NO. 19-50242

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DUNCAN D. HUNTER,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of California
Honorable Thomas J. Whelan, District Judge Presiding

APPELLANT'S SUPPLEMENTAL BRIEF

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I.
Summary of Argument.

The Speech or Debate Clause is essential to the separation of powers at the core of our representative democracy. Whenever the Executive is overzealous in its assertion of power, the Clause protects the branch closest to the People. Those protections must remain robust.

That is certainly true here. From the nearly unprecedented step of executing a search warrant at Congressman Hunter's congressional office, ER:167, to arguing this Court has no jurisdiction over his appeal, the Executive is pushing for precedent curtailing the Clause's protections.[1]

[1] "ER" is the government's Excerpts of Record. "SER" is Congressman Hunter's Supplemental Excerpts of Record. "RESP" is Congressman Hunter's response to the government's motion to dismiss the appeal. "RPLY" is the government's reply.

As a result, it is not hyperbole to say the Court's decision in this case will echo beyond its facts. At issue is whether the Clause is a bulwark or a paper tiger. The Constitution intended the former. The Court should honor its design.

First, the Court should remand for production of the grand jury transcript and further proceedings. *See Meinhold v. United States DOD*, 34 F.3d 1469, 1474 (9th Cir. 1994) ("Prior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision."). Congressman Hunter is entitled to the transcript so he can determine what protected material the government used in securing the indictment and present a complete Speech or Debate Clause claim. The preference for grand jury secrecy must give way to the Clause's constitutional safeguards.

Second, even without the grand jury transcript, the Court can and should reverse the denial of Congressman Hunter's motion to dismiss. On the face of the indictment, it is clear the prosecution improperly relied on protected material in bringing this case.

The most obvious example is Congressman Hunter's communications with his Chief-of-Staff regarding an official Naval-base visit. They fall within the Clause's purview, regardless of whether Congressman Hunter was in Italy for a family vacation. Thus, their use in the grand jury and inclusion in the indictment was prohibited.

And the government's reliance on the FEC reports is even more problematic. The Speech or Debate Clause protects legislative acts. *See Gravel v. United States*, 408 U.S. 606, 625 (1972). In this context, "legislative" includes "matters which the Constitution places within the jurisdiction of either House." *Id.* As explained below, the House has consistently asserted jurisdiction over "matters related to a successful campaign for election to the House," including alleged FEC violations. *See* House Comm. on Ethics, H. Rept. 113-727 at 20, 113th Cong. 2d Sess. (2015). Accordingly, they are legislative and off limits to the Executive.

This is dispositive. The Clause prohibits the government from using protected material to secure an indictment. The indictment should be dismissed.

II.
Argument.[2]

A. The Court should order production of the grand jury transcript and remand for further proceedings.

Congressman Hunter has a constitutional right to present a complete Speech

[2] Congressman Hunter pauses to note his objection to these truncated proceedings. He has a well-established right to this interlocutory appeal, *Helstoski v. Meanor*, 442 U.S. 500, 508 (1979), but has been denied the opportunity to file an opening or a reply brief. Such treatment has no precedent. Never has a Speech or Debate Clause appeal been handled in this manner. Accordingly, he asks the Court to allow full briefing. Although this would delay the trial, it remains the proper and preferable course.

or Debate Clause claim.[3] *Cf. United States v. Stever*, 603 F.3d 747, 755 (9th Cir. 2010) ("the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense."). He cannot do so without the grand jury transcript. The Court, therefore, should order its production. Indeed, at this point, the Court need not reach the larger, dispositive Speech or Debate Clause issues because the district court's threshold error requires remand for further proceedings. *See Lyng v. Nw. Indian Cemetery Protective Ass'n.*, 485 U.S. 439, 445 (1988) ("judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.").

To be clear, Congressman Hunter seeks only the *relevant* portions of the grand jury transcript. He asks for the testimony of any witness with knowledge of matters within the legislative sphere (e.g., meetings in which fact-finding, pending or proposed bills, policy issues, etc. were discussed). In addition, he requests production of all exhibits submitted to the grand jury related to legislative acts or communications regarding legislative matters.[4]

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[3] The Court reviews for abuse of discretion the denial of a motion for grand jury materials. *United States v. Caruto*, 627 F.3d 759, 768 (9th Cir. 2010).

[4] Disclosure to the defense, rather than *in camera review*, is most appropriate. *See Dennis v. United States*, 384 U.S. 855, 875 (1966) ("The determination of what may be useful to the defense can properly and effectively be made only by an advocate.").

1. Relevant facts.

Congressman Hunter moved for production of the grand jury transcript, citing "strong grounds [] to believe, based on the indictment, that the grand jury was presented evidence protected by the Speech or Debate Clause, and thus a potential ground to dismiss the indictment exists." SER:2. He argued production of the transcript was necessary to determine the extent of the violation and bring an appropriate motion. SER:3-4.

The district court denied the motion, concluding Congressman Hunter "failed to demonstrate any particularized need for disclosure of grand jury materials." ER:3. This Court should reverse. *See Dennis*, 384 U.S. at 875 ("Because petitioners were entitled to examine the grand jury minutes . . . we reverse the judgment below and remand.").

2. The grand jury issue is properly before the Court.

This Court has jurisdiction over the grand jury issue because it is part of Congressman Hunter's Speech or Debate Clause claim. *See United States v. Rostenkowski*, 59 F.3d 1291, 1300 (D.C. Cir. 1995) ("[b]ecause delaying until after trial the appeal of an order refusing to review grand jury materials for Speech or Debate material could expose a legislator to a prosecution based upon his legislative acts, we hold that the district court order denying [a] motion [for review of grand jury material] satisfies the [collateral order doctrine]."); *United States v.*

Decinces, 808 F.3d 785, 792 (9th Cir. 2015) (the Court has pendant jurisdiction over issues in an "interlocutory appeal if raised in conjunction with other issues properly before the court and if the rulings were inextricably intertwined or if review of the pendent issue was necessary to ensure meaningful review of the independently reviewable issue[.]").

The government has tacitly conceded this point. It did not contest the Court's jurisdiction to review the grand jury ruling in its reply.

Moreover, if the transcripts are not produced now, there is a significant possibility Congressman Hunter will be back before this Court for a second interlocutory appeal. Pursuant to the Jencks Act, *see* 18 U.S.C. § 3500(b) and Fed. R. Crim. P. 26.2(a), once a witness testifies at trial, the government must produce his or her testimony before the grand jury.[5] Here, if that production reveals protected Speech or Debate Clause material, Congressman Hunter will have grounds to reopen his motion to dismiss the indictment. And if that motion is denied, Congressman Hunter would again appeal, stopping the trial in its tracks. This serves no one. As such, the Court should reach the merits of the issue.

[5] This does not moot the grand jury issue. The Jencks Act is triggered *only* if the government calls the witness at trial and production is limited to testimony "relate[d] to the subject matter as to which the witness has testified." 18 U.S.C. § 3500(b).

3. Congressman Hunter is entitled to production of the grand jury transcript.

There is a "growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice." *Dennis,* 384 U.S. at 870. Thus, "[t]he court may authorize disclosure . . . of a grand-jury matter at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury." Fed. R. Crim. P. 6(e)(3)(E)(ii). Moreover, disclosure is *required*, "[w]hen the defense shows a particularized need for grand jury transcripts that outweighs the need for secrecy[.]" *United States v. Plummer*, 941 F.2d 799, 806 (9th Cir. 1991).

Here, because its function is complete, "the interests in grand jury secrecy [are] reduced." *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 222 (1979); *see also United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 234 (1940) ("after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it."). Further reducing those interests, the government previously disclosed five short sections of heavily redacted grand jury transcripts and two redacted interview reports.[6] Given that the identity of those seven witnesses is now known to the defense, any justification for continuing to

[6] The *only* unredacted portions concerned a discreet matter irrelevant to the Speech or Debate Clause or the substance of the charges.

withhold their testimony is non-existent. *See id.*

The remaining question, therefore, is whether Congressman Hunter has the requisite "particularized need." *Dennis*, 384 U.S. at 870. As noted, under Rule 6(e)(3)(E)(ii), the defendant has a particularized need when he or she "shows that a ground *may exist* to dismiss the indictment because of a matter that occurred before the grand jury." (Emphasis added). An indictment secured by presentation of material and/or testimony protected by the Speech or Debate Clause is subject to dismissal (in whole or as to the infected counts). *See United States v. Renzi*, 651 F.3d 1012, 1028 (9th Cir. 2011) ("A court cannot permit an indictment *that depends* on privileged material to stand . . . or else the Clause loses much of its teeth.") (emphasis in original); *Bank of Nova Scotia v. United States*, 487 U.S. 250, 263 (1988) (a court may dismiss an indictment where grand jury proceeding "violations had an effect on the grand jury's decision to indict."). Accordingly, to the extent the government used protected material/testimony before the grand jury in this case, a ground may exist to dismiss the indictment.

There is considerable evidence the government did so. *See United States v. Rayburn House Office Bldg.*, 378 U.S. App. D.C. 139, 146 (2007) ("The search of [the] Congressman['s] office must have resulted in the disclosure of legislative materials to agents of the Executive."). First, it is plain on the face of the indictment that at least some protected material was provided to the grand jury. As

discussed below, the correspondence with Congressman Hunter's Chief-of-Staff about the Naval-base visit falls within the legislative sphere. *See United States v. Biaggi*, 853 F.2d 89, 103 (2d Cir. 1988) (even informal legislative fact-finding conduct is protected under the Speech or Debate Clause). There is no doubt these communications were presented to the grand jury. ER:123. For this reason alone, production is warranted.

In addition, the redacted transcripts and interview reports produced thus far establish that, among others, a legislative aide, a Member of Congress, and Congressman Hunter's close confidants testified before the grand jury. Plainly, these people possessed protected information. Congressman Hunter's aide and fellow Member would necessarily have been privy to his legislative activities. *See Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 530 (9th Cir. 1983) ("information pertinent to potential legislation or investigation is . . . within the 'legitimate legislative sphere'"). And it is almost inconceivable that, while before the grand jury, they did not at least touch on those areas.

Indeed, the alleged overt acts and charged counts rely heavily on meetings Congressman Hunter attended. ER:99-132. To the extent legislative matters were discussed during these meetings, those conversations would be protected. *See id.* at 530; *In re Grand Jury Investigation*, 587 F.2d 589, 596-97 (3d Cir. 1978) (legislative communications with aides are protected). And if the government

elicited grand jury testimony regarding those protected conversations, "a ground may exist to dismiss the indictment." Fed. R. Crim. P. 6(e)(3)(E)(ii).

Congressman Hunter, therefore, has a good faith basis to seek these transcripts in support of his Speech or Debate Clause claim. *Renzi*, 651 F.3d at 1020 (evidence of acts covered by the Clause "could not be introduced to any jury, grand or petit."). The same is true for other aspects of the grand jury presentation, such as documents related to meetings in which legislative matters were discussed. ER:91.

As the Third Circuit explained in *In Re Grand Jury Investigation*, 608 Fed. App'x. 99, 101 (3d Cir. 2015), "[w]here an act or communication has some legislative and non-legislative components . . . the legislative components should be separated from the non-legislative components, if possible, and the latter may be the subject of questioning." But here, this determination is possible only if the grand jury testimony is available for examination. *See United States v. Beals*, 2012 U.S. Dist. LEXIS 12658, *5 (E.D. Cal. 2012) (Defendant was entitled to grand jury transcript, "[e]ven if dismissal is unlikely").

Nor does the government's under-seal filing address this concern. Although it explains that one particular subject was not presented to the grand jury, (Decl. ¶18), it says nothing about what *was* presented. And its references to the scope of prior defense counsel's assertions of privilege are beside the point. Any failure to

object would not condone an improper presentation of forbidden materials. More important, defense counsel were not allowed to be present during the grand jury proceedings. Thus, without the grand jury transcript, Congressman Hunter has no way of knowing how far the prosecution strayed into prohibited territory.

Finally, the government may respond that Congressman Hunter is nevertheless not entitled to the grand jury transcript because he cannot proffer more precisely what protected material would justify dismissal. But this is an untenable Catch-22. Indeed, the Court rejected an analogous government argument in *United States v. Muniz-Jaquez*, 718 F.3d 1180, 1181-83 (9th Cir. 2013).

The defendant there was charged with illegally reentering the country. *Id*. As part of his defense, he sought production of the dispatch recordings made by the arresting agents. *Id*. The district court denied the motion. *Id*.

This Court reversed, noting the defense motion was "not a fishing expedition." *Id.* at 1184. Although the defendant could not demonstrate what the tapes would reveal or even if they would be helpful (because he did not have them), this was irrelevant. *Id.* The Court held that he was entitled to the recordings because they "*could have been* crucial to . . . his defense." *Id.* (emphasis added). Accordingly, the Court, "remand[ed] for production of the recordings, any motions the production may generate, including any motion for a

new trial, and such subsequent determinations as may be appropriate." *Id*.

The same result is warranted here. Because Congressman Hunter has demonstrated "a ground *may exist* to dismiss the indictment [in whole or in part]," the Court should remand for production of the grand jury transcript (and exhibits) for all witnesses with knowledge of legislative matters. Fed. R. Crim. P. 6(e)(3)(E)(ii) (emphasis added).

B. The Court should reverse the denial of Congressman Hunter's motion to dismiss.

Even without the transcript, the Court can and should reverse the district court's denial of his motion to dismiss the indictment under the Speech or Debate Clause.[7]

1. Congressman Hunter's conversations with his Chief-of-Staff about visiting a military base are protected.

Beginning with the messages between Congressman Hunter and his Chief-of-Staff about touring the Naval base, the district court erred in concluding they were unprotected. ER:2, 123. Because the parties have already spilt considerable ink on this issue, Congressman Hunter limits his discussion to two additional points:

First, the government's argument on this issue is misdirected. It focuses on

[7] "Whether the Clause precludes [a Member's] prosecution is a question of law" reviewed de novo. *Renzi*, 651 F.3d at 1020-21.

the district court's factual finding that the Italy trip was a family vacation, not a legislative act. RPLY:5-6. But that finding does not carry the day. According to the district court, "the *primary* purpose of [the trip] was unrelated to Hunter's work as a member of Congress." ER:2 (emphasis added). But this does not mean it was his *sole* purpose. *See United States v. Dowdy*, 479 F.2d 213, 226 (4th Cir. 1973) (a "basic flaw in the government's argument is its implied assertion . . . that [the Clause] is applicable only when a pure legislative motive is present").[8]

People work during family vacations. And there is no dispute that, while in Italy, Congressman Hunter and his aide were discussing a work-related visit to a Naval base. That alone is the salient fact. *See Gov't of V.I. v. Lee*, 775 F.2d 514, 525-26 (3d Cir. 1985) ("If the court determines that a particular meeting or event constitutes a legislative act . . . then legislative immunity attaches and that particular activity is not admissible"). When the act itself is legislative, the underlying purpose is irrelevant because "the Clause applies in equal force to protect 'legislative acts' regardless of a Member's alleged motivation." *Renzi*, 651

[8] The government says, an "appeals court must conclude that acts were not legislative where the district court found [the] senator did not meet his burden of establishing that [the] primary purpose of [the] act was legislative." RPLY:5 (citing *United States v. Menendez*, 831 F.3d 155, 169 (3d Cir. 2016)). But *Menendez* did not say that. Rather, it held, "after we conclude that an act is in fact legislative must we refrain from inquiring into a legislator's purpose or motive." *Id.* at 167. The court looked to purpose only because the act was "ambiguously legislative." *Id.* at 166. Here, there is no ambiguity.

F.3d at 1025.

Here, a Member of the Armed Services Committee was communicating with his aide about an official visit to a Naval base. *See Dowdy*, 479 F.2d at 223 ("it may be necessary to go beyond the indictment to obtain the full meaning of what appear facially to be perfectly proper allegations."). As a matter of law, this was legislative. *See Gravel*, 408 U.S. at 616-17 ("it is literally impossible . . . for Members of Congress to perform their legislative tasks without the help of aides and assistants"); *McSurely v. McClellan*, 553 F.2d 1277, 1286 (D.C. Cir. 1976) ("We have no doubt that information gathering [] by . . . field work by a Senator or his staff, is essential to informed deliberation over proposed legislation"). Thus, even if the visit was "designed primarily to provide a pretext for the family vacation," ER:2, it remains protected.

A hypothetical is helpful: a Member takes to the floor in support of a bill. But his comments are pretextual. His true purpose is to slander a potential primary challenger. There is no recourse. The Member's purpose is irrelevant; the act of speaking on the floor is legislative and thus his comments are protected. *See United States v. Brewster*, 408 U.S. 501, 516 (1972) (the Clause "has enabled reckless men to slander and even destroy others with impunity, but that was the conscious choice of the Framers"). The same rationale applies here. The subject communications are protected.

Second, as to prejudice, "[s]ome toxins can be deadly in small doses." *Buck v. Davis*, 137 S. Ct. 759, 777 (2017). While ordinarily a single error in the indictment process might not warrant dismissal, the Court can take judicial notice that San Diego is a Navy town. *See* Fed. R. Evid. 201(b).[9] In that context, there is no way to overstate the impact on the grand jurors from the improper introduction of Congressman Hunter's profane remark. ER:123. Nor can the government prove otherwise. *See Chapman v. California*, 386 U.S. 18, 24 (1967) (the government bears the burden of establishing "federal constitutional error . . . was harmless beyond a reasonable doubt"). The indictment should be dismissed. *See Bank of Nova Scotia*, 487 U.S. at 263 ("if there is grave doubt that the decision to indict was free from such substantial influence, the violations cannot be deemed harmless.").[10]

2. The FEC reports are protected.

The Court should also rule in Congressman Hunter's favor because the Speech or Debate Clause protected his FEC reports.

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[9] Summary of Naval Base San Diego, *available at* https://www.cnic.navy.mil/regions/cnrsw/installations/navbase_san_diego.html.

[10] At the very least, the Court should prohibit the government from using the protected communications at trial, *see Renzi*, 651 F.3d at 1020 (evidence covered by the Clause cannot "be introduced to any jury"), and order them stricken from the indictment. *See Dowdy*, 479 F.2d at 227 (finding a particular overt act violated the Speech or Debate Clause and holding "the speech or debate clause constitutes a limitation on what may be alleged as well as what may be proved.").

a. *Congressman Hunter's FEC argument is properly before the Court*.

The government claims Congressman Hunter "should not be permitted to raise [this issue] for the first time in an interlocutory appeal." RPLY:6 n.6. But there is no impediment.

The law is clear: "'Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Citizens United v. Federal Election Commission*, 558 U.S. 310, 330-31 (2010); *United States v. Wahid*, 614 F.3d 1009, 1016 (9th Cir. 2010) ("claims, not arguments, are preserved [for] appeal."). The government, however, contends Congressman Hunter's FEC argument "is an entirely new claim." RPLY:6 n.6. It isn't.

The Court recently confronted the distinction between "claim" and "argument" in *United States v. Sineneng-Smith*, 910 F.3d 461, 469 (9th Cir. 2018). There, "[t]he government urge[d] [the Court to] review Sineneng-Smith's First Amendment overbreadth claim for plain error, arguing that she waived the issue by not raising it until [the Court] requested supplemental briefing." *Id.*

The Court declined to do so: "Although Sineneng-Smith never specifically argued overbreadth before our request for supplemental briefing, she has consistently maintained that a conviction under the statute would violate the First

Amendment." *Id.* Thus, "[b]ecause Sineneng-Smith has asserted a First Amendment claim throughout the litigation, her overbreadth challenge 'is - at most - a new argument to support what has been a consistent claim.'" *Id*. As such, "review [was] de novo." *Id.*

Here too, Congressman Hunter has consistently maintained the indictment should be dismissed under the Speech or Debate Clause. His FEC-based challenge is at most a new argument in support of that consistent claim. Accordingly, review is de novo. *See id.*; *United States v. Lillard*, --- F.3d ---, 2019 U.S. App. LEXIS 25984, *12 (9th Cir. 2019) (de novo review applied because newly raised point was considered a "further argument in support of [a preserved] claim.").

And this remains true, even if the FEC argument were a new claim. De novo review applies to new claims on appeal when they "present[] a question that 'is purely one of law' and where 'the opposing party will suffer no prejudice as a result of the failure to raise the issue in the trial court[.]'" *United States v. Saavedra-Velazquez*, 578 F.3d 1103, 1106 (9th Cir. 2009). Here, the issue is purely legal. And the government cannot complain of prejudice – it has had two chances to address the FEC-based argument before this Court. *See id.*

Finally, at a minimum, the issue is properly before the Court for plain error review. *See* Fed. R. Crim. P. 52(b). Facing trial and conviction based on reports that are constitutionally protected would affect (violate) Congressman Hunter's

substantial rights. *See id*. Accordingly, regardless of the standard of review, the result should be the same. The Court should consider Congressman Hunter's argument that reliance on the FEC filings violated his rights under the Speech or Debate Clause.

b. *The reports fall within the legislative sphere*.

Moving to the merits, the government calls Congressman Hunter's argument "entirely frivolous." RPLY:8. But his rationale flows directly from controlling precedent. The argument is straightforward:

- The Speech or Debate Clause protects all acts within the "legislative sphere," regardless of the Member's intent. *Gravel*, 408 U.S. at 624-25.
- The Supreme Court has defined this sphere to include "matters which the Constitution places within the jurisdiction of either House." *Id.* at 625.
- The House of Representatives has consistently determined that investigations into a Member's allegedly improper campaign spending and false campaign reports fall within its constitutional jurisdiction.[11]
    - In 2012, a House Committee considered a report that a Member "had filed false information in his campaign finance reports to the FEC[.]" H. Rept. 113-727 at 20. In response, "the Committee unanimously voted to *affirm jurisdiction over matters relating to a successful campaign for election to*

[11] The Constitution gives the House power to determine its jurisdiction. U.S. Const. Art. I, § 5, Cl 2 ("Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.").

the House." *Id.* (emphasis added).

- The Committee noted, it "had previously taken this position with respect to its jurisdiction in other matters similar to these allegations, where Members had allegedly violated laws, rules, or standards of conduct when conducting their initial campaign for the House." *Id.* at 20 n.13 (citing as examples, House Comm. on Standards of Official Conduct, *In the Matter of Representative Earl F. Hilliard*, H. Rept. 107-130, 107th Cong. 1st Sess. (2001); House Comm. on Standards of Official Conduct, *In the Matter of Representative Jay Kim,* H. Rept. 105-797, 105th Cong. 2d Sess. at 6,677 (1998)).

- In *Hilliard*, the House asserted jurisdiction over the Member's acts in converting campaign funds to personal use "in excess . . . and expend[ed] campaign funds [] for a purpose not attributable to bona fide campaign or political purposes." *Hilliard,* H. Rept. 107-130 at viii.

- In *Kim*, the House asserted jurisdiction over issues including that the Member "had contemporaneous knowledge of false statements by his campaign committee to the Federal Election Commission." *Kim,* H. Rept. 105-797, at 2-3, 7.

- And it has asserted such jurisdiction in this case. ER:62 (Ethics Committee asserting "jurisdiction to determine whether Representative Duncan Hunter . . . engaged in . . . falsification of campaign finance records, and prohibited use of campaign contributions.").

From these points, it follows that the FEC reports are protected as a matter within Congress' jurisdiction. Thus, under *Gravel*, they are legislative.[12]

[12] This remains true regardless of how the House categorizes FEC reports. In other words, although the House may consider FEC reporting to be a political activity, *see* House Ethics Manual, 110th Cong. 2d Sess. at 124 (2008), this cannot overcome *Gravel*'s controlling definition.

Nor does this reasoning lead to absurd results, as the government may claim. Although it is true that Congress asserts jurisdiction over bribery and other potential crimes by its Members, Congressman Hunter's argument does not extend to such criminal conduct. The reason is simple.

A Member has no obligation to take a bribe or convert government property. *See Brewster*, 408 U.S. at 526 ("Taking a bribe is, obviously, no part of the legislative process or function"). But he or she *must* file FEC reports. *See* 52 U.S.C. § 30104. They are a prerequisite to the job, and thus part and parcel of the ability to legislate.

As the Supreme Court noted in *Buckley v. Valeo*, 424 U.S. 1, 26 (1976), "raising of large sums of money [is] an ever more essential ingredient of an effective candidacy." It follows that the spending reports are "an integral part of the . . . *communicative* processes by which Members participate in committee or House proceedings[.]" *Gravel*, 408 U.S. at 625 (emphasis added). The communication (reporting) is essential to the participation (legislating).

The reports, therefore are entirely off limits. The Clause "fall[s] like an iron curtain to preclude prosecution for the otherwise unprotected activity[.]" *See Renzi*, 651 F.3d at 1025.

This protection, moreover, is consistent with the Speech or Debate Clause's purpose. *See Dowdy*, 479 F.2d at 221 ("the concept of 'legislative act' should be

broadly construed to effectuate the purpose"). As the unrebutted "belts and suspenders" example from Congressman Hunter's response illustrates, absent Speech or Debate Clause protection, FEC reports can be used to embarrass, intimidate, and prosecute Members for activity within the legislative sphere. *See Barr v. Mateo*, 360 U.S. 564, 571 (1959) ("officials of government should be free to exercise their duties unembarrassed"). This prosecution is a case in point.

The government has taken what should be, at most, a civil FEC proceeding designed to accomplish "conciliation," 52 U.S.C. § 30109(a)(4)(A)(i), and transformed it into a criminal Sarbanes-Oxley prosecution carrying a potential twenty-year sentence. ER:94, 132-33 (indictment charging violations of 18 U.S.C. § 1519 based on FEC reports). This is like a barber using a flamethrower instead of a hairdryer. And it evinces precisely the type of Executive overreach that the Clause was intended to prevent. *See Gravel*, 408 U.S. at 616 (the Clause "protects Members against prosecutions that . . . threaten the legislative process").

c. *The government's arguments are misguided.*

The government offers several responses. None are persuasive.

First, the government argues that FEC reports cannot be legislative because "Hunter was required to file [them] . . . in his role as a *candidate* for Congressional office[.]" RPLY:6 (emphasis in original). While the factual predicate is true, the conclusion does not follow. Once successful, the *candidate* becomes a *Member*

protected by the Clause, and subject to the House's jurisdiction. Indeed, Congress itself draws this very distinction, exercising jurisdiction "over matters relating to a *successful* campaign for election to the House." H. Rept. 113-727 at 20 (emphasis added). And here, all of the charged spending and reporting was done while Congressman Hunter was an incumbent legislator. Thus, it was all protected. *See McSurely*, 553 F.2d at 1295 (when, as here, an "activity is arguably within the 'legitimate legislative sphere' the Speech or Debate Clause bars inquiry even in the face of a claim of 'unworthy motive.'").

Second, the government offers a policy argument: If the Court finds for Congressman Hunter, "not only would incumbent federal legislators be immune from prosecution—they could never be compelled to file FEC disclosures at all." RPLY:8. This is inaccurate. Given the House's power to discipline and remove its Members, there exists sufficient enforcement mechanisms to compel compliance. *See Dowdy*, 470 F.2d at 227 ("the House or Senate clearly has jurisdiction to try any member who is a wrongdoer and punish him for his derelictions.").

Finally, the government suggests it has substantial precedent on its side. But research reveals, and the government has cited, no case rejecting (or adopting) Congressman Hunter's argument about his FEC reports.

Given this reality, the government uses the shoehorn approach to stretch existing precedent. It cites *United States v. Myers*, 692 F.2d 823, 849 (2d Cir.

1982), *Menendez*, 831 F.3d at 175, *United States v. Schock*, 891 F.3d 334, 336 (7th Cir. 2018), and *Buckley,* 424 U.S. at 1. RPLY:7-8. These cases are inapposite.

In *Myers*, the court did not address FEC filings, or confront the argument raised here (i.e., that Congress' assertion of jurisdiction brings the reports within the legislative sphere). Thus, it could not have decided the issue. The same is true of *Menendez* and *Schock*. Indeed, *Schock* is particularly inapt. It dealt with the defendant's argument about the interpretation of House rules. The government's reliance on *Buckley* is even further afield. RPLY:8. *Buckley* did not mention the Speech or Debate Clause.

This is not to say that financial reports have never been used in prosecuting Members. But those cases did not consider the arguments raised here. Thus, they have little relevance. As this Court has explained, "unstated assumptions on non-litigated issues are not precedential holdings binding future decisions." *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288 (9th Cir. 1985). And "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925).

In short, the government has not pointed to a single decision addressing the argument that FEC reports: (a) fall within the legislative sphere, as defined in *Gravel*, because the House has asserted jurisdiction over them, and (b) are within

the Clause's purpose because they can contain speech related to legislative activities. That is why this is a matter of first impression. And for the reasons discussed above, Congressman Hunter's argument should prevail.

This leaves the question of remedy. The government cannot credibly dispute the FEC reports' central role in this prosecution. And Congressman Hunter has already detailed their pervasiveness. RESP:21-22. Accordingly, if they are protected, and they are, the indictment cannot stand.

III.
Conclusion.

In the final analysis, the Second Circuit's commentary bears repeating: "[T]he life of a congressman -- as incumbent legislator and perpetual candidate for office, whose official day ends only after a round of nominally 'social' events at which he is obliged to appear, and his weekends and holidays are only an opportunity to reconnect with his constituents -- makes the line between 'official work' and 'personal services' particularly difficult to draw." *Rostenkowski*, 59 F.3d at 1312.

Because this is no less true here, application of the Speech or Debate Clause is particularly appropriate. The Court should permit Congressman Hunter to continue serving his constituents without Executive interference. If the House believes he should be disciplined, he will be. If not, he won't. In either event, the

separation of powers will be protected.

Congressman Hunter respectfully requests the Court reverse the district court's orders denying his motions: (a) for relevant grand jury transcripts, and (b) to dismiss the indictment under the Speech or Debate Clause.

Respectfully submitted,

s/ Devin Burstein

Dated: October 16, 2019

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CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32-3(a), the above supplemental brief filed by Court order contains 5,599 words, which is within the designated twenty-page (5,600-word) limit.