No. 08-1059

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM J. JEFFERSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY TO BRIEF IN OPPOSITION

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This Court has never addressed the important constitutional issue raised by this case: whether the use of privileged Speech or Debate material in the grand jury may be grounds for dismissing a facially valid indictment of a Member of Congress. The Fourth Circuit, relying on *Costello v. United States*, 350 U.S. 359 (1956), as controlling precedent, answered this question no. Three other circuits, expressly rejecting the application of *Costello* in the Speech or Debate context, have answered yes. Nevertheless, the government urges this Court to deny review, arguing that petitioner has overstated the holding below and that no actual conflict exists, and further that there was no meaningful Speech or Debate violation here in any event. The government's position cannot be squared with the language of the Fourth Circuit's opinion or the facts of this case.

1. In its effort to deny a circuit conflict, the government resorts to rewriting the opinion below. It asserts that "the court of appeals' opinion is properly understood as holding that, regardless of whether there may be circumstances in which a Speech or Debate Clause violation before a grand jury could warrant dismissal of a facially valid indictment, those circumstances are not present in this case." Opp. at 12. It further asserts that the court of appeals left open the question of whether a "sufficiently compelling" showing of a Speech or Debate violation in the grand jury might warrant dismissal of an indictment. Opp. at 11. But these assertions are rebutted by the opinion itself, which

repeatedly states that violation of a constitutional privilege in the grand jury *cannot* be grounds for invalidating a facially valid indictment.

The Fourth Circuit began its analysis by citing *Costello* and *United States v. Calandra*, 414 U.S. 338 (1974), for the proposition that: "Under controlling precedent, a facially valid indictment is not subject to dismissal simply because the grand jury may have considered improper evidence, or because it was presented with information or evidence that may contravene a constitutional privilege." App. 26a. The court described *Costello* as holding that, "when an indictment is facially valid and the grand jury was 'legally constituted and unbiased,' the competency and adequacy of the evidence presented to it is not subject to challenge," App. 27a, and stated that, "We have consistently adhered to *Costello's* guiding and settled principles." *Id.*

The court then recounted its previous application of the *Costello* rule in *United States v. Johnson*, 419 F.2d 56 (4th Cir. 1969), where, "in a context not unlike that presented here, we concluded that the *Costello* mandate barred us from looking behind an indictment to assess whether the grand jury had considered privileged legislative materials." App. 27a-28a. The court noted that in *Johnson*, it rejected the claim that grand jury bias could arise from the grand jury's receipt of constitutionally-impermissible evidence – foreclosing bias as an avenue for examination of the use of Speech or Debate material in the grand jury. In distinguishing *United States v. Dowdy*, 479 F.2d 213 (4th Cir. 1973), on which the defense relied below, the court

said: "Importantly, *Dowdy* did not purport to circumvent *Costello* and its progeny, or to rule that a court should look behind an otherwise valid indictment for Speech or Debate Clause materials that may have been presented to a grand jury." App. 30a. The court stated its holding plainly: "Bounded by such precedent, we are likewise not entitled to review the grand jury record in Jefferson's case – the Indictment simply does not question any legislative acts." App. 28a.

By the court's own terms, therefore, it determined that it was "*barred* ... from looking behind an indictment" and "*not entitled* to review the grand jury record" (emphasis added). Measured against the Fourth Circuit's language, the government's version of the court's holding – that in appropriate circumstances, a Speech or Debate violation in the grand jury could be grounds for dismissal of an otherwise valid indictment – misstates the ruling below. Surely, if the Fourth Circuit had intended to say what the government says it said, it would have done so at least as clearly as the government's opposition brief does.

Because it cannot find support for its view of the holding in the opinion's clear language, the government instead relies on its interpretation of several brief passages from the end of the decision, neither of which bears the weight assigned by the government. The government first points to footnote 8, in which the court noted that, "At least two of our sister circuits have observed, in *dicta*, that a *pervasive* violation of the Speech or Debate Clause before a grand jury might be used to invalidate an indictment. ... Jefferson has made no such assertion,

however, and we have no reason to reach such an issue." App. 30a, n.8 (emphasis original). This footnote obviously does not indicate that the Fourth Circuit would agree that a pervasive violation could be grounds for dismissing an indictment. In fact, that possibility would be entirely inconsistent with the court's clear statement that it was not entitled to look at the evidence behind the indictment. Indeed, in *United States v. Johnson,* the protected legislative material did constitute "a substantial part" of the evidence heard by the grand jury, but the Fourth Circuit rejected the claim that its introduction invalidated the indictment. 419 F.2d at 59.[1]

Seeking additional support for its version of the holding, the government points to the Fourth Circuit's discussion of the district court's review of the record. There, after noting that the district court examined the grand jury transcripts "out of an abundance of caution," the Fourth Circuit commented: "The court acknowledged, however – and we agree – that the controlling authorities did not compel such a comprehensive review. ... Under the facts of this case, however, the court's decision to act as it did in assessing Jefferson's Speech or Debate Clause claim was within its discretion and entirely appropriate." App. 31a. But the government's claim that this passage reflects a

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[1] The Fourth Circuit's ruling cannot be upheld on the ground that the violation was not "pervasive" in any event. The prosecutors' colloquies with and instructions to the grand jury were never transcribed or reviewed, so it is impossible to assess how much emphasis was placed upon the staffer's testimony about Mr. Jefferson's influence with African officials.

holding that Speech or Debate violations in the grand jury may be grounds for dismissing an indictment is, at best, strained and unconvincing. Given the Fourth Circuit's analysis, its reliance on *Costello*, and most importantly its articulation of its ruling – that it was *not entitled to review the grand jury record* when the indictment did not question any legislative acts – the only logical reading of this portion of the opinion is that it simply means that the trial court, which found no Speech or Debate violations and refused to dismiss the indictment, did not err merely by looking at the grand jury record. Certainly it does not say that the trial court could have dismissed the indictment had it recognized a Speech or Debate violation in the grand jury.

2. Once the government's inaccurate characterization of the court of appeals' holding is set aside, its claim that there is no conflict with *United States v. Rostenkowski*, 59 F.3d 1291 (D.C. Cir. 1995), *United States v. Helstoski*, 635 F.2d 200 (3d Cir. 1980), and *United States v. Swindall*, 971 F.2d 1531 (11th Cir. 1992), can be disposed of. The government acknowledges that *Rostenkowski* held that "at least under some circumstances the Speech or Debate Clause prohibits not only reference to protected material on the face of the indictment but also the use of that material before the grand jury." 59 F.3d at 1300. The government insists that this creates no conflict, however, because *Rostenkowski* did not define *when* dismissal would be required. But *Rostenkowski* does not confine the circumstances under which an indictment would be invalidated to "pervasive" violations, which even under the government's inaccurate interpretation is the only

possibility left open by the Fourth Circuit's decision. More importantly, *Rostenkowski* concludes that the use of Speech or Debate material in the grand jury may require dismissal of a facially valid indictment, while the Fourth Circuit held that it was barred from considering such a claim.

This conflict is further apparent from the courts' different treatment of *Costello* and *Calandra* – an issue that the government's brief does not even address. *Rostenskowski* specifically distinguished the very precedents upon which the Fourth Circuit relied. The D.C. Circuit found that *Costello* and *Calandra,* which hold that a facially valid indictment may not be challenged on the ground that constitutionally improper evidence was introduced in the grand jury, did not apply to challenges based on the use of Speech or Debate material. *See* 59 F.3d at 1298. *Rostenkowski* also noted that *Calandra* did not preclude a challenge when what was occurring in the grand jury was itself a constitutional violation – and that "it is the very act of questioning that triggers the protections of the Speech or Debate Clause." 59 F.3d at 1298. The Fourth Circuit, by contrast, held that *Costello* was *controlling,* and refused to address the concept of a Speech or Debate violation in the grand jury at all.

Further, the fact that the court in *Rostenkowski* did not have occasion to decide *when* the use of Speech or Debate evidence in the grand jury would invalidate an indictment does not obviate the clear conflict between *Rostenkowski* and the Fourth Circuit on the governing legal issue: whether

a facially valid indictment is ever subject to dismissal on Speech or Debate grounds.[2]

For similar reasons, the conflict with *United States v. Helstoski* is real. *Helstoski* rejected the application of *Costello* and *Calandra* in the Speech or Debate context, and expressly held that use of legislative evidence in the grand jury was grounds for invalidating an indictment. While the government claims that the Fourth Circuit left open the proper treatment of a case where there were pervasive violations, as in *Helstoski*, this claim is unfounded for the reasons discussed above.

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[2] In discussing why a court must have the power to look behind a facially valid indictment, *Rostenkowski* offered as an example the fact that if it did not, a prosecutor might, with impunity, inflame a grand jury through use of Speech or Debate evidence that does not appear in the indictment. The government notes that during the motions hearing, the defense acknowledged that it was not arguing that the prosecutors had inflamed the grand jury here. Opp. at 19 n.5. But this point has no relevance. *Rostenkowski* does not suggest that inflaming the grand jury is the only use of Speech or Debate evidence that could be grounds for invalidating an indictment. While in this case there is no argument that the government employed evidence of unpopular or controversial positions adopted by Mr. Jefferson to stir the grand jurors' passions, its use of privileged evidence was even more problematic. The government expressly relied on evidence of Mr. Jefferson's legislative activities to establish its core theory on the bribery counts: that Mr. Jefferson had valuable influence which he offered in return for payment. Moreover, under the Fourth Circuit's formulation, in direct contrast to *Rostenkowski*, the possibility that the prosecutors had inflamed the grand jury with Speech or Debate evidence would not be grounds for reviewing the grand jury record in any event.

Finally, although the Fourth Circuit distinguished *Swindall*, its distinction was based on a misreading of that case. The Fourth Circuit asserted that *Swindall* was only concerned with the introduction of evidence at trial. App. 24a-25a. But *Swindall* unmistakably holds that use of Speech or Debate evidence *in the grand jury* is grounds for invalidating an indictment. *See* 971 F.2d at 1546-47. Moreover, while the government points to the fact that Swindall himself was questioned before the grand jury, the Eleventh Circuit did not find that fact necessary to its conclusion that the Speech or Debate Clause had been violated. *See* 971 F.2d at 1549. Nor was it necessary to its conclusion that an indictment may be dismissed where legislative material relevant to the decision to indict is used in the grand jury and therefore exposes a Member of Congress to liability. *Id.* at 1548.

Thus, contrary to the government's assertions, the Fourth Circuit's holding that it was barred from considering Speech or Debate violations in the grand jury in this case because the indictment was facially valid is in direct conflict with the decisions of the other circuits that have considered this issue.

But even if there technically were no conflict – which petitioner strongly disputes – this case would still warrant review on certiorari. It raises an important constitutional question concerning the scope of the Speech or Debate Clause's protections in the grand jury context that has not been, but should be, settled by this Court. There is little doubt that in any subsequent prosecution of a Congressman, a court in the Fourth Circuit faced with a challenge to use of Speech or Debate material in the grand jury

would read the Fourth Circuit's opinion to preclude it from considering that challenge. Prosecutors in that circuit will therefore be free to use privileged legislative material to support their case and persuade the grand jury to indict, and the defendant Member will have no recourse – a result fundamentally at odds with this Court's strong statement that the Speech or Debate privilege is "absolute." *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 501 (1975).

3. Review is also important here because the Fourth Circuit's refusal to look behind the indictment to consider Mr. Jefferson's claim allowed a violation of the Speech or Debate Clause to go unremedied. In arguing otherwise, the government first relies on the Fourth Circuit's statement that the trial court "concluded that the grand jury had not considered any Speech or Debate Clause material." Opp. at 13 (emphasis omitted). But the Fourth Circuit was simply wrong. Lionel Collins testified about Mr. Jefferson's activities in connection with the passage of the African Growth and Opportunity Act ("AGOA"), a major African trade bill, and testified that those activities were the source of Mr. Jefferson's influence with African leaders. In considering this testimony, the trial court stated that, "While a Member's role in passing legislation is the sort of legislative activity protected by the Clause, the reference cited here is no infringement of the Clause." App. 55a. In other words, the trial court recognized that Speech or Debate material *was presented* to the grand jury, but nevertheless declined to find that the Clause had been violated. Indeed, the government itself admits that the grand

jury heard Speech or Debate evidence: "... Collins referred in his testimony to petitioner's performance of a legislative act (helping move the AGOA through Congress)." Opp. at 15.

The government's assertion that Collins' testimony can be ignored as unsolicited is rebutted by the fact that the government interviewed Collins before putting him in the grand jury and knew how he would respond to a question about Mr. Jefferson's relationships with African officials. In addition, the prosecutors' follow-up questions emphatically and directly tied Mr. Jefferson's work on the passage of the AGOA legislation to his influence with African officials.

The government also argues that the district court correctly concluded that Collins' testimony was not material or relevant to the criminal conduct alleged in the indictment. But the fact that the indictment does not charge the defendant with crimes based on his activities during the passage of AGOA has no bearing here. Collins' testimony, as elicited by the prosecutors, established that Mr. Jefferson had significant influence with African officials in part as the result of his legislative activities. The bribery-related counts in the indictment all depend on the allegation that Mr. Jefferson accepted things of value from businesses seeking projects in Africa in return for using his influence with African leaders on behalf of those businesses. The government does not rebut petitioner's argument that proof that Mr. Jefferson *possessed* influence – which was established by introduction of his legislative acts – supported the government's theory that Mr. Jefferson was *selling*

influence. And because of the Fourth Circuit's approach to the issue, it did not review the district court's conclusions in this regard.

Finally, the government argues that its case in the grand jury did not "rely" or "depend" on Speech or Debate material because there was sufficient other evidence of the alleged criminal acts. Opp. at 16. But the government offers no way to separate the impact of the privileged legislative material used in the grand jury from that of the other evidence introduced by the government.[3] In *Dowdy,* the Fourth Circuit itself found that convictions obtained at trial had to be set aside where the "erroneously admitted evidence of legislative acts was arguably relevant to proof of bribery, and we cannot confidently say that the jury did not consider it in finding guilt." 479 F.2d at 227. Applying that standard to the grand jury evidence here would require dismissal of the 14 bribery-related counts in the indictment.

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3 Although the government cites *Rostenkowski* for the proposition that the defense bears the burden of proof on this issue (Opp. at 17 n.3), the cited quotation relates to a different question: whether the government must prove that it has an independent source of information for its trial evidence in a case against a Member. 59 F.3d at 1300. But *Rostenkowski* itself states that in response to a challenge at the pre-trial stage, the government must show "that the indictment is valid under the Speech or Debate Clause – both on its face and, as we have held, in its provenance." *Id.* Moreover, neither the defendant nor any court has seen the entire record of the grand jury proceedings, so no court could determine if the material was relied on or not.

For the reasons set forth above and in the petition, the petition should be granted.

Respectfully submitted,

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