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 CONSOLIDATED RESPONSE IN OPPOSITION TO THE GOVERNMENT'S MOTION TO DISMISS THE APPEAL OR SET A EXPEDITED BRIEFING SCHEDULE, AND HIS RESPONSE TO THE COURT'S ORDER TO SHOW CAUSE

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DUNCAN D. HUNTER, Defendant-Appellant.	C.A. No. 19-50242 U.S.D.C. No. 18-cr-3677-W Southern District of California Appellant's consolidated response in opposition to the government's motion to dismiss the appeal or set an expedited briefing schedule, and his response to this Court's Order to Show Cause.

I.
Introduction.

The district court could not have been more clear: "I'm not willing to say that Mr. Hunter's appeal is frivolous." Appendix (APP):13.[1] "I didn't make a finding that [his Speech or Debate Clause claim] is frivolous." APP:13.

This disposes of the Order to Show Cause in Congressman Hunter's favor. Under binding precedent, he is entitled to an interlocutory appeal from the denial of his motion to dismiss the indictment under the Speech or Debate Clause. *See*

[1] After the government filed its motion to dismiss the appeal, the district court held a status hearing and continued the trial to January 14, 2020, with the understanding that a further continuance might be necessary depending on this Court's resolution of the government's motion. During the hearing, the government repeatedly urged the district court to find Congressman Hunter's appeal frivolous. As quoted above, the district court would not do so. The hearing transcript is attached. APP:1-15.

Helstoski v. Meanor, 442 U.S. 500, 508 (1979) ("if a Member 'is to avoid exposure to [being questioned for acts done in either House] and thereby enjoy the full protection of the Clause, his . . . challenge to the indictment must be reviewable before . . . exposure [to trial] occurs.'") (internal citation omitted); *United States v. Renzi*, 651 F.3d 1012, 1018 (9th Cir. 2011) ("[We have] jurisdiction to review a Member's interlocutory claim that an indictment against him should be dismissed as violative of the Speech or Debate Clause."). Thus, this Court's jurisdiction is certain.

Nor does the government's motion to dismiss the appeal alter this conclusion. It puts the cart before the horse. The government frames the jurisdictional question as whether Congressman Hunter can raise a colorable – i.e., non-frivolous – claim during briefing on the merits. *See United States v. Zone*, 403 F.3d 1101, 1104 (9th Cir. 2005) (for purposes of interlocutory jurisdiction, the claim need only have "some possible validity") (internal citations omitted). Plainly, that is far different from whether he will ultimately prevail. And in *every* other Speech or Debate Clause case to have come before this Court the defendant has been allowed to make his or her substantive arguments in an opening brief, not a truncated motion response.

The reason is clear. Because the Speech or Debate Clause "reinforces the separation of powers and protects legislative independence," it would be

inappropriate, and disrespectful, to dismiss a claim made by a representative of an equal branch of government without a full opportunity to brief the merits. *Fields v. Office of Eddie Bernice Johnson*, 459 F.3d 1, 8 (D.C. Cir. 2006) (en banc) (collecting cases). To this end, counsel is aware of no case in the federal judiciary where a Member of Congress has been denied full briefing when raising a claim under the Speech or Debate Clause – and the government has cited none.

Instead, against the weight of authority, the government relies almost entirely on a one-sided proposed order drafted by the prosecution. In asking the district court to sign the order, the government represented it was intended to "assist" with this Court's review. Dckt. 2-2 at 202. But it was not. Rather, the government added the phrase "wholly without merit" – which the district court never used in its oral ruling – in an improper attempt to eviscerate Congressman Hunter's appellate rights; it was setting up a motion to dismiss. *See* Dckt. 2-2 at 3.

Thus, this Court should not credit the "wholly without merit" phrase in the district court's written order. In fact, the court repudiated the government's language when the prosecutors unsuccessfully tried to convince it to say the appeal was "frivolous" at the next hearing. APP:13. The district court was right in its refusal. Even a cursory review of the record demonstrates Congressman Hunter's Speech or Debate Clause claim has "some possible validity." *Zone*, 403 F.3d at 1104. As such, it is not subject to dismissal.

Further, there is no truth to the government's accusation that the appeal is a delay tactic. It fails to offer any theory as to what benefit Congressman Hunter gains from postponement. And counsel's declaration should put the matter to rest.

Finally, the Court should deny the government's request for an expedited briefing schedule. None of the relevant factors cut in the government's favor. *See* 9th Cir. Rule 27-12. And an expedited schedule would violate Congressman Hunter's Sixth Amendment right to counsel of his choice, as the undersigned cannot proceed on an expedited basis.[2] *See United States v. Rivera-Corona*, 618 F.3d 976, 979 (9th Cir. 2010) ("A defendant who can hire his own attorney has a [] right, independent and distinct from the right to effective counsel, to be represented by the attorney *of his choice*.") (emphasis in original). Moreover, the trial has already been delayed until *at least* January 14, 2020. APP:12. Thus, much of the disruption to the trial schedule that would normally occur because of the interlocutory appeal has already occurred.

Accordingly, the Court should deny the government's motion in its entirety, and set this appeal on the normal course.

[2] Further details on this point are provided in counsel's declaration at APP:22-25.

II.
Relevant facts.

Congressman Duncan D. Hunter represents California's 50th congressional district. He was first elected in 2008, and has been re-elected five times. On August 21, 2018, during Congressman Hunter's latest re-election campaign, the United States Attorney's Office for the Southern District of California filed a multi-count indictment against him and his wife. It alleged they misspent campaign funds to cover personal expenses and then misreported those expenditures. Dckt. 2-2 at 88.

Congressman Hunter pleaded not guilty and won his election. He then moved to dismiss the indictment on the ground that it violated the Speech or Debate Clause of the United States Constitution. Dckt. 2-2 at 157. The district court denied the motion. Dckt. 2-2 at 1.

Congressman Hunter filed a Notice of Interlocutory Appeal from the denial. District Court (D.C.) Dckt. 78. Shortly thereafter, the government moved this Court to dismiss the appeal, asserting a lack of jurisdiction. Dckt. 2-1. In the alternative, it asked for an expedited briefing schedule. Dckt. 2-1 at 2. The Court issued an Order to Show Cause as to its jurisdiction, Dckt. 3, and gave Congressman Hunter until September 6, 2019, to respond to both the government's motion to dismiss and the Order to Show Cause. Dckt. 5.

Before turning to that response, however, Congressman Hunter pauses to correct an important misstatement of fact. The government alleges, "over the years, the Hunters spent in excess of $250,000 in campaign funds on improper personal expenses." Dckt. 2-1 at 5. This is misleading.

The prosecution admits nearly half of this amount (at least $116,000) was paid as salary to Congressman Hunter's official campaign manager, Mrs. Hunter. Dckt. 2-2 at 91. There was nothing improper in this and the government does not dispute that Mrs. Hunter performed bona fide campaign services. As stated, Congressman Hunter won all of his elections, and is the only remaining Republican Member in the Southern District of California. Thus, his campaign manager's work speaks for itself. Her salary was a legitimate campaign expense.

This leaves approximately $134,000 of alleged misspending and reporting over more than 6 years, or approximately $22,000 per year. That represents a small fraction of Congressman Hunter's campaign funds, and is entirely consistent with, at most, negligent accounting practices by others, not intentional fraud.

To this end, in the 2016 election cycle, the average spending for an incumbent Republican in the House was approximately $1,700,000. *See House Campaign Expenditures* (available at https://www.brookings.edu/wp-content/uploads/2017/01/vitalstats_ch3_tbl2.pdf). Given that House terms are two

years, this breaks down to $850,000 per year. Based on these figures, $22,000 is a mere 2.5% of average yearly congressional campaign spending.

Calling a molehill a mountain doesn't make it so.

But this is an issue for another day. Congressman Hunter has filed this interlocutory appeal not to argue the facts but because the government's case is constitutionally flawed. It rests on information protected by the Speech or Debate Clause as to which Congressman Hunter has absolute immunity. Trial is prohibited.

III.
The Court has jurisdiction over Congressman Hunter's interlocutory appeal.

"Though every member of the public has an interest in avoiding the strain, expense, and injury to reputation resulting from a trial on criminal charges even if the ultimate outcome, at trial or on appeal, will be favorable, the interests of Members of Congress in this regard are especially compelling. Their ultimate vindication in an appeal after conviction will come long after serious, perhaps irreparable, political damage has been inflicted." *United States v. Myers*, 635 F.3d 932, 936 (2d Cir. 1980).

Moreover, "the pendency of criminal charges against a Member of Congress and a trial of those charges implicate aspects of our representative form of government. The Member's capacity to represent his constituents is inevitably

impaired. In the case of a Congressman, he is their sole voice and vote in the House of Representatives . . . . The primary purpose for the appearance of that Clause in the Constitution was 'to prevent intimidation by the executive and accountability before a possibly hostile judiciary.'" *Id.* (quoting *United States v. Johnson*, 383 U.S. 169, 181 (1966)).

Given this purpose, a Member of Congress facing criminal charges has the right to an interlocutory appeal from denial of his or her motion to dismiss the indictment under the Speech or Debate Clause. *Meanor*, 442 U.S. at 508 ("the Speech or Debate Clause was designed to protect Congressmen 'not only from the consequences of litigation's results but also from the burden of defending themselves.'"). Thus, as a matter of law, this Court has jurisdiction over Congressman Hunter's appeal. *See Renzi*, 651 F.3d at 1018 ("the collateral order doctrine . . . affords us jurisdiction to review a Member's interlocutory claim that an indictment against him should be dismissed as violative of the Speech or Debate Clause.").

The government, however, seeks to dodge this black-letter law by moving to dismiss the appeal. But the motion fails – it is procedurally premature and substantively flawed.

A. The government's motion to dismiss is premature.

The government seeks pre-briefing dismissal under Federal Rule of Appellate Procedure 27 and Ninth Circuit Rule 27-9.2. Dckt. 2-1 at 1. Neither rule contemplates dismissal in this posture. Instead, the determination of merit is precisely what this Court, after full briefing, will decide. And research reveals this Court has never dismissed a similar interlocutory criminal appeal *before* briefing.

The reason for such restraint is compelling. As noted, the Speech or Debate Clause is designed to prevent trial in the first place. *See Meanor*, 442 U.S. at 506. When triggered, it prohibits the prosecution. *See Renzi*, 651 F.3d at 1018. Thus, unless the determination of the Clause's applicability is made before trial, its core protection is lost. *See id*. And it is the appellate *process* that allows for meaningful review and determination of that issue. On the other hand, dismissing a Speech or Debate Clause appeal before briefing would summarily defeat the constitutional protection without due consideration or the appropriate respect to which a Member of an equal branch of government is entitled.

Here, the government has not met its burden to justify such a drastic result. Thus, Congressman Hunter (and this Court) should be given the benefit of having appellate counsel review the record and frame the arguments in the normal course – i.e., with full briefing and oral argument.

The cases cited by the government prove the point. It relies on *United States v. Alvarez-Moreno*, 657 F.3d 896, 899 (9th Cir. 2011), for the proposition that "[t]his Circuit has made it clear that it will 'summarily dismiss frivolous' claims[.]" Dckt. 2-1 at 2. But in *Alvarez-Moreno*, the defendant brought an interlocutory appeal on a double jeopardy claim, which was decided on the merits *after* full briefing and argument (the defendant prevailed). *See Alvarez-Moreno*, 657 F.3d at 899-900.

The same applies to the out-of-Circuit cases the government cites in a footnote. Dckt. 2-1 at 12 n.4. Not a single one involves a dismissal, let alone a dismissal before briefing, and most are not even criminal cases. In fact, those decisions – *United States v. Durenberger*, 48 F.3d 1239, 1242 (D.C. Cir. 1995); *McSurely v. McClellan*, 521 F.2d 1024, 1032 (D.C. Cir. 1975), on *reh'g*, 553 F.2d 1277 (D.C. Cir. 1976); *William v. Brooks*, 945 F.2d 1322, 1325 (5th Cir. 1991); and *Powell v. Ridge*, 247 F.3d 520, 524 (3d Cir. 2001) – all involved full decisions on the merits. Thus, the government has not provided any authority supporting its position that dismissal is appropriate at this stage in the proceedings.

Far more relevant to that question is *Renzi*, 651 F.3d at 1023-32. The government calls it "the most significant Speech or Debate Clause authority to be written in this circuit in nearly four decades[.]" Dckt. 2-2 at 73 n.9. In *Renzi*, the

Court decided the case only *after* full briefing and argument (more on *Renzi* later). *See* 651 F.3d at 1023-32. The same is appropriate here.

B. Congressman Hunter's arguments are not frivolous.

Beyond the procedural inaptness of the government's premature request for dismissal, its substantive arguments are unpersuasive. An appeal is frivolous when the appellant takes a "position [] foreclosed by binding precedent." *United States v. Pocklington*, 831 F.3d 1186, 1188 (9th Cir. 2016) (internal quotations and citation omitted). Here, none of Congressman Hunter's arguments are foreclosed. To the contrary, his contentions are viable and raise questions of first impression warranting full briefing and meaningful appellate review.

1. The Speech or Debate Clause provides broad protection for acts and information falling within the legislative sphere.

The Speech or Debate Clause provides: "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." Article I, § 6, cl. 1. It guarantees individual Members *and their staff* legal immunity for their activities in the "legislative sphere." *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503 (1975).

The Clause "was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch. It thus protects Members against prosecutions that

directly impinge upon or threaten the legislative process." *Gravel v. United States*, 408 U.S. 606, 616 (1972). To that end, the scope of the Speech or Debate Clause's protections reaches beyond its "heart" – actual "speech or debate in either House" – to "other matters which the Constitution places within the jurisdiction of either House." *Id.* at 625.

That extension to "other matters" is necessary to guarantee the Legislative Branch's freedom from oversight by the other branches, as the legislative function takes far more than speaking on the House floor. In view of this critical protection, the Supreme Court has "[w]ithout exception . . . read the Speech or Debate Clause broadly to effectuate its purposes." *Eastland*, 421 U.S. at 501. This broad interpretation results in broad protections.

First, the Clause provides immunity for all actions "within the 'legislative sphere,' . . . even though the [ ] conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes." *Doe v. McMillan*, 412 U.S. 306, 312-13 (1973). In other words, "the Government [is] barred by the Clause's privilege against liability from prosecuting [Members] for those acts" falling within the Clause. *Renzi*, 651 F.3d at 1020.

Second, "the Government [is] precluded from compelling [a Member], or his [or her] aides, to 'testify[] at trials or grand jury proceedings' about that conduct" falling within the Clause. *Id.*

Third, the Clause bars prosecutors from advancing their cases by "[r]evealing information as to a legislative act." *United States v. Helstoski*, 442 U.S. 477, 490 (1979). As such, evidence of acts covered by the Clause "could not be introduced to any jury, grand or petit." *Renzi*, 651 F.3d at 1020.

2. The indictment relies on protected information.

Within this framework, Congressman Hunter's claim – that information and evidence protected by the Speech or Debate Clause permeates this prosecution – is at least colorable. Specifically, in his briefs, he will argue the indictment treads too far into legislative territory where the Executive is persona non grata, the grand jury proceedings were flawed, and the expenditure reports on which the indictment relies are constitutionally protected.[3]

a. *The government's presentation to the grand jury violated the Speech or Debate Clause*.

During its investigation, the government served expansive search warrants at a number of locations, including Congressman Hunter's congressional offices.

[3] Given that this is a motion response – not a brief on the merits – Congressman Hunter limits his substantive arguments to showing only "some possible validity." *Zone*, 403 F.3d at 1104.

The warrants authorized the seizure of:

1. All computer systems, software, peripherals, and data storage devices;

2. All documents, including all temporary and permanent electronic files and records, relating to the commission of the federal crimes listed above;

3. User-attribution data to include data reflecting who used or controlled the computer or electronic storage device . . . including . . . electronic mail stored on the computer or device . . . and user created documents, including metadata.

Dckt. 2-2 at 167.

There can be no dispute that information obtained from these searches included material protected by the Speech or Debate Clause. Because the government took *everything*, they necessarily took protected legislative information.

Agents also questioned Congressman Hunter's staff, before seizing and imaging their cell phones. Dckt. 2-2 at 167. The government then used the evidence it obtained during the searches – and called the staff members as witnesses before the grand jury – to obtain the indictment against Congressman Hunter. Dckt. 2-2 at 167. In doing so, the government violated the second and third core protections of the Speech or Debate Clause. *See Renzi*, 651 F.3d at 1020. It compelled protected testimony and used protected information to prosecute. *See id*.

The government works hard to misunderstand this point. Both below and in its motion to dismiss, it focuses on just three isolated aspects of the evidence, and argues they are not protected. In doing so, it sets up its own strawman to knock down, while ignoring the bigger picture.

Congressman Hunter disagrees with the government as to each of the three items, but his argument is not so limited. Instead, as he will explain more fully in his briefs on the merits, the indictment cannot stand because it is infected by Speech or Debate Clause violations. *See id.* at 1028 ("A court cannot permit an indictment *that depends* on privileged material to stand—and burden a Member with litigation that ultimately cannot succeed—or else the Clause loses much of its teeth.") (emphasis in original) (citing *Eastland*, 421 U.S. at 503). A couple of further points on this issue.

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

First, Congressman Hunter's conversations with his Chief-of-Staff about planning a visit to the Navy base in Italy plainly fall within the Clause's protection because fact-finding activities and related communications are covered. *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); *McSurely*, 553 F.2d at 1287 ("The acquisition of knowledge through informal sources is a

necessary concomitant of legislative conduct and thus should be within the ambit of the privilege so that congressmen are able to discharge their constitutional duties properly.").

At the time of the proposed visit, Congressman Hunter served on the House's Armed Services Committee and its Seapower subcommittee. Fact-finding at Naval installations was undoubtedly part of his legislative role. And the United States Naval base in Naples, Italy (where Congressman Hunter planned to visit) is home to the Sixth Fleet. Given its importance, Members of Congress regularly visit that base. *See*, *e.g.*, *Pelosi to travel to Italy, Ukraine to start August recess*, Politico, 2015, available at https://politi.co/2khtA8z. Thus, it is a valid location for protected legislative fact-finding activity.

And internal communications with Congressional staff about that activity fall within the same protection. Just like confidential chambers' discussions between a judge and his or her clerks are vital to the administration of justice, "it is literally impossible . . . for Members of Congress to perform their legislative tasks without the help of aides and assistants." *Gravel*, 408 U.S. at 616-17 (citation omitted). Because "the day-to-day work of such aides is so critical to the Members' performance[,] they must be treated as the latter's alter egos; and [] if they are not so recognized, the central role of the Speech or Debate Clause – to prevent intimidation of legislators by the Executive and accountability before a

possibly hostile judiciary, will inevitably be diminished and frustrated." *Id*. As such, Congressman Hunter's conversations with his principal legislative aide about fact-finding activity (visiting the Naval base) were covered by the Speech or Debate Clause. *See* Dckt. 2-2 at 123.

Moreover, this remains true even if, as the government alleges, "the activity was undertaken for an illicit purpose" because "the Clause applies in equal force to protect 'legislative acts' regardless of a Member's alleged motivation." *Renzi*, 651 F.3d at 1025. The Supreme Court made this point explicitly in *Johnson*, 383 U.S. at 180: "However reprehensible such conduct may be, we believe the Speech or Debate Clause extends at least so far as to prevent it from being made the basis of a criminal charge against a member of Congress . . . . The essence of such a charge in this context is that the Congressman's conduct was improperly motivated, and . . . *that is precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry*." (Emphasis added).

The government, however, failed to heed this constitutional restriction. It used protected communications to secure the indictment. And then it went a step further, gratuitously including in the indictment a comment from Congressman Hunter to his Chief-of-Staff that disparaged the Navy. Dckt. 2-2 at 145. This was in no way necessary to the charges. Rather, it was used to taint public perception

(and the jury pool) in a Navy town (San Diego).[4] That type of intimidation and embarrassment is exactly what the Speech or Debate Clause was designed to prevent. *See United States v. Helstoski,* 635 F.2d 200, 205 (3d Cir. 1980) ("the mere threat of an indictment is enough to intimidate the average congressman and jeopardize his independence. Yet, it was to prevent just such overreaching that the speech or debate clause came into being. A hostile executive department may effectively neutralize a troublesome legislator, despite the absence of admissible evidence to convict, simply by ignoring or threatening to ignore the privilege in a presentation to a grand jury.").

Accordingly, Congressman Hunter's argument that the indictment is tainted has at least some validity.

ii. The district court erred in denying Congressman Hunter access to grand jury materials.

Second, the district court improperly restricted Congressman Hunter's ability to pursue his Speech or Debate Clause claim. Congressman Hunter sought an order to produce the grand jury transcripts and instructions. *See* D.C. Dckt. 40. He argued, "[d]isclosure is appropriate in this case because strong grounds exist 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

[4] The United States Attorney's Office made sure the comment received plenty of attention by issuing a press release linking to the indictment.

the indictment exists." D.C. Dckt. 40 at 2. The government opposed the motion, which the district court denied. *See* Dckt. 2-2 at 1, 64. The government then used Congressman Hunter's inability to point out specific information disclosed to the grand jury as a sword to defeat Congressman Hunter's Speech or Debate Clause motion. *See* Dckt. 2-2 at 81.

This is unfair. The government cannot hide the ball, and then fault the defendant for failing to find it. *See Banks v. Dretke*, 540 U.S. 668, 696 (2004) ("A rule [] declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process."). Yet that is exactly what happened.

Plainly, the denial of Congressman Hunter's motion for grand jury disclosure is part of his Speech or Debate Clause claim and therefore properly raised in this interlocutory appeal. As the District of Columbia Circuit explained, "[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 [the legislator's] motion [for review of grand jury material] satisfies the [collateral order doctrine]. Accordingly, we have jurisdiction to hear [the] interlocutory appeal of that order." *United States v. Rostenkowski*, 59 F.3d 1291, 1300 (D.C. Cir. 1995).

And because Congressman Hunter's argument on this issue is at least viable, there is no basis for pre-briefing dismissal. *See United States v. Swindall*, 971 F.2d 1531, 1546-47 (11th Cir. 1992) ("When a violation of the privilege occurs in the grand jury phase, a member's rights under the privilege must be vindicated in the grand jury phase.").

b. *The FEC reports are protected*.

These are not Congressman Hunter's only non-frivolous arguments. In his opening brief, Congressman Hunter will also demonstrate the indictment must be dismissed because the allegedly false statements (indeed, any statements) made in campaign disclosure reports are protected by the Speech or Debate Clause. This is an issue of first impression and it has considerable merit.[5]

[5] That this precise argument was not made below is of no moment. "'[O]nce 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) (emphasis added, citation omitted); *United States v. Wahid*, 614 F.3d 1009, 1016 (9th Cir. 2010) ("claims, not arguments, are preserved [for] appeal."). The claim here is that the indictment runs afoul to the Speech or Debate Clause; Congressman Hunter is permitted to make "new argument[s] to support what has been [a] consistent claim[.]" *Citizens United*, 558 U.S. at 331. Moreover, review is de novo. *See United States v. Saavedra-Velazquez*, 578 F.3d 1103, 1106 (9th Cir. 2009) (*de novo review applies even to* arguments raised for the first time 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.'") (citation omitted).

i. FEC reports permeate this prosecution.

The government's case against Congressman Hunter rests on two basic allegations: (1) he misspent campaign funds; (2) he then misreported the personal expenditures as campaign expenditures on forms filed with the Federal Election Commission (FEC). Dckt. 2-2 at 89. This second category – the allegedly misleading FEC reports – form the basis of thirteen counts, each carrying a potential twenty-year sentence. And they provide the evidence underlying other counts, as follows: (a) conspiracy count ¶¶ 2-3; (b) conspiracy count ¶¶ 7, 10; (c) conspiracy count ¶ 15; (d) conspiracy count ¶ 22, also overt acts 166, 167; (e) evidence underlying wire fraud allegations; (f) counts 45-57 are specially based on FEC reports; and (g) evidence underlying counts 58-60.

ii. FEC reports fall within the legislative sphere.

For the entire period covered by the indictment (2010-2016), in his role as a legislator, Congressman Hunter was statutorily obligated to file the FEC reports. *See* 52 U.S.C. § 30104; Dckt. 2-2 at 82 ("the indictment is referring to 52 U.S.C. § 30104"). They were (and are) a threshold requirement for legislating, inextricably intertwined with the ability to legislate – one cannot legislate without being elected and one cannot be elected or remain in office without filing FEC forms. In this sense, the FEC reports are "an integral part of the deliberative and *communicative* processes by which Members participate in committee or House

proceedings[.]" *Gravel*, 408 U.S. at 625 (emphasis added). Thus, they are protected. Indeed, Members' FEC disclosures fall directly within the purpose of the Speech or Debate Clause. *See Miller v. Transamerican Press Inc.*, 709 F.2d 524, 528 (9th Cir. 1983) ("the privilege [] protects freedom of speech in the legislative forum").

A hypothetical illustrates the point. Consider a presidential administration that takes a hardline stance in favor of belts, and against suspenders. The Executive brands anyone who uses or promotes suspenders an enemy of the State. Legislation is passed banning material support of suspenders.

But there is an opposition party. A member of this party facing reelection seeks to galvanize the suspender base. She proposes pro-suspender legislation. And as part of her fact-finding, she takes well-known suspender advocates out for a series of dinners, which she discloses on her FEC reports, as she must.

The Executive branch then uses the FEC reports to intimidate and embarrass her. It publicizes the pro-suspender meals in an effort to scuttle her pending legislation. When that fails, it indicts her. Exhibit A in the prosecution is the FEC disclosures.

In this context, the Speech or Debate Clause would certainly apply. *See Gravel*, 408 U.S. at 617 ("the central role of the Speech or Debate Clause [is] to prevent intimidation of legislators by the Executive and accountability before a

possibly hostile judiciary"); *Barr v. Mateo*, 360 U.S. 564, 571 (1959) ("officials of government should be free to exercise their duties unembarrassed"). The FEC reports would be protected as legislative speech because they reflect her protected legislative conduct. *See Miller*, 709 F.2d at 530 ("Obtaining information pertinent to potential legislation or investigation is one of the 'things generally done in a session of the House'") (citation omitted). Thus, the Executive could not use them against her before the grand jury, in the indictment, or at trial.

So too here. This is the point of the Clause's categorical protection. *See Eastland*, 421 U.S. at 501. Once triggered, "the Clause [] fall[s] like an iron curtain to preclude prosecution for the otherwise unprotected activity[.]" *Renzi*, 651 F.3d at 1025. It is a facial safeguard. *See Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 421 (D.C. Cir. 1995) ("the nature of the use to which documents will be put – testimonial or evidentiary – is immaterial if the touchstone is interference with legislative activities.").

If one FEC report is protected, all are. *See Biaggi*, 853 F.2d at 103 ("the Speech or Debate Clause forbids not only inquiry into acts that are manifestly legislative but also inquiry into acts that are purportedly legislative, 'even to determine if they are legislative in fact[.]'"). This is because the Speech or Debate Clause bars the Executive from deciding what is protected and what is not. *See Gravel*, 408 U.S. at 618 ("the Court has sought to implement its fundamental

purpose of freeing the legislator from executive and judicial oversight that realistically threatens to control his conduct as a legislator."). If the category even arguably falls within the Clause's broad purview, it is entirely off limits. *See McSurely*, 553 F.2d at 1285 (when 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.'") (citation omitted).

In the context of FEC reports, this prohibition on Executive oversight makes sense: "[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. "For the 'ordinary person,' unlike a legislator, the distinction between work and life may be relatively clear. For a Congressman, it is not so clear; service in the United States Congress is not a job like any other, it is a constitutional role to be played upon a constitutional stage." *Id.* Thus, the mandatory FEC disclosures that accompany this constitutional role must be

protected.[6]

iii. Only Congress, not the Executive, has the power to punish FEC report violations.

Nor does it matter that such protection would immunize Members from criminal prosecution based on FEC reports. *See Barr*, 360 U.S. at 576 ("there may be occasional instances of actual injustice which will go unredressed, but we think that price a necessary one to pay for the greater good."). That is the cost of protecting the separation of powers. As the Supreme Court put it: "In its narrowest scope, the Clause is a very large, albeit essential, grant of privilege. It has enabled reckless men to slander and even destroy others with impunity, but that was the conscious choice of the Framers." *United States v. Brewster*, 408 U.S. 501, 516 (1972).

Moreover, Congress itself has the power to investigate and address ethical or criminal violations. *See id*. at 518 ("each House is empowered to discipline its Members. Article I, § 5, does indeed empower each House to 'determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member'"). And of course, there are the

[6] FEC reports are not merely a political activity adjacent to the legislative sphere. They are within the sphere as a threshold requirement for the ability to legislate. *See Swindall*, 971 F.2d at 1543 ("the privilege protects legislative status as well as legislative acts.").

constituents who provide the campaign funds to begin with. If they are unhappy with a Member's spending or reporting, they can vote him or her out of office. Thus, there is little chance of Members escaping the consequences of any misdeeds.

In any event, the application of the Speech or Debate Clause to FEC disclosures is an issue of first impression. It is also a pure question of law, which is ripe for review and anything but frivolous. As such, to ensure Congressman Hunter receives the "full protection of the Clause, his . . . challenge to the indictment must be reviewable before . . . exposure [to trial] occurs." *Meanor*, 442 U.S. at 508 (quotations and citation omitted).

3. The government's misplaced reliance on the order it drafted.

To vitiate this protection and Congressman Hunter's right to interlocutory appellate review, the government uses misdirection. Over and over it repeats that Congressman Hunter's motion to dismiss was wholly without merit, purportedly quoting the district court. Dckt. 2-1 at 2, 4, 10, 13, 16, 19. But those were not the district court's words. To the contrary, in the court's oral ruling delivered from the bench, it never suggested Congressman Hunter's claim was wholly without merit. Dckt. 2-2 at 199-201. Instead, post-hearing, the government submitted a proposed order it drafted for the district court's signature. It is *only* that order which contains the "wholly without merit" phrase. *See* Dckt. 2-2 at 3.

But when the district court was specifically asked about the merit of the issue in the context of *this appeal*, the court made clear it had not found the claim frivolous:

Prosecutor: "We assume . . . you found that the matter was frivolous[.]"

District Court: "Well, I didn't make a finding that it's frivolous."

***

District Court: "I'm not willing to say that Mr. Hunter's appeal is frivolous."

APP:12-13.

The government-drafted order, therefore, does not reveal the district court's true opinion on the matter. Rather, it was part of a premeditated prosecutorial plan to short-circuit Congressman Hunter's appeal. This is not to suggest that the court's ruling would have been different without the government's assistance. The point is that the word choice – "wholly without merit" – did not come from the court.[7]

The government, moreover, was not candid with the district court about its intent. It told the court: "because of the right that defendants have in this context to an interlocutory appeal, and the Ninth Circuit review of this court's factual

[7] Were there any doubt (and there is not), the Court could remand for a further hearing on the issue. *See* APP:9. But that is unnecessary because, as discussed, Congressman Hunter's arguments are at least colorable and not subject to dismissal.

determinations, we've asked for the court to make a set of findings *to assist that review*." Dckt. 2-2 at 202 (emphasis added). That was nonsense; this Court is perfectly capable of reviewing an oral ruling as well as a written one. The government's true purpose was to *change* the district court's ruling in order to undermine Congressman Hunter's appellate rights. This type of prosecutorial manipulation should not be countenanced.

Nor does the order accomplish the government's goal.

First, the district court clearly erred in finding that Congressman Hunter's emails with his Chief-of-Staff regarding a visit to a Naval base in Italy did not fall within the Speech or Debate Clause. As just discussed, the Clause protects those communications.

Second, the order notes only that the "primary purpose" of Congressman Hunter's Italy travel was personal. Dckt. 2-2 at 2. But even if true, so what? Under *Renzi*, 651 F.3d at 1025, "the fact that the activity was undertaken for an illicit purpose is of no consequence; the Clause applies in equal force to protect 'legislative acts' regardless of a Member's alleged motivation."[8]

[8] Further, as the Supreme Court explained in *Burrage v. United States*, 134 S. Ct. 881, 889-90 (2014), the criminal law typically requires but-for causation. Thus, whatever the government meant when it wrote "primary purpose" is irrelevant. *See id*. at 892 ("50 percent[]? Fifteen percent? Five? Who knows.").

Accordingly, for all the reasons set forth above – including that this Court has never dismissed a Speech or Debate Clause appeal before briefing on the merits – it should deny the government's motion to dismiss.

IV.
The Court should deny the motion to expedite.

The Court should also deny the government's motion to expedite. There is no basis to deviate from the normal course.

Under Ninth Circuit Rule 27-12, a motion to expedite is proper only "upon a showing of good cause." In determining good cause, the Court considers the following non-exhaustive factors: "(1) an incarcerated criminal defendant contends that the valid guideline term of confinement does not extend beyond 12 months from the filing of the notice of appeal; (2) the projected release date for an incarcerated criminal defendant occurs within 12 months from the filing of the notice of appeal; or (3) in the absence of expedited treatment, irreparable harm may occur or the appeal may become moot." *Id.*

Here, none of the factors cut in the government's favor. Nor has it even attempted to establish good cause. Moreover, this is not a scenario in which the case has been pending for an inordinate length of time. The median time to trial in cases charging conspiracy to defraud the United States is 23.4 months, and 23.5

months in wire fraud prosecutions.[9] Here, the government charged both offenses. The indictment was filed a year ago. Thus, there is no valid reason to proceed on an expedited schedule.

On this issue, the Court's decision in *Renzi* should be outcome determinative. In *Renzi*, although the former Congressman was facing trial with two others, briefing on his interlocutory appeal proceeded in the normal course. APP:18-21. And the mandate did not issue for nearly two years following the notice of appeal. APP:21. The government here provides no basis for different (rushed) treatment of this case.

Finally, Congressman Hunter has a constitutional right to counsel of his choice. *See Rivera-Corona*, 618 F.3d at 979. As set forth in Counsel's Declaration, (APP:22-24), for personal and professional reasons, an expedited schedule would interfere with that right.

[9] https://www.uscourts.gov/sites/default/files/data_tables/jb_d10_0930.2018.pdf.

V.
Conclusion.

Congressman Hunter respectfully requests the Court deny the government's motion to dismiss the appeal and for expedited briefing. He further asks the Court to discharge the Order to Show Cause.

Respectfully submitted,

s/ Devin Burstein

Dated: September 6, 2019

Devin Burstein
Warren & Burstein
501 West Broadway, Suite 240
San Diego, Ca. 92101

APPENDIX

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	.
PLAINTIFF,	. NO. 18-CR-3677
V.	. AUGUST 13, 2019
DUNCAN D. HUNTER,	. SAN DIEGO, CALIFORNIA
DEFENDANT.	.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE THOMAS J. WHELAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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REPORTED BY STENOTYPE, TRANSCRIBED BY COMPUTER

11:04:21

SAN DIEGO, CALIFORNIA; AUGUST 13, 2010; 11:04 A.M.

-OOO-

THE CLERK: CALLING MATTER NUMBER 18 ON THE CALENDAR, 18CR3677, UNITED STATES OF AMERICA VERSUS DUNCAN HUNTER.

MR. HALPERN: GOOD MORNING, YOUR HONOR. PHIL HALPERN AND EMILY ALLEN FOR THE GOVERNMENT.

THE COURT: GOOD MORNING, SIR.

MR. BURSTEIN: GOOD MORNING, YOUR HONOR. DEVIN BURSTEIN AND GREG VEGA ON BEHALF OF CONGRESSMAN HUNTER WHO IS PRESENT BEFORE THE COURT.

THE COURT: ALL RIGHT. THE MATTER IS ON CALENDAR FOR STATUS. JUST BY WAY OF BACKGROUND, I DID READ THE STATUS REPORT THAT WAS SUBMITTED, OR FILED, YESTERDAY BY COUNSEL. THEY FILED A JOINT STATUS REPORT. JUST FOR THE RECORD,

11:04:58

MR. HUNTER APPARENTLY HAS UNTIL SEPTEMBER 6TH TO RESPOND TO THE NINTH CIRCUIT'S OSC WITH REGARD TO WHETHER OR NOT THEY HAVE JURISDICTION TO HEAR THE APPEAL THAT HE'S FILED AND ALSO WITH REGARD TO RESPONDING TO THE GOVERNMENT'S MOTION TO DISMISS.

BASED ON THAT, THE PARTIES ARE JOINTLY REQUESTING THAT WE CONTINUE THE TRIAL DATE. THE GOVERNMENT HAS INDICATED IN THEIR PAPERS THAT ONCE MR. BURSTEIN, OR MR. HUNTER I SHOULD SAY, RESPONDS TO OR FILES A RESPONSE TO THOSE MOTIONS, THE GOVERNMENT INTENDS TO FILE A REPLY. SO IT LOOKS LIKE IT WOULD PROBABLY BE UNTIL THE END OF SEPTEMBER OR FIRST OF OCTOBER, AT THE VERY EARLIEST, BEFORE WE'D KNOW WHETHER OR NOT THE NINTH

11:05:52 CIRCUIT IS GOING TO ACCEPT JURISDICTION.

MR. BURSTEIN: EVERYTHING UP UNTIL THEN -- TYPICALLY, IN MY EXPERIENCE, BECAUSE THE MOTION TO DISMISS, YOUR HONOR, HAS TO GO TO A THREE-JUDGE MOTION PANEL, AND USUALLY IT WOULD TAKE A LITTLE BIT LONGER THAN THAT FOR A MOTION PANEL TO REVIEW, I THINK THAT THAT IS MAYBE TECHNICALLY ACCURATE AT THE ABSOLUTELY FASTEST BECAUSE IT WOULD BE A PRETTY QUICK TURNAROUND FOR A MOTIONS PANEL, BUT I GUESS IT'S TECHNICALLY POSSIBLE BY THE FIRST OF OCTOBER.

THE COURT: WELL, IN ANY EVENT, I'M JUST SAYING THAT BY WAY OF BACKGROUND TO JUSTIFY WHY I AGREE WITH THE PARTIES THAT I THINK THE TRIAL DATE SHOULD BE CONTINUED.

AND THAT'S STILL BOTH THE PARTIES' REQUEST; IS THAT CORRECT?

11:06:37 MR. HALPERN: YES, YOUR HONOR, IF IN FACT THE TRIAL DATE IS GOING TO BE CONTINUED.

THE COURT: WELL, I'M NOT GOING TO CONTINUE IT IF NOBODY WANTS ME TO. I JUST ASSUME TRY IT.

MR. HALPERN: OKAY. THE ONLY THING I WOULD ADD, YOUR HONOR, IS THAT WE ALSO HAVE ANOTHER PLEADING TO BE CONSIDERED; AND THAT IS, IF THE COURT INTENDS TO MOVE AHEAD, AS WE WANT THE COURT TO MOVE AHEAD, WE WOULD LIKE AN OFFICIAL FINDING AS TO THE FACT THAT THE COURT RETAINS JURISDICTION JUST SO WE HAVE A CLEAR RECORD FOR THE NINTH CIRCUIT. WE'RE PREPARED TO FILE THAT AT SOON AS POSSIBLE SO WE DON'T DELAY THE NINTH CIRCUIT AT

11:07:13 ALL. IN FACT, WHAT WE'D LIKE TO DO IS MAKE SURE THE NINTH CIRCUIT HAS A COMPLETE AND THOROUGH RECORD SO THEY CAN RULE THAT IN FACT THIS COURT DOES HAVE CONTINUING JURISDICTION TO DO THE TRIAL. AND WE AGREED WITH DEFENSE COUNSEL ON A BRIEFING SCHEDULE WHICH WE WOULD BE HAPPY TO ACCELERATE, IF THAT'S THE COURT'S DESIRE.

THE COURT: WELL, THE SECOND PART OF YOUR JOINT MOTION -- AND QUITE HONESTLY, THE PROBLEM I HAVE WITH THAT IS THAT THE BASIC JURISDICTION FOR A DISTRICT COURT IS THAT I HAVE TO HAVE AN ACTUAL CASE OR CONTROVERSY TO RULE ON. AND REALLY, WHAT YOU'RE TALKING ABOUT IS POTENTIAL CONTROVERSY. WE HAVE A CASE, BUT IT'S POTENTIAL CONTROVERSY THAT ISN'T GOING TO COME TO FRUITION, IF AT ALL, UNTIL THE NINTH CIRCUIT DECIDES THEY HAVE JURISDICTION. SO WHILE I AGREE I COULD AND SHOULD RULE ON

11:08:07 THAT TYPE OF A MOTION, I THINK AT THIS POINT IT'S PREMATURE FOR ME TO SET IT UNTIL THE NINTH CIRCUIT DECIDES WHETHER THEY'RE GOING TO TAKE THE CASE BECAUSE AS OF RIGHT NOW I HAVE JURISDICTION, AND THEY DON'T. THEY HAVEN'T ACCEPTED IT. SO THERE IS NO CONTROVERSY FOR ME TO RULE ON OR GIVE AN ADVISORY OPINION ON.

MR. HALPERN: WE COULDN'T AGREE MORE. WE DO THINK THAT THE COURT DOES HAVE JURISDICTION. ALTHOUGH, I MUST SAY, UNDER THE CASE LAW, AS I UNDERSTAND IT, ONCE THE DEFENSE FILES NOTICE OF APPEAL, THAT TECHNICALLY, AS A RULE, WOULD DEPRIVE A COURT OF JURISDICTION; AND THEREFORE, IT'S UP TO THE NINTH

11:08:41 CIRCUIT, WHICH ALWAYS HAS THE ABILITY TO DECIDE WHETHER IN FACT THEY KEEP JURISDICTION. WHAT I AM SUGGESTING IS THAT I THINK IT WOULD BE ADVISABLE FOR BOTH SIDES HERE TO BRIEF AS QUICKLY AS POSSIBLE THIS QUESTION SO WE CAN HAVE A THOROUGH RECORD FOR THE NINTH CIRCUIT. THAT'S MY SUGGESTION, YOUR HONOR. ALTHOUGH, I UNDERSTAND THAT IF THE NINTH CIRCUIT DOES FIND IT'S FRIVOLOUS, THE COURT HAS MAINTAINED JURISDICTION THE WHOLE TIME.

THE COURT: WELL, THE PROBLEM I STILL HAVE IS THAT -- YOU'RE RIGHT; NORMALLY WHEN THEY FILE A NOTICE OF APPEAL, IT'S AUTOMATIC THAT THIS COURT'S LOST JURISDICTION, BUT I THINK THAT CHANGES WHEN THEY ISSUE AN OSC WITH REGARD TO WHETHER OR NOT THEY HAVE JURISDICTION. THAT WOULD INDICATE TO ME THAT THEY HAVEN'T DECIDED WHETHER THEY'RE GOING TO KEEP THE CASE OR NOT.

11:09:28 SO I THINK I STILL HAVE JURISDICTION AT THIS POINT.

MR. HALPERN: I DON'T DISAGREE WITH THAT, YOUR HONOR.

THE COURT: AND SINCE I STILL HAVE JURISDICTION AND THEY DON'T HAVE JURISDICTION, AS OF THIS MOMENT, THERE'S NO CONTROVERSY FOR ME TO RESOLVE. SO UNLESS THE PARTIES CAN COME UP WITH SOME REASON WHY I SHOULD RULE ON THIS BEFORE THEY MAKE THEIR DECISION REGARDING JURISDICTION, I'M NOT INCLINED TO DO IT. I DON'T THINK I HAVE JURISDICTION TO DO IT.

MR. BURSTEIN: YOUR HONOR, MAY I BE HEARD BRIEFLY?

THE COURT: SURE.

MR. BURSTEIN: ONE OF THE HARDEST THINGS A LAWYER

11:09:56 EVER HAS TO DO IS TELL THE COURT THEY DON'T HAVE JURISDICTION. ALL RIGHT. IT'S NOT SOMETHING WE LIKE TO BE IN THE POSITION TO DO. BUT AS A MATTER OF LAW, AT THIS MOMENT, DESPITE THE OSC, THIS COURT DOES NOT HAVE HAVE JURISDICTION. THE NINTH CIRCUIT HAS JURISDICTION OVER THIS CASE. IF -- THEY ISSUED THE OSC. IF THEY GRANT THE MOTION TO DISMISS THE APPEAL, JURISDICTION WILL COME BACK. THE ONLY WAY FOR THIS COURT TO HAVE JURISDICTION, DUAL JURISDICTION, IS TO MAKE A RULING ON DUAL JURISDICTION. THE PARTIES AGREE ON THAT, AS OF THIS MOMENT. THAT'S WHY THE GOVERNMENT HAS ASKED FOR A FINDING OF DUAL JURISDICTION. IT'S OUR POSITION THAT WE DON'T NEED TO LITIGATE THIS AT THE MOMENT BECAUSE WE ASKED FOR A BRIEFING SCHEDULE. IT'S OUR POSITION THE COURT CAN'T EVEN MAKE THAT FINDING ANYMORE, BUT THE PARTIES ARE IN AGREEMENT THAT AS OF THIS

11:10:46 MOMENT, AS A MATTER OF LAW, THE NINTH CIRCUIT HAS JURISDICTION.

MR. HALPERN: WELL, YOUR HONOR, I DON'T THINK THAT'S CORRECT. THE PARTIES ARE IN AGREEMENT THAT ABSENT SPECIFIC FINDINGS AND THE NINTH CIRCUIT ISSUING A STAY, THIS COURT, IF IT BELIEVES THE MATTER IS FRIVOLOUS, DOES RETAIN JURISDICTION. THE GOVERNMENT'S POSITION HAS ALWAYS BEEN WHEN WE LOOK AT THE, IN THE CASE LAW, ESPECIALLY UNDER *ABNEY* AND *LAMERE*, IT'S SUGGESTED THAT THIS COURT CAN RETAIN JURISDICTION IF SPECIFIC FINDINGS HAVE BEEN MADE BY THE COURT. ALL OUR POSITION IS THAT WE WOULD LIKE TO ENSURE THAT THE COURT HAS MADE THOSE APPROPRIATE FINDINGS SO THAT THE NINTH CIRCUIT UNDERSTANDS THAT

11:11:32 IN DECIDING THE ULTIMATE QUESTION OF WHETHER THEY WISH TO EXERCISE JURISDICTION IN THIS CASE. AND THAT'S OUR CONCERN. WE JUST WANT TO MAKE SURE THE RECORD IS CLEAR AS TO WHAT THE COURT WANTS. AND AS FAR AS THAT'S CONCERNED -- AGAIN, WE DON'T WANT TO PUT THE DEFENSE IN A BAD POSITION. WE'RE READY TO FILE A BRIEF AS QUICKLY AS POSSIBLE TO HAVE THE COURT CONSIDER THIS AND MAKE SURE THAT THE NINTH CIRCUIT IS AWARE OF THE EXACT FINDINGS THAT HAVE BEEN MADE IN THIS MATTER.

THE COURT: WELL, WHY DON'T WE DO IT THIS WAY: WHEN YOU'RE RESPONDING, MR. BURSTEIN, AND IN YOUR REPLY BRIEF, MR. HALPERN, WHY DON'T YOU INQUIRE OF THE NINTH CIRCUIT IF THEY BELIEVE THAT I HAVE JURISDICTION TO MAKE SUCH A --

MR. HALPERN: THAT IS ACCEPTABLE, YOUR HONOR. THE ONLY THING I WOULD AUGMENT WOULD BE WE WOULD LIKE TO PRESENT A

11:12:35 PROPOSED ORDER TO THIS COURT JUST SO THE NINTH CIRCUIT IS AWARE OF EXACTLY YOUR POSITION, YOU KNOW, ON THESE ISSUES BECAUSE THERE ARE SPECIFIC FINDINGS THAT WHEN WE LOOKED AT THE LAW HAD, YOU KNOW, SHOULD HAVE BEEN MADE. AND I THINK THE COURT HAS INDICATED THE RIGHT THINGS, BUT WE JUST WANTED TO MAKE SURE IT WAS CLEAR TO THE NINTH CIRCUIT.

THE COURT: I HAVE NO PROBLEM WITH THE PROPOSED ORDER AS LONG AS MR. BURSTEIN AGREES TO WHATEVER YOU HAVE IN IT. BUT I THINK IT WOULD BE BETTER IF THE NINTH CIRCUIT ACTUALLY REQUESTS OR DIRECTS OR TELLS ME THAT I HAVE JURISDICTION TO RULE ON THAT WHILE THEY'RE DECIDING WHETHER OR NOT THEY HAVE

11:13:12 JURISDICTION TO TAKE THE CASE.

MR. BURSTEIN: I AGREE, YOUR HONOR. THAT'S OUR POSITION. THERE'S NO WAY WE'RE GOING TO AGREE WITH THE PROPOSED ORDER BECAUSE IT'S OUR POSITION THAT BY FILING THE MOTION TO DISMISS -- THE QUESTION FOR THE MOTION TO DISMISS THE APPEAL, YOUR HONOR, IS WHETHER THE APPEAL IS FRIVOLOUS. THAT IS THE JURISDICTIONAL QUESTION. THAT'S NOW BEFORE THE NINTH CIRCUIT. THAT'S HOW WE'LL KNOW WHO HAS JURISDICTION. IF THE MOTION TO DISMISS IS DENIED, THE NINTH CIRCUIT HAS JURISDICTION FOR THE DURATION OF THE INTERLOCUTORY APPEAL. IF IT'S GRANTED, JURISDICTION COMES BACK HERE WITH THE MANDATE. IT'S AS SIMPLE AS THAT. THIS IS NEEDLESSLY COMPLICATED. I WILL INQUIRE IN MY RESPONSE IF THE NINTH CIRCUIT FEELS ADDITIONAL FACTUAL FINDINGS ARE REQUIRED TO ASK THEM FOR A LIMITED REMAND FOR THAT PURPOSE.

11:13:57 THE GOVERNMENT CAN SAY WHATEVER IT WANTS IN THEIR REPLY BRIEF BUT I ASSURE THE COURT THAT I WILL DO THAT.

THE COURT: WHY DON'T WE DO THAT? I'M CERTAINLY READY TO RULE ON IT IF I HAVE JURISDICTION TO DO SO. THAT'S MY ONLY ISSUE.

MR. BURSTEIN: I AGREE.

THE COURT: SO THAT'S WHAT WE'LL DO WITH REGARD TO THAT. THAT TAKES US BACK TO THE TRIAL HERE. YOUR STATUS REPORT THAT YOU JOINTLY SUBMITTED SUGGESTS THAT YOU WANT ME TO MOVE THE TRIAL TO, I BELIEVE, OCTOBER 29TH; IS THAT CORRECT?

MR. BURSTEIN: YES, YOUR HONOR.

11:14:24 THE COURT: THE PROBLEM WITH THAT IS GOING TO BE THAT I'M NOT GOING TO BE AVAILABLE FOR THE TWO MIDDLE WEEKS IN NOVEMBER. SO I CAN TRY THE CASE EARLIER. I CAN SET IT FOR OCTOBER 1ST, OCTOBER 8TH, IF YOU WANT. I ASSUME IT'S A FULL WEEK OF TRIAL ESTIMATE. I COULD DO IT THEN OR I COULD DO IT AFTERWARDS. I COULD START IT THE WEEK OF NOVEMBER 26TH.

MR. BURSTEIN: SORRY, YOUR HONOR. I DIDN'T MEAN TO CUT YOU OFF.

THE COURT: NOVEMBER 26TH OR SOMETIME AFTER THAT.

MR. BURSTEIN: WE RECOMMEND NOVEMBER 26TH OR SOMETIME AFTER THAT BECAUSE HERE IS THE PROBLEM: IF THE NINTH CIRCUIT IS TAKING THEIR TIME, AS THEY MAY, WITH THIS ISSUE, THEN WE'RE GOING TO SET A DATE, EVERYBODY IS GOING TO RAMP UP, RESOURCES ON BOTH SIDES WILL BE SPENT, AND THEN WE'LL COME BACK IN HERE

11:15:16 OCTOBER WHATEVER AND SAY, YOUR HONOR, THE NINTH CIRCUIT HASN'T RULED. BUT IF WE SET IT FOR NOVEMBER 26TH, I THINK WE CAN ALL BE RELATIVELY CERTAIN, UPWARDS OF 85 PERCENT CERTAIN, WE'LL HAVE A FINAL ANSWER FROM THE NINTH CIRCUIT. AND IN THAT CONTEXT WHERE WE'RE IN SOMEWHAT UNCHARTED TERRITORY IT SEEMS THAT WHY DON'T WE JUST SET A DATE CERTAIN WHERE WE'LL KNOW WHAT THE NINTH CIRCUIT IS GOING TO DO RATHER THAN COMING BACK AND FORTH IN HERE AND TAKING THE COURT'S TIME JUST TO MOVE DATES.

MR. HALPERN: THE PROBLEM WITH THE GOVERNMENT SETTING IT TWO DAYS BEFORE THANKSGIVING IS WE HAVE NUMEROUS WITNESSES TO MOVE THROUGHOUT THE COUNTRY AND --

11:15:54 THE COURT: WE CAN GO AFTER THAT. DO YOU WANT TO GO TO DECEMBER 3RD? I WASN'T LOOKING AT THAT.

MR. BURSTEIN: NO OBJECTION FROM THE DEFENSE TO DECEMBER 3RD.

THE COURT: I WASN'T TAKING INTO CONSIDERATION THE THANKSGIVING HOLIDAY.

MR. HALPERN: ONCE AGAIN, WE UNDERSTAND IT MIGHT BE DIFFICULT, BUT OUR PREFERENCE WOULD, OF COURSE, BE EARLIER RATHER THAN LATER, LIKE OCTOBER 15TH.

THE COURT: I KNOW. IF I GIVE YOU OCTOBER 15TH, I'M NOT SURE WE CAN GET IT DONE IN TIME. BY THE 8TH, I THINK WE CAN GET IT DONE IN TIME AND 1ST OF OCTOBER WE'LL GET IT DONE. BUT IF IT'S GOING TO BE FOUR WEEKS, I'M NOT SURE, WITH DELIBERATIONS, IF WE'LL GET IT DONE IN TIME.

11:16:37 MR. HALPERN: DECEMBER 3RD.

THE COURT: DECEMBER 3RD THEN?

MR. HALPERN: I MEAN, AGAIN, THE ONLY REASON WE SAY THAT IS -- WE WOULD PREFER, TO BE HONEST, AN EARLIER DATE.

THE COURT: I WOULD HAVE PREFERRED TRYING IT LAST YEAR, IF YOU WANT TO TALK ABOUT PREFERENCES.

MR. HALPERN: BUT AGAIN, IT MAKES NO SENSE TO SET A TRIAL DATE WITHIN DAYS OF WHEN WE EXPECT A COURT OF APPEALS DECISION.

THE COURT: ALL RIGHT. DOES EVERYBODY AGREE DECEMBER 3RD, 9:00, FOR TRIAL? IS THAT WHERE WE ARE?

11:17:06 MR. BURSTEIN: YES, YOUR HONOR. I THINK IT MAKES SENSE. THE COURT DOESN'T NEED US TO INFORM IT IF THE NINTH CIRCUIT, IF IT GETS TO BE LATE IN NOVEMBER --

THE COURT: YOU CAN ALWAYS PUT IT ON FOR STATUS. YOU SHOULD HAVE SOME FINALITY HERE.

MR. BURSTEIN: THAT'S WHAT WE'LL DO.

THE COURT: MR. VEGA, SINCE I KNOW YOU'RE STILL LEAD COUNSEL, I ASSUME YOU'RE AGREEING WITH ALL THIS?

MR. VEGA: I AM, YOUR HONOR.

THE COURT: JUST WANT TO MAKE SURE.

MR. VEGA: YES.

MR. HALPERN: ONCE AGAIN, WHILE WE'D LOVE DECEMBER 3RD -- AND IF THE COURT FEELS IT'S BEST, WE'LL DO IT -- BUT IF IT IS FOUR WEEKS, IT WILL TAKE US RIGHT INTO CHRISTMAS.

11:17:39 THE COURT: WELL, WHY DON'T WE DO THIS: LET'S GO OFF THE RECORD FOR A MINUTE AND LET YOU GENTLEMEN DECIDE WHAT YOU WOULD LIKE TO HAVE AND I'LL WORK WITH YOU, LIKE I ALWAYS HAVE.

(COUNSEL CONFER.)

MR. BURSTEIN: JANUARY 14TH?

THE COURT: I DON'T HAVE A 2020 CALENDAR UP HERE, BUT I ASSUME IF THAT'S A TUESDAY, THAT'S OKAY. IT'S A TUESDAY. SO JANUARY 14TH, 2020, AT 9:00; THAT'S WHAT EVERYBODY AGREES ON?

MR. VEGA: YES, YOUR HONOR.

MR. HALPERN: YES, IT LOOKS LIKE THAT'S THE EARLIEST PRACTICABLE DATE GIVEN THE HOLIDAYS AND THE LENGTH OF THE

11:18:28 TRIAL.

THE COURT: THAT'S FINE. MR. HUNTER, IS THAT GOING TO BE ALL RIGHT WITH YOU, SIR?

THE DEFENDANT: YES, YOUR HONOR.

THE COURT: ALL RIGHT. SO THAT WILL BE THE ORDER. WE'LL VACATE THE CURRENT TRIAL DATE OF SEPTEMBER 10TH AND RESET THE MATTER FOR TRIAL JANUARY 14, 2020, AT 9:00 IN THIS DEPARTMENT. AND DEPENDING ON THE RESPONSE THE NINTH CIRCUIT GIVES TO THE BRIEFING THAT'S GOING TO BE FILED BY MR. BURSTEIN AND BY THE GOVERNMENT, COUNSEL CAN CONTACT MY CLERK AND WE'LL SET A TIME FOR A HEARING FOR THE DUAL JURISDICTION ISSUE. IS THAT AGREEABLE WITH EVERYBODY?

MR. BURSTEIN: YES, YOUR HONOR. I WOULD SUGGEST THAT PERHAPS THE GOVERNMENT WANTS TO ORDER A TRANSCRIPT OF THIS

11:19:07 HEARING TO PROVIDE TO THE NINTH CIRCUIT SO THE NINTH CIRCUIT KNOWS EXACTLY WHAT THIS COURT HAS THOUGHT ABOUT A POTENTIAL LIMITED REMAND, OR WE CAN DO IT IF THE GOVERNMENT PREFERS.

THE COURT: ANYBODY IS ENTITLED TO ORDER A TRANSCRIPT THAT WANTS TO.

MR. HALPERN: WELL, YES, YOUR HONOR. I THINK WHAT WOULD BE MOST BENEFICIAL -- AND AGAIN, WE CAN PRESENT SOMETHING TO YOU -- IS FOR YOU TO CLARIFY FOR THE NINTH CIRCUIT WHY YOU HAVE JURISDICTION, WHAT THE REASONS ARE. WE ASSUME IT'S BECAUSE YOU FOUND THAT THE MATTER WAS FRIVOLOUS AND THAT THE DEFENDANT DID IN FACT HAVE TO GO TO TRIAL ON THE DATE BECAUSE

11:19:43 THIS COURT POSSESSED JURISDICTION BECAUSE THE MATTERS WERE NOT COLORABLE, I.E. FRIVOLOUS.

THE COURT: WELL, I DIDN'T MAKE A FINDING THAT IT'S FRIVOLOUS. MY FINDING IS THAT IT'S MY BELIEF THAT, SINCE THEY HAVE ISSUED AN OSC REGARDING WHETHER OR NOT THEY'RE GOING TO ACCEPT OR RETAIN JURISDICTION, THAT I STILL HAVE JURISDICTION, AND THERE'S NO CASE OR CONTROVERSY FOR ME AT THIS TIME TO RULE ON; THAT IF I STILL HAVE JURISDICTION, THEY HAVEN'T DECIDED IF THEY'RE GOING TO TAKE JURISDICTION, THERE'S NO DUAL JURISDICTION ISSUE THAT THIS COURT SHOULD RESOLVE.

MR. HALPERN: I WILL SAY THAT MY UNDERSTANDING OF IT, YOUR HONOR -- AND I'M NOT TRYING TO SUGGEST WHAT THIS COURT SHOULD FIND -- MY UNDERSTANDING IN LAW IS THAT IF THERE'S NO FINDING THAT THE MATTER IS FRIVOLOUS, NON-COLORABLE, THE NINTH
11:20:34 CIRCUIT WILL BASICALLY ACCEPT JURISDICTION AND THEY'LL DEPRIVE THIS COURT OF JURISDICTION. THE ONLY WAY THIS COURT MAY MAINTAIN JURISDICTION OF THIS MATTER IS IF YOU FIND THAT THE ISSUES ON SPEECH OR DEBATE ARE IN FACT FRIVOLOUS, WHICH IS THE MATTER I WANTED TO BRIEF WITH MR. BURSTEIN OVER THE NEXT NUMBER OF WEEKS. THAT'S MY UNDERSTANDING OF THE LAW.

MR. BURSTEIN: WE'LL RAISE IT WITH THE NINTH CIRCUIT, AS THE COURT HAS ALREADY DIRECTED US.

THE COURT: AT THIS POINT, I'M NOT WILLING TO SAY THAT MR. HUNTER'S APPEAL IS FRIVOLOUS. I'VE BEEN A JUDGE, AS YOU BOTH KNOW, FOR PROBABLY 30 YEARS, AND I'VE NEVER HAD A

11:21:04

SPEECH OR DEBATE CLAUSE ISSUE BECAUSE I'VE NEVER HAD A CONGRESSMAN; SO I'M NOT IN A POSITION TO SAY THAT IT'S FRIVOLOUS OR NOT FRIVOLOUS.

MR. BURSTEIN: THANK YOU, YOUR HONOR.

THE COURT: WE ARE IN RECESS.

(MATTER CONCLUDED.)

C-E-R-T-I-F-I-C-A-T-I-O-N

I HEREBY CERTIFY THAT I AM A DULY APPOINTED, QUALIFIED AND ACTING OFFICIAL COURT REPORTER FOR THE UNITED STATES DISTRICT COURT; THAT THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT OF THE PROCEEDINGS HAD IN THE AFOREMENTIONED CAUSE; THAT SAID TRANSCRIPT IS A TRUE AND CORRECT TRANSCRIPTION OF MY STENOGRAPHIC NOTES; AND THAT THE FORMAT USED HEREIN COMPLIES WITH THE RULES AND REQUIREMENTS OF THE UNITED STATES JUDICIAL CONFERENCE.

DATED: AUGUST 15, 2019, AT SAN DIEGO, CALIFORNIA.

/S/ JULIET Y. EICHENLAUB
JULIET Y. EICHENLAUB, RPR, CSR
OFFICIAL COURT REPORTER
CERTIFIED SHORTHAND REPORTER NO. 12084

PACER fee: Not Exempt Change

General Docket
United States Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 10-10088
USA v. Richard Renzi
Appeal From: U.S. District Court for Arizona, Tucson
Fee Status: Paid

Docketed: 03/04/2010
Termed: 06/23/2011

Case Type Information:
1) criminal
2) other
3) null

Originating Court Information:
District: 0970-4 : 4:08-cr-00212-DCB-BPV-1
Court Reporter: Chris Wallace, Court Reporter
Trial Judge: David C. Bury, Senior District Judge
Trial Judge: Bernardo P. Velasco, Magistrate Judge
Date Filed: 02/21/2008

Date Order/Judgment:	Date Order/Judgment EOD:	Date NOA Filed:	Date Rec'd COA:
02/18/2010	02/18/2010	03/04/2010	03/04/2010

Prior Cases:
None

Current Cases:

	Lead	Member	Start	End
Companion	10-10088	11-10066	02/11/2011	
Cross-Appeal	10-10088	10-10122	03/22/2010	

UNITED STATES OF AMERICA
Plaintiff - Appellee,

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v.

RICHARD G. RENZI
Defendant - Appellant,

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[COR LD NTC Retained]
Steptoe & Johnson LLP
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Washington, DC 20036

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BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES Amicus Curiae,	Kerry William Kircher Direct: 202-225-9700 [COR LD NTC Government] U.S. House of Representatives Office of General Counsel 219 Cannon House Office Building Washington, DC 20515-6601 Katherine E. McCarron Direct: 202-225-9700 [COR NTC Government] U.S. House of Representatives Office of General Counsel 219 Cannon House Office Building Washington, DC 20515-6601
BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES **Terminated:** 07/19/2011 Amicus - Amicus Curiae,	
CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON Amicus Curiae - Pending,	Melanie Sloan Direct: 202-408-5565 [COR LD NTC Retained] Citizens for Responsibility and Ethics in Washington 1400 I Street, NW Suite 450 Washington, DC 20005

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RICHARD G. RENZI,

Defendant - Appellant.

03/04/2010	1 14 pg, 243.12 KB	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Reporters Transcript required: Yes. Sentence imposed:. Transcript ordered by 03/25/2010. Transcript due 04/26/2010. Appellant briefs and excerpts due by 06/03/2010 for Richard G. Renzi. Appellee brief due 07/06/2010 for United States of America. Appellant's optional reply brief is due 14 days after service of the answering brief. [7253174] (HC) [Entered: 03/04/2010 01:59 PM]
03/22/2010	2 12 pg, 245.21 KB	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Reporters Transcript required: Yes. First cross appeal brief due 06/03/2010 for Richard G. Renzi. Second brief on cross appeal due 07/06/2010 for United States of America. Third brief on cross appeal due 08/05/2010 for Richard G. Renzi. The optional reply brief is due 14 days after the service of the third cross appeal brief. [7274028] [10-10122, 10-10088] (HC) [Entered: 03/22/2010 01:35 PM]
04/01/2010	3 1 pg, 25.48 KB	Filed (ECF) notice of appearance of Andrew G. Levchuk for Appellant USA in 10-10122, Appellee USA in 10-10088. Date of service: 04/01/2010. [7287142] [10-10122, 10-10088] (Levchuk, Andrew) [Entered: 04/01/2010 03:46 PM]
04/01/2010	4	Added attorney Andrew Levchuk for USA [7287396] [10-10122, 10-10088] (JFF) [Entered: 04/01/2010 04:56 PM]
05/12/2010	5	14 day oral extenstion by phone to file Appellant Richard G. Renzi 's first cross-appeal brief. First cross appeal brief due 06/17/2010 for Richard G. Renzi. Second brief on cross appeal due 07/19/2010 for United States of America. Third brief on cross appeal due 08/18/2010 for Richard G. Renzi. [7334010] [10-10088, 10-10122] Optional reply brief is due 14 days after service of the 3rd xap brief. (TH) [Entered: 05/12/2010 09:51 AM]
06/17/2010	6 1 pg, 25.7 KB	Filed (ECF) notice of appearance of Brian M. Heberlig for Appellant Richard G. Renzi in 10-10088, Appellee Richard G. Renzi in 10-10122. Date of service: 06/17/2010. [7376766] [10-10088, 10-10122] (Heberlig, Brian) [Entered: 06/17/2010 09:18 PM]
06/17/2010	7 86 pg, 230.36 KB	Submitted (ECF) First Brief on Cross-Appeal brief for review. Submitted by Appellant Richard G. Renzi in 10-10088, Appellee Richard G. Renzi in 10-10122. Date of service: 06/17/2010. [7376767] [10-10088, 10-10122] (Heberlig, Brian) [Entered: 06/17/2010 09:30 PM]
06/18/2010	8 2 pg, 84.82 KB	Filed clerk order: The first brief on cross-appeal [7] submitted by Richard G. Renzi is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, with a blue cover, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. [7377072] [10-10088, 10-10122] (GLS) [Entered: 06/18/2010 10:28 AM]
06/18/2010	9	ENTRY UPDATED. Filed Appellant Richard G. Renzi excerpts of record in 4 volumes. Served on 06/17/2010. [7379287] [10-10088, 10-10122] (GLS) [Entered: 06/21/2010 01:41 PM]
06/18/2010	10	Received UNDER SEAL Appellant Richard G. Renzi notice regarding filing under seal. [7381113] [10-10088, 10-10122] (GLS) [Entered: 06/22/2010 02:40 PM]
06/18/2010	11	ENTRY UPDATED. Filed UNDER SEAL Appellant Richard G. Renzi excerpts of record in 2 volumes. Served 06/17/2010. [7381129] [10-10088, 10-10122] (GLS) [Entered: 06/22/2010 02:45 PM]
06/22/2010	12	Received 7 paper copies of First Brief on Cross-Appeal [7] filed by Richard G. Renzi. [7382065] [10-10088, 10-10122] (SD) [Entered: 06/23/2010 12:30 PM]
06/24/2010	13 101 pg, 697.63 KB	Filed (ECF) Bipartisan Legal Advisory Group of the United States House of Representatives Motion for leave to file a brief AMICUS CURIAE within the word limits applicable to parties' principal briefs. Date of service: 06/24/2010. [7383574] [10-10122, 10-10088]--[COURT UPDATE: After verification with counsel, changed docket text to reflect content of filing, resent notice. 06/24/2010 by ASW] (Levinson-Waldman, Ariel) [Entered: 06/24/2010 01:23 PM]
06/24/2010	14	Entered appearance of Amicus Curiae - Pending BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES in 10-10088 and Amicus Curiae - Pending BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES in 10-10122. [7384176] [10-10088, 10-10122] (Turcios, Margoth) [Entered: 06/24/2010 04:00 PM]
07/05/2010	15 3 pg, 64.16 KB	Filed (ECF) Appellee USA Motion to extend time to file Second Brief on Cross-Appeal brief until 08/18/2010. Date of service: 07/05/2010. [7393440] (Levchuk, Andrew) [Entered: 07/05/2010 08:35 PM]
07/15/2010	16 1 pg, 23.25 KB	Filed order (Appellate Commissioner) The motion of the Bipartisan Legal Advisory Group of the U.S. House of Representatives (“the House”) to file an oversized amicus brief is granted. Plaintiff United States of America’s unopposed motion for an extension of time to file the second brief on cross-appeal is granted. The second brief on cross-appeal is due August 18, 2010. The third brief on cross-appeal is due September 17, 2010. The optional reply brief is due within 14 days after service of the third brief on cross-appeal.. (Pro Mo) [7405797] [10-10088, 10-10122] (KKW) [Entered: 07/15/2010 09:02 AM]
07/15/2010	17 2 pg, 85.2 KB	Filed clerk order: The amicus brief [13] submitted by BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, with a green cover, accompanied by certification,

		attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. [7406579] [10-10088, 10-10122] (WWP) [Entered: 07/15/2010 01:25 PM]
07/20/2010	18	Received 7 paper copies of Amicus brief [13] filed by BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES. [7412922] [10-10088, 10-10122] (SD) [Entered: 07/21/2010 12:12 PM]
08/18/2010	19 80 pg, 220.05 KB	Submitted (ECF) Second Brief on Cross-Appeal brief for review. Submitted by Appellee USA in 10-10088. Date of service: 08/18/2009. [7445028] [10-10088, 10-10122] (Levchuk, Andrew) [Entered: 08/18/2010 09:17 PM]
08/19/2010	20 2 pg, 84.61 KB	Filed clerk order: The second brief on cross-appeal [19] submitted by USA in is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, with a red cover, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. [7445251] [10-10088, 10-10122] (GLS) [Entered: 08/19/2010 10:17 AM]
08/25/2010	21 35 pg, 268.37 KB	Submitted (ECF) Amicus brief for review and filed Motion to become amicus curiae. Submitted by Citizens for Responsibility and Ethics in Washington. Date of service: 08/25/2010. [7451886] [10-10088, 10-10122] (Sloan, Melanie) [Entered: 08/25/2010 02:15 PM]
08/26/2010	22	Entered appearance of Amicus Curiae - Pending Citizens for Responsibility and Ethics in Washington. [7453080] [10-10088, 10-10122] (GLS) [Entered: 08/26/2010 10:37 AM]
08/27/2010	23	Received 7 paper copies of Second Brief on Cross-Appeal brief [19] filed by USA. [7455009] [10-10088, 10-10122] (SD) [Entered: 08/27/2010 12:08 PM]
09/01/2010	24 1 pg, 23.54 KB	Filed clerk order (Deputy Clerk:AMT):Citizens for Responsibility and Ethics in Washington's ("CREW") motion for leave to file an amicus brief and the proposed amicus brief are referred to the merits panel for consideration. Within seven days of the filing of this order, CREW is ordered to file seven copies of the brief in paper format, accompanied by certification that the documents are identical to the version submitted electronically. Any further motion to file amicus curiae briefs shall be treated in the same fashion. [7460102] [10-10088, 10-10122] (KKW) [Entered: 09/01/2010 01:48 PM]
09/03/2010	25	Received 7 paper copies of Amicus brief [21] filed by Citizens for Responsibility and Ethics in Washington. [7463403] [10-10088, 10-10122] (SD) [Entered: 09/03/2010 02:51 PM]
09/14/2010	26 1 pg, 47.02 KB	Filed (ECF) Appellant USA in 10-10122 citation of supplemental authorities. Date of service: 09/14/2010. [7472785] [10-10122, 10-10088] (Levchuk, Andrew) [Entered: 09/14/2010 10:13 AM]
09/17/2010	27 70 pg, 156.05 KB	Submitted (ECF) Third Brief on Cross-Appeal brief for review. Submitted by Appellant Richard G. Renzi in 10-10088, Appellee Richard G. Renzi in 10-10122. Date of service: 09/17/2010. [7478675] [10-10088, 10-10122] (Heberlig, Brian) [Entered: 09/17/2010 02:53 PM]
09/20/2010	28 2 pg, 84.45 KB	Filed clerk order: The third brief on cross-appeal [27] submitted by Richard G. Renzi in is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, with a yellow cover, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. [7479317] [10-10088, 10-10122] (GLS) [Entered: 09/20/2010 09:52 AM]
09/21/2010	29	Received 7 paper copies of Third Brief on Cross-Appeal [27] filed by Richard G. Renzi. [7482640] [10-10088, 10-10122] (SD) [Entered: 09/22/2010 08:39 AM]
09/30/2010	30 3 pg, 12 KB	Filed (ECF) Appellant USA in 10-10122 Unopposed Motion to extend time to file a reply until 10/08/2010. Date of service: 09/30/2010. [7493373] [10-10122, 10-10088] (Levchuk, Andrew) [Entered: 09/30/2010 05:46 PM]
10/05/2010	31 1 pg, 22.74 KB	Filed clerk order (Deputy Clerk:LKK): Appellant's motion for an extension of time to file the reply brief is granted. The reply brief is due October 8, 2010. [7496913] [10-10088, 10-10122] (BJB) [Entered: 10/05/2010 10:07 AM]
10/10/2010	32 13 pg, 28.37 KB	Submitted (ECF) Cross-Appeal Reply Brief brief for review. Submitted by Appellant USA in 10-10122. Date of service: 10/10/2010. [7503402] [10-10122, 10-10088]--[COURT UPDATE: replaced brief to include corrections to footnotes font size and resent notice. 10/14/2010 by MS] (Levchuk, Andrew) [Entered: 10/10/2010 06:19 PM]
10/15/2010	33 2 pg, 84.87 KB	Filed clerk order: The cross-appeal reply brief [32] submitted by USA is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, with a gray cover, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. [7509616] [10-10088, 10-10122] (GLS) [Entered: 10/15/2010 09:40 AM]
11/12/2010	34	Received 7 paper copies of Cross-Appeal Reply Brief [32] filed by USA [7545138] [10-10088, 10-10122] (SD) [Entered: 11/15/2010 10:43 AM]
01/04/2011	35 6 pg, 87.87 KB	Notice of Oral Argument on FEBRUARY Calendar. Please return ACKNOWLEDGMENT OF HEARING NOTICE form to: SAN FRANCISCO Office. Attention: The Notice of Docket Activity may not list your case

		number. Please open attached documents to view details about your case. [7599207] (JZ) [Entered: 01/04/2011 12:19 PM]
01/24/2011	36 1 pg, 26.53 KB	Filed (ECF) notice of appearance of Kerry W. Kircher for Amicus Curiae BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES in 10-10122, 10-10088. Date of service: 01/24/2011. [7621651] [10-10122, 10-10088] (Kircher, Kerry) [Entered: 01/24/2011 09:27 AM]
01/24/2011	37 1 pg, 26.47 KB	Filed (ECF) notice of appearance of Katherine E. McCarron for Amicus Curiae BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES in 10-10088, 10-10122. Date of service: 01/24/2011. [7621672] [10-10088, 10-10122] (McCarron, Katherine) [Entered: 01/24/2011 09:31 AM]
01/24/2011	38	Added attorney Katherine E. McCarron, Kerry William Kircher for BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES, in case 10-10122 Katherine E. McCarron, Kerry William Kircher for BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES, in case 10-10088. [7622093] [10-10088, 10-10122] (Turcios, Margoth) [Entered: 01/24/2011 11:14 AM]
01/24/2011	39 4 pg, 16.5 KB	Filed (ECF) Amicus Curiae BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES in 10-10088, 10-10122 Motion for miscellaneous relief [MOTION FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT]. Date of service: 01/24/2011. [7622168] [10-10088, 10-10122] (Kircher, Kerry) [Entered: 01/24/2011 11:31 AM]
01/31/2011	40	UPDATED CASE CALENDARED: 02/17/2011 9:00 AM San Francisco, CA Courtroom 2 [7631112] [07-71080, 10-10088, 10-10122] (AW) [Entered: 01/31/2011 04:53 PM]
01/31/2011	41 3 pg, 45.89 KB	revised Notice of Oral Argument on FEBRUARY 17 2011 SF Calendar. Please return ACKNOWLEDGMENT OF HEARING NOTICE form to: SAN FRANCISCO Office. Please open attached documents to view details about your case. [7631126] [10-10088, 10-10122] (AW) [Entered: 01/31/2011 05:15 PM]
02/01/2011	42 2 pg, 29.43 KB	Filed clerk order (Deputy Clerk:BJB): The unopposed motion of amicus curiae, the Bipartisan Legal Advisory Group of the U.S. House of Representatives, to participate in oral arguments is GRANTED. Amicus curiae will not be accorded any additional time but will be permitted as much time as Appellant/Cross-Appellee Richard G. Renzi relinquishes from his allotted time of twenty minutes. [7632639] [10-10088, 10-10122] (BJB) [Entered: 02/01/2011 03:32 PM]
02/17/2011	43	ARGUED AND SUBMITTED TO RICHARD C. TALLMAN, CONSUELO M. CALLAHAN and SUZANNE B. CONLON. [7652945] [10-10088, 10-10122] (Walker, Synitha) [Entered: 02/17/2011 02:28 PM]
06/23/2011	44 50 pg, 585.97 KB	FILED OPINION (RICHARD C. TALLMAN, CONSUELO M. CALLAHAN and SUZANNE B. CONLON) AFFIRMED IN PART; DISMISSED IN PART. Judge: RCT Authoring, FILED AND ENTERED JUDGMENT. [7794907] (RMM) [Entered: 06/23/2011 08:11 AM]
07/07/2011	45 70 pg, 184.21 KB	Filed (ECF) Appellant Richard G. Renzi in 10-10088, Appellee Richard G. Renzi in 10-10122 petition for rehearing en banc (from 06/23/2011 opinion). Date of service: 07/07/2011. [7811697] [10-10088, 10-10122] (Heberlig, Brian) [Entered: 07/07/2011 02:27 PM]
07/18/2011	46 37 pg, 417.28 KB	Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES in 10-10088, 10-10122. Date of service: 07/18/2011. [7824100] [10-10088, 10-10122] --[COURT UPDATE: Edited docket text to reflect the content of the filing. Resent NDA. 07/19/2011 by DB] (Kircher, Kerry) [Entered: 07/18/2011 04:05 PM]
07/19/2011	47	Entered appearance of Amicus Curiae BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES. [7824669] [10-10088, 10-10122] (LC) [Entered: 07/19/2011 10:17 AM]
07/19/2011	48	Terminated Amicus Curiae BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES in 10-10088 and Amicus Curiae BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES in 10-10122 [7824749] [10-10088, 10-10122] (LC) [Entered: 07/19/2011 10:39 AM]
07/19/2011	49	Added attorney Katherine E. McCarron for BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES [7824786] [10-10088, 10-10122] (LC) [Entered: 07/19/2011 10:45 AM]
08/01/2011	50 1 pg, 23.25 KB	Filed order (RICHARD C. TALLMAN, CONSUELO M. CALLAHAN and SUZANNE B. CONLON)The petition for rehearing en banc is DENIED. [7838350] [10-10088, 10-10122] (KKW) [Entered: 08/01/2011 09:49 AM]
08/05/2011	51 9 pg, 30.73 KB	Filed (ECF) Appellant Richard G. Renzi in 10-10088, Appellee Richard G. Renzi in 10-10122 Motion to stay the mandate. Date of service: 08/05/2011. [7845153] [10-10088, 10-10122] (Heberlig, Brian) [Entered: 08/05/2011 07:12 AM]
08/08/2011	52	Filed order (RICHARD C. TALLMAN) Defendant-Appellant's Motion to Stay the Mandate for 90 days

	1 pg, 21.72 KB	pending petition to the United States Supreme Court for a writ of certiorari is GRANTED. [7846944] [10-10088, 10-10122] (KKW) [Entered: 08/08/2011 10:18 AM]
11/03/2011	53 1 pg, 41.79 KB	Received notice from the Supreme Court: petition for certiorari filed on 10/31/2011. Supreme Court Number 11-557. [7953229] (RR) [Entered: 11/03/2011 12:40 PM]
11/03/2011	54 3 pg, 27.8 KB	Filed (ECF) Appellant Richard G. Renzi in 10-10088, Appellee Richard G. Renzi in 10-10122 Correspondence: Notice of filing of petition for certiorari.. Date of service: 11/03/2011 [7953437] [10-10088, 10-10122] (Heberlig, Brian) [Entered: 11/03/2011 02:11 PM]
01/19/2012	55 3 pg, 52.76 KB	The petition for writ of certiorrari was denied on 01/17/2012. Supreme Court Number 11-557. MANDATE ISSUED. [8036967] [10-10088, 10-10122] (RR) [Entered: 01/19/2012 11:09 AM]

DECLARATION OF COUNSEL

I, Devin Burstein, declare the following to be true.

1. I was retained to represent Congressman Hunter in this appeal, on July 19, 2019. That same day, I filed the Notice of Appeal from the district court's order denying Congressman Hunter's motion to dismiss under the Speech or Debate Clause. I am the only attorney representing Congressman Hunter on appeal.
2. There is no truth to the government's claim that this appeal has been taken for purposes of delay. To be clear, the purpose of this appeal is to vindicate Congressman Hunter's constitutional rights.
3. For the reasons below, I urge the Court to set this case on the normal course and deny the government's motion to expedite.
    a. As I informed the government before it filed its motion, my son was born on June 29, 2019. He is now only two months old. I also have a three-year old daughter. I am working a limited schedule so that I can bond with my new son, while supporting my wife and daughter.
    b. Responding to the government's motion in this case has taken the vast majority of my work time. I need to turn to other cases. To that end:
        i. I need to prepare for oral argument before this Court on September 10, 2019, in *United States v. Mathis*, No. 17-50215.

ii. I have an opening brief due to this Court on September 20, 2019, in *United States v. Clews*, No. 19-50205. My client is in custody.

iii. I have an opening brief due to this Court on September 25, 2019, in *United States v. Grimaldo,* No. 19-50101. My client is in custody.

iv. I will be out of the country for the last week of September.

v. I will have a reply brief due on a state-court habeas petition in October, in *People v. Ponce*, No. RIC 1903076. My client is in custody.

vi. I have a reply brief due to this Court on October 3, 2019, in *United States v. Aragon,* No. 18-50248. My client is in custody.

vii. I have an opening brief due to this Court on October 18, 2019, in *United States v. Peterson,* No. 19-10246. My client is in custody.

viii. I have oral argument scheduled before this Court on October 24, 2019, in *United States v. Galloway*, No. 18-10313.

ix. I will have a reply brief due to this Court later this year, in *United States v. Johnson*, No. 19-10044. My client is in custody.

x. I have oral argument scheduled before this Court on November 15, 2019, in *United States v. Wilson*, No. 18-50440. This case raises a complex Fourth Amendment issue of first impression with amicus

briefs from the ACLU, Google, Facebook, the Electronic Frontier Foundation (EFF) and the Electronic Privacy Center (EPIC). My client is in custody.

xi. I have numerous other district court and state court matters with pending deadlines. The vast majority of those clients are also in custody.

4. Given my family commitments and obligations to in-custody clients, I respectfully request the Court deny the government's motion to expedite. Otherwise, it will be nearly impossible to effectively represent Congressman Hunter.

Respectfully submitted,

s/ Devin Burstein

Dated: September 6, 2019

Warren & Burstein