No. 16-755

# In the Supreme Court of the United States

ROBERT MENENDEZ, PETITIONER

*v.*

UNITED STATES OF AMERICA

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

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## QUESTION PRESENTED

Petitioner, a United States Senator, has been indicted for bribery and other public-corruption offenses. The indictment alleges that, in exchange for travel, luxury vacations, and payments benefitting his reelection campaign, petitioner agreed to urge Executive Branch officials to take actions favorable to his benefactor. The question presented is:

Whether the court of appeals correctly rejected petitioner's contention that the indictment must be dismissed based on his assertion that some of his attempts to influence Executive Branch officials were protected by the Speech or Debate Clause, U.S. Const. Art. 1, § 6, Cl. 1.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 831 F.3d 155. The opinion of the district court (Pet. App. 38a-75a) is reported at 132 F. Supp. 3d 610.

## JURISDICTION

The judgment of the court of appeals was entered on July 29, 2016. A petition for rehearing was denied on September 13, 2016 (Pet. App. 88a-89a). The petition for a writ of certiorari was filed on December 12, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

A federal grand jury in the District of New Jersey returned an indictment charging petitioner, a United States Senator, with one count of conspiracy to commit bribery and honest-services mail and wire fraud,

in violation of 18 U.S.C. 371, 201(b), 1341, 1343, 1346; one count of traveling in interstate and foreign commerce with the intent to promote, manage, establish, and carry on an unlawful activity, in violation of 18 U.S.C. 1952 (the Travel Act); eight counts of soliciting bribes while serving as a public official, in violation of 18 U.S.C. 201(b)(2)(A); two counts of honest-services wire fraud, in violation of 18 U.S.C. 1343, 1346; one count of honest-services mail fraud, in violation of 18 U.S.C. 1341, 1346; and one count of making false statements, in violation of 18 U.S.C. 1001(a)(1). Pet. App. 93a-175a. Petitioner moved to dismiss the indictment, contending 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. The district court denied those motions. Pet. App. 38a-75a. The court of appeals affirmed. *Id.* at 1a-37a.

1. Since 2006, petitioner has been a United States Senator for New Jersey. The indictment alleges that from 2006 until 2013, he engaged in a quid pro quo bribery scheme with Salomon Melgen, a Florida ophthalmologist and businessman. Petitioner solicited and accepted flights on Melgen's private jets, vacations at Melgen's villa in the Dominican Republic, a stay at a luxury hotel in Paris, and more than $750,000 in payments benefitting his 2012 reelection campaign. In exchange, petitioner agreed to urge Executive Branch officials to take actions favorable to Melgen's personal and business interests, including: (a) issuing visas to Melgen's girlfriends; (b) resolving a Medicare billing matter in Melgen's favor; and (c) assisting Melgen in a

contract dispute with the Government of the Dominican Republic. Pet. App. 2a-3a, 94a-98a.[1]

a. On three occasions in 2007 and 2008, Melgen sought petitioner's help in securing visas to allow his girlfriends to visit the United States. Pet. App. 112a-126a. Each time, petitioner sent a letter to the Department of State supporting the visa application. For example, a July 2008 letter stated that petitioner "would like to advocate unconditionally for Dr. Melgen and encourage careful consideration of [the] visa application." *Id.* at 113a-114a. And when one of the applications was denied, petitioner emailed a staff member that he wanted to "call [the] Ambassador tomorrow and get a reconsideration." *Id.* at 120a. Shortly thereafter, the Department of State sent petitioner a letter stating that Melgen's girlfriend could apply again, and she ultimately secured a visa. *Id.* at 121a-122a. A member of petitioner's staff wrote that the changed result was "ONLY DUE to the fact that [petitioner] intervened." *Id.* at 123a.

b. Between 2009 and 2012, Melgen sought petitioner's help in a dispute with the Centers for Medicare and Medicaid Services (CMS) over Melgen's billing for a biological product called Lucentis. Lucentis is an injectable solution packaged in single-use vials. Pet. App. 4a, 136a. Although each vial contains excess solution, the Food and Drug Administration has only approved the use of one dose per vial, the Centers for Disease Control and Prevention have warned that using a single vial to treat multiple patients could spread infection, and Medicare policy requires that each patient be treated using a separate vial. *Id.* at 136a.

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[1] Because this case arises from motions to dismiss, we describe the facts as alleged in the indictment. See Pet. App. 4a.

Melgen's dispute with CMS arose when a CMS contractor discovered that he had been using a single vial to treat multiple patients—a practice known as "multidosing"—but billing Medicare as if he had purchased a separate vial for each patient. *Id.* at 136a, 149a. CMS ultimately determined that Melgen overbilled Medicare by nearly $9 million in 2007 and 2008. *Id.* at 4a.[2]

In June 2009, shortly before CMS instituted formal administrative proceedings against Melgen, petitioner emailed a staff member with instructions to call Melgen about a "Medicare problem we need to help him with." Pet. App. 137a. Over the next several weeks, petitioner and his staff communicated with Melgen and Melgen's lobbyists about how best to weigh in on his behalf. *Id.* at 139a-140a. Petitioner ultimately spoke by phone with Jonathan Blum, the Director and Acting Principal Deputy of CMS. *Id.* at 5a, 140a-142a, 201a. Before the call, Blum was told that petitioner was "advocating on behalf of a physician friend of his in Florida." *Id.* at 141a. Petitioner's staff prepared him for the call with arguments provided by Melgen's lobbyists, and during the call petitioner argued to Blum that "CMS's policy guidelines regarding single-use vials were vague and that a doctor in Florida was being treated unfairly as a result." *Id.* at 142a. When Blum responded that Melgen's case should be resolved through the CMS appellate process, petitioner hung up on him. *Ibid.* A few weeks later, petitioner

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[2] Melgen, through his medical practice, has unsuccessfully pursued administrative and judicial review of CMS's determination. The practice's petition for a writ of certiorari seeking review of the Eleventh Circuit's unpublished decision rejecting its challenges is currently pending. *Vitreo Retinal Consultants of the Palm Beaches, P.A.* v. *HHS*, No. 16-808 (filed Dec. 21, 2016).

emailed his chief of staff that they "should determine who has the best juice at CMS" and the Department of Health and Human Services (HHS) to assist Melgen. *Id.* at 143a.

Over the next several months, Melgen's team continued to update petitioner's staff on the status of his administrative appeals. Pet. App. 144a. In August 2010, petitioner attempted to schedule a call to speak to the Secretary of HHS about the matter, but was unable to do so. *Id.* at 144a-145a. In May 2011, petitioner arranged for Melgen to meet with another Senator so that Melgen could personally solicit his help with the billing dispute. *Id.* at 145a-146a.

In June 2012, petitioner renewed his advocacy for Melgen during a meeting with Marilyn Tavenner, who was then the Acting Administrator of CMS and who had been nominated to fill that position permanently. Pet. App. 5a. Two days before the meeting, petitioner and his staff met with Melgen's lobbyist to prepare. *Id.* at 148a. During the meeting, petitioner never mentioned Tavenner's pending nomination, and instead pressed her about multi-dosing and advocated a position favorable to Melgen in his billing dispute. *Id.* at 5a-6a, 148-149a.

Several weeks later, petitioner had a follow-up call with Tavenner. Pet. App. 6a. Beforehand, petitioner's staff prepared a memorandum incorporating talking points provided by Melgen's lobbyist. *Id.* at 149a-150a. During the call, Tavenner informed petitioner that CMS would not change its position on multi-dosing, and petitioner said that he would raise the issue directly with then-Secretary of HHS Kathleen Sebelius. *Id.* at 6a-7a, 149a-151a.

Petitioner enlisted the help of then-Senate Majority Leader Harry Reid to arrange a meeting with Secretary Sebelius, which took place in August 2012. Pet. App. 7a, 153a. While the meeting was being scheduled, a member of petitioner's staff asked whether petitioner had told Melgen about the meeting. Petitioner responded that he "ha[d]n't told Dr. Melgen yet" because he didn't want to "raise expectation[s] just in case [the meeting] falls apart." *Id.* at 152a. Before the meeting, petitioner again met with Melgen's lobbyists to prepare. *Id.* at 153a. During the meeting, petitioner "advocated on behalf of Melgen's position in his Medicare billing dispute, focusing on Melgen's specific case and asserting that Melgen was being treated unfairly." *Ibid.* (capitalization altered). Secretary Sebelius told petitioner that she did not have the power to influence Melgen's case because it was in the administrative appeals process. *Id.* at 7a-8a, 153a.

c. In 2012 and 2013, Melgen sought petitioner's help with a contract dispute with the Government of the Dominican Republic. Melgen had acquired complete ownership of a company that held a potentially lucrative contract giving it the exclusive right to install and operate X-ray imaging equipment in Dominican ports. Pet. App. 8a. The company and the Dominican government had been litigating the validity of the contract since shortly after it was signed in 2002. *Id.* at 126a-127a.

In May 2012, petitioner's staff arranged for him to meet with an Assistant Secretary of State. Pet. App. 128a-130a. During the meeting, petitioner expressed dissatisfaction with the Department of State's failure to assist Melgen's company in its dispute with the Dominican government. *Id.* at 130a. After the meet-

ing, the Assistant Secretary emailed his staff that he had told petitioner that he would see if the Department of State could help "leverage a correct [Dominican] decision on the port contract." *Id.* at 131a. Later emails within the Department of State referred to the matter as "[petitioner's] favorite DR port contract case." *Id.* at 133a.

In January 2013, petitioner asked a member of his staff to contact Customs and Border Protection (CBP) to stop CBP from donating container scanning equipment to the Dominican Republic—a step that would have undermined Melgen's efforts to be the exclusive provider of such services. Pet. App. 133a. The staffer emailed a contact at CBP to "ask[] that you please consider holding off on the delivery of any such equipment until you can discuss this matter with us." *Id.* at 133a-134a.

2. In April 2015, a grand jury returned an indictment charging petitioner and Melgen with conspiracy to commit bribery and honest-services fraud, a Travel Act violation, bribery, and honest-services fraud. The indictment also charged petitioner with making false statements in his annual financial disclosure forms by failing to list any of the reportable gifts he received from Melgen. Pet. App. 92a-175a.[3]

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[3] Before the indictment was returned, one current and one former member of petitioner's staff withheld testimony from the grand jury based on the Speech or Debate Clause. The district court granted the government's motion to compel the testimony. Pet. App. 84a-87a. Petitioner appealed, and the court of appeals remanded for additional factfinding. *Id.* at 76a-83a. On remand, the government elected not to present the staffers' testimony to the grand jury. *Id.* at 11a-12a.

Petitioner moved to dismiss the indictment based on the Speech or Debate Clause, which provides that Senators and Representatives "shall not be questioned in any other Place" for "any Speech or Debate in either House." U.S. Const. Art. I, § 6, Cl. 1. Petitioner conceded that his efforts to help Melgen's girlfriends secure visas were not protected. But he argued that some aspects of his advocacy for Melgen in the CMS billing dispute and the Dominican contract matter were privileged legislative acts. And he contended that the Speech or Debate Clause required dismissal of the indictment because the charges would require the government to introduce evidence of those acts at trial and because evidence of those acts had been presented to the grand jury. Pet. App. 12a.

The district court declined to dismiss the indictment. Pet. App. 46a-75a. The court noted that, under this Court's decisions, "[a]ttempting to influence the Executive Branch is * * * a non-legislative activity." *Id.* at 44a (citing *Doe* v. *McMillan*, 412 U.S. 306, 313 (1973)). And after a paragraph-by-paragraph analysis of the indictment, the court held that all of the challenged allegations involved non-legislative acts because they describe petitioner's efforts to influence the Executive Branch to take actions favorable to Melgen in two specific matters—his billing dispute with CMS and his contract dispute with the Dominican government. *Id.* at 49a-65a.[4]

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[4] In a separate order, the district court dismissed some of the bribery counts on unrelated grounds. 132 F. Supp. 3d 635. The grand jury recently returned a superseding indictment correcting the deficiency identified by the court and charging petitioner and Melgen with six counts of bribery each rather than eight. D. Ct.

3. Exercising jurisdiction under the collateral-order doctrine, the court of appeals affirmed. Pet. App. 1a-37a. As relevant here, the court agreed with the district court that the Speech or Debate Clause did not require dismissal of the charges against petitioner. *Id.* at 15a-32a.

The government argued that the Speech or Debate Clause "does not extend to Legislative attempts to influence Executive actions" through informal means. Pet. App. 21a-22a. The court of appeals "disagree[d]" with that view as a categorical matter. *Id.* at 22a. Instead, it held that "informal efforts to influence the Executive Branch * * * may (or may not) be protected legislative acts depending on their content, purpose, and motive." *Ibid.* Adopting a line similar to the one urged by petitioner, the court concluded that "efforts to intervene in decisions pending before the Executive Branch that would mainly affect one particular party" are unprotected, but that the Clause may protect informal attempts to influence broader matters of "policy." *Ibid.*; see, *e.g.*, Pet. C.A. Br. 19.

Petitioner had clarified on appeal that his Speech or Debate Clause challenge was limited to five acts: (1) his June 2012 meeting with Acting CMS Administrator Tavenner; (2) his July 2012 call with Tavenner; (3) his August 2012 meeting with Secretary Sebelius; (4) his May 2012 meeting with an Assistant Secretary of State; and (5) his staff's January 2013 communications with CBP. Pet. App. 23a. The court of appeals held that those acts were not protected because the district court had not clearly erred in finding that the acts "were essentially lobbying on behalf of a particu-

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Doc. 149, at 53-60. The superseding indictment is otherwise identical to the original indictment.

lar party." *Ibid.* First, the court noted "that Dr. Melgen or his case was mentioned specifically during each of the challenged acts" and that "participants in the challenged acts were aware that their policy discussions related specifically to Dr. Melgen." *Id.* at 26a. Second, the court noted that petitioner's preparation for the challenged acts—including his close collaboration with Melgen's lobbyists—confirmed that "Melgen was the primary focus of the supposedly protected communications." *Id.* at 27a. Third, the court observed that the evidence showed that "Melgen and his lobbyist were particularly interested in following up with [petitioner] on all of the challenged acts." *Id.* at 28a. And fourth, the court emphasized that petitioner's contention that the challenged acts were focused on general "policy" was contradicted to the record, which indicated that "Melgen's particular case" was the focus of the meetings and other communications. *Id.* at 29a.

4. The court of appeals denied rehearing en banc without noted dissent. Pet. App. 88a-89a.

## ARGUMENT

Petitioner's informal efforts to influence the Executive Branch were not protected by the Speech or Debate Clause. As this Court has repeatedly instructed, the Clause "does not protect attempts to influence the conduct of executive agencies." *Hutchinson* v. *Proxmire*, 443 U.S. 111, 121 n.10 (1979). Petitioner has not cited any decision, by any court, holding that the Clause protects conduct like that alleged here. Instead, he contends (Pet. 19-37) that the court of appeals erred by examining the "purpose" or "motive" of his lobbying. But the court conducted that inquiry only because it adopted *petitioner's* view that the Speech or Debate Clause protects efforts to lobby the

Executive Branch if those efforts are aimed at "policy" rather than a particular case. Such a rule necessarily requires an examination of the content and context of a legislator's lobbying to determine whether it was, in fact, aimed at "policy." Given the legal framework that petitioner himself proposed, the court's limited inquiry into the purpose of petitioner's lobbying does not conflict with any decision of this Court or another court of appeals. And this interlocutory case would be a poor vehicle in which to consider the question presented even if that question otherwise warranted this Court's review. The petition for a writ of certiorari should be denied.

1. Petitioner's actions are not covered by the Speech or Debate Clause because the Clause does not protect a Senator's informal attempts to influence the Executive Branch.

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. Where it applies, the Clause affords Members of Congress three protections. First, it grants civil and criminal immunity for legislative acts. *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 Members "may not be made to answer" questions about their legislative acts. *Gravel* v. *United States*, 408 U.S. 606, 616 (1972). And third, it bars the use of legislative-act evidence against a Member. *United States* v. *Helstoski*, 442 U.S. 477, 487 (1979).

In identifying the legislative acts entitled to those protections, this Court has emphasized that the Speech or Debate Clause strikes a careful balance. 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). Thus, while the Clause safeguards the legitimate prerogatives of Congress, it does not extend beyond the legislative sphere, and it does not "make Members of Congress super-citizens, immune from criminal responsibility." *Id.* at 516.

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 also extended the Clause's protection beyond its literal terms to include acts "generally done in a session of the House by one of its members in relation to the business before it," such as voting, issuing committee reports, and participating in committee hearings. *Id.* at 624 (quoting *Kilbourn* v. *Thompson*, 103 U.S. 168, 204 (1880)). "The gloss going beyond a strictly literal reading of the Clause has not, however, departed from the objective of protecting only *legislative* activities." *Hutchinson*, 443 U.S. at 125 (emphasis added). The Clause thus reaches only acts that are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel*, 408 U.S. at 625.

b. Because the Speech or Debate Clause is limited to acts that are integral to the legislative process, this Court has repeatedly instructed that "it does not protect attempts to influence the conduct of executive

agencies." *Hutchinson*, 443 U.S. at 121 n.10. The Court has recognized that "Members of Congress may frequently be in touch with and seek to influence the Executive Branch." *Doe*, 412 U.S. at 313. But the Court has emphasized that "this conduct[,] 'though generally done, is not protected legislative activity.'" *Ibid.* (quoting *Gravel*, 408 U.S. at 625); see, *e.g.*, *Brewster*, 408 U.S. at 512; *Johnson*, 383 U.S. at 172; see also *United States* v. *McDade*, 28 F.3d 283, 299 (3d Cir. 1994) (Alito, J.) ("The Supreme Court has repeatedly stated that the Speech or Debate Clause does not apply to efforts by members of Congress to influence the Executive Branch."), cert. denied, 514 U.S. 1003 (1995).[5]

c. This Court's direction that the Speech or Debate Clause does not protect informal attempts to influence the Executive Branch resolves this case. As petitioner's own descriptions make clear (Pet. 12-14), each of the five acts at issue was an attempt to influence an administrative agency—specifically, to persuade HHS and CMS to change their position in Melgen's billing dispute or to persuade the Department of State and CBP to take actions that would help Melgen in his contract dispute with the Dominican Republic. Peti-

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[5] This Court's decisions instructing that the Speech or Debate Clause does not protect attempts to influence the Executive Branch addressed informal contacts with executive officials like the lobbying at issue in this case. See, *e.g.*, *Doe*, 412 U.S. at 313. Members of Congress may also seek to influence the Executive Branch through protected legislative activity, such as floor speeches or committee proceedings. Pet. App. 18a n.1; see *Johnson*, 383 U.S. at 171-172, 184-185 (concluding that a Congressman's speech on the House floor was protected but that his informal attempts to influence the Department of Justice were not). No activity of that kind is at issue here.

tioner has not denied that his acts were attempts to influence the Executive Branch. Instead, he has argued that those acts are protected because he purportedly sought "to influence the Executive Branch on policy" rather than "to influence the Executive Branch to benefit an individual alone." Pet. C.A. Br. 19; see *id.* at 35 ("By all accounts, [petitioner] advocated a change in policy.") (emphasis omitted); see also, *e.g.*, *id.* at 20-21 (seeking to justify a distinction between unprotected "case work" and protected efforts to achieve a "policy change" under Third Circuit precedent).[6]

Petitioner's assertion that the Speech or Debate Clause protects efforts "to influence the Executive Branch on policy" contradicts this Court's repeated admonitions that the Clause "does not protect attempts to influence the conduct of executive agencies." *Hutchinson*, 443 U.S. at 121 n.10; see, *e.g.*, *Doe*, 412 U.S. at 313; *Gravel*, 408 U.S. at 625. The Court has never suggested that those categorical statements leave open a sweeping but unstated exception for attempts to influence matters of "policy." To the contrary, the Court has made clear that although "Members of Congress are constantly in touch with the Executive Branch of the Government" to "cajole" or "exhort with respect to the administration of a federal statute"—that

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[6] Petitioner erred in seeing support for that distinction in the Third Circuit's prior decision in *McDade*. Pet. C.A. Br. 20-22. In that case, the court stated that "routine casework for constituents" is "clearly not protected" by the Speech or Debate Clause. 28 F.3d at 300. But the court expressly declined to decide whether legislative lobbying of executive officials on "broader policy" qualified as a legislative act for Speech or Debate Clause purposes, because it held that the indictment at issue in *McDade* would not need to be dismissed even if both of the acts in question were protected. *Ibid.*

is, on matters of policy—"such conduct * * * is not protected legislative activity." *Gravel*, 408 U.S. at 625.

Petitioner's position is also inconsistent with the separation-of-powers principles that animate the Speech or Debate Clause. The Clause protects the independence of Members of Congress with respect to "matters which the Constitution places within the jurisdiction of either House." *Gravel*, 408 U.S. at 625. But the execution of the laws is not such a matter. "[I]t is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'" *Buckley* v. *Valeo*, 424 U.S. 1, 138 (1976) (per curiam) (quoting U.S. Const. Art. II, § 3). "The Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws." *Bowsher* v. *Synar*, 478 U.S. 714, 722 (1986). Instead, "once Congress makes its choice in enacting legislation, its participation ends," and Congress "can thereafter control the execution of its enactment only indirectly—by passing new legislation." *Id.* at 733-734. Members of Congress may also seek to influence the Executive Branch through less formal means. But when they do so, they are engaged in conduct that is "in no wise related to the due functioning of the legislative process." *Gravel*, 408 U.S. at 625 (quoting *Johnson*, 383 U.S. at 172).

That is equally true whether a Member seeks to influence the Executive Branch's resolution of a particular case or a broader matter of policy. Indeed, no principled line divides "[e]fforts to influence the Executive Branch on policy" from "efforts to influence the Executive Branch to benefit an individual alone." Pet. C.A. Br. 19. Administrative agencies make specific deci-

sions based on broader policies, and virtually any attempt to influence the resolution of a particular matter can thus be framed as an appeal to "policy." This case illustrates that point: As the court of appeals explained, "for every mention of policy concerns" in petitioner's contacts with Executive Branch officials, "there is substantial record support for the District Court's findings that those concerns were instead attempts to help Dr. Melgen." Pet. App. 27a.

d. Aside from the court of appeals' decisions in this case, petitioner has not cited any decision, by any court, concluding that the Speech or Debate Clause protects a legislator's attempt to influence the Executive Branch—whether on a matter of "policy" or otherwise. The closest that petitioner comes (Pet. 17 n.4) are a handful of decisions concluding that the Clause protects "informal legislative fact-finding and information-gathering." But this Court has expressly distinguished such factfinding from the sort of lobbying at issue here, emphasizing that "[r]egardless of whether and to what extent the Speech or Debate Clause may protect calls to federal agencies seeking information, it does not protect attempts to influence the conduct of executive agencies." *Hutchinson*, 443 U.S. at 121 n.10. That unambiguous direction—and the fact that petitioner has not identified any court that would treat his conduct as protected—provides more than sufficient reason to deny the petition for a writ of certiorari.

2. Although petitioner cannot argue that the result reached below conflicts with any decision of this Court or another court of appeals, he contends that the court of appeals erred and created a circuit conflict by examining the "purpose" or "motive" of his lobbying. But

the court conducted that inquiry only because it adopted *petitioner's* view that attempts to influence the Executive Branch are protected by the Speech or Debate Clause if "the object was to influence policy." Pet. C.A. Br. 19; see Pet. App. 22a-23a. The court's consideration of petitioner's purpose—or, in his terms, his "object"—thus only worked to his benefit, affording him more protection than he is entitled to under this Court's decisions. And because no other court has had occasion to consider how to separate lobbying on "policy" from lobbying to benefit a particular individual, the court's limited consideration of purpose in this context does not conflict with any decision of this Court or another court of appeals. To the contrary, the court of appeals specifically distinguished the decisions on which petitioner relies.

a. This Court has instructed that, where it applies, "the Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process *and into the motivation for those acts*." *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 508 (1975) (quoting *Brewster*, 408 U.S. at 525). Accordingly, "the mere allegation that a valid legislative act was undertaken for an unworthy purpose" does not "lift the protection of the Clause." *Id.* at 508-509. For example, a floor speech does not lose its protection because it was allegedly delivered in exchange for a bribe, see *Johnson*, 383 U.S. at 180, and a congressional subpoena does not lose its protection because it was allegedly motivated by a desire to retaliate against First Amendment activity, see *Eastland*, 421 U.S. at 508-509; see also *Tenney* v. *Brandhove*, 341 U.S. 367, 377 (1951). By definition, the Speech or Debate Clause protects legislative acts

even if those acts would otherwise violate the law. It necessarily follows that a mere allegation that a legislative act was undertaken for an unlawful purpose does not vitiate the privilege.

b. Consistent with this Court's decisions, the court of appeals recognized that "'an unworthy purpose' does not eliminate Speech or Debate protection." Pet. App. 17a (quoting *Johnson*, 383 U.S. at 180). But the court concluded that unlike the legislative acts addressed in this Court's Speech or Debate Clause decisions, petitioner's contacts with executive officials were not "manifestly legislative," and instead fell into a category of "ambiguously legislative" acts that may or may not be privileged depending on the circumstances. *Id.* at 18a. The court therefore held that, to determine whether petitioner's conduct was protected by the Clause in the first place, it had to examine "the content, purpose, and motive of the [conduct] to assess its legislative or non-legislative character." *Ibid.* In so doing, the court did not ask whether petitioner acted with an "unworthy purpose." *Eastland*, 421 U.S. at 509. Instead, it asked whether petitioner's actions were "attempts to influence the Executive Branch on policy" or "efforts to intervene in decisions pending before the Executive Branch that would mainly affect one particular party." Pet. App. 22a.

The court of appeals' limited consideration of the purpose of petitioner's lobbying followed directly from its acceptance of the substantive rule petitioner himself urged the court to adopt. Petitioner argued that "[e]fforts to influence the Executive Branch on policy are protected" and that the protected status of particular lobbying efforts depends on "whether *the object* was to influence policy or individual case work." Pet.

C.A. Br. 19 (emphasis added); see, *e.g.*, *id.* at 35. The government disagrees with the court's view that the Speech or Debate Clause protects attempts to influence the Executive Branch on policy. But having adopted petitioner's view of the Clause's substantive scope, the court necessarily had to conduct some inquiry into the nature of his lobbying efforts to determine whether those efforts were, in fact, attempts to influence general "policy" rather than Melgen's particular matters.[7]

c. The court of appeals' limited inquiry into the purpose of petitioner's lobbying, in accordance with the legal framework that petitioner himself espoused, does not conflict with any decision by this Court. The court of appeals emphasized that no inquiry into purpose or motive is permitted when a legislator's acts are "manifestly legislative." Pet. App. 17a (quoting *Government of Virgin Islands* v. *Lee*, 775 F.2d 514, 522 (3d Cir. 1985)). That category encompasses all of the acts this Court has found to be protected by the Speech or Debate Clause, including "introducing proposed legislation," "subpoenaing records for [a] committee hearing," "inserting material in the Congressional Record," "introducing evidence during commit-

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[7] Petitioner, in contrast, had asserted that any informal conversation with the Executive Branch couched as "policy" is automatically immune, even if—as in this case—all participants in the conversation "were aware that their policy discussions related specifically to [a particular case]" and "[the] case was mentioned specifically during each of the challenged acts." Pet. App. 26a. Requiring courts to close their eyes to objective evidence of such a case-specific focus would effectively immunize "efforts to influence the Executive Branch to benefit an individual alone," Pet. C.A. Br. 19—conduct that even petitioner concedes is outside the scope of the Speech or Debate Clause.

tee hearings," "delivering a speech on the floor of the House," "interrogating witnesses during committee hearings," and "voting on resolutions." *Lee*, 775 F.2d at 522 (describing *Helstoski*, *Eastland*, *Doe*, *Gravel*, *Johnson*, *Tenney*, and *Kilbourn*); see Pet. App. 17a (reiterating the same list of acts that are protected without regard to purpose).[8] The court of appeals allowed an inquiry into purpose only for "ambiguously legislative" activities such as lobbying the Executive Branch—a category of conduct that this Court has never held to be protected by the Speech or Debate Clause at all.

Furthermore, the court of appeals' inquiry into petitioner's purpose was not the sort of questioning of motives that this Court's decisions forbid. This Court has emphasized that a legislative act does not lose its protection because it was undertaken for an "unworthy" purpose. *Eastland*, 421 U.S. at 509. But the court of appeals did not question the legitimacy of petitioner's motives—it asked only whether his lobbying was aimed at matters of policy, or instead at assisting a particular individual. In conducting that inquiry, moreover, the court focused on objective indications of the purpose of petitioner's advocacy—including the fact that "Melgen or his case was mentioned specifically during each of the challenged acts," Pet. App. 26a, and the fact that petitioner and his staff collaborated closely with Melgen's lobbyists to prepare for the meetings and calls, *id.* at 27a-28a.

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[8] The court of appeals did not specifically address *Bogan* v. *Scott-Harris*, 523 U.S. 44 (1998), which was decided after *Lee*. But *Bogan* likewise involved conduct that was "undoubtedly legislative," *id.* at 56—specifically, introducing, voting for, and signing a budget ordinance.

Petitioner is thus quite wrong to assert (Pet. 19) that the court of appeals' decision "requires Members of Congress to relinquish their Speech or Debate Clause immunity in order to vindicate it" or to submit to "a test of their good motives in order to claim the protection of [the] Clause." The court did not ask whether petitioner's motives were good or bad—only whether his lobbying focused on broad policy or an individual case. Had the court concluded that petitioner's actions sought to influence policy, that finding would have precluded any other inquiry into his motives—including whether he acted because of a bribe or for some other unworthy purpose. And the fact that the court instead concluded that petitioner acted to influence particular matters involving Melgen in no way calls into question his "good motives" (*ibid.*). This Court has emphasized that Members of Congress engage in a "wide range of legitimate 'errands' performed for constituents," including help with specific matters such as "securing Government contracts." *Brewster*, 408 U.S. at 512. Those activities "are entirely legitimate"—they simply cannot claim "the protection afforded by the Speech or Debate Clause." *Ibid.* It remains for the jury to decide at trial whether petitioner acted for an unquestionably illegitimate motive—that is, in a quid pro quo exchange for Melgen's gifts, which is plainly not protected. See *id.* at 526 ("Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act.").

d. The court of appeals' limited inquiry into petitioner's purpose also does not conflict with any decision by another court of appeals. In arguing otherwise, petitioner relies (Pet. 20-26) on decisions by the

Second, Fourth, and D.C. Circuits. But none of those cases addressed informal attempts to influence the Executive Branch, and none of them conflicts with the decision below. Indeed, the court of appeals confirmed the absence of any conflict by specifically stating that the decisions on which petitioner relies are "distinguishable." Pet. App. 20a.

Petitioner places greatest weight (Pet. 20-23) on *United States* v. *Dowdy*, 479 F.2d 213 (4th Cir.), cert. denied, 414 U.S. 823, and 414 U.S. 866 (1973). That case involved the chairman of a congressional subcommittee who met with Executive Branch officials to "gather[] information in preparation for a possible subcommittee investigatory hearing," and who was alleged to have done so for an improper purpose. *Id.* at 224. The Fourth Circuit premised its analysis on the understanding that "the speech or debate clause bars inquiry into a Congressman's preparation for a subcommittee hearing." *Id.* at 224 n.20. And because the court viewed such preparations as categorically protected, it concluded that the congressman's investigation would not lose its protected character even if it had been undertaken "for improper non-legislative purposes." *Id.* at 226. In other words, as the court of appeals explained here, *Dowdy* involved what the court termed "manifestly legislative activity" rather than "ambiguously legislative activity." Pet. App. 20a. "No matter how illicit Dowdy's motives were, the act of conducting the investigation would still be a legislative one," but the situation is different where, as here, it is the legislator's "purpose or motive that will de-

termine in part whether the [conduct at issue] was a legislative act at all." *Lee*, 775 F.2d at 524.[9]

Petitioner also relies (Pet. 23-25) on *McSurely* v. *McClellan*, 553 F.2d 1277 (D.C. Cir. 1976) (en banc) (*McSurely I*), cert. dismissed, 438 U.S. 189 (1978). That decision does not assist petitioner for three reasons. First, like *Dowdy*, it addressed the application of the Speech or Debate Clause to a congressional investigation rather than an attempt to influence the Executive Branch. *Id.* at 1282-1283. Second, the portion of Judge Leventhal's opinion on which petitioner relies did not speak for the court, which was equally divided on the relevant issue. *Id.* at 1295 (opinion of Leventhal, J.); see *id.* at 1280. And third, Judge Leventhal's opinion actually undermines petitioner's position. Judge Leventhal recognized that "[*i*]*n the usual case* if the activity is arguably within the 'legitimate legislative sphere' the Speech or Debate Clause bars inquiry even in the face of a claim of an 'unworthy motive.'" *Id.* at 1295 (emphasis added).[10] But he then concluded that a congressional investigator's conduct was "outside the protection of legislative immunity" because he had taken "concededly extraneous material" unrelated to the investigation—in other words, because he acted for a non-legislative purpose. *Id.* at 1296 (emphasis omitted); see *id.* at 1296 n.66 ("[I]f his interest in taking [the material] was of a

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[9] Petitioner asserts (Pet. 25 n.7) that the court of appeals erred in characterizing *Dowdy* as involving "manifestly legislative activity." He took the opposite view below, acknowledging that "the conduct in *Dowdy* appeared unambiguously legislative." Pet. C.A. Br. 38.

[10] Petitioner's quotation of this sentence (Pet. 23) omits the qualifier "[i]n the usual case."

personal nature * * * rather than a legislative interest, there is no legislative immunity from suit.").[11]

Finally, petitioner relies (Pet. 25-26) on *United States* v. *Biaggi*, 853 F.2d 89 (2d Cir. 1988), cert. denied, 489 U.S. 1052 (1989). Like *McSurely I*, *Biaggi* stated that "it is *generally* true that the Speech or Debate Clause forbids not only inquiry into acts that are manifestly legislative but also inquiry into acts that are purportedly legislative, 'even to determine if they are legislative in fact.'" *Id.* at 103 (quoting *Dowdy*, 479 F.2d at 226) (emphasis added). But the court then held that the government had properly introduced evidence about the "nonlegislative reasons" for a purportedly legislative factfinding trip. *Ibid.* Neither the Second Circuit's statement that inquiry into legislative purpose is "generally" barred nor its conclusion conflicts with the decision below.[12]

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[11] A subsequent panel opinion in *McSurely* reiterated the general rule that courts may not inquire into the motives for legislative acts. *McSurely* v. *McClellan*, 753 F.2d 88, 106 (D.C. Cir.), cert. denied, 474 U.S. 1005 (1985). But that opinion did not deviate from Judge Leventhal's interpretation of the Speech or Debate Clause in *McSurely I*. The panel explained that "[a]lthough the opinions of an equally divided court may not be cited for precedential value in this circuit, Judge Leventhal's opinion * * * constitutes the law of the case." *Id.* at 96.

[12] Petitioner briefly cites (Pet. 26-27) several decisions from other circuits stating that the Speech or Debate Clause's protections do not depend on a legislator's motive. But the court of appeals acknowledged and embraced that general rule. Pet. App. 17a. It permitted a limited inquiry into purpose only because of what it regarded as the ambiguously legislative character of petitioner's conduct. *Id.* at 18a. None of the decisions on which petitioner relies addressed conduct like that at issue here. To the contrary, all but one of those cases involved manifestly legislative activity. See *Rangel* v. *Boehner*, 785 F.3d 19, 22-24 (D.C. Cir.) (congres-

3. Even if the question presented otherwise warranted this Court's review, this case would not be an appropriate vehicle in which to consider it. The court of appeals affirmed the denial of petitioner's motions to dismiss the indictment based on the Speech or Debate Clause. But because the case has not gone to trial, there is not yet a full factual record against which to judge the legislative character 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 a petition for a writ of certiorari. *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). If petitioner is acquitted, his claim will become moot. And if he is convicted, he can present his Speech or Debate Clause claim to this Court, along with any others he may have, 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).

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sional disciplinary proceedings), cert. denied, 136 S. Ct. 218 (2015); *Bagley* v. *Blagojevich*, 646 F.3d 378, 394-395 (7th Cir. 2011) (governor's line-item veto), cert. denied, 132 S. Ct. 253 (2011); *Bryant* v. *Jones*, 575 F.3d 1281, 1306-1307 (11th Cir. 2009) (drafting a legislative budget proposal), cert. denied, 559 U.S. 940 (2010); *Almonte* v. *City of Long Beach*, 478 F.3d 100, 103, 106-107 (2d Cir. 2007) (council members' vote on budget proposals and discussions related to a new budget); *Torres-Rivera* v. *Calderón-Serra*, 412 F.3d 205, 213-214 (1st Cir. 2005) (governor's signing of legislation into law). And the final case is likewise distinguishable, because it involved conduct that was deemed clearly non-legislative. *Kamplain* v. *Curry Cnty. Bd. of Comm'rs*, 159 F.3d 1248, 1252 (10th Cir. 1998).

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, citation, emphasis, and internal quotation marks omitted). That is why petitioner was able to invoke the collateral-order doctrine to appeal the denial of his motions to dismiss. *Id.* at 506-508; see Pet. App. 12a-13a. But the availability of a collateral-order appeal does not guarantee the interlocutory exercise of this Court's discretionary certiorari jurisdiction, which is instead informed by whether a particular case is a suitable vehicle for deciding a legal question of exceptional importance.

Here, even if petitioner were correct that his Speech or Debate Clause challenge presented a question warranting this Court's review, the Court would be in a far better position to address that claim after a trial. Petitioner's motions to dismiss were decided based on the allegations in the indictment and limited additional evidence introduced in the district court. Pet. App. 24a-25a. At a trial, in contrast, the court would make rulings about the admissibility of specific testimony and documents that petitioner asserts are privileged under the Speech or Debate Clause. Such a specific record would provide a sounder basis for this Court to consider whether and to what extent the Speech or Debate Clause protects a legislator's informal attempts to lobby the Executive Branch.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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