No. 14-1083

In the Supreme Court of the United States

JAMES W. SANDLIN, 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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QUESTION PRESENTED

Whether a private citizen charged with public-corruption offenses has standing to invoke a Member of Congress's legislative privilege under the Speech or Debate Clause, U.S. Const. Art. I, § 6, Cl. 1, to preclude the admission of evidence of the Member's alleged legislative acts.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-60) is reported at 769 F.3d 731. The order of the district court denying petitioner's post-trial motion for acquittal or for a new trial is unreported.

A prior interlocutory opinion of the court of appeals resolving claims raised by petitioner's co-defendant Richard Renzi (Pet. App. 71-124) is reported at 651 F.3d 1012. The order of the district court denying Renzi's motion to dismiss the indictment and petitioner's motion for leave to join that motion to dismiss, is reported at 686 F. Supp. 2d 956.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 2014. A petition for rehearing was denied on December 1, 2014 (Pet. App. 69-70). The peti-

tion for a writ of certiorari was filed on February 27, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A grand jury in the United States District Court for the District of Arizona returned an indictment charging petitioner, a private citizen, and his co-defendant Richard Renzi, then a United States Congressman, with public-corruption offenses. 08-cr-212 Docket entry No. (Dkt. No.) 466 (Sept. 22, 2009). Renzi moved to dismiss those charges, claiming they were based on his legislative acts in violation of the Speech or Debate Clause, U.S. Const. Art. I, § 6, Cl. 1. Petitioner moved for leave to join the motion to dismiss. Dkt. No. 328, at 1 (Apr. 17, 2009). Adopting the report and recommendation of a magistrate judge, the district court denied Renzi's motion to dismiss. Dkt. No. 573, at 15 (Feb. 18, 2010). In the same order, the court also denied petitioner's motion for leave to join Renzi's motion to dismiss. *Ibid.* Renzi filed an interlocutory appeal, but petitioner did not. The court of appeals affirmed the denial of Renzi's motion to dismiss, Pet. App. 71-124, and this Court denied certiorari. 132 S. Ct. 1097 (2012) (No. 11-557).

Following a joint jury trial, petitioner and Renzi were convicted of conspiracy to commit honest-services wire fraud and extortion, in violation of 18 U.S.C. 371; six counts of honest-services wire fraud, in violation of 18 U.S.C. 1343 and 1346; two counts of extortion under color of official right, in violation of 18 U.S.C. 1951; conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h); concealing illegal proceeds, in violation of 18 U.S.C. 1956(a)(1)(B)(i); and two counts of transacting in criminally derived funds,

in violation of 18 U.S.C. 1957. Pet. App. 18 n.15, 62.[1] Petitioner was sentenced to 18 months of imprisonment, to be followed by three years of supervised release. *Id.* at 62. The court of appeals affirmed. *Id.* at 1-60.

1. Petitioner and Renzi are long-time friends. Pet. App. 12. From 2001 to 2003, they were business partners in a real-estate development company based in Arizona. *Ibid.* In November 2002, Renzi was elected to the United States House of Representatives, serving Arizona's First Congressional District. *Id.* at 8, 11. In February 2003, petitioner, who had campaigned on Renzi's behalf, purchased Renzi's share of the development company. *Id.* at 12 & n.8. Petitioner paid in part with an $800,000 promissory note, payable to Renzi personally in annual installments through September 2007. *Id.* at 12; see Gov't C.A. Br. 4.

By January 2005, Renzi had been reelected and had obtained a seat on the House Natural Resources Committee, which is responsible for approving legislation authorizing the exchange of federal land for privately owned land. Pet. App. 13 & n.10; see *id.* at 74-75 & n.4. That month, Renzi met with representatives of Resolution Copper Company (RCC) to discuss the possibility of RCC acquiring a government-owned campground in Arizona through a land exchange for the purpose of mining copper. *Id.* at 13-14; see Gov't C.A. Br. 6. Bruno Hegner, an RCC executive, asked Renzi which private lands RCC should consider buying to exchange for the campground. Pet. App. 13-14. Renzi "'nonchalant[ly]'" mentioned a tract that petitioner owned. *Id.* at 14 (brackets in original) (quoting

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[1] Renzi was convicted of several additional counts that are not at issue here. See Pet. App. 18 n.15.

Supp. C.A. E.R. 26). But Renzi did not mention his relationship with petitioner, or that petitioner still owed him $700,000 plus interest on a personal note. *Ibid.*

In February 2005, Renzi and Hegner met again in Renzi's Washington, D.C. office. Pet. App. 14; Gov't C.A. Br. 7. Renzi was now more "'stern'" that RCC needed to buy petitioner's land for inclusion in the proposed land exchange. Gov't C.A. Br. 7 (quoting Supp. C.A. E.R. 26); see Pet. App. 14 (observing that Renzi was "insistent about the importance of RCC acquiring [petitioner's] property"). When asked whether he had a business relationship with petitioner, Renzi "became visibly aggravated and insisted that, although he had sold a piece of property to [petitioner] many years ago, 'there was no business relationship.'" Pet. App. 14 (quoting Supp. C.A. E.R. 11-12).

Although RCC "would not have been interested in [petitioner's] property absent Renzi's suggestion," it began negotiating with petitioner to purchase the property. Pet. App. 14. During those negotiations, petitioner exchanged frequent personal phone calls with Renzi. Gov't C.A. Br. 7-8. Because Hegner suspected "'communication'" and possibly a "'connection'" between petitioner and Renzi, he had a consultant search records for any relationship between the two. *Id.* at 8 (quoting 3 C.A. E.R. 33).

In March 2005, Hegner told Renzi that "[petitioner] was insisting upon unreasonable terms." Pet. App. 14. Later that day, Hegner received a fax from petitioner stating that Renzi's office had contacted him and that he "'want[ed] to cooperate.'" *Ibid.* (quoting 3 C.A. E.R. 32). In April 2005, Hegner again communi-

cated with Renzi to report "continuing * * * trouble" with the negotiations. *Id.* at 15. Renzi "responded with the key ultimatum: 'No Sandlin property, no bill.'" *Ibid.* (quoting 3 C.A. E.R. 34). Hegner was "shock[ed]" by Renzi's comment, which he understood to mean that Renzi would not support RCC's proposed land exchange unless RCC bought petitioner's land and included it in the deal. *Ibid.* The same day Hegner received that ultimatum, he learned that petitioner and Renzi "had been joint shareholders in an Arizona business." *Ibid.* Because "'that was different'" from what Renzi had said when asked whether he had a business relationship with petitioner, Hegner decided "'there was no way'" RCC would buy petitioner's land. Gov't C.A. Br. 9 (quoting 3 C.A. E.R. 36); see Pet. App. 15.

Also in April 2005, the Aries Group, an investment group led by real-estate developer Philip Aries, approached Renzi's District Director, Joanne Keene, about a separate land exchange. Pet. App. 15. Keene arranged for Aries to meet with Renzi. Gov't C.A. Br. 9. During that meeting, "Aries proposed to trade petrified-forest parcels in Renzi's district for federal land near Florence, Arizona." Pet. App. 15. Renzi was not interested in those parcels, which "'surprised'" Aries because Congress had mandated their acquisition. Gov't C.A. Br. 9-10 (quoting Supp. C.A. E.R. 45). Instead, Renzi proposed that Aries buy petitioner's land and include it in the exchange, emphasizing that government acquisition of the land would help alleviate water shortages at a nearby military base. Pet. App. 15; see Gov't C.A. Br. 4-5, 10. Renzi told Aries that, once every congressional term, "he could prioritize a single land exchange to pass

directly through the Natural Resources Committee." Pet. App. 15-16. Renzi "promised" Aries: "'If you include [petitioner's land] in your exchange, I will give you my free pass.'" *Id.* at 16 (quoting 3 C.A. E.R. 41). Petitioner and Renzi exchanged several personal phone calls around the time of Renzi's meeting with Aries. Gov't C.A. Br. 10. But Renzi did not tell Aries about his relationship with petitioner. Pet. App. 16.

"'[G]oing way out on a limb at the request of Congressman Renzi'" and "'putting [his] complete faith in Congressman Renzi and [Keene] that this [wa]s the correct decision,'" Aries negotiated with petitioner to purchase the property. Pet. App. 16 (second and third sets of brackets in original) (quoting 2 C.A. E.R. 8, 43). Petitioner insisted on "'unusual'" and "'onerous'" terms, including a "'huge' earnest money payment of $1 million," which petitioner wanted released immediately rather than remaining in escrow in case the sale fell through. Gov't C.A. Br. 10-11 (some internal quotation marks omitted) (quoting Supp. C.A. E.R. 63-65). Despite those terms, and although the Aries Group otherwise "'had no interest'" in petitioner's land, it bought the land for $4.5 million based on Renzi's promise. Pet. App. 16 (quoting Supp. C.A. E.R. 64); see Gov't C.A. Br. 12.

In May 2005, immediately after Aries wired petitioner a $1 million deposit on the land, petitioner paid $200,000 on his note to Renzi. Pet. App. 16. Although the note was payable to Renzi himself, petitioner made the $200,000 check payable to a wine company owned by Renzi, who in turn deposited the check into the account of an insurance agency that Renzi also owned. *Ibid.* Renzi did not report petitioner's pay-

ment in the 2005 financial disclosure form that he filed with Congress. *Ibid.*

In September 2005, shortly before Aries was set to pay petitioner another $1.5 million for the land, petitioner paid Renzi the remaining $533,000 that he owed on the note. Pet. App. 16-17. Petitioner paid Renzi that amount through an intermediary, and the money was again deposited into the account of Renzi's insurance agency, with a notation stating that the funds were for an "insurance payment." *Id.* at 17 (quoting 3 C.A. E.R. 89). As with the earlier payment, Renzi did not report the $533,000 payment from petitioner on his 2005 financial disclosure form. *Ibid.*

In October 2006, a reporter left Aries a message asking him about his dealings with petitioner and Renzi. Pet. App. 17. Petitioner exchanged several phone calls with Renzi and then instructed Aries "to call the reporter back, deny that '[Renzi] was the one pushing this land,' and instead state that it was The Nature Conservancy that was 'pushing the land deal.'" *Ibid.* (citation omitted); see Gov't C.A. Br. 28. Petitioner also "falsely assured" Aries that Renzi had not "'receive[d] * * * proceeds from the closing' with the Aries Group" and that "'[Renzi] was involved in that land in no way, shape, or fashion.'" Pet. App. 17-18 (citation omitted); see Gov't C.A. Br. 28.

2. a. In September 2009, following an extensive investigation, a grand jury in the United States District Court for the District of Arizona returned a second superseding indictment against petitioner and Renzi. Pet. App. 18. The indictment charged them with, *inter alia*, conspiracy to commit honest-services wire fraud and extortion; substantive wire fraud; extortion; conspiracy to launder money; concealing illegal pro-

ceeds; and transacting in criminally derived funds. Dkt. No. 466, at 6-19. As relevant here, the indictment alleged that from January 2005 to October 2006, petitioner and Renzi schemed to use Renzi's position in Congress as leverage to compel RCC and the Aries Group to buy petitioner's land so that petitioner could immediately repay his debt to Renzi, who "was having financial difficulty throughout 2005 and needed a substantial infusion of funds." *Id.* at 6-7.

b. Renzi moved to dismiss the indictment, claiming, *inter alia*, that the charges relating to the land-exchange scheme were based on his legislative acts in violation of the Speech or Debate Clause. See Dkt. No. 86 (Oct. 15, 2008). Specifically, Renzi argued that his "negotiations" with RCC and Aries—during which he promised to support the Aries Group's proposed land exchange if it bought petitioner's property, and threatened to withhold support for RCC's proposed land exchange if it did not buy the property—were protected legislative acts. See *id.* at 13-21. Petitioner moved for leave to join the motion to dismiss. Dkt. No. 328, at 1.

Adopting the report and recommendation of a magistrate judge, the district court denied Renzi's motion to dismiss. Dkt. No. 573, at 1-9, 15. The court also denied petitioner's motion for leave to join Renzi's motion to dismiss, noting that petitioner had "failed to file a supporting memorandum" with his motion "and ha[d] not entered any objection to the" magistrate judge's report and recommendation. *Id.* at 1 n.1, 15.

c. Renzi filed an interlocutory appeal, Dkt. No. 585 (Mar. 4, 2010), but petitioner did not. The court of appeals accepted jurisdiction over Renzi's appeal under the collateral order doctrine. Pet. App. 79. As

relevant here, the court affirmed the district court's denial of Renzi's motion to dismiss, concluding that his extortionate "negotiations" with RCC and Aries were not legislative acts protected by the Speech or Debate Clause. *Id.* at 73-79, 81-96. Renzi sought rehearing en banc, but the court of appeals denied his petition without any judge requesting a vote. 10-10088 Docket entry No. 50 (Aug. 1, 2011). This Court likewise denied Renzi's petition for a writ of certiorari. 132 S. Ct. 1097 (2012) (No. 11-557).

3. a. Thereafter, petitioner and Renzi were jointly tried in a 24-day jury trial, at which 45 witnesses testified. Pet. App. 18. As relevant here, Hegner and Aries testified during the government's case in chief about their negotiations with petitioner and Renzi. See *id.* at 13-18, 31, 33; 3 C.A. E.R. 11-53; Supp. C.A. E.R. 14-98. When cross-examining Hegner, Renzi elicited testimony that he "had 'signed on to sponsor [a] bill'" supporting RCC's proposed land exchange "even though the bill no longer included [petitioner's] property." Pet. App. 33 (citation omitted). Renzi further elicited "that he did, in fact, introduce the bill in late May 2005," though no action was ever taken on it. *Ibid.*; see *id.* at 15. Similarly, when cross-examining Aries, Renzi elicited that he had "'cooled his support'" for "legislation" supporting the Aries Group's proposed land exchange, which included petitioner's property, in 2006, "after RCC complained that Aries' exchange 'seemed to be moving more quickly than [RCC's].'" *Id.* at 31 (quoting 13-10588 Docket entry No. 49-2, at 284, 288 (D. Ariz. May 8, 2014)).

Keene took the stand after Hegner and Aries. Pet. App. 31, 33. To rebut the foregoing testimony that Renzi had elicited from Hegner and Aries, the gov-

ernment asked Keene questions on the same subjects. First, in response to the suggestion that Renzi "continued to support the RCC exchange even after Hegner refused to purchase [petitioner's] property," the government elicited from Keene that Renzi "'did not seem very excited and interested in'" the RCC exchange once petitioner's land was no longer part of the deal. *Id.* at 33 (quoting Supp. C.A. E.R. 147). Second, the government "elicited an alternative explanation as to why Renzi's ardor" for the Aries exchange "had cooled" by 2006: According to Keene, Renzi had told her that "'he wanted to put the brakes on' the Aries exchange because he had learned that Duke Cunningham," a sitting Congressman, "was being indicted" on unrelated corruption charges. *Id.* at 31 (quoting Supp. C.A. E.R. 159). Renzi contemporaneously objected to both of those portions of Keene's testimony, but petitioner did not object. Gov't C.A. Br. 30.

The jury returned a verdict finding petitioner and Renzi guilty of 13 counts of public corruption. Pet. App. 18 & n.15, 62.

b. Renzi subsequently filed several motions for a new trial, arguing, *inter alia*, that the above-described portions of Keene's testimony were inadmissible evidence of his legislative acts. See Dkt. No. 1314, at 1, 33-34 (Oct. 25, 2013). Petitioner adopted other aspects of Renzi's motions for a new trial, but he did not adopt or assert the claim that Keene's testimony violated Renzi's legislative privilege. See Dkt. No. 1248, at 1 (July 12, 2013). Nor did petitioner otherwise contend that he would be entitled to a new trial if Renzi succeeded on a claim that admission of Keene's challenged testimony violated the Speech or Debate

Clause. The district court denied the motions for a new trial, concluding, in relevant part, that Renzi had "opened the door" to Keene's challenged testimony by eliciting evidence on the same subjects. Dkt. No. 1314, at 34. The district court subsequently sentenced petitioner to 18 months of imprisonment, to be followed by three years of supervised release. Pet. App. 19, 62. Renzi was sentenced to 36 months of imprisonment, to be followed by three years of supervised release. Dkt. No. 1318, at 1-2 (Oct. 28, 2013); Pet. App. 18-19.

c. The court of appeals affirmed. Pet. App. 1-60. As relevant here, the court rejected Renzi's claim—which petitioner purported to join, *id.* at 34 n.25; Pet. C.A. Br. 40-44—that admission of the two challenged portions of Keene's testimony violated the Speech or Debate Clause. Pet. App. 25-34.

The court of appeals began its analysis by underscoring that the "focus" of the Speech or Debate Clause "is on the improper *questioning* of a Congressman." Pet. App. 28. No such questioning occurs, the court observed, when a Member "chooses to offer * * * evidence of legislative acts" in his own defense. *Ibid.* (quoting *United States* v. *McDade*, 28 F.3d 283, 294-295 (3d. Cir. 1994) (Alito, J.), cert. denied, 514 U.S. 1003 (1995); citing *United States* v. *Myers*, 635 F.2d 932, 942 (2d Cir.), cert. denied, 449 U.S. 956 (1980)). And when a Member "find[s] it advantageous to introduce evidence of his own legislative acts," the court "agreed with the Second, Third, and D.C. Circuits" that "the government is entitled to introduce rebuttal evidence narrowly confined to the same legislative acts." *Id.* at 28-29 (relying on *McDade*, 28 F.3d at 294-295, *Myers*, 635 F.2d at 942, and *United States*

v. *Rostenkowski*, 59 F.3d 1291, 1303 (D.C. Cir. 1995)). "[S]uch rebuttal evidence," the court reasoned, "does not constitute questioning the member of Congress in violation of the Clause." *Id.* at 29. Because "it was Renzi himself who injected [legislative-act evidence] into his trial" and Keene's "rebuttal testimony" was "narrow[ly]" "limited" and "directly responsive to" the testimony Renzi elicited, the court concluded that Renzi "was not impermissibly questioned in violation of the Clause." *Id.* at 32-34.

The court of appeals rejected Renzi's argument that it had improperly found that he "waived his Speech or Debate privilege" in violation of this Court's statement in *United States* v. *Helstoski*, 442 U.S. 477 (1979), that a waiver must be "explicit and unequivocal." Pet. App. 30 (quoting *Helstoski*, 442 U.S. at 490-491). The court "underst[ood] *Helstoski*'s admonition," but held that "the limited rebuttal evidence at issue here [was] distinct from [the] waiver" at issue in *Helstoski*, which addressed whether a Member waives the privilege at trial "based on a willingness to testify before a grand jury." *Ibid.*; see *id.* at 30-31. The court noted that *Helstoski* "had no occasion to decide whether a Member is 'questioned' in violation of the Clause where, as here, he has the opportunity to introduce testimony in his own defense and decides to open the door at trial by introducing evidence of his legislative acts." *Ibid.*

In a footnote, the court of appeals alternatively concluded that Keene's testimony did not constitute legislative-act evidence in any event. Pet. App. 31-32 n.24. The court explained that "the testimony concerned only Renzi's 'promise to perform an act in the future,' which is not a legislative act." *Ibid.* (quoting

Helstoski, 442 U.S. at 489); see *ibid.* (concluding that Renzi's stated desire "'to put the brakes on' the Aries exchange" related to his not-yet-executed "promise to introduce a federal land exchange bill that included tracts [sought] by the Aries Group," and that his "fading enthusiasm" for "introduc[ing] the RCC bill in the future" related to his not-yet-executed "promise" to RCC (citation omitted)). The court recognized that *United States* v. *Brewster*, 408 U.S. 501 (1972), "suggests that a legislator's decision to vote against a bill *after* it has been introduced may be a protected legislative activity," but found that observation unhelpful to Renzi because Keene's challenged testimony related only to Renzi's mere "'promise[s] to perform an act in the future.'" Pet. App. 31 n.24 (quoting *Helstoski*, 442 U.S. at 489).

Finally, the court of appeals noted petitioner's argument that the admission of Keene's testimony "somehow implicate[d] his convictions." Pet. App. 34 n.25. The court stated that it "need not decide whether [petitioner] is entitled to seek refuge under Renzi's Speech or Debate privilege," reasoning that "[s]ince Renzi is not entitled to relief under the Clause, neither is [petitioner]." *Ibid.*

d. Petitioner and Renzi both sought rehearing en banc, but the court of appeals denied the petitions without any judge requesting a vote. Pet. App. 69-70.

ARGUMENT

Petitioner asks (Pet. 18) "only that this Court hold his petition in abeyance pending resolution of" the petition for a writ of certiorari filed by his co-defendant Richard Renzi, see *Renzi* v. *United States*, No. 14-1082 (Feb. 27, 2015). Petitioner further requests (Pet. 19) that if the Court grants review and

reverses in Renzi's case, it "grant [petitioner's] petition, vacate the Ninth Circuit's judgment, and remand for further proceedings on [petitioner's] entitlement to benefit from that holding." Petitioner emphasizes (Pet. 18) that he "is not seeking plenary review in this Court."

The government's brief in opposition to Renzi's petition for a writ of certiorari explains why Renzi's claims do not warrant this Court's review. See Br. in Opp. at 16-32, *Renzi* v. *United States*, No. 14-1082 (May 19, 2015). A copy of that brief is being served on petitioner. Additionally, as the government explained in the court below, petitioner would not be entitled to dismissal or a new trial even if Renzi's legislative privilege had been violated because petitioner lacks standing to invoke the privilege. See Gov't C.A. Br. 30-38.

Nevertheless, because the court of appeals had no occasion to "decide whether [petitioner] is entitled to seek refuge under Renzi's Speech or Debate privilege," Pet. App. 34 n.25, it would be proper to hold the petition for a writ of certiorari in this case pending resolution of Renzi's petition. If this Court denies Renzi's petition for a writ of certiorari, it should likewise deny the petition in this case. If the Court grants Renzi's petition, it should further hold the petition in this case and dispose of it as appropriate following a decision in Renzi's case.

CONCLUSION

The petition for a writ of certiorari should be held pending the disposition of the petition for a writ of certiorari in *Renzi* v. *United States*, No. 14-1082 (Feb. 27, 2015), and then disposed of accordingly.

Respectfully submitted.

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