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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Department of Justice (DOJ) does not dispute the exceptional importance of the Speech or Debate Clause questions presented in the petition. It instead offers a variety of arguments built from the same premise: that the Clause must be cabined so as not to interfere with public-corruption prosecutions. Accordingly, in DOJ's telling, an allegation of criminal conduct vitiates the protections of the Clause and a subsequent conviction confirms that they never should have applied. Likewise, DOJ argues that the Clause's protections should be subject to waiver rules developed in other contexts notwithstanding this Court's precedent on the subject in *this* context.

DOJ's arguments mischaracterize the decisions below and find no support either in logic or in the decisions of this Court. The Ninth Circuit allowed this prosecution to proceed even though it depended on evidence of Renzi's protected legislative fact-finding. It then upheld his convictions despite the introduction of additional evidence of Renzi's legislative work in reliance on an erroneous waiver theory.

Not only are the decisions below wrong, and not only are they inconsistent with decisions of this Court and other courts of appeals, they have generated enormous uncertainty about the operation of the Clause, substantially weakened its protections, and greatly diminished the independence of the Legislative Branch. Contrary to DOJ's contention, moreover, each question in the petition is squarely presented in this case.

This Court should grant certiorari to restore the Clause as a reliable safeguard of the separation of powers. This is Renzi's view, but it is also the view of

the bipartisan leadership of the House of Representatives, former lawmakers with decades of experience, and a group of scholars and former congressional counsel—all of them *amici* in this case who agree that review is warranted.

A. The Court Should Grant Review To Decide Whether Fact-Finding By An Individual Member Is A Legislative Act Protected By The Clause

1. As DOJ concedes, Opp. 23, the courts of appeals are divided on whether the Speech or Debate Clause protects fact-finding by individual Members of Congress. Nonetheless, DOJ argues that this case would not be an appropriate vehicle for resolving this question because, in its view, Renzi would not be entitled to relief no matter how the Court decided it. That is not correct. As the Ninth Circuit itself recognized, the court of appeals "would [have] agree[d]" with Renzi's request to dismiss the public-corruption charges if this Court had "extended Clause protection to prelegislative investigations and fact-finding by individual Members." Pet. App. 79a n.12. Thus, the petition squarely presents the first question in the petition—a question of exceptional importance on which the courts of appeals are divided.

DOJ misstates Renzi's arguments. He has never taken the position that extortion is a legislative act or that he enjoys blanket immunity from prosecution. Rather, Renzi has argued that DOJ impermissibly put at issue his motivation for investigating and developing the land-exchange legislation in question. Renzi expressly conditioned his support for those draft bills on whether they would help protect a military base in Arizona—an objective that DOJ agreed was in the public interest. Pet. C.A.E.R. 127.

The mere fact that DOJ alleged an additional, improper motive—that Renzi sought to benefit himself—does not strip these legislative acts of the protections of the Clause. See *Eastland* v. *United Servicemen's Fund*, 421 U.S. 491, 508-09 (1975); *United States* v. *Brewster*, 408 U.S. 501, 538 (1972); see also *Rangel* v. *Boehner*, ___ F.3d ___, 2015 WL 2145743, at *3 (D.C. Cir. May 8, 2015) (rejecting "familiar" argument "made in almost every Speech or Debate Clause case" that conduct at issue cannot be "legislative" because it was "*illegal*").

As Renzi has consistently argued, the proper inquiry is whether an individual Member's fact-finding is legislative, not whether it is legal or illegal. See *Bogan* v. *Scott-Harris*, 523 U.S. 44, 54-55 (1998) (explaining that this inquiry looks to the "nature of the act," not the "motive or intent of the official performing it"); see also *Rangel*, 2015 WL 2145743, at *3. If a Member's fact-finding is legislative, then the Clause applies absolutely. *Eastland*, 421 U.S. at 503. That is why the Ninth Circuit explicitly acknowledged that it would have been compelled to dismiss Renzi's indictment if this Court had held that an individual Member's fact-finding is a protected legislative act.

2. Not only is the first question in the petition the subject of a circuit conflict and squarely presented, the Ninth Circuit wrongly decided it. Although the court of appeals was right to assume that its prior precedent protecting fact-finding by individual Members from *civil* discovery was correct, Pet. App. 78a-79a; see Opp. 24, it erred by cabining that holding, Pet. App. 78a-79a. No other court of appeals has ever suggested that the protections accorded to a Member's fact-finding would vary depending on whether the underlying case was civil or criminal.

Contrary to the Ninth Circuit's approach, the scope of the protections of the Speech or Debate Clause do not vary based on context. Rather, the Clause protects all activities within the "legitimate legislative sphere." *Eastland*, 421 U.S. at 503. Fact-finding by individual Members easily meets this test: it is "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings" with respect to legislation or other matters within Congress' jurisdiction. *Gravel* v. *United States*, 408 U.S. 606, 625 (1972). Indeed, such fact-finding is indispensible to Congress' work, as the *amicus* briefs make clear. See House Amicus Br. 16-17 (describing fact-finding by individual Members as "at the heart of the legislative process"); Brand Amicus Br. 10. (describing work of Congress as increasingly decentralized and Member-driven).

Refusing to extend the Clause's protections to the actions of individual legislators would have absurd consequences. It would deny the Clause's protections to Members of leadership who do not serve on committees, see House Amicus Br. 22-23 (describing tradition that Speaker of the House does not serve on standing committees), eliminate protections for investigations initiated by individual Members, see Brand Amicus Br. 11-12 (describing genesis of investigation into "Operation Fast and Furious" in fact-finding by individual Member then in Senate minority), and render the Clause's protections unavailable to investigations commenced by the minority party or other Members whose interests diverge from those of a committee chair, see Doolittle Amicus Br. 9-10 (explaining that committees do not "always proceed

in a manner that an individual member may desire or obtain the information that a member requires").[1]

B. The Court Should Grant Review To Decide Whether A Member's Official Actions To Develop, Evaluate, And Draft Legislation Prior To The Formal Introduction Of A Bill Are Legislative Acts Protected By The Clause

1. The Ninth Circuit held that a staffer's testimony about Renzi's attitude toward one bill and his reasons for not introducing another were unprotected by the Speech or Debate Clause because the testimony related to conduct occurring prior to the introduction of legislation. See Pet. App. 27a n.24. At the same time, the court made clear that identical testimony would have been protected if it involved conversations about a "bill after it ha[d] been introduced." *Ibid.* (distinguishing *Brewster* on that basis). No court of appeals has ever before conditioned the Clause's protections on whether a bill has been introduced. And other courts of appeals have expressly rejected such an approach. See, *e.g.*, *Yeldell* v. *Cooper Green Hosp., Inc.,* 956 F.2d 1056, 1063 (11th Cir. 1992) ("the decision whether or not to introduce legislation is one of the most purely legislative acts that there is"). The second question in the petition, then, is likewise a question of exceptional importance that

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[1] DOJ suggests that Renzi's challenge to his *indictment* should fail because he does not identify specific evidence that should have been excluded *at trial*. Opp. 22. But a post-conviction challenge to an indictment that depended on evidence of an individual Member's fact-finding need not enumerate the pieces of violative evidence subsequently introduced. DOJ cites no authority for its contrary view.

is both squarely presented and the subject of a circuit conflict.

Recognizing the indefensibility of the Ninth Circuit's rationale, DOJ contends that it meant something other than what it said. See Opp. 30 (characterizing decision as "fact-bound" holding that Renzi's statement "related to" corrupt promise). That is not a fair reading of the court of appeals' decision. The court made clear that it found the conduct unprotected because it occurred "*before* Renzi made good on his promise to introduce a federal land exchange bill" and "[t]herefore the testimony concerned only Renzi's 'promise to perform an act in the future.'" Pet. App. 27a n.24 (quoting *United States* v. *Helstoski*, 442 U.S. 477, 489 (1979); (emphasis added)). See also *ibid.* (distinguishing *Brewster*).

DOJ's reading of the court of appeals' decision is self-defeating. Under its reading, the court found that the testimony was proper because it "related to" an earlier corrupt promise. Opp. 30.[2] But this Court foreclosed that approach in *Brewster* when it barred the prosecution from introducing evidence about how a Member "acted, voted, or decided"—even though those actions undoubtedly "related to" the Member's unprotected promise to introduce legislation in the future. 408 U.S. at 527-28. The test is not whether a Member's actions "related to" a prior promise; it is whether those actions constitute legislative acts. When, as here, the actions are legislative, the Clause's protections are absolute.

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[2] The testimony at issue did not describe actual promises to take action in the future. See Pet. 11.

2. The Ninth Circuit's holding that the Speech or Debate Clause does not protect work on legislation prior to its introduction is manifestly erroneous—so erroneous that DOJ has declined to defend it. And for good reason: a Member's discussions with senior staff about his assessment of legislation and his reasons for declining to introduce a bill are core legislative acts. See *Kilbourn* v. *Thompson*, 103 U.S. 168, 204 (1880) (Clause protects acts "generally done in a Session of the House by one of its members in relation to the business before it"); see also *Yeldell,* 956 F.2d at 1063.

As the petition explains (at 24-26), the Ninth Circuit's decision creates enormous and unworkable gaps in the Clause's protections. The decision thereby ignores this Court's instruction that the Clause be interpreted to fit the "complexities of the modern legislative process" and to address the "realistic[] threat[s]" to a Member's legislative independence. *Gravel*, 408 U.S. at 616, 618; see Brand Amicus Br. 11-12 (describing importance to Congress of individual Members' work on legislation prior to introduction); Doolittle Amicus Br. 16 (same). The Ninth Circuit's decision has also introduced substantial uncertainty about the Clause's operation, which will inevitably chill legislative conduct. See, *e.g.*, *In re Grand Jury Subpoenas*, 571 F.3d 1200, 1206 (D.C. Cir. 2009) (Kavanaugh, J., concurring) ("'[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'") (quoting *Upjohn Co.* v. *United States*, 449 U.S. 383, 393 (1981)).

C. The Court Should Grant Review To Decide Whether A Member Can Waive The Protections Of The Clause Only By Explicitly And Unequivocally Renouncing Them

1. In *Helstoski*, this Court held that the protections of the Speech or Debate Clause could be waived, if at all, "only after explicit and unequivocal renunciation of the protection[s]." 442 U.S. at 491. In this case, the Ninth Circuit allowed DOJ to question Renzi's staff about his legislative acts even though he never explicitly and unequivocally renounced the Clause's protections. The Ninth Circuit's decision thus conflicts with *Helstoski*.

DOJ offers three arguments for denying review, but none is persuasive. First, DOJ claims that the courts of appeals have rejected Renzi's reading of *Helstoski*. Opp. 29-30. But the cases on which DOJ relies involved challenges to indictments. In each case, the Member-defendant argued that the indictment violated the Clause because the Member would need to testify about his legislative acts in his defense. Because the indictments did not necessarily put at issue the Member-defendants' legislative acts, the courts of appeals rejected these arguments. The courts then went on to note that a Member-defendant who testified in his own defense would be subject to cross-examination.

Nothing in these cases conflicts with Renzi's reading of *Helstoski*. None of them addressed whether a Member had waived the Clause's protections or, more critically, what procedures a trial court must follow to ensure that any renunciation of the privilege is explicit and unequivocal. These cases, moreover, did not involve counsel for a Member asking

questions of a prosecution witness on cross-examination. Renzi thus does not ask the Court to hold that a Member-defendant may use the Clause as both a sword and a shield during a criminal trial. Rather, he asks the Court to decide the question squarely presented by this petition: whether the protections of the Clause may be renounced absent an explicit statement by a Member.

DOJ next claims that *Helstoski* is not controlling here for the reason that the Ninth Circuit disclaimed any "waiver" finding and instead determined that Renzi had not been "questioned" within the meaning of the Clause because his counsel "open[ed] the door" to these topics. Opp. 28 & n.2. This is semantics. Saying that a defendant "opened the door" to questions about otherwise privileged matters is another way of saying that the defendant impliedly waived the privilege. Indeed, to justify its rule, both the court of appeals and DOJ rely on implied-waiver cases and principles. See Pet. App. 24a (relying on principles of fairness); Opp. 28 (citing case law on standard of waiver in Fifth Amendment context).

DOJ asks this Court to prioritize the adversarial process over the protections of the Clause. See Opp. 28 (expressing concern that Renzi would "distort[] the truth-seeking process and undermin[e] the 'central purpose of [the] criminal trial * * * to decide the factual question of * * * guilt or innocence" (quoting *Delaware* v. *Van Ardsall*, 475 U.S. 673, 681 (1986) (ellipses and third set of brackets added by DOJ). *Helstoski* forecloses that request in two ways. First, the decision makes clear that the normal rules for determining waiver do not apply in the Speech or Debate Clause context. 442 U.S. at 491. Second, it emphasizes that the Clause is designed to "preserve

the constitutional structure of separate, coequal, and independent branches of government," *not* "to assure fair trials." *Ibid.* Both the rule and the rationale offered by the Ninth Circuit and DOJ thus squarely conflict with *Helstoski*.

DOJ's final argument—that no conflict exists among the courts of appeals, Opp. 29-30—is ultimately irrelevant, because the Ninth Circuit's decision conflicts with this Court's decision in *Helstoski*. It is also mistaken.

DOJ is correct that *Fields* v. *Office of Eddie Bernice Johnson*, 459 F.3d 1 (D.C. Cir. 2006), and the cases following it arose in the context of civil actions alleging wrongful termination of employees. But DOJ does not explain why the holding of those cases—that an opposing party may not inquire into a matter protected by the Clause that has been put at issue by a Member or the House itself—would not have demanded a conclusion that is the opposite of the Ninth Circuit's here.[3]

The circuit split identified in the petition (at 28-29) is real and undeniable. It is also a significant one, as it will further encourage forum shopping, particularly when the D.C. Circuit's decisions are considered in conjunction with other decisions reflecting that court's refusal to cabin the Clause. See, *e.g.*, *Rangel*, 2015 WL 2145743, at *3-4 (concluding that internal House disciplinary processes involved legislative acts); *In re Grand Jury Subpoena*, 571 F.3d at 1203 (quashing subpoena for Member's rec-

[3] DOJ also asserts, Opp. 29-30, that the *holdings* of these cases should be ignored because of earlier *dicta* in *United States* v. *Rostenkowksi*, 59 F.3d 1291 (D.C. Cir. 1995). But a holding controls over dictum, not the other way around.

ords directed to Member's lawyers); *United States* v. *Rayburn House Office Bldg.*, 497 F.3d 654, 660-63 (D.C. Cir. 2007) (holding that Clause provides non-disclosure privilege).

2. The Speech or Debate Clause plays an important structural role in the constitutional system. The decision of the court of appeals would reduce it to a trial privilege susceptible to the same waiver rules that apply in other contexts, thereby contravening *Helstoski*'s teaching that the "ordinary rules for determining the appropriate standard of waiver" do not apply. 442 U.S. at 491. The proper inquiry, reflecting a due recognition of the importance of the Clause in our government of separated powers, led this Court to conclude that the protections of the Clause can be waived, if at all, only explicitly and unequivocally. *Ibid.*

Helstoski's requirement that any waiver of the protections of the Clause be "explicit and unequivocal," 442 U.S. at 491, guarantees that those protections will not disappear unexpectedly when a Member of Congress needs them most, in the midst of a criminal prosecution brought by DOJ before a potentially hostile judiciary. Depriving the Member of control of the privilege, and allowing a question by counsel during cross-examination of a prosecution witness to waive the protections of the Clause, would eviscerate *Helstoski*'s guarantee and render the Clause a weak and undependable guardian of those protections. As *amici* explain, this would impair legislative independence in exactly the manner the

Framers sought to prevent. See House Amicus Br. 21; Doolittle Amicus Br. 17-18.[4]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[4] DOJ argues that review of the second and third questions is unwarranted for the additional reason that any error in admitting Keene's testimony had no effect on the outcome of the trial. Opp. 32 n.3. As the petition explains (at 35), that is wrong because the testimony addressed the key issue in the case. DOJ offers no response to this argument. In any event, this Court's ordinary practice is to leave harmless-error determinations to the lower court in the first instance. *E.g., Ring* v. *Arizona*, 536 U.S. 584, 609 n.7 (2002).