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

REPLY BRIEF FOR PETITIONER

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The Third Circuit in the decision below grabbed the third rail of the Speech or Debate Clause by expressly sanctioning an inquiry into a legislator's subjective "motive" and "purpose" to determine whether his acts constitute "legislative acts" protected by the Clause. This Court has made crystal clear that the Speech or Debate Clause forbids any such inquiry, as the proper question is "whether, *stripped of all considerations of intent and motive*, [the official's] actions were legislative" in nature. *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998) (emphasis added). By disregarding this Court's clear precedent, the Third Circuit not only gutted one of the core purposes of the Clause, but also opened a clean split with at least three circuits that forbid motive inquiries even in cases involving "ambiguously legislative" acts.

The government attempts to downplay the circuit split, but the split is stark. The Second, Fourth, and D.C. Circuits have all held that when an act appears—based upon its objective content—to be at least "arguably," "apparently," or "purportedly" legislative, the Speech or Debate Clause prohibits further inquiry into the legislator's potential motives and the acts are deemed protected.

The decision below adopts a very different approach. When an act is "ambiguously legislative," the Third Circuit requires courts to consider a legislator's subjective "motive" and "purpose" to determine whether the act itself is protected by the Clause. Rather than resolving close cases in favor of the legislator and dutifully avoiding consideration of

a legislator's subjective intent, the Third Circuit holds that an "ambiguously legislative" act in fact triggers an extensive inquiry into the legislator's subjective "motive" and "purpose." Pet.App.18a.

Rather than defending the Third Circuit's unprecedented motive inquiry, the government's opposition spends considerable space sidestepping the issue, arguing primarily that none of Senator Menendez's acts constitute protected "legislative acts," whatever the standard. Opp.10-11. But as the government is forced to acknowledge, *see* Opp.19, the court below squarely rejected its argument that all informal efforts to influence the Executive Branch are categorically excluded from the Clause's protections, recognizing—as several other courts have—that efforts to gather information for possible legislation or congressional hearings and to oversee the administration of federal policy may constitute protected legislative activity. Pet.16-17. The government fails to identify a single court that has adopted its miserly reading of the Speech or Debate Clause, which would strip Members of Congress of the Clause's protections when they perform many of the activities that play an integral role in the modern legislative function.

The government does not dispute that the Third Circuit made Senator Menendez's "motive" and "purpose" the decisive factor in finding that his acts were unprotected, nor can it dispute that the Third Circuit is the only court that has ever found such inquiries permissible. This Court's review is necessary to resolve the circuit split and to correct the Third Circuit's error.

I. Certiorari Is Needed To Resolve The Circuit Split Over Whether Courts May Inquire Into A Legislator's Motive When Deciding If His Acts Are Protected By The Speech Or Debate Clause

The circuits disagree about whether they may probe a legislator's motive to decide if his "ambiguously legislative" acts are protected by the Speech or Debate Clause. In at least the Second, Fourth, and D.C. Circuits, courts are forbidden from considering a legislator's motive when deciding if such informal acts merit immunity. "Once it [is] determined … that the legislative function … was *apparently* being performed, the propriety and the motivation for the action taken, as well as the detail of the acts performed, are immune from judicial inquiry." *United States v. Dowdy*, 479 F.2d 213, 226 (4th Cir. 1973); *accord United States v. Biaggi*, 853 F.2d 89, 103 (2d Cir. 1988); *McSurely v. McClellan* ("*McSurely II*"), 753 F.2d 88, 106 (D.C. Cir. 1985) (*per curiam*). An act that appears legislative, based upon its objective content, is protected, regardless of the Executive's speculation as to the motives underlying the act. Close cases are resolved in favor of the legislator and the purposes of the Clause.

The Third Circuit acknowledged that it was departing from the decisions of these other circuits when it endorsed a starkly different test. *See* Pet.App.19a. In direct conflict with the other circuits, the Third Circuit held that when an act is neither manifestly legislative nor clearly non-legislative, a court should *not* end the inquiry and recognize Speech or Debate Clause immunity, but rather should proceed to consider "the content,

purpose, and *motive* of the act to assess its legislative or non-legislative character." Pet.App.18a (emphasis added). Whereas the Second, Fourth, and D.C. Circuits would resolve close cases involving "ambiguously" or "apparently" legislative acts in favor of the legislator (and the Clause), the Third Circuit held that such cases should be resolved by inquiring into the legislator's subjective purpose and motive. It would be difficult to imagine a starker split.

The government attempts to minimize the split by claiming that the *Dowdy* rule applies only to "manifestly legislative" acts. Opp.22. But the Fourth Circuit certainly did not treat the acts at issue in *Dowdy* (informal meetings with Executive Branch officials) as "manifestly legislative" acts. To the contrary, the Fourth Circuit characterized Dowdy's conduct as "purportedly" or "apparently" legislative, and proceeded to hold that the Clause nonetheless prohibited inquiry into the "actual motives" for such acts, "even to determine if they are legislative in fact." 479 F.2d at 226; *see also Biaggi*, 853 F.2d at 103 (addressing "purportedly legislative acts"); *McSurely II*, 753 F.2d at 106 ("apparently" legislative acts).

Moreover, the government's response misses the overarching point. With the exception of the Third Circuit, no court has ever held that a legislator's subjective motive or purpose can properly be part of the equation when determining whether the legislator's acts are "legislative acts" protected by the Clause. To the contrary, the Second, Fourth, and D.C. Circuits have all emphatically rejected that approach, reaching the same conclusion that this

Court reached in *Bogan*: a legislator's subjective intent should play no role in resolving "the logically prior question of whether [the legislator's] acts were legislative." 523 U.S. at 54.

If a legislator engaged in the same "ambiguously legislative" conduct as Senator Menendez in any jurisdiction outside of the Third Circuit, *Dowdy* and its progeny make clear that the legislator's alleged "motive" or "purpose" would play no role in determining whether the acts were protected by the Clause.

Conversely, if a legislator engaged in the same "apparently legislative" conduct as Congressman Dowdy in the Third Circuit, the decision below makes clear that the Third Circuit *would* expressly consider the legislator's alleged motive and purpose in assessing the "legislative or non-legislative character" of his acts. Pet.App.18a. That is the very definition of a Circuit split.

II. The Decision Below Violates This Court's Precedent And Undermines The Separation Of Powers

The most notable feature of the government's brief in opposition is its absence of any meaningful defense of the Third Circuit's motive inquiry. The government cannot bring itself to include the lower court's use of the words "motive" and "purpose" in its statement of the question presented, nor does it dispute Petitioner's contention that the Speech or Debate Clause strictly prohibits such inquiries. Opp.(i), 17-18. These omissions underscore the fact

that the Third Circuit's approach fundamentally conflicts with this Court's precedent.

This Court has repeatedly and emphatically made clear that the test for whether an act is a "legislative act" protected by the Clause must be an objective one. The proper question is "whether, *stripped of all considerations of intent and motive*, [an official's] actions were legislative." *Bogan*, 523 U.S. at 55 (emphasis added). Although drawing the line between protected legislative acts and unprotected acts may be difficult in some circumstances, such lines must be drawn based upon objective criteria. "Whatever imprecision there may be in the term 'legislative activities,'" this determination calls for a "practical" assessment, trained on the role an act plays in relation to "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 … within the jurisdiction of either House." *Hutchinson v. Proxmire*, 443 U.S. 111, 127, 124, 126 (1979) (emphasis deleted); *see generally* Richard H. Fallon, Jr. et al., *Hart & Wechsler's The Federal Courts and the Federal System* 1046 n.7 (7th ed. 2015) ("[T]he determination whether a particular activity should be classified as legislative hinges on the nature of the activity, not the subjective intent of the actor.").

Rather than defending the Third Circuit's unprecedented motive test, the government attempts to minimize the error by claiming that the Third Circuit authorized only a "limited inquiry" into the Senator's subjective intent. Opp.11, 17-19. But

simply recasting the Third Circuit's approach as a "limited inquiry" does not resolve the constitutional issue, as it is no answer to say that the Third Circuit violated the Clause, but only a little bit.

The government also attempts to shift the blame by suggesting that Senator Menendez invited this error. *See* Opp.16-17 (contending that the Third Circuit "examin[ed] the 'purpose' or 'motive'" of the Senator's acts "only because it adopted *petitioner's* view that attempts to influence the Executive Branch are protected … if 'the object was to influence policy.'"). That fundamentally distorts the record. Petitioner did not invite an inquiry into his subjective motive and purpose merely by resisting the government's extreme view that all discussions with Executive Branch officials are categorically unprotected, non-legislative acts. To the contrary, Petitioner made clear below that informal contacts with Executive Branch officials must be examined based upon their objective content, without speculating as to the legislator's alleged motive. Indeed, the Third Circuit expressly recognized as much, explaining that Senator Menendez argued it would be "inappropriate to consider a legislator's motives when determining the character of an ambiguously legislative act." Pet.App.19a.

The closest the government comes to a defense of the decision below is its suggestion that "the court of appeals' inquiry into petitioner's purpose was not the sort of questioning of motives that this Court's decisions forbid," insofar as the Third Circuit "did not ask whether petitioner's motives were good or bad." Opp.20-21. To the contrary, this Court's decisions forbid *all* questioning of motives. *Bogan*, 523 U.S. at

54-55.[1] The reason is plain: "[j]udicial inquiry into subjective motivation … may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government." *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982). The difficulties with this motive inquiry are most apparent when it yields the conclusion that the act is indeed protected by the Clause. An inquiry into motive to determine whether an act is immune from an inquiry into motive "sounds absurd, because it is." *Sekhar v. United States*, 133 S. Ct. 2720, 2727 (2013). This Court's precedents wisely protect against a scenario where the motive inquiry is a success, but the immunity dies in the process.

III. This Court's Precedent Does Not Support The Government's Extreme Position That All Legislative Efforts To Influence The Executive On Policy Are Unprotected

Unable to defend the Third Circuit's motive inquiry, the government attempts to sidestep that inquiry altogether by asserting that—whatever the proper standard—this case is not certworthy because none of the Senator's acts were protected "legislative acts." Opp.10-11. Under the government's miserly reading of the Clause, all "informal attempts to influence the Executive Branch" are categorically

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[1] The government ignores this Court's instruction to evaluate a legislator's acts "stripped of all considerations of intent and motive," relegating *Bogan* to a footnote in its opposition. Opp.20 n.8.

excluded from the Clause's protections. Opp.11. But as the government reluctantly acknowledges, *see* Opp.19, the court below squarely rejected this argument, recognizing—as several other courts have—that informal meetings with Executive Branch officials to gather information for possible legislation and to oversee the administration of federal policy may constitute protected legislative activity. Pet.16-17 & n.4 (collecting cases). The government fails to identify a single court that has adopted its extreme view that all informal contacts with the Executive Branch fall outside the Clause's protections.

In all events, to the extent that the government insists that all the acts at issue here are just unprotected efforts to lobby the Executive, that is simply wrong. When, for example, the Senate Majority Leader and the Chairman of a relevant subcommittee sit down with an Executive Branch official, that action is plainly at least an "apparently legislative" act. *See* Brief of Former General Counsels of the U.S. House of Representatives as *Amici Curiae* 14 ("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.'" (quoting *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927))). Similarly, when a Subcommittee Chairman meets with a State Department official and discusses U.S. foreign policy in advance of a Subcommittee hearing, Pet.13-14, such an act cannot simply be dismissed as an informal attempt to lobby the Executive. And, of course, that is the premise of the decision below, which launched an inquiry into motive precisely because it viewed the acts here to be apparently legislative acts that could reasonably be

cast as informal fact-finding, information gathering for possible legislation, vetting of a presidential nominee, or oversight. Pet.App.32a, 21a.

The government's continued reliance on the extreme position that all informal efforts to influence the Executive Branch are categorically excluded from the Clause's protections reinforces the need for plenary review in this case. In *Hutchinson*, this Court expressly left open "whether and to what extent the Speech or Debate Clause may protect calls to federal agencies seeking information." 443 U.S. at 121 n.10. In the nearly forty years since *Hutchinson*, the lower courts have generally treated such informal fact-finding and oversight activities as protected "legislative" activities, given their integral role in the modern legislative process. *See, e.g.*, *McSurely v. McClellan* (*"McSurely I"*), 553 F.2d 1277, 1286-87 (*en banc*) (opinion of Leventhal, J.) ("We have no doubt that information gathering," even "'through informal sources'" during "field work by a Senator or his staff," is "'a necessary concomitant of legislative conduct and thus should be within the ambit of the privilege.'"); *United States v. McDade*, 28 F.3d 283, 300 (3d Cir. 1994) (Alito, J.) ("Whether the Speech or Debate Clause shields forms of 'oversight' [including] letters or other informal communications to Executive Branch officials … is less clear."); *id.* at 304 (Scirica, J., concurring and dissenting in part) (the Clause protects "[t]rue legislative oversight," including the "formal and informal activities" congressmen use to "monitor[] the operations of executive departments and agencies"); *SEC v. Comm. on Ways & Means*, 161 F. Supp. 3d 199, 237 (S.D.N.Y. 2015) ("The Clause's protections also extend to a legislator's gathering of

information from federal agencies and from lobbyists."); *Jewish War Veterans v. Gates*, 506 F. Supp. 2d 30, 57 (D.D.C. 2007) ("[A] Member's gathering of information beyond the formal investigative setting is protected by the Speech or Debate Clause so long as the information is acquired in connection with or in aid of an activity that qualifies as 'legislative' in nature.").

The government obviously disagrees with these cases, as it continues to espouse a categorical position expressly rejected by the courts below. Granting certiorari would allow this Court to clarify that a legislator's subjective motive and purpose should play no role in determining whether his acts are protected, and would give it the option to provide further guidance as to the types of interactions with Executive Branch officials that constitute "legislative acts" within the meaning of the Clause.

IV. It Would Be Inappropriate To Delay Certiorari Until After Trial

There is no merit to the government's final effort to forestall review by suggesting that certiorari should be postponed until after trial. The Speech or Debate Clause is meant to provide absolute immunity *from suit*, not just from liability. *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (*per curiam*). It is hard to imagine the government endorsing a similar argument when executive privilege or qualified immunity is at stake. *See, e.g.*, *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) ("[Qualified immunity] is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is

erroneously permitted to go to trial."). An absolute immunity enshrined in the text of the Constitution should not be treated less favorably than those atextual privileges and immunities just because the Speech or Debate Clause limits, rather than benefits, the Executive.[2]

More fundamentally, the government's plea to defer review of this interlocutory petition to allow the lower courts to develop a "full factual record," Opp.25, would simply pave the way for additional constitutional transgressions. The government does not contest that the decision below authorizes inquiry into a legislator's "motive" and "purpose," and thus would permit the prosecutors to question the Senator's subjective intent in meeting with Executive Branch officials. There is no serious debate that those questions would not be permissible in any court outside the Third Circuit, and that such a motive-based approach conflicts with both this Court's precedents and the most fundamental purposes underlying the Clause. Under these circumstances, the proper time to correct the Third Circuit's aberrant, subjective approach to the Speech or Debate Clause is now.

CONCLUSION

The petition for certiorari should be granted.

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[2] The government also ignores that the Third Circuit invited it to develop the record on remand from the Senator's first appeal, but it declined to do so. Pet.15 n.3.

Respectfully submitted,

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