Renzi apparently on House floor during conversation regarding third issue). Notwithstanding that this evidence, on its face, pertained to proposed legislation and Mr. Renzi's motivations regarding that legislation, the District Court allowed its introduction against Mr. Renzi, who then was convicted, *id.* at 4-11, 130-33.

The Ninth Circuit let stand Mr. Renzi's indictment and then conviction. In *Renzi I*, it upheld the denial of his motion to dismiss the indictment by concluding that Mr. Renzi could be charged with misconduct in connection with his consideration of RCC's and Mr. Aries's proposed land exchange legislation because the Speech or Debate Clause (purportedly) only protects investigative activity conducted under the auspices of a committee investigation, rather than by Members individually. *See* Renzi Pet. App. B, at 79a n.12 (*Renzi I*, 651 F.3d at 1026 n.12). In *Renzi II*, it upheld his conviction because the Clause (purportedly) only applies after the introduction of relevant legislation, rather than during a Member's consideration of whether to introduce that legislation. *See* Renzi Pet. App. A, at 27a n.24 (*Renzi II*, 769 F.3d at 748 n.24). And, also in *Renzi II*, it further upheld his conviction on the theory that Mr. Renzi waived his Speech or Debate Clause rights through his lawyers' cross-examination of two Executive Branch trial witnesses, notwithstanding this Court's prior admonition that waiver of the Clause, if possible at all, only may be accomplished by an "explicit and unequivocal" statement of such an intent, *Helstoski*, 442 U.S. at 490-94, of which, indisputably, there was none. *See* Renzi Pet. App. A, at 21a-28a (*Renzi II*, 769 F.3d at 745-48).

SUMMARY OF ARGUMENT

The Speech or Debate Clause provides Members of Congress with an absolute immunity for their legislative activities "to insure that the legislative function the Constitution allocates to Congress may be performed independently." *Eastland*, 421 U.S. at 502. To effectuate that purpose, the Court has held that the Clause protects not just speech and debate on the floor of the House and Senate, but all actions that are "an integral part of the deliberative and communicative processes by which Members participate" in legislative proceedings. *Gravel*, 408 U.S. at 625. Indeed, the Court consistently has "read the Speech or Debate Clause broadly to effectuate its purposes." *Eastland*, 421 U.S. at 501.

The Speech or Debate rulings in the decisions below, by contrast, would diminish this majestic constitutional provision, both (i) substantively as to any legal process issued from within the Ninth Circuit, and (ii) in terms of the generation of substantial uncertainty as to legal process issued elsewhere. Neither that diminution nor that uncertainty is appropriate for a provision that is "vitally important to our system of government," *Meanor*, 442 U.S. at 506, and about which "[t]he Supreme Court has rarely spoken with greater clarity," *United States v. Peoples Temple of the Disciples of Christ*, 515 F. Supp. 246, 249 (D.D.C. 1981).

ARGUMENT

I. REVIEW IS APPROPRIATE BECAUSE THE NINTH CIRCUIT RULINGS, IF ALLOWED TO STAND, WOULD DECIMATE THE PROTECTIONS OF THE CLAUSE, AND WITH THEM THE INDEPENDENCE OF THE LEGISLATIVE BRANCH

The Ninth Circuit's (a) limitation of the Clause to information-gathering by congressional committees, rather than individual Members, and then only such activity that post-dates the introduction of legislation, and (b) determination that the protections of the Clause may be waived in the absence of an "explicit and unequivocal" renunciation, *Helstoski*, 442 U.S. at 490-94, constitute "miserly reading[s]" of the Clause "in derogation of the integrity of the legislative process." *Eastland*, 421 U.S. at 505 (quotation marks omitted).

A. Fact-Finding by Individual Members, before Legislation Is Introduced, Is Essential to the Legislative Process, and Thus the Protection of Such Activity Is Essential to the Independence of the Legislative Branch.

Investigation, oversight, and information-gathering play a critical role, as they should, in enabling Members to determine – before they put pen to paper – whether legislation is needed or advisable (and, if so, what precepts it should contain). *See, e.g.*, *supra*, Introduction & Background, Part II. Investigations to determine whether to propose, for example, a particular land exchange, how to structure that exchange, and how to

vote on an exchange proposed by another Member all lie at the heart of the legislative process, and thus the Speech or Debate Clause. *See id.* That reality is in no way diminished by whether the investigative activity is pursued within the committee context, or apart from it, and whether it is pursued before or after formal introduction of legislation. Put another way, there is no coherent constitutional rationale for the lines drawn by the Ninth Circuit.

1. As to *Renzi I*'s limitation of the Clause's protections to information-gathering in the committee context, it is Members – not committees – to whom the Clause directly refers, U.S. Const. art. I, § 6, cl. 1 ("[F]or any Speech or Debate in either House, *they* [*Senators and Representatives*] shall not be questioned in any other Place." (emphasis added)), and it is Members – not committees – who sponsor and vote on legislation, *see, e.g.*, *id.* art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members . . . ."). Indeed, the Ninth Circuit itself previously had recognized these constitutional realities in applying the Clause to the information-gathering activities of an individual Member: Gathering "information pertinent to potential legislation . . . is one of the things generally done in a session of the House, concerning matters within the legitimate legislative sphere." *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 530 (9th Cir. 1983) (quotation marks omitted). The Ninth Circuit's pivot on this question in the context of this case ignores, then, not only the weight of the lower court authority,[5] but also the purpose and

[5] *See, e.g.*, *McSurely v. McClellan*, 553 F.2d 1277, 1286 (D.C. Cir. 1976) (en banc) ("information gathering, whether by issuance of subpoenas or field work by a Senator or his staff, is essential

history of the Speech or Debate Clause and the realities of the legislative process.

2. As to *Renzi II*'s limitation of the Clause's protections to information-gathering efforts that post-date the introduction of legislation, that suggestion also is contrary to the weight of the lower court authority,[6] the text and purpose of the Clause, and the realities and practicalities of the legislative process. As the Court has emphasized in applying the Clause, congressional information-gathering is vital *no matter the end result, if any*:

> Nor is the legitimacy of a congressional inquiry to be defined by what it produces. The very nature of the investigative function – like any research – is that it takes the searchers up some 'blind alleys' and into non-productive enterprises. To be a valid inquiry there need be no predictable end result.

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to informed deliberation over proposed legislation"); *see also* Renzi Pet. at 13-16 (citing cases).

[6] *See, e.g.*, *Brown & Williamson*, 62 F.3d at 411-12, 415-23 (quashing on Speech or Debate grounds subpoena for House committee documents that pertained to committee's investigation into effects of tobacco products; no consideration of presence or absence of pending legislation); *Jewish War Veterans v. Gates*, 506 F. Supp. 2d 30, 53 (D.D.C. 2007) ("actual drafting of legislation [and] negotiating with other Members over it" are "indisputably legislative in nature" and, therefore, covered by Clause); *see also* Renzi Pet. at 21-23 (citing cases). Indeed, again, the Ninth Circuit itself previously (and correctly) had recognized that legislative activities "pertinent to *potential* legislation" were protected by the Clause. *Miller*, 709 F.2d at 529-31 (emphasis added).

Eastland, 421 U.S. at 509 (Speech or Debate Clause precludes suit against Senate subcommittee Members and staff engaged in investigative activity; no indication of pending legislation).

* * *

To expose Members to prosecution for activities that lie at the heart of the legislative process (and to conviction based on evidence of such activity) would subject them to precisely the "intimidation . . . by the Executive" and "accountability before a possibly hostile judiciary" that the Court has held that the Clause forbids. *Id.* at 502 (quotation marks omitted); *supra*, Introduction & Background, Part I. The "integrity of the legislative process," *Brewster*, 408 U.S. at 507, and the "separation of powers so deliberately established by the Founders," *Johnson*, 383 U.S. at 178, require that the Court reject such a construction.

B. This Court's Requirement That the Protections of the Clause May Be Waived, if at All, Only after an "Explicit and Unequivocal" Renunciation of Those Protections Likewise Is Essential to the Protection of the Legislative Process and the Independence of the Legislative Branch.

Prior to the Ninth Circuit's ruling in this case, no court ever had held that a Member of Congress had waived his or her Speech or Debate Clause protections. Indeed, this Court, while expressing doubt that such a waiver is even possible, had emphasized:

> Assuming that [it] is possible [for an individual Member to waive], we hold that waiver can be found only after explicit and

> unequivocal renunciation of the protection. The ordinary rules for determining the appropriate standard of waiver do not apply in this setting.

Helstoski, 442 U.S. at 490-91; *see also id.* at 492 (reiterating same); *id.* at 492-94 (holding same as to possibility of institutional waiver).[7]

In establishing the "explicit and unequivocal" standard for any waiver, and in emphasizing that the "ordinary rules" of waiver "do not apply" in the Speech or Debate Clause context, this Court had explained: "[*A*]*ny lesser standard* would risk intrusion by the Executive and the Judiciary into the sphere of protected legislative activities." *Helstoski*, 442 U.S. at 491 (emphasis added). The Ninth Circuit here ignored that admonition.[8]

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[7] *See also, e.g.*, *Johnson*, 383 U.S. at 173-77 & nn.5 & 7 (reversing conviction where Executive Branch cross-examined defendant Member regarding legislative material, notwithstanding that Member had testified about such material on direct examination); *Brown & Williamson*, 62 F.3d at 421 n.11 (holding Member did not waive Speech or Debate protections by "statements made [voluntarily] during a radio broadcast interview"); *Pittston Coal Grp., Inc. v. Int'l Union, United Mine Workers of Am.*, 894 F. Supp. 275, 278 n.5 (W.D. Va. 1995) (no waiver where Senator voluntarily disclosed documents in litigation; characterizing waiver argument as "meritless"; "Pittston [has] produced no evidence that Senator Rockefeller renounced his privilege, let alone made the 'explicit and unequivocal expression' required to waive it.").

[8] While the contours of the Ninth Circuit's waiver holding are far from clear (e.g., in what circumstances it will apply, and on precisely what lesser standard waiver now will be discovered), that very uncertainty compounds the "risk [of] intrusion by the Executive and the Judiciary into the sphere of protected

One reason that any lesser standard – such as that adopted by the Ninth Circuit here – threatens the independence of the Legislative Branch is that Members perform a substantial portion of their legislative activity in the public sphere, and thus in a context where, under ordinary waiver principles, the protections of the Clause would evaporate. If the protections of the Clause are so ephemeral that Member conduct – or, indeed, conduct by mere agents of the Member, rather than the Member him- or herself, as here – "open[s] the door" to prosecution at the hands of the Executive Branch for legislative activities, Renzi Pet. App. A, at 26a-29a (*Renzi II*, 769 F.3d at 747-49), Members necessarily (i) will endeavor to conduct more legislative activities outside the public gaze (presumably not a beneficial result), while (ii) acting with substantially less independence in light of the diminished likelihood that the protections of the Clause will be deemed to remain available.

II. REVIEW IS APPROPRIATE BECAUSE THE CIRCUIT SPLITS ENGENDERED BY THE NINTH CIRCUIT RULINGS, IF PERMITTED TO FESTER, THEMSELVES WOULD UNDERMINE THE PROTECTIONS OF THE CLAUSE, AND THE INDEPENDENCE ENSURED BY THOSE PROTECTIONS

The Ninth Circuit's Speech or Debate rulings create substantial uncertainty regarding the application of the Clause, uncertainty that itself undermines the values protected by the Clause.

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legislative activities," *Helstoski*, 442 U.S. at 491. *See also infra*, Argument, Part II.

Most notably, the 87 House Members who currently represent congressional districts in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington (comprising 20 percent of the membership of the House) now risk compelled testimony regarding certain legislative matters, and compelled disclosure of some legislative documents, to the Executive Branch, or to private civil litigants, to the extent process issues from their home districts or states. Those same Members, however, continue to enjoy the Clause's protections as to that testimony and those documents in Washington, D.C., where they perform much of their work, and in the great bulk of the rest of the country.

This uncertainty not only will confound Members from Ninth Circuit congressional districts in the conduct of their legislative affairs, it provides perverse incentives for civil and criminal actions, and grand jury investigations, to be commenced within the Ninth Circuit (such that process will issue there), when possible. Indeed, this may be true even when such actions and investigations involve Members – as parties or non-parties – representing congressional districts outside the Ninth Circuit.

What's more, the Ninth Circuit ruling risks chilling all House Members in their communications with Members serving Ninth Circuit congressional districts. For example, under the Ninth Circuit's approach, a Member from Ohio (perhaps the Speaker of the House, who traditionally does not serve on House standing committees) would be discouraged from speaking in candor with a Member from California (perhaps the Democratic Leader of the House, who also traditionally does not serve on House standing committees) about important legislative matters (say

the possible introduction of an important bill) for fear that the California Member might later be compelled to disclose the substance of their conversations. It is difficult to imagine a construction of the Clause that would chill, disrupt, and burden Congress's legislative, oversight, and investigative functions to a greater extent. *See, e.g.*, *MINPECO*, 844 F.2d at 859 ("Discovery procedures can prove just as intrusive [as lawsuits against Members].").

The Court should grant Mr. Renzi's Petition to remedy this uncertain and unsatisfactory state of affairs, and affirm the constitutionally-mandated vitality of the Speech or Debate Clause. As Judge Kavanaugh of the D.C. Circuit observed in a recent Speech or Debate Clause case, quoting the Court:

> [T]he scope of a privilege must be clear and predictable for the privilege to serve its purpose. As the Supreme Court has said, "[a]n 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)).

CONCLUSION

The House respectfully urges the Court to grant Mr. Renzi's Petition.

Respectfully submitted,

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April 8, 2015

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-1508

UNITED STATES OF AMERICA,
Appellee,
v.
JOSEPH M. MCDADE,
Defendant,

CUSTODIAN OF RECORDS,
COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT,
UNITED STATES HOUSE OF REPRESENTATIVES,
Appellant.

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DIRECTING THE PRODUCTION OF RECORDS PURSUANT TO FED.R.CRIM.P. 17(c), AT CRIMINAL NO. 92-249

ARGUED: July 12, 1996

BEFORE: Becker, Stapleton and Greenberg,
Circuit Judges.

ORDER

It appearing to the Court that:

(1). The district court has ruled that the documents at issue are protected by the privilege conferred by the Speech or Debate Clause, and that ruling has not been challenged before us;

(2). With this determination made, our decision in *In re: Grand Jury Proceedings*, 587 F.2d 589 (3d. Cir. 1977) ("*Eilberg*") neither required nor authorized disclosure to the government;

(3). It was error for the district court to require production of the documents at issue to the government at the time of the district court's order;

It is hereby ORDERED that the portions of the district court's order of June 5, 1996 appealed from are VACATED.*

BY THE COURT:

/s/ Edward R. Becker
Circuit Judge

DATED: JUL 12 1996

* If in the course of future proceedings, the district court determines that a legitimate issue exists as to whether there has been a valid waiver of the Committee's privilege, nothing here said is intended to preclude the district court from ordering the documents at issue produced for its inspection *in camera* in connection with the resolution of that issue.