No. 16-755

IN THE

Supreme Court of the United States

ROBERT MENENDEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICI CURIAE* FORMER GENERAL COUNSELS OF THE U.S. HOUSE OF REPRESENTATIVES IN SUPPORT OF PETITIONER

WILLIAM PITTARD
Counsel of Record
KAISERDILLON PLLC
1401 K Street, NW
Washington, D.C. 20005
(202) 640-2850
wpittard@kaiserdillon.com

Counsel for Former General Counsels of the U.S. House of Representatives

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INTEREST OF *AMICI CURIAE*

Amici are former General Counsels of the U.S. House of Representatives ("Former House Counsels"). They served across the past five decades, and under the past eight Speakers of the House.[1]

Kerry W. Kircher served in the Office of General Counsel between 1995 and 2016; he served as the General Counsel between 2011 and 2016, under Speakers Paul D. Ryan and John A. Boehner. *Geraldine R. Gennet* served in the Office of General Counsel between 1995 and 2007; she served as the Acting General Counsel between 1996 and 1997 and as the General Counsel between 1997 and 2007, under Speakers Nancy Pelosi, J. Dennis Hastert, and Newt Gingrich. *Thomas J. Spulak* served as the House General Counsel between 1994 and 1995, under Speaker Thomas S. Foley. *Steven R. Ross* served as the House General Counsel between 1983 and 1993, under Speakers Foley, James C. Wright, Jr., and Thomas P. "Tip" O'Neill, Jr. *Stanley M. Brand* served as the House General Counsel between 1976 and 1983, under Speaker O'Neill.

Each of the Former House Counsels advised Members of Congress on their constitutional responsibilities and on the constitutional protections designed to allow those Members to perform their responsibilities independently, free from fear of reprisal at the hands

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

of the Executive or Judicial Branches. Chief among those constitutional protections is the Speech or Debate Clause, U.S. Const. art. I, § 6, cl. 1 ("[F]or any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place.").

The Clause is a fundamental pillar of Congress's independence, and a bulwark in preserving the separation of powers on which our government depends. It is critically important, not only to Congress's relationship with the other branches of the federal government, but also to its Members' ability to perform independently their assigned constitutional role in our system of separated powers. *See* The Federalist No. 51 (James Madison or Alexander Hamilton) ("[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.").

The Speech or Debate Clause issues arise here in the context of the Executive Branch's indictment of Robert Menendez, a sitting U.S. Senator from New Jersey, for alleged violation of certain criminal statutes, in connection with his consideration of certain health policy and port security issues. *See generally* Pet. at 8-14. Senator Menendez particularly seeks review of the holding by the Third Circuit Court of Appeals that application of the Speech or Debate Clause depends on probing his "motive for performing an act." *Id.* at i; *see also, e.g.*, *id.* App. A at 18a, 21a-23a (Third Circuit decision—reported at *United States v. Menendez*, 831 F.3d 155 (3d Cir. 2016)—holding that application of Clause "turn[s] on the content, purpose, and motive of the communications at issue"; "we consider the

content, purpose, and motive of the act"; consideration of "content, purpose, and motive is necessary"; application of Clause "depend[s] on the[] content, purpose, and motive" of challenged oversight activities).

The Former House Counsels have no interest in shielding Senator Menendez from criminal liability, and they do not file this brief for that purpose. They do, however, have a great interest in ensuring that the courts construe the Clause in a manner that protects Congress and its Members in the conduct of their legislative duties. That interest arises out of their shared commitment to an independent Legislative Branch, which in turn arises out of their shared understanding of why such independence is so critically important to our liberties as Americans.

Because the Third Circuit did not properly interpret the Clause in this case, the Former House Counsels join Senator Menendez in urging the Court to accept this case for review.

INTRODUCTION AND BACKGROUND

I. THE COURT'S SPEECH OR DEBATE CLAUSE JURISPRUDENCE.

The Speech or Debate Clause is rooted historically in the suppression and intimidation, by criminal prosecution, of Members of Parliament by English monarchs in the 16th and 17th centuries. *See, e.g.*, *Bogan v. Scott-Harris*, 523 U.S. 44, 48-49 (1998); *United States v. Johnson*, 383 U.S. 169, 178 (1966). As a result of the English experience, "[f]reedom of speech and action in the legislature was taken as a matter of course" by the Founders, and included by them in the Constitution in the form of the Speech or Debate Clause. *Tenney v. Brandhove*, 341 U.S. 367, 372-73 (1951).

"The purpose of the Clause is to [e]nsure that the legislative function the Constitution allocates to Congress may be performed independently." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 502 (1975). Its "'central role'" is to "'prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary.'" *Id.* (quoting *Gravel v. United States*, 408 U.S. 606, 617 (1972)). The Clause thus "reinforce[es] the separation of powers so deliberately established by the Founders." *Johnson*, 303 U.S. at 178; *see also United States v. Brewster*, 408 U.S. 501, 507-08 (1972) ("The immunities of the Speech or Debate Clause were . . . written into the Constitution . . . to protect the integrity of the legislative process by insuring the independence of individual legislators."; "[T]hroughout United States history, the privilege has been recognized as an important protection of the independence and integrity of the legislature." (quotation marks omitted)).

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

1. The Court has held that, when applicable, the Speech or Debate Clause provides to Members three distinct protections: (i) an immunity from prosecutions and lawsuits for all "actions within the 'legislative sphere,'" *McMillan*, 412 U.S. at 312 (quoting *Gravel*, 408 U.S. at 624-25); *see also, e.g.*, *Eastland*, 421 U.S. at 503 (same); (ii) a non-evidentiary use privilege that bars prosecutors and parties from advancing their cases or claims against Members by "[r]evealing information as to a legislative act," *United States v. Helstoski*, 442 U.S. 477, 490 (1979); *see also Johnson*, 383 U.S. at 173-77 (same); and (iii) a testimonial or discovery privilege against being compelled to testify about legislative matters, *see, e.g.*, *Gravel*, 408 U.S. at 615-16 (quashing subpoena insofar as it sought testimony regarding legislative matters).

The Court has drawn no distinctions among the three protections in terms of effect. Rather, it has held unequivocally that, when the Clause applies, it is "absolute." *Eastland*, 421 U.S. at 501, 503, 509-10 & n.16; *accord Bogan*, 523 U.S. at 48, 52-53, 54; *Gravel*, 408 U.S. at 623 n.14.

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

> "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House."

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

3. The Court has held that, beyond legislative activities themselves, the Clause particularly protects "'against inquiry into . . . the motivation for those [legislative] acts.'" *Helstoski*, 442 U.S. at 489 (quoting *Brewster*, 408 U.S. at 525); *see also Bogan*, 523 U.S. at 55 ("[I]t simply is 'not consonant with our scheme of government for a court to inquire into the motives of legislators.'" (quoting *Tenney*, 341 U.S. at 377)); *Brewster*, 408 U.S. at 538 (whether legislative activity improperly motivated "'is precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry'" (quoting *Johnson*, 383 U.S. at 180)).

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

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

Id. at 616-17; *see also, e.g.*, *Eastland*, 421 U.S. at 507 (Senate committee aide, as well as Senators

themselves, immune from suit under Clause; "We draw no distinction between the Members and the Chief Counsel.").

5. Finally, the Court has held that the protections of the Clause apply "even though the[] conduct [in question], if performed in *other* than legislative contexts, would . . . be unconstitutional or otherwise contrary to criminal or civil statutes." *McMillan*, 412 U.S. at 312-13 (emphasis added); *accord Eastland*, 421 U.S. at 510. In so holding, the Court has acknowledged the potential costs associated with this broad constitutional protection. "[W]ithout doubt the exclusion of [legislative act] evidence will make prosecutions more difficult." *Helstoski*, 442 U.S. at 488. "[T]he broad protection granted by the Clause creates a potential for abuse." *Eastland*, 421 U.S. at 510. Nevertheless, the Court steadfastly and repeatedly has held that the Clause *must* be broadly construed and applied because that was "'the conscious choice of the Framers' buttressed and justified by history." *Id.* (quoting *Brewster*, 408 U.S. at 516).

II. CONGRESSIONAL LEGISLATIVE ACTIVITY, GENERALLY.

As noted *supra*, Introduction & Background, Part 1.2-3, the Speech or Debate Clause encompasses all conduct "within the sphere of legitimate legislative activity," including particularly "the motivation for [that conduct]." *Eastland*, 421 U.S. at 501, 503, 508 (quotation marks omitted); *see also, e.g.*, *Helstoski*, 442 U.S. at 487-88 (Clause protects "legislative acts [and] the motivation for legislative acts").

As the Court further has recognized, investigative activity, or fact-finding, is essential to a Member's ability to participate in the legislative process and

thus constitutes a core type of protected legislative activity. "This Court has often noted that the power to investigate is inherent in the power to make laws because 'a legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change.'" *Eastland*, 421 U.S. at 504 (quoting *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927)). Indeed, "'the power of inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.'" *Id.* at 504 n.15 (ellipsis in original; quoting *Barenblatt v. United States*, 360 U.S. 109, 111 (1959); *Sinclair v. United States*, 279 U.S. 263, 291-92 (1929)).

This is so because a Member cannot understand the societal conditions that require, or do not require, legislative action—and thus cannot know whether to introduce legislation, much less the appropriate content of any such legislation—without preliminary fact-finding. *See, e.g.*, *Eastland*, 421 U.S. at 504-05 ("[W]here the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it." (brackets in original; quotation marks omitted)). And, by the same token, a Member considering a bill suggested by another Member cannot know whether to join in sponsoring that bill, vote in favor of it, seek to amend it, or oppose it without likewise engaging in fact-finding. *See id.*; *see also id.* at 505 ("To conclude that the power of inquiry is other than an integral part of the legislative process would be a miserly reading of the Speech or Debate Clause in derogation of the 'integrity of the legislative process.'" (quoting *Brewster*, 408 U.S. at 524; *Johnson*, 383 U.S. at 172)).

While congressional investigations, to fall within the Speech or Debate Clause protection, must "concern[] a subject on which 'legislation could be had,'" *Eastland*, 421 U.S. at 506 (holding Clause applicable upon determining that relevant investigation concerned such subject; quoting *McGrain*, 273 U.S. at 177), the Court's inquiry in this regard "is narrow," *id.* at 506-07.

Two subjects, particularly relevant here, on which legislation certainly could be had are those of health policy and port security. *See* U.S. Const. art. I, § 8, cl. 1 ("The Congress shall have the Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and the general Welfare of the United States . . . ."); *id.* art. I, § 8, cl. 3 ("To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"); *id.* art. I, § 8, cl. 18 ("To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof"). Indeed, some of Congress's most significant acts have come in these areas. *See, e.g.*, The Social Security Amendments of 1965, Pub. L. No. 89–97, 79 Stat. 286 (1965) (authorizing Medicare and Medicaid); USA PATRIOT Improvement & Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2006) (including various port security measures).

III. SENATOR MENENDEZ'S ACTIVITY, AND THE THIRD CIRCUIT RULING REGARDING THAT ACTIVITY.

In addition to being called on to introduce, support, oppose, amend, and otherwise consider any number of health policy and port security bills, Senator Menendez held two particularly relevant committee assignments.

First, Senator Menendez served on the Senate's Committee on Finance. That Committee has jurisdiction over all matters relating to "[h]ealth programs under the Social Security Act and health programs financed by a specific tax or trust fund [e.g., Medicare]," "[c]ustoms, collection districts, and ports of entry and delivery," and "[t]ransportation of dutiable goods." Rule XXV.1(i), Standing Rules of the Senate ("Senate Rules"); *see also, e.g.*, Pet. at 10 (noting particular Finance Committee authority, in connection with its health jurisdiction, in overseeing Department of Health and Human Services ("DHHS") and its Centers for Medicare and Medicaid Services ("CMS")).

Second, Senator Menendez served on the Senate's Committee on Foreign Relations and, particularly, as the Chair of that Committee's Subcommittee on Western Hemisphere, Peace Corps, and Narcotics Affairs ("WHA Subcommittee"). The Foreign Relations Committee has jurisdiction over all matters relating to "[r]elations of the United States with foreign nations generally," including "[f]oreign economic, military, technical, and humanitarian assistance," and other "[m]easures to foster commercial intercourse with foreign nations." Senate Rule XXV.1(j)(1). And the WHA Subcommittee particularly holds jurisdiction over "all matters within the geographic region, including matters relating to: (1) terrorism and nonproliferation; (2) crime and illicit narcotics; (3) U.S. foreign assistance programs; and (4) the promotion of U.S. trade and exports." Committee Rep.: Membership & Juris. of Subcomms. at 3-4, Comm. on Foreign Relations, U.S. Sen. (114th Cong.), http://www.foreign.senate.gov/imo/media/doc/Jurisdiction%20and%20Subcommittees%20114th%20congress.pdf.

In other words, Senator Menendez's legitimate legislative interest in matters pertaining to health policy and port security issues was, and is, particularly acute. *See also, e.g.*, Senate Rule XXVI.8(a)(2) ("[E]ach standing committee . . . shall review and study, on a continuing basis, the application, administration, and execution of those laws or parts of laws, the subject matter of which is within the jurisdiction of the committee.").

As his Petition recites, *see* Pet. at 11-14, here Senator Menendez challenges the Indictment's reliance, in part, on five particular allegations, namely that he: (1) met with Marilyn Tavenner, the then-nominee to head CMS, about a health policy "issue," Pet. App. G (Indictment) at 148a-149a; (2) spoke by telephone with Ms. Tavenner about the same issue, *see id.* at 150a-151a; (3) met with Kathleen Sebelius, the then-Secretary of DHHS, about the same issue, *id.* at 153a—a meeting that a CMS attendee described as "on the policy," *id.* App. J (FBI Interview Summary) at 258a; (4) met with William Brownfield, a then-Assistant Secretary at the State Department, about cargo traveling between ports of the Dominican Republic and the United States, *see id.* App. G at 129a-130a; and (5) allowed a staffer to send an email requesting information, from the Department of Homeland Security's U.S. Customs and Border Protection division, about the security of a port in the Dominican Republic, *see id.* at 133a-134a.

The Third Circuit held that determining whether Senator Menendez enjoys Speech or Debate Clause immunity for the above-described activities requires probing "the content, purpose, and motive of the [relevant] act." Pet. App. A at 18a. The Circuit's reference to scrutinizing a Member's motive was not

merely careless, or inconsequential: It repeatedly stressed the "necess[ity]" of such scrutiny, making it a central premise of its holding. *Id.* at 21a-23a (application of Clause "turn[s] on the content, purpose, and motive of the communications at issue"; consideration of "content, purpose, and motive is necessary"; application of Clause "depend[s] on the[] content, purpose, and motive" of challenged oversight activities). According to the Circuit: "Only after we conclude that an act is in fact legislative must we refrain from inquiring into a legislator's purpose or motive." *Id.* at 19a.

Applying that standard, the Third Circuit concluded that, while record evidence "show[ed] that each of the challenged acts involved policy discussions," Pet. App. A. at 24a, the District Court's conclusion that the Speech or Debate Clause nonetheless was inapplicable was not clearly erroneous because that court "plausibl[y]" determined that other evidence suggested a non-legislative purpose, *id.* at 25a-26a (quotation marks omitted); *see also id.* at 29a ("Because the record supports both views, the District Court's findings were not clearly erroneous."); *id.* at 29a-30a (not clear error to determine that Sen. Menendez was "not *primarily* concerned with broader issues of policy" (emphasis added)); *id.* at 32a (not clear error to determine that "it was not the *primary* purpose . . . to gather information" (emphasis added)); *id.* ("In sum, the materials before us provide a sufficient basis for the District Court's conclusion that the *predominant* purpose of the challenged acts was [non-legislative]." (emphasis added)).

SUMMARY OF ARGUMENT

Notwithstanding the "central role" of the Speech or Debate Clause in ensuring the "independent[]" functioning of the Legislative Branch and its Members, *Eastland*, 421 U.S. at 502 (quotation marks omitted), and thus the vital importance of the Clause to the effective operation of the checks and balances central to our federal system, *see id.*; *Johnson*, 383 U.S. at 178; *Brewster*, 508 U.S. at 507-08, the Third Circuit would turn the Clause on its head so as to allow full-fledged executive and judicial scrutiny of the motives of Senators and Representatives. This is precisely what the Clause prohibits.

1. The protections of the Clause, including particularly the applicability of those protections to Congress's information-gathering responsibilities, *see supra*, Introduction & Background, Parts I, II, enable meaningful oversight and thus serve as a vital bulwark against executive, and judicial, overreach.

2. The Third Circuit's scrutiny of a Member's motives is clearly impermissible. This Court repeatedly has admonished that the Clause serves exactly to insulate Members of the Legislative Branch from such scrutiny by the other Branches, *see supra*, Introduction & Background, Part I.3, yet the Third Circuit would require it for a Member to claim the benefits of the Clause.

3. Were the Third Circuit decision to stand, Members would be chilled in the performance of their legislative activities, and the legislative process would suffer. That chill would result not only from a Member's exposure to Executive and Judicial Branch scrutiny of the Member's motives, but also from the Member's new burden to prove not only his or

her legislative motive, but also the absence of a "predominant" non-legislative motive. Pet. App. A at 32a. And the chill would only be heightened by the uncertainty and confusion inherent in Members facing divergent standards for Speech or Debate Clause immunity, depending on the jurisdiction seeking to bring judicial power to bear over them.

ARGUMENT

I. THE SPEECH OR DEBATE CLAUSE ENABLES MEANINGFUL OVERSIGHT.

One of Congress's most vital functions is oversight of the operations of the federal government, such oversight being "an essential and appropriate auxiliary to the legislative function." *McGrain*, 273 U.S. at 174. In *McGrain*, the Court considered a congressional investigation of the role of the Department of Justice in the Teapot Dome scandal; the Court emphasized the essential nature of such oversight:

> [T]he subject to be investigated was the administration of the Department of Justice—whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes and enforce appropriate remedies against the wrongdoers . . . . Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit. This becomes manifest when [it] is reflected that the functions of the Department of Justice, the powers and duties

> of the Attorney General, and the duties of his assistants are all subject to regulation by congressional legislation, and that the department is maintained and its activities are carried on under such appropriations as in the judgment of Congress are needed from year to year.

Id. at 177-78; *see also, e.g.*, *Watkins v. United States*, 354 U.S. 178, 187 (1957) (Congress's power of inquiry "encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes").

Indeed, in discussing the Speech or Debate Clause, the Court has quoted later-President Woodrow Wilson regarding the importance of Congress informing itself as to those affairs on which it may consider legislation:

> "Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. . . . The only really self-governing people is that people which discusses and interrogates its administration."

Hutchinson v. Proxmire, 443 U.S. 111, 132 (1979) (quoting W. Wilson, Congressional Government 303 (1885)).

For Congress effectively to conduct such oversight, and thereby necessarily to risk, and likely to engender,

the ire of the officials it is overseeing, it must be secure in its immunity from harassment for such activity. While the Court repeatedly has held that the Clause in fact does insulate Members engaged in that conduct, *see supra*, Introduction & Background, Part II, the Third Circuit's decision effectively would remove that immunity, such that Members only are protected in those uncertain situations in which they can convince a "'potentially hostile'" executive or judiciary of their pure motives. *Eastland*, 421 U.S. at 502 (quoting *Gravel*, 408 U.S. at 617); *see also* Pet. App. A. at 26a, 32a (affirming denial of immunity where District Court "plausibl[y]" could have found that Sen. Menendez's "primary," or "predominant," motive was not legislative (quotation marks omitted)). This is not the "broad[]" protection mandated by the Court. *Eastland*, 421 U.S. at 501; *supra*, Introduction & Background, Part I.

While the Clause traces to the monarchical overreach that threatened Parliament's independence in the 16th and 17th centuries, *see supra*, Introduction & Background, Part I, its role in checking executive overreach, by protecting those bold enough to challenge such overreach, is no less important in today's America. *See also, e.g.*, *Brewster*, 408 U.S. at 507-08 ("The immunities of the Speech or Debate Clause were . . . written into the Constitution . . . to protect the integrity of the legislative process by insuring the independence of individual legislators.").

II. THE THIRD CIRCUIT'S SCRUTINY OF A MEMBER'S MOTIVES IS CLEARLY IMPERMISSIBLE.

To determine the applicability of the Speech or Debate Clause, the Third Circuit would require examination of a Member's "motive" in engaging in the

relevant conduct, including oversight. *See supra*, Introduction & Background, Part III; Pet. App. A at 21a (application of Clause "depend[s] on the[] content, purpose, and motive" of challenged oversight activities). But the Court has held that examination of that motive is exactly what the Clause forbids: "The essence of [the criminal charge against Congressman Johnson] is that the Congressman's conduct was improperly motivated, and as will appear that is precisely what the Speech or Debate Clause generally forecloses from executive and judicial scrutiny." *Johnson*, 383 U.S. at 180; *see also supra*, Introduction & Background, Part I.3.

In *Johnson*, the Court considered circumstances similar to those alleged here:

> It was undisputed that Johnson delivered the speech [i.e., took a particular official action]; it was likewise undisputed that Johnson received the funds [certain political contributions]; *controversy centered upon questions of who first decided that a speech was desirable, who prepared it, and what Johnson's motives were for making it*.

383 U.S. at 184 (emphasis added). The Court held: "[A] prosecution under a general criminal statute dependent on such inquiries necessarily contravenes the Speech or Debate Clause." *Id.* It so held because such a prosecution necessarily "draw[s] into question the legislative acts of the defendant member of Congress or his motives for performing them." *Id.* at 185; *see also, e.g.*, *Brewster*, 408 U.S. at 509 ("Our conclusion in *Johnson* was that the privilege protected Members from inquiry into legislative acts or the motivation for actual performance of legislative acts.").

In *Brewster*, the Court reiterated that "[i]t is beyond doubt that 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." 408 U.S. at 525. The *Brewster* Court thus was at pains to stress that the prosecution it allowed there (under a particular bribery statute) was permissible only because conviction was possible by establishing merely the "taking or agreeing to take money for a promise to act in a certain way"; i.e., without regard to whether Senator Brewster *actually* took any particular legislative action, much less his motive(s) in doing so. *Id.* at 526-28; *see also id.* at 526 ("There is no need for the [Executive Branch] to show that [Senator Brewster] fulfilled the alleged illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise."; as such: "Nor is inquiry into a legislative act or the motivation for a legislative act necessary to a prosecution under this statute or this indictment.").

And, in *Helstoski*, the Court reiterated that "[t]he Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts." 442 U.S. at 489. There, the Court affirmed the inadmissibility of evidence of past legislative acts, notwithstanding the Executive Branch's contention that it sought "to introduce such evidence to show Helstoski's motive for taking money, not to show his motive for introducing the bills." *Id.* at 486. The Court rejected that effort to probe motive, and it did so notwithstanding the costs necessarily imposed by the Clause: "We do not accept the [Executive Branch]'s arguments; without doubt the exclusion of such evidence will make prosecutions more difficult. Indeed, the Speech or Debate Clause was designed to preclude prosecution of Members for legislative

acts." *Id.* at 488-89; *see also, e.g.*, *Eastland*, 421 U.S. at 510 ("Respondents make the familiar argument that the broad protection granted by the Clause creates a potential for abuse. That is correct, and in *Brewster* . . . , we noted that the risk of such abuse was 'the conscious choice of the Framers' buttressed and justified by history." (quoting *Brewster*, 408 U.S. at 516)).

In short, the Clause's protection against inquiry into a Member's motive(s) is fundamental and well-established—notwithstanding the Third Circuit's holding otherwise. *See also, e.g.*, Pet. at 19-27 (discussing lower court authority, and split engendered by Third Circuit decision); *In re Hubbard*, 803 F.3d 1298, 1310-11 & n.11 (11th Cir. 2015) (state legislative immunity, informed by Speech or Debate Clause jurisprudence, covers motive). Rather, the test for application of the Clause is an objective one, as this Court has emphasized:

In *Eastland*, for example, the Court considered the applicability of the Clause where certain Senators and their aides were accused of using a congressional subpoena to violate the First Amendment rights of the subpoena recipient. *See* 421 U.S. at 493-96. The appellate court concluded that the subpoena in fact violated the recipient's constitutional rights. *See id.* at 497-99. This Court reversed on grounds of Speech or Debate Clause immunity, notwithstanding the asserted constitutional violation: "Congressmen and their aides are immune from liability for their actions within the legislative sphere . . . , even though their conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes." *Id.* at 503, 510; *accord McMillan*, 412 U.S. at 312-13. In

determining whether the challenged activity fell within that sphere, the Court noted that the exercise of Congress's investigatory power plainly qualifies, *see Eastland*, 421 U.S. at 503-05; *supra*, Introduction & Background, Part II, and thus asked simply whether the relevant investigation "concerned a subject on which 'legislation could be had.'" *Id.* at 506 (quoting *McGrain*, 273 U.S. at 177). Finding that test met, the Court "conclude[d] that the Speech or Debate Clause provides complete immunity." *Id.* at 506-07.

Any doubt on this score was settled following the Court's unanimous ruling in *Bogan*. There, the Court considered common law legislative immunity for local officials, looking to Speech or Debate Clause jurisprudence for guidance. *See* 523 U.S. at 48-54. In doing so, the Court noted that the lower court "*erroneously relied on [the government officials]' subjective intent in resolving the logically prior question of whether [the officials'] acts were legislative.*" *Id.* at 54 (emphasis added). The Court continued:

> Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it. . . .
>
> This leaves us with the question whether, stripped of all considerations of intent and motive, [the government officials]' actions were legislative.

Id. at 54-55.

The Third Circuit's necessarily subjective inquiry into a Member's motive—or "primary" motive, *e.g.*, Pet. App. A at 32a—not only would strip a core protection of the Clause, it threatens to convert an immunity into little more than a post hoc ratification of conduct of which the Executive and Judicial

Branches approve. Simply put, an "immunity" that depends on establishing pure legislative motive is no immunity at all. *See also, e.g.*, *Bogan*, 523 U.S. at 55 (noting that, in *Tenney*, Court "held that the defendant . . . had acted in a legislative capacity even though he allegedly singled out the plaintiff for investigation [for improper purpose]"); *Rangel v. Boehner*, 785 F.3d 19, 24 (D.C. Cir. 2015) ("Instead of looking into the [legislative officials]' 'motive or intent,' the standard of determining whether an act is legislative 'turns on the nature of the act' itself." (quoting *Bogan*, 523 U.S. at 54)); *id.* ("Rangel contends that the [legislative officials]' conduct cannot be legislative because it was, in his view, *illegal*. This familiar argument—made in almost every Speech or Debate Clause case—has been rejected time and again. . . . Such is the nature of absolute immunity, which is—in a word—absolute." (quotation marks omitted)).

III. THE THIRD CIRCUIT DECISION WOULD CHILL MEMBERS IN THE PERFORMANCE OF THEIR LEGISLATIVE RESPONSIBILITIES.

As noted, *supra*, Introduction & Background, Part I.3; *supra*, Argument, Part II, the Third Circuit's decision renders at the center of the Speech or Debate Clause inquiry the very thing (motive) that the Court has deemed protected from inquiry. Indeed, the Third Circuit not only would examine legislator motive, it would place on Members the burden to prove that motive, and, beyond that, to prove a negative; namely, that any non-legislative motive they may have harbored was not "predominant." Pet. App. A at 32a. This intrusive inquiry, coupled with the confusion and uncertainty inherent in exposing Members to varying standards for immunity, would substantially chill

Members in the performance of their legislative duties.

Under the Third Circuit decision, Legislative Branch officials could not know, *ex ante*, what of their oversight and associated information-gathering activity would be protected, and what would not. Rather, immunity as to that activity only could be determined after a highly subjective inquiry into the Member's "primary" motive. Pet. App. A. at 29a-30a, 32a. The natural consequence of this erosion of the protections of the Clause would be to leave Members without clear guidance as to its applicability, and thus without an ability meaningfully to asses when they should, or need not, hesitate in undertaking oversight activity.

Most notably, the six Senators, 31 House Members, and one Delegate who currently represent States, congressional districts, and territories from within the Third Circuit would risk liability for their oversight activity, to the extent process issues from their home judicial districts. Those same representatives, however, presumably would continue to enjoy the Clause's protections where process issued from Washington, D.C., where they perform much of their work, and in the great bulk of the rest of the country.

This uncertainty not only would confound legislators from within the Third Circuit, it would provide perverse incentives for civil and criminal actions, and grand jury investigations, to be commenced within the Third Circuit (such that process would issue there), when possible. Indeed, this would be true even when such actions and investigations involved legislators—as parties or non-parties—representing jurisdictions outside the Third Circuit.

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

> [T]he scope of a privilege must be clear and predictable for the privilege to serve its purpose. As the Supreme Court has said, "an uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."

In re Grand Jury Subpoenas, 571 F.3d 1200, 1206 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)).

CONCLUSION

The Former House Counsels respectfully urge the Court to grant Senator Menendez's Petition.

Respectfully submitted,

WILLIAM PITTARD
Counsel of Record
KAISERDILLON PLLC
1401 K Street, NW
Washington, D.C. 20005
(202) 640-2850
wpittard@kaiserdillon.com

Counsel for Former General Counsels of the U.S. House of Representatives

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