No. 11-557

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 Speech or Debate Clause, U.S. Const. Art. I, § 6, Cl. 1, provides petitioner (a former United States Congressman currently under criminal indictment) with a non-disclosure privilege that entitles him to a *Kastigar*-like hearing at which the United States would have to prove that the indictment is based on non-privileged evidence that was not derived from privileged legislative-act evidence.

2. Whether the indictment charging petitioner with extorting private investors to buy land owned by petitioner's former 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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes and rule: Page

Miscellaneous:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-55a) is reported at 651 F.3d 1012. The orders of the district court (Pet. App. 56a-78a, 210a-222a) are reported at 686 F. Supp. 2d 956 and 686 F. Supp. 2d 991.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 2011. A petition for rehearing was denied on August 1, 2011 (Pet. App. 239a-240a). The petition for a writ of certiorari was filed on October 31, 2011 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In September 2009, a federal grand jury sitting in the District of Arizona returned a second superseding

indictment charging petitioner, a former United States Congressman, with 48 criminal counts, *viz.* conspiracy to commit extortion, mail fraud, and wire fraud, in violation of 18 U.S.C. 371, 1341, 1343, 1346, and 1951(a); wire fraud, in violation of 18 U.S.C. 1343 and 1346; conspiracy to launder money, in violation of 18 U.S.C. 1956(a)(1)(B)(i) and 1957; money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i) and 1957; extortion, in violation of 18 U.S.C. 1951; conspiracy to commit insurance fraud, in violation of 18 U.S.C. 371 and 1033; insurance fraud and making false statements, in violation of 18 U.S.C. 1033; racketeering, in violation of 18 U.S.C. 1962(c); and filing a false tax return, in violation of 26 U.S.C. 7206(1). Pet. App. 7a, 79a-155a. Petitioner moved to dismiss the indictment, arguing that the charges are based on his legislative acts and that legislative-act evidence was presented to the grand jury in violation of the Speech or Debate Clause, U.S. Const. Art. I, § 6, Cl. 1. See Pet. App. 57a, 63a-77a. Petitioner also moved for a hearing such as that contemplated in *Kastigar* v. *United States*, 406 U.S. 441 (1972), at which the government would be required to show that the charges were based on unprivileged evidence that was not derived from legislative-act evidence. See Pet. App. 210a-221a. Adopting the recommendations of a magistrate judge, see *id.* at 156a-209a, 223a-239a, the district court denied the motions, *id.* at 56a-78a, 210a-222a. The court of appeals affirmed. *Id.* at 1a-55a.

1. Petitioner was elected to the United States House of Representatives in 2002 as the representative of Arizona's First Congressional District. Pet. App. 3a. He later obtained a seat on the House Natural Resources Committee (NRC), which is responsible for approving

legislation authorizing the exchange of federal land for privately owned land. *Id.* at 4a.

In 2005, Resolution Copper Corporation (RCC) owned the mineral rights to a copper deposit located near Superior, Arizona. Pet. App. 4a, 159a. RCC planned to extract the copper, but wanted to first obtain the surface rights, which the federal government owned. *Ibid.* RCC hired a consulting firm to assist it in buying private property that it would then offer to the government in exchange for the surface rights associated with the copper deposit. *Id.* at 4a-5a. In 2005, the consulting firm approached petitioner about sponsoring the required land-exchange legislation in the NRC. *Id.* at 5a. Petitioner met with RCC representatives in his congressional office and told them that he would support the land exchange if they purchased a parcel of land owned by James Sandlin to include in the proposed exchange. *Id.* at 5a, 160a. Petitioner did not disclose that Sandlin was a former business partner who owed petitioner $700,000 plus accruing interest. *Ibid.*

Although RCC negotiated with Sandlin in an attempt to buy the land in question, the parties were unable to agree because Sandlin insisted on unreasonable terms. Pet. App. 5a, 160a. In March 2005, an RCC representative called petitioner to inform him that the negotiations were not progressing. *Id.* at 5a. Petitioner assured RCC that Sandlin would be more cooperative in the future. *Ibid.* Later that day, RCC received a fax from Sandlin stating that he had heard from petitioner's office that petitioner had the impression Sandlin was not being cooperative and indicating his intent to cooperate in the negotiations. *Ibid.* When RCC and Sadlin remained unable to reach a deal, petitioner told RCC that he would kill its land-exchange proposal—a proposal

that would have been beneficial to petitioner's district—if RCC did not buy the Sandlin property. Specifically, petitioner told an RCC representative: "[N]o Sandlin property, no bill." RCC then ended its negotiations with Sandlin. *Id.* at 5a, 159a-160a; Gov't C.A. Br. 7.

Soon after Sandlin's negotiations with RCC collapsed, petitioner began meeting with an investment group led by Philip Aries (collectively, Aries) that wished to acquire land owned by the federal government, to discuss petitioner's possibly sponsoring a land exchange on the group's behalf. Pet. App. 5a-6a, 160a-161a. As before, petitioner insisted that Aries buy the Sandlin property to include in the proposed exchange. *Id.* at 6a, 161a. Petitioner assured Aries that, in return, its proposal would get a "free pass" through the NRC. *Ibid.*

Within a week, Aries bought the Sandlin property for $4.6 million and promptly wired $1 million to Sandlin. Pet. App. 5a-6a, 160a-161a. Sandlin immediately wrote a check for $200,000 to a company owned by petitioner. *Id.* at 6a. Petitioner deposited the check into a bank account of Patriot Insurance (an insurance company he also owned) and used most of the money to pay an outstanding Patriot Insurance debt. *Ibid.* When Aries later expressed concern about the deal before closing, petitioner personally assured the group that he would introduce its land exchange proposal once the sale was complete. *Ibid.* On the day the deal between Sandlin and Aries closed, Sandlin paid the remaining $533,000 he owed to petitioner into a Patriot Insurance account. *Ibid.* Petitioner, who failed to report either of Sandlin's repayments on his federal tax return, used the funds to pay for a host of personal debts. Gov't C.A. Br. 8-9. Despite his promises to Aries, petitioner never intro-

duced the land-exchange proposal in the NRC. Pet. App. 6a.

2. a. In 2008, the government presented evidence of the foregoing facts to the grand jury that ultimately issued the second superseding indictment. Gov't C.A. Br. 40-43. The evidence included testimony, emails, memoranda, letters, and notes of RCC and Aries representatives memorializing or otherwise recounting their communications with petitioner and Sandlin concerning the proposed land exchanges and the Sandlin property. *Ibid.*; see Pet. App. 73a, 197a-205a. None of the documents presented to the grand jury was a confidential congressional document, and most were generated by people or entities who were not part of the legislative process.[1] Gov't C.A. Br. 43.

In September 2009, the grand jury returned the second superseding indictment. It charged petitioner with 48 criminal counts, including conspiracy to commit extortion, mail fraud, and wire fraud; substantive wire fraud; conspiracy to launder money; money laundering; extortion; conspiracy to commit insurance fraud; insurance fraud and making false statements; racketeering; and filing a false tax return. Pet. App. 7a n.7, 79a-155a; Gov't C.A. Br. 3-4; see p. 2, *supra*.

b. Petitioner moved to dismiss the indictment, arguing, *inter alia*, that the charges are based on his legislative acts and are the result of the government's introducing legislative-act evidence to the grand jury in violation of the Speech or Debate Clause. See Pet. App. 57a, 62a-77a. As relevant here, petitioner argued that his

[1] The government had presented testimony from several of petitioner's former staffers to a previous grand jury, but it did not present that testimony to the grand jury that returned the second superseding indictment. Gov't C.A. Br. 40-41; see Pet. C.A. Br. 18-19.

communications with RCC and Aries representatives about their land-exchange proposals constituted "investigatory fact-finding" protected by the Clause. *Id.* at 62a; see 4:08-cr-00212 Docket entry No. 86, at 13-22, 35-38 (D. Ariz. Oct. 15, 2008).

Petitioner separately moved for a hearing such as that contemplated in *Kastigar*, at which the government would be required to show that any unprivileged evidence presented to the grand jury was not "derived, directly or indirectly, from information protected by the Speech or Debate Clause." 4:08-cr-00212 Docket entry No. 92, at 12 (D. Ariz. Oct. 15, 2008) (*Kastigar* Mot.); see *id.* at 10-13. Petitioner further argued that the government must establish that it "made no nonevidentiary use" of privileged or derivative materials, and he sought the dismissal of the charges against him if the government could not prove that "all of its pre-trial strategy was based on independent sources." *Id.* at 13; see *id.* at 13-14.

c. Adopting the recommendations of a magistrate judge, Pet. App. 156a-209a, 223a-238a, the district court denied petitioner's motions in two published orders, *id.* at 56a-78a, 210a-222a.

The district court rejected petitioner's argument that every communication he had about the land exchange proposals is protected by the Speech or Debate Clause. Pet. App. 62a. Petitioner's "negotiations" with RCC and Aries, the court reasoned, were not themselves legislative acts but instead involved, at most, unprotected "promises to perform future legislative acts." *Id.* at 62a, 64a (citing *United States* v. *Helstoski*, 442 U.S. 477, 489-490 (1979)); see *id.* at 73a, 195a. The court also rejected petitioner's contention that his communications with RCC and Aries constituted privileged "investigatory

fact-finding," explaining that such fact-finding qualifies as a protected legislative act only if it is "an integral part of the deliberative and communicative process by which Members participate in committee and House proceedings addressing legislation put before it or some other similar subject." *Id.* at 62a, 67a; see *id.* at 170a (citing *Gravel* v. *United States*, 408 U.S. 606, 625 (1972)). And the court "agree[d]," *id.* at 67a, with the magistrate judge's conclusion, *id.* at 191a-194a, that petitioner's communications with RCC and Aries did not meet that test.

The district court also denied petitioner's motion for a *Kastigar*-type hearing. Pet. App. 210a-222a. As the court explained, in *Kastigar*, this Court held that, when the government obtains a grant of immunity to compel an individual to testify over an assertion of his Fifth Amendment privilege against self-incrimination, the government is prohibited both from directly using that testimony and from using any evidence derived from the testimony. *Id.* at 212a-213a (citing *Kastigar*, 406 U.S. at 453-454). In such a case, the district court explained, "the Government must establish independent evidentiary support for any future prosecution free from the taint of the compelled testimony." *Id.* at 213a. The district court rejected petitioner's argument that the direct- and derivative-use immunities outlined in *Kastigar* are necessary to protect the legislative privilege guaranteed by the Speech or Debate Clause. *Id.* at 213a-215a.

The district court concluded that the privilege provided by the Speech or Debate Clause is a privilege against use, not a privilege against disclosure, as petitioner asserted. See Pet. App. 210a-220a. The court acknowledged that the D.C. Circuit had reached a differ-

ent conclusion in *United States* v. *Rayburn House Office Building, Room 2113*, 497 F.3d 654 (2007) (*Rayburn*), cert. denied, 552 U.S. 1295 (2008), holding that "the compelled disclosure of privileged material to the Executive during execution of [a] search warrant" for a congressional office violated the Clause. Pet. App. 217a (quoting *Rayburn*, 497 F.3d at 656). But the court agreed with the concurring judge in *Rayburn* that "the Speech or Debate Clause does not shield against *any and all* Executive Branch exposure to records of legislative acts because this would jeopardize law enforcement tools that have never been considered problematic." *Id.* at 219a. Noting that "there is no Supreme Court precedent to suggest that the Speech or Debate Clause applies to limit the Executive Branch's power to *investigate* criminal conduct," *id.* at 220a, the district court denied petitioner's motion for a *Kastigar*-type hearing, *id.* at 222a.

3. Petitioner filed an interlocutory appeal and the court of appeals exercised its jurisdiction under the collateral order doctrine, affirming the district court's denial of petitioner's motion to dismiss and his motion for a *Kastigar*-style hearing. See Pet. App. 1a-55a.[2]

a. On the merits, the court of appeals first rejected petitioner's contention that his "'negotiations' with RCC and Aries [were] protected 'legislative acts.'" Pet. App.

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[2] The court of appeals concluded, Pet. App. 9a-10a, that it lacked jurisdiction to address petitioner's argument that the district court should have "wholly suppress[ed] all of the evidence against him relating to his * * * 'negotiations,'" *id*. at 3a, and dismissed that aspect of his appeal, *id*. at 10a, 55a. The court also rejected, on the merits, petitioner's contention that the government presented a "pervasive" array of legislative-act evidence to the grand jury that returned the second superseding indictment. *Id*. at 27a; see *id*. at 27a-39a. Petitioner does not seek this Court's review of those rulings.

11a-27a. The court recognized that, if the negotiations were deemed to be legislative acts, petitioner would be entitled under the Speech or Debate Clause to three distinct protections: (1) a privilege against the government's prosecution of him for those acts, (2) a privilege against the government's compelling petitioner or his aides to testify at trial or before a grand jury about those acts, and (3) a privilege against the introduction of those acts to any jury, grand or petit. *Id.* at 11a-12a. The court also recognized that this Court has extended the Clause's protections of legislative acts beyond just "words spoken in debate" or "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." *Id.* at 14a (quoting *Kilbourne* v. *Thompson*, 103 U.S. 168, 204 (1881); citing *Gravel*, 408 U.S. at 617, 624); see *id.* at 14a-17a. But, the court noted, the reach of that protection is limited to acts that were "clearly a part of the legislative process—the due functioning of the process," *id.* at 15a (quoting *United States* v. *Brewster*, 408 U.S. 501, 515-516 (1972)), and, accordingly, it does not include "many activities that a Member might be *expected to perform*," *ibid.* And, the court of appeals noted, this Court has recognized a "marked distinction" between privileged legislative acts and unprivileged promises to engage in future legislative acts. *Id.* at 17a.

Applying those principles to petitioner's "negotiations" with RCC and Aries, the court of appeals concluded that those acts were not legislative acts entitled to protection under the Speech or Debate Clause. Pet. App. 17a-27a. First, the court explained that petitioner's actions were merely "*related to*," but not an integral part of, his participation in House proceedings. *Id.* at 18a-19a (quoting *Brewster*, 408 U.S. at 516). The

court noted that this Court in *Brewster* similarly declined to protect Congressman Brewster's "negotiations with private parties," 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." *Ibid.* (quoting *Brewster*, 408 U.S. at 516).

Second, the court of appeals relied on the fact that petitioner's negotiations were "pre-legislative" and involved a mere "promise[] to perform future legislative acts." Pet. App. 17a, 18a. The court rejected petitioner's argument that, when it comes to land-swap legislation, the act of negotiating with private parties "is analogous to discourse between legislators over the content of a bill and must be considered a protected 'legislative act' under a broad construction of the Clause." *Id.* at 18a.

Third, the court concluded that, because petitioner's negotiations were "extortion[ate]," they were not a "legitimate" "part of the legislative process or function." Pet. App. 20a-21a (quoting *Brewster*, 408 U.S. at 526). In *Brewster*, the court of appeals noted, this Court stated that "[t]aking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act." *Id.* at 20a (quoting *Brewster*, 408 U.S. at 526). Following the Third Circuit's lead, the court rejected petitioner's argument that the court should "distinguish between bribery and extortion charges against a Member," deciding that "*Brewster* applie[s] to both." *Id.* at 21a (citing *United States* v. *McDade*, 28 F.3d 283, 296 n.16 (3d Cir. 1994) (Alito, J.)).

The court of appeals also rejected petitioner's argument that circuit precedent compelled the conclusion

that his extortionate communications with RCC and Aries constituted investigatory fact-finding entitled to protection under the Clause. Pet. App. 24a-27a. 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," although the court also noted that no decision of this Court has ever "recognized investigations by an individual Member to be protected." Pet. App. 25a & n.10. The court emphasized, however, that the court in *Miller* "expressly limited its holding to circumstances in which no part of the investigation or fact-finding itself constituted a crime." *Id.* at 25a (citing *Miller*, 709 F.2d at 530). That limitation, the court explained, reflected this "Court's own admonishments that the Clause does not protect unlawful investigations by Members—even if performed by Congress *as a body*." *Id.* at 26a (citing *Gravel*, 408 U.S. at 621-622, 626). Because petitioner is alleged to have "violate[d] an otherwise valid criminal law in preparing for or implementing [his] legislative acts," the court concluded that its decision in *Miller* did not support petitioner's argument. *Id.* at 27a (brackets in original) (quoting *Gravel*, 408 U.S. at 626).

b. The court also rejected petitioner's claim that he was entitled to "a *Kastigar*-like hearing to determine whether the Government used evidence protected by the Speech or Debate Clause to obtain non-privileged evidence and whether the Government can prove its case with evidence derived from legitimate independent sources." Pet. App. 39a; see *id.* at 39a-54a.

The court recognized that petitioner's request was based on the premise that the Speech or Debate Clause

provides a non-disclosure privilege that has not yet been recognized by this Court. Pet. App. 39a. Under that view, the court noted, "legislative convenience [would] preclude[] the Government from reviewing documentary evidence referencing 'legislative acts' even as part of an investigation into unprotected activity." *Ibid.* The court of appeals rejected that view, which it acknowledged "has its genesis" in the D.C. Circuit's decision in *Rayburn*. *Id.* at 40a. In *Rayburn*, the D.C. Circuit held that the Speech or Debate Clause provides a privilege against disclosure because allowing members of the Executive Branch to review privileged materials without a Member's consent would distract Members and their staffs from their legislative work. 497 F.3d at 660, 663; see Pet. App. 41a-44a. In the view of the court of appeals here, in contrast, "distraction *alone*" cannot "serve as a touchstone for application of the Clause's testimonial privilege." *Id.* at 44a. Instead, the court reasoned, the Clause protects against "*unnecessar[y]*" distraction, a concern that is not at issue when the Executive investigates a Member for non-legislative (and therefore non-privileged) criminal activity, even if the investigation involves review of documentary legislative-act evidence. *Id.* at 48a-49a.

Finally, the court of appeals noted that, even if it were to agree with *Rayburn* that the Clause includes a non-disclosure privilege, petitioner still would not be entitled to the *Kastigar*-style hearing he sought. Pet. App. 39a n.21. Relying on the "general rule that facially valid indictments are not subject to challenge," the court observed that the Speech or Debate Clause—unlike the Fifth Amendment and the federal immunity statute construed in *Kastigar*—does not include an immunity from derivative use. *Id.* at 40a n.21 (citing *United States* v.

Calandra, 414 U.S. 338, 354-355 (1974)). Thus, the court explained, even under the rule announced in *Rayburn*, petitioner "would need to rely on the exclusionary rule to preclude a jury's consideration of 'fruit' evidence," a rule that "has no place in the grand jury context." *Ibid.* The court of appeals further noted that the D.C. Circuit in *United States* v. *Rostenkowski*, 59 F.3d 1291, 1300, supplemented on denial of reh'g, 68 F.3d 489 (1995), "reject[ed] the suggestion that *Kastigar*-like hearings are appropriate in the Speech or Debate context." Pet. App. 40a n.21. Similarly, the court observed, the *Rayburn* panel denied Congressman Jefferson's demand that the government return the unprivileged documents and computer files that it had seized in the search of his office without first reviewing them. *Ibid*. (citing *Rayburn*, 497 F.3d at 664-667).

ARGUMENT

Petitioner urges (Pet. 8, 11-21) this Court to grant his petition for a writ of certiorari in order to settle a disagreement between the Ninth Circuit and the D.C. Circuit about whether the Speech or Debate Clause, U.S. Const. Art. I, § 6, Cl. 1, contains a "non-disclosure" privilege that limits Executive Branch access to legislative-act evidence regardless of whether or in what manner the Executive later used such evidence. The United States agrees both that the courts of appeals are divided about the correct resolution of that question and that the question is an exceedingly important one warranting this Court's attention in an appropriate case. This case is not an appropriate vehicle for its resolution, however, because petitioner would not have been entitled to the relief he seeks (*i.e.*, a hearing such as that contemplated in *Kastigar* v. *United States*, 406 U.S. 441

(1972)) even if the court of appeals had agreed with the D.C. Circuit that the Clause includes a privilege against disclosure. Petitioner also renews his contention (Pet. 9, 22-30) that the second superseding indictment should have been dismissed because it was based on his protected investigatory "fact-finding." The court of appeals correctly rejected that argument and its decision does not conflict with any decision of this Court or of any other court of appeals.

1. Petitioner urges the Court (Pet. 11-21) to grant his petition for a writ of certiorari in order to resolve the disagreement between the court of appeals here and the D.C. Circuit in *United States* v. *Rayburn House Office Building, Room 2113*, 497 F.3d 654 (2007), cert. denied, 552 U.S. 1295 (2008), about whether the Speech or Debate Clause contains a "non-disclosure privilege" that "protects Members of Congress from disclosing legislative-act materials, 'regardless of the use to which the disclosed materials are put.'" Pet. 12 (quoting *Rayburn*, 497 F.3d at 660). Review of that question is not appropriate in this case.

The question whether the Speech or Debate Clause includes a privilege against disclosure of legislative-act material to the Executive is exceedingly important. The D.C. Circuit's holding in *Rayburn* that the Clause does contain a non-disclosure privilege is fundamentally incorrect and imposes a significant obstacle to the Executive's ability to investigate allegations of congressional corruption. Indeed, that was the basis of the United States' unsuccessful petition for a writ of certiorari in *Rayburn*. See 552 U.S. 1295 (2008) (No. 07-816). Although the United States continues to believe that the D.C. Circuit erred in finding a non-disclosure privilege in the Clause and continues to believe that it is impor-

tant that this Court correct that erroneous view in an appropriate case, this case does not satisfy the Court's usual criteria for review on a petition for a writ of certiorari because resolution of that issue is not outcome determinative. Review of that question is therefore not warranted in this case.

a. 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 "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).

Consistent with its text, "[t]he heart of the Clause is speech or debate in either House." *Gravel*, 408 U.S. at 625. This Court has extended the Clause to preclude inquiry into all "[l]egislative acts," in light of the Clause's purpose "to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary." *Id.* at 617, 624-625. Nonetheless, "the courts have extended the privilege to matters beyond pure speech or debate * * * 'only when necessary to prevent indirect impairment of such deliberations.'" *Id.* at 625 (quoting *United States* v. *Doe*, 455 F.2d 753, 760 (1st Cir.), vacated *sub nom. Gravel* v. *United States*, 408 U.S. 606 (1972)). The Clause "does not extend beyond what is necessary to preserve the integrity of the legis-

lative process." *Brewster*, 408 U.S. at 517; see *Forrester* v. *White*, 484 U.S. 219, 224 (1988) (courts have "been careful not to extend the scope of [the Clause] further than its purposes require"). And it does not extend to non-legislative acts like "[t]aking a bribe," which "is, obviously, no part of the legislative process or function." *Brewster*, 408 U.S. at 526.

In keeping with that balance, the Clause gives Members three protections. First, it grants them civil and criminal immunity for legislative acts. See *Doe* v. *McMillan*, 412 U.S. 306, 311-312 (1973); *United States* v. *Johnson*, 383 U.S. 169, 184-185 (1966). Second, it guarantees that a Member, or his alter ego, "may not be made to answer" questions about his legislative acts. *Gravel*, 408 U.S. at 616. Third, it bars the use of legislative-act evidence against a Member. *United States* v. *Helstoski*, 442 U.S. 477, 487 (1979). Those three protections—immunity from suit, a testimonial privilege, and a prohibition on use, all limited to legislative acts—are "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." *Brewster*, 408 U.S. at 525. Thus, while the Clause protects the legitimate prerogatives of the Legislative Branch, it does not "make Members of Congress super-citizens, immune from criminal responsibility." *Id.* at 516.

Contrary to the D.C. Circuit's reasoning in *Rayburn*, the protections of the Speech or Debate Clause do not confer a privilege of confidentiality. The Clause's text, limited to speech or debate in either House, describes activities that are generally *public* in nature. And the Clause's history explains the textual focus on public de-

bate. The Clause's "taproots [lie] in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries," during which the Crown prosecuted Members of Parliament "for 'seditious' speeches." *Tenney* v. *Brandhove*, 341 U.S. 367, 372 (1951). The Clause, unlike traditional confidentiality privileges such as the attorney-client privilege, protects public, non-confidential activities, such as floor debates, committee hearings, votes, and the drafting of bills and committee reports. See *Gravel*, 408 U.S. at 624; see also *Doe*, 412 U.S. at 311-313. These are matters that the Executive Branch is free to review without violating the Clause; rather, the Clause prohibits the *use* of such matters against a Member in a criminal or civil case.

In addition, unlike confidentiality-based privileges, the Speech or Debate Clause's protection of legislative materials or actions applies regardless of whether a Member has attempted to maintain their confidentiality. As Judge Henderson, writing separately in *Rayburn*, explained: "[W]hat the Clause promotes is the Member's ability to be open in debate—free from interference or restriction—rather than any secrecy right." 497 F.3d at 670 (Henderson, J., concurring in the judgment). Neither the text nor the history of the Clause supports *Rayburn*'s apparent inference that the Clause provides disparate protection for two classes of legislative acts, those conducted in public and those conducted under a cloak of secrecy.[3]

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[3] While *Rayburn* itself is seriously flawed, petitioner seeks a notably broader rule than that adopted by the D.C. Circuit. *Rayburn* concerned the execution of a search warrant in a congressional office, and the court of appeals "h[e]ld that the *compelled disclosure* of privileged material to the Executive during execution of the search warrant for Rayburn House Office Building Room 2113 violated the Speech or

b. Although the D.C. Circuit's recognition of a non-disclosure privilege in the Speech or Debate Clause is erroneous and should be corrected in an appropriate case, this is not that case. It is true that the court of appeals here rejected *Rayburn*'s view of the Clause, see Pet. App. 39a-54a; but the court also recognized that petitioner would not be entitled to the relief he seeks even if the D.C. Circuit were correct that the Speech or Debate Clause contains a non-disclosure privilege, see *id.* at 39a n.21.

Invoking the non-disclosure reasoning of *Rayburn*, petitioner filed a motion in the district court seeking a hearing such as this Court contemplated in *Kastigar*.[4] At that hearing, the government would be required to

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Debate Clause." 497 F.3d at 656 (emphasis added). The court of appeals repeatedly emphasized that its holding concerned what it considered to be "compelled disclosure." *Id.* at 660, 661, 662, 664. Petitioner, in contrast, seeks a "non-disclosure privilege preventing the Executive * * * from obtaining legislative material from a Member of Congress *without his consent*." Pet. 10 (emphasis added). Petitioner adopts this broader formulation presumably in an effort to challenge on Speech or Debate grounds the government's interviews of his "aides *without his consent* about his role developing the land-exchange legislation," as well as the government's review of documents the aides voluntarily provided. Pet. 7 (emphasis added). As Amicus Bipartisan Legal Advisory Group of the U.S. House of Representatives (BLAG) recognizes (BLAG Amicus Br. 19), *Rayburn* did not address that issue. It remains unclear whether the non-disclosure privilege adopted in *Rayburn* would be extended to the breadth petitioner seeks.

[4] As petitioner notes (Pet. 8 n.3), this Court held in *Kastigar* that, under the Fifth Amendment and 18 U.S.C. 6002, the government must demonstrate, when prosecuting a defendant who has been granted immunity in return for his testimony, "that the evidence it proposes to use" against him "is derived from a legitimate source wholly independent of the compelled testimony." 406 U.S. at 460; see *id.* at 453 (further describing this "immunity from use and derivative use").

show that, even if the second superseding indictment did not charge or otherwise rest on legislative acts, it also was not based on (and the government was not otherwise influenced by) unprivileged evidence that was "derived, directly or indirectly, from information protected by the Speech or Debate Clause." *Kastigar* Mot. 12; see *id.* at 10-14. The district court denied the motion, Pet. App. 210a-222a; see *id.* at 223a-238a, and the court of appeals affirmed the denial, *id.* at 39a-54a. In his petition for a writ of certiorari, petitioner does not explicitly renew his argument that he was entitled to a *Kastigar*-like hearing. But his reliance on *Rayburn*'s finding of a non-disclosure privilege in the Clause is relevant only to his request for such a hearing. That is apparent in petitioner's court of appeals briefing, which invoked *Rayburn*'s non-disclosure view only in support of his claim that "the district court [should] have held a *Kastigar*-like hearing to deter future violations" and "return [petitioner] to the position he would have occupied had the government not violated the Clause." Pet. C.A. Br. 2, 25; see *id.* at 24-25, 50-55. The dispositive question for petitioner's purposes is not, therefore, whether the Clause contains a non-disclosure privilege, but whether, if it does, that privilege entitles petitioner to a heretofore unrecognized "*Kastigar*-like" hearing under the Speech or Debate Clause.

Petitioner cites no authority for awarding such extraordinary relief in the speech-or-debate context. Indeed, his petition does not even discuss *Kastigar*; it is mentioned only in the petition's recital of this case's procedural history. Pet. 8 & n.3. And, as the court of appeals correctly held, neither *Rayburn* nor any other authority supports requiring the government to prove, on pain of dismissal, "that the indictment was not ob-

tained through the use of derivative evidence." Pet. App. 39a-40a n.21.

Even under the D.C. Circuit's erroneous reasoning in *Rayburn*, petitioner would not have been entitled to the relief he seeks. The court in *Rayburn* rejected Congressman Jefferson's claim that the Speech or Debate Clause, for the sake of "deter[ring] future unconstitutional acts," required the government to return, without reviewing, even the *unprivileged* documents it had seized in the search of his office. Recognizing that the remedy for any speech-or-debate violation "must give effect not only to the separation of powers underlying the * * * Clause but also to the sovereign's interest under Article II, Section 3 in law enforcement," the court held that the government could retain seized copies of unprivileged materials. 497 F.3d at 664; see *id.* at 663-666. Indeed, the court made clear that, pursuant to a separate "Remand Order" the court had issued, the government could also review seized but as-yet-unseen computer files once the district court made an *in camera* determination that the files were not "records of legislative acts." *Id.* at 658 (citation omitted); see *id.* at 662-663. As the court put it: "The Speech or Debate Clause protects against the compelled disclosure of privileged documents to agents of the Executive, *but not the disclosure of non-privileged materials.*" *Id.* at 664 (emphasis added).

Rayburn neither held nor suggested that government exposure to protected materials requires the suppression or return of derivative unprotected materials. Much less did it hold—as would be necessary to support petitioner's claimed entitlement to a *Kastigar*-like hearing—that the government must show, on pain of dismissal, that its investigation and resulting indictment

were in no way influenced by unprivileged materials "derived, directly or indirectly, from information protected by the Speech or Debate Clause." *Kastigar* Mot. 12. The decision in *Rayburn* did not address the validity of the indictment against Congressman Jefferson at all, let alone whether he was entitled to a *Kastigar*-like hearing.

Not only does *Rayburn* afford no support for a *Kastigar*-type hearing, the D.C. Circuit's earlier decision in *United States* v. *Rostenkowski*, 59 F.3d 1291, supplemented on denial of reh'g, 68 F.3d 489 (1995), rejected any contention that, "[u]nder *Kastigar*," the government must "establish an independent source"—"untainted" by privileged legislative-act evidence—for unprivileged "information upon which it would prosecute a Member of Congress." *Id*. at 1300. Rather, the court observed, "the burden of proof is the other way round: the Member must show that the Government has relied upon privileged material." *Ibid*. (the "burden of establishing the applicability of legislative immunity, by a preponderance of evidence, rests with" the legislator) (quoting *Government of the V.I.* v. *Lee*, 775 F.2d 514, 524 (3d Cir. 1985)). *Rayburn*, which did not mention *Kastigar*, provides no indication of an intent to overrule *Rostenkowski*'s refusal to apply *Kastigar*'s derivative-use restrictions in the speech-or-debate context. And no other court has ever extended *Kastigar* in that fashion.

A finding that petitioner was entitled to a *Kastigar*-like hearing would be in significant tension with this Court's decision in *United States* v. *Calandra*, 414 U.S. 338 (1974). The Court held there that the exclusionary rule's prohibition against the "derivative use" of unconstitutionally obtained evidence does not apply at the grand-jury stage of criminal proceedings, because:

(1) "such derivative use of illegally obtained evidence by a grand jury" "work[s] no new" constitutional violation, *id.* at 354; and (2) the "damage" that such an "unprecedented" derivative-use prohibition would inflict on the grand jury's investigative prerogatives would heavily outweigh any deterrence benefits, *ibid.*; see *id.* at 349-355. In this case, petitioner's claim would require dismissal of the second superseding indictment unless the government could show that the wholly unprivileged evidence it presented to the grand jury was in no way "tainted" by protected legislative-act materials. Neither deterrence concerns nor any other interest can justify such a sweeping, "unprecedented" remedy. *Id.* at 354; cf. *Rayburn*, 497 F.3d at 665 (finding "no * * * reason why return of * * * non-privileged documents is required").

In sum, petitioner remains fully able to assert the Speech or Debate Clause's protection against being prosecuted for legislative acts, being compelled to testify about legislative acts, and having legislative acts introduced in evidence against him. See p. 16, *supra*. He can identify no justification for immunizing *unprivileged* evidence used to secure an indictment for *unprivileged* acts. Accordingly, he would not be entitled to the relief he seeks—a *Kastigar*-type hearing—regardless of whether this Court agreed with his contention that the Speech or Debate Clause contains a privilege against disclosure. Resolution of the underlying question on which the courts of appeals disagree would therefore have no effect on the outcome of this case, rendering this case an unsuitable vehicle for resolution of that conflict.[5]

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[5] Petitioner's amicus recognizes (BLAG Amicus Br. 16) that a holding that no *Kastigar*-type hearing is required in the Speech or Debate

2. The Court's review is also not warranted to consider petitioner's argument (Pet. 9, 22-30) that the district court should have dismissed the indictment because it was based on protected "fact-finding."

a. As noted *supra*, this Court has construed the Speech or Debate Clause to protect more than actual speech or debate. In order to effectuate the Clause's purpose "to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary," the Court has held that it precludes inquiry into all "[l]egislative acts." *Gravel*, 408 U.S. at 617, 624-625. Nonetheless, "the courts have extended the privilege to matters beyond pure speech or debate * * * '*only when necessary* to prevent indirect impair-

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context is "consistent with other appellate jurisprudence." BLAG also believes (*id.* at 19) that petitioner has framed his first question presented "too broadly" because it rests on the premise—not addressed by the panel or any other court—that "the Speech or Debate Clause is violated when a Member's aides, absent any legal compulsion, disclose to the Executive Branch information about the Member's legislative activities without the Member's permission."

Nevertheless, BLAG would reformulate the question presented and have this Court grant the petition for a writ of certiorari to decide whether compelled disclosure of documentary evidence of legislative acts is prohibited under the Clause to the same degree as compelled oral questioning of Members and their aides (a question petitioner does not address and that is not raised on the facts of this case, see Pet. 7). Amicus does not suggest that any resolution of that question would affect whether petitioner is entitled to the *Kastigar*-style hearing he seeks. To the extent that the issue amicus urges this Court to address would warrant review, it should not be addressed in the abstract, but should await a case in which it is actually presented. If, for example, the trial evidence includes documentary evidence the disclosure of which was compelled over petitioner's objection, the question framed by amicus might be presented. It is not presented on this pretrial record.

ment of such deliberations.'" *Id.* at 625 (emphasis added) (quoting *United States* v. *Doe*, 455 F.2d at 760); see *Brewster*, 408 U.S. at 517 (the Clause "does not extend beyond what is necessary to preserve the integrity of the legislative process"); see also *Forrester*, 484 U.S. at 224 (courts have "been careful not to extend the scope of [the Clause] further than its purposes require").

The Court has held that, for a "matter[]" "other" than pure speech or debate to qualify as a protected "[l]egislative act[]," it "must be 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. Such legislative acts include voting on legislation or on a resolution, see *Brewster*, 408 U.S. at 516 n.10, 526, 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*, 412 U.S. at 313. 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." *Helstoski*, 442 U.S. at 489-490. Nor does the Clause's protection for legislative acts extend to "[t]aking a bribe," which "is, obviously, no part of the legislative process or function." *Brewster*, 408 U.S. at 526; see *ibid.* ("When a bribe is taken, it does not matter whether the promise for which the bribe was given was for the performance of a legislative act[.]"). As relevant to petitioner's case, extortion—which is closely akin to

bribery—also is not a protected legislative act. *Gravel*, 408 U.S. at 622 (the Clause "provides no protection for criminal conduct threatening the security of the person or property of others," even when "performed at the direction of [a Member] in preparation for or in execution of a legislative act"); 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 contention that the illegal acceptance of gratuities is protected); *id.* at 289-294.

b. The court of appeals correctly recited these established principles defining the bounds of what constitutes a legislative act, see Pet. App. 13a-21a, and petitioner does not appear to contend otherwise. Petitioner argues instead that his conduct qualifies as legislative acts because it was "investigation and fact-finding related to potential legislation." Pet. 22. Petitioner urges this Court to review the court of appeals' rejection of that argument for two reasons. First, he contends (Pet. 22-26), the courts of appeals are conflicted about whether the Clause protects informal "fact-finding" by an individual Member (rather than as part of a formal investigation by a congressional body). Second, he argues (Pet. 27-30) that the court of appeals here, after assuming that such protection is available for informal fact-finding, erroneously "creat[ed] * * * a crime-fraud exception" to that protection. Pet. 27. But the court of appeals' correct conclusion that petitioner's extortionate acts are not entitled to protection under the Speech or Debate Clause does not warrant further review.

First, it is true, as petitioner contends (Pet. 23-26), that 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 of Congress or his aides 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 qualify as a legislative act that is entitled to the Clause's protections, at least in some circumstances. *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) (en banc), cert. dismissed, 438 U.S. 189 (1978); see *Lee*, 775 F.2d at 519-521 (3d Cir.) (relying on Speech or Debate Clause cases to interpret similarly worded statute affording legislative immunity to legislators in the Virgin Islands). Even in those cases, however, the courts did not simply accept without inquiry a Member's assertion that the actions in question qualified as legislative acts, 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 entitled to protection under the Clause, resolution of that disagreement is not appropriate in this case. Here, the court of appeals "assum[ed]," based on circuit precedent, that the

Clause does protect such informal fact-finding "to the same extent as official investigations by Congress as a body." Pet. App. 25a. The court then rejected petitioner's claim of privilege on the independent ground that his conduct was not actually legitimate fact-finding but instead involved a criminally extortionate promise to introduce land-exchange legislation in the future only if RCC or Aries, to petitioner's personal benefit, bought property from his former business partner. *Id.* at 17a-27a. Petitioner does not identify any court of appeals that would consider such illegal activity to be protected under the Clause. Thus, even if this Court granted the petition for a writ of certiorari and accepted petitioner's proposed rule that the Clause protects informal fact-finding by individual Members, that alone would not entitle petitioner to dismissal of the indictment. He would also have to show that the court of appeals—and the district court and magistrate judge as well (*id.* at 60a-63a, 181a-196a)—erred in concluding that petitioner's conduct here was not in fact the type of informal investigation that qualifies as a legislative act as this Court has understood that term. Petitioner cannot demonstrate that the lower courts' case-specific determination on that issue warrants review by this Court. 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.").

Second, petitioner's attempt to characterize (Pet. 27-30) the court of appeals' conclusion that his extortionate activity was not a protected legislative act as the "cre-

ation of a crime-fraud exception" (Pet. 27) does not render that case-specific (and correct) conclusion a matter of enduring import warranting this Court's review. The court of appeals established no new principle of law. Instead, it followed this Court's lead in applying the settled test for deciding what constitutes a protected legislative act. Pet. App. 16a-17a (stating that a matter that is not pure speech or debate on the floor of the House is nevertheless a legislative act if it is "'an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings'") (quoting, *inter alia*, *Eastland*, 421 U.S. at 504). In the course of applying that test, the court of appeals relied on this Court's holding in *Brewster*, 408 U.S. at 536, that "[t]aking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act" to conclude that petitioner's extortionate activities were likewise not legislative acts. See Pet. App. 20a; see also *Gravel*, 408 U.S. at 622 (noting that the Clause "provides no protection for criminal conduct threatening the security of the person or property of others," even when "performed at the direction of [a Member] in preparation for or in execution of a legislative act"). Petitioner's observation that "[t]he key question is whether the particular conduct is legislative, not its alleged illegality" (Pet. 29), is therefore correct but incomplete: it ignores this Court's admonitions that bribery and extortion are not, in fact, legislative. See also *McSurely*, 553 F.2d at 1287-1288 (though 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") (internal quotation marks and citation omitted).

Petitioner himself concedes, as he must, "that illegal conduct that is 'no part of the legislative process or function' is not legislative activity in the first place and, therefore, is not entitled to any protection under the Clause." Pet. 29 (quoting *Brewster*, 408 U.S. at 526). He argues instead that the court of appeals erroneously concluded "that the Executive may void Speech-or-Debate protection for fact-finding and investigation simply by alleging that some part of the investigation or fact-finding constituted a crime." *Ibid.* That is incorrect. The court of appeals' decision does not grant the Executive the authority to unilaterally "avoid application of the Clause merely by alleging illegality." Pet. 28. Rather, as the Third and D.C. Circuits have recognized, a *court* must decide, based on the "content" of the communications or negotiations at issue, whether the Member's alleged fact-finding was legislative or not. *Lee*, 775 F.2d at 522; see *McSurely*, 553 F.2d at 1287 (the matter is for "the court to determine"); *id.* at 1299 (remanding to the district court to decide whether a Senate investigator took actions "he knew to be wholly unrelated to the legislative inquiry and, if so, whether such conduct was actionable under the applicable law").

Contrary to petitioner's suggestion (Pet. 22), such judicial review does not impermissibly question the "motivation for a [Member's] legislative act." Instead, such an inquiry discerns whether the act in question was in fact a legislative act. See *Lee*, 775 F.2d at 522 (though "[i]t is undisputed that legislative immunity precludes inquiry into the motives or purposes of a legislative act," a legislator's "assertions" of privilege "cannot preclude a court of competent jurisdiction from determining whether [the legislator's] conversations were, in fact, legislative in nature so as to trigger * * * immunity");

see also *Eastland*, 421 U.S. at 503 (the Speech or Debate Clause's protections apply "*once it is determined* that Members are acting within the 'legitimate legislative sphere'") (emphasis added). This Court has "consistently exercised the power to construe and delineate claims arising under" the Speech or Debate Clause and other constitutional privileges. *United States* v. *Nixon*, 418 U.S. 683, 704 (1974) (citing *Doe*, *Gravel*, *Brewster*, and *Johnson*). These cases cannot be read to forbid a court from inquiring whether a Member's allegedly protected "fact-finding" (Pet. 9) was indeed fact-finding or was instead an unprotected "criminal * * * method[] of investigative inquiry." *McSurely*, 553 F.2d at 1288.

c. Not only is petitioner's fact-specific claim unworthy of review, the interlocutory posture of this case counsels against reviewing at this time petitioner's claim that the prosecution against him is based on his legislative acts. The court of appeals affirmed the district court's denial of petitioner's motion to dismiss; but because the case has not yet gone to trial, there is not yet a full factual record against which to judge the legislative nature of petitioner's actions. Ordinarily, the absence of a final judgment is "a fact that of itself alone furnishe[s] sufficient ground for the denial" of the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); see also *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., concurring in denial of certiorari). "[E]xcept in extraordinary cases, [a] writ [of certiorari] is not issued until final decree." *Hamilton-Brown Shoe Co.*, 240 U.S. at 258. This Court therefore routinely denies petitions by criminal defendants challenging interlocutory determinations

that may be reviewed at the conclusion of the criminal proceedings. See Eugene Gressman et al., *Supreme Court Practice* § 4.18, at 280-281 & n.63 (9th ed. 2007).

It is true that a claim of privilege under the Speech or Debate Clause is not an ordinary one for purposes of appellate review. This Court has recognized that "if a Member is to avoid exposure to [being questioned for acts done in either House] and thereby enjoy the full protection of the Clause, his . . . challenge to the indictment must be reviewable before . . . exposure [to trial] occurs." *Helstoski* v. *Meanor*, 442 U.S. 500, 508 (1979) (brackets in original; internal quotation marks and citation omitted). That is why petitioner was able to pursue an interlocutory appeal below. See Pet. App. 8a-9a. But the availability of an interlocutory appeal as of right does not guarantee the interlocutory exercise of this Court's discretionary jurisdiction on a writ of certiorari. The Court exercises such jurisdiction not for error correction but to resolve questions of exceptional legal significance. See Sup. Ct. R. 10. Here, even if petitioner's claim that his communications with RCC and Aries were legislative acts otherwise presented an important legal question, but see pp. 26-29, *supra*, the Court would be in a better position to address that claim after a trial at which the district court will undoubtedly make additional rulings about the admissibility of specific evidence that petitioner claims is privileged under the Speech or Debate Clause. See Pet. App. 8a (the court of appeals noted that the district court will "address the propriety of each piece of evidence as the Government moves to introduce it at trial") (internal quotation marks omitted). If petitioner is acquitted, his current claim will become moot. If petitioner is convicted, he can present that claim to this Court, along with any

others the court of appeals rejects, in a single petition following a final judgment. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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