No. 18-406

In the Supreme Court of the United States

AARON J. SCHOCK, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner is entitled to interlocutory review of his claim that the indictment should be dismissed on the theory that it references ambiguous regulations of the U.S. House of Representatives, and that such references would violate the Rulemaking Clause, U.S. Const. Art. I, § 5, Cl. 2.

2. Whether, assuming such an interlocutory appeal of his Rulemaking Clause claim would not otherwise be permitted, petitioner may nevertheless rely on the court of appeals' jurisdiction over a separate claim raised under the Speech or Debate Clause, U.S. Const. Art. I, § 6, Cl. 1, as the basis for appellate jurisdiction over both claims.

3. Whether the Speech or Debate Clause provides a Member of Congress with immunity from prosecution for submitting false or fraudulent claims for reimbursement to the House of Representatives.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 891 F.3d 334. The opinion of the district court (Pet. App. 13-65) is not published in the Federal Supplement but is available at 2017 WL 4780614.

JURISDICTION

The judgment of the court of appeals was entered on May 30, 2018 (Pet. App. 11-12). On August 21, 2018, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including September 27, 2018, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following his indictment for a variety of fraud-related charges in the United States District Court for the Central District of Illinois, petitioner moved to dismiss the

indictment. The court denied his motion to dismiss, and the court of appeals affirmed in part and dismissed the appeal in part. Pet. App. 1-10.

1. Petitioner represented Illinois's 18th Congressional District in the U.S. House of Representatives from 2009 until his resignation in March 2015. Pet. App. 1, 67. As alleged in the indictment, petitioner defrauded his campaign committees and the House of Representatives by repeatedly submitting false or fraudulent requests for reimbursement. *Id.* at 2.

a. The Federal Election Campaign Act of 1971 (Election Act), 52 U.S.C. 30101 *et seq.* (Supp. V 2017), applies to the election of candidates for federal office. The Election Act requires the campaign committee of a federal candidate to accurately report to the Federal Election Commission (FEC) certain donations and expenditures. See, *e.g.*, 52 U.S.C. 30104 (Supp. V 2017). The Election Act also prohibits candidates from converting campaign funds to "personal use." 52 U.S.C. 30114(b) (Supp. V 2017).

Federal law affords each Member of the House an "allowance," from a fund known as the Members' Representational Allowance (MRA), "to support the conduct of [his] official and representational duties." 2 U.S.C. 5341(a) (Supp. V 2017). The House Committee on Administration oversees the MRA and may "fix and adjust" the MRA's amounts, terms, and conditions. 2 U.S.C. 4313(a) (Supp. V 2017); see 2 U.S.C. 5341(d) (Supp. V 2017). Regulations for the proper use of MRA funds are set forth in the Member's Congressional Handbook. C.A. App. 23, 88-126. The Handbook provides that "[o]nly expenses the primary purpose of which [is] official and representational and which are in-

curred in accordance with the Handbook are reimbursable." *Id.* at 92. In order to obtain disbursements from the MRA, a member must submit a voucher to the Office of Finance, which is part of the Chief Administrative Office of the House. *Id.* at 26, 123, 221, 231-239. The member must sign the voucher, "certifying that the expense was incurred in support of the Member's official and representational duties." *Id.* at 123.

b. The indictment alleges that petitioner personally obtained large sums of money by submitting numerous false and fraudulent claims for reimbursement. Pet. App. 66-108. It alleges, for instance, that petitioner purchased a Chevrolet Tahoe in 2009 for about $56,000 and directed his staff members "to cause his mileage reimbursement[]" requests to the House of Representatives "to average approximately $1,200 per month, which was enough to cover his car payment, but to vary it each month so as to not make it 'obvious.'" *Id.* at 76-77. The indictment alleges that, between 2008 and 2014, petitioner "caused the House and his [campaign] Committees to reimburse him for approximately 150,000 miles more than the vehicles for which he sought reimbursement were actually driven." *Id.* at 78. The indictment further alleges that petitioner traded in the previous Tahoe in 2014 and purchased a new Tahoe with campaign committee funds, yet caused the new Tahoe to be titled in his own name, concealing the purchase by describing the $73,896 cost in his FEC filings as a "transportation expense." *Id.* at 88. According to the indictment, petitioner "made no effort to reimburse [his committee] for any personal use of the 2015 Tahoe, as required by the FEC." *Id.* at 78. Instead, despite the fact that he had no "personal vehicle that he had actually paid for," petitioner submitted mileage claims of

$18,354 to his committees and $2368 to the House. *Id.* at 88.

The indictment additionally alleges a variety of other fraudulent conduct, such as purchasing approximately $29,000 of camera equipment, then instructing his staff to fabricate and submit a "false invoice" for submission to the House representing that the expense was for web development, web hosting, and email-related services. Pet. App. 79-80. The indictment also alleges that petitioner billed the House $25,000 for the redecoration and refurnishing of his Washington, D.C., offices—including the purchase of a $5000 chandelier—even though the purchase of such furniture is not reimbursable by the MRA, which limits reimbursement for decorations to those of "nominal value." *Id.* at 88-89. After the office redecoration came to light, petitioner met with House officials and acknowledged that the expenses were "personal," asking if House payments to the decorator would be publicly disclosed if he reimbursed the House. *Id.* at 90.

2. In November 2016, a grand jury charged petitioner with nine counts of wire fraud, in violation 18 U.S.C. 1343; one count of mail fraud, in violation of 18 U.S.C. 1341; one count of theft of government funds, in violation of 18 U.S.C. 641; two counts of making false statements, in violation of 18 U.S.C. 1001; five counts of making false filings with the FEC, in violation of 18 U.S.C. 1519; and six counts of filing false tax returns, in violation of 26 U.S.C. 7206. Pet. App. 1-2, 66-108. Petitioner moved to dismiss the indictment, arguing that the charges against him were barred by the Speech or Debate Clause, U.S. Const. Art. I, § 6, Cl. 1, and by the Rulemaking Clause, *id.* § 5, Cl. 2, which authorizes each house of Congress to "determine the Rules of its Proceedings."

See Pet. App. 3. In support of his Rulemaking Clause claim, petitioner relied on *United States* v. *Rostenkowski*, 59 F.3d 1291 (D.C. Cir. 1995), which held that "a sufficiently ambiguous House Rule is non-justiciable," *id.* at 1306.

The district court denied in part and granted in part the motion to dismiss. Pet. App. 13-65. The court assumed, consistent with *Rostenkowski*, that the Rulemaking Clause prohibits courts from interpreting ambiguous House regulations relating to member reimbursement. *Id.* at 18-19. But the court determined that, even on that assumption, most of the counts of the indictment that implicated House regulations were not subject to dismissal, because the government needed only to "prove that [petitioner] submitted false claims in an effort to obtain money," which could "conceivably be accomplished without any reliance on House Rules." *Id.* at 22; see *id.* at 20-30, 38-44. The court did, however, dismiss one count (Count 9), which alleged that petitioner retained fees that his constituents paid for "DC Fly-In" events, in violation of House ethics rules. *Id.* at 30; see *id.* at 30-38. The court reasoned that "the Government must rely on House Rules" to prove that count, *id.* at 34, and it concluded that the referenced rules were ambiguous, *id.* at 36.[*]

The district court also rejected petitioner's reliance on the Speech or Debate Clause. Pet. App. 44-49. The court explained that the Clause was inapplicable because the indictment did not allege that petitioner's

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[*] The government did not appeal from the dismissal of Count 9, or from the district court's dismissal of another count on grounds not relevant here. See Pet. App. 61-64 (rejecting Count 11 as "duplicitous").

criminal acts involved "mak[ing] or enforc[ing] congressional rules," observing that petitioner's "conduct, as charged in the Indictment, would be better characterized as rule-breaking, not rulemaking." *Id.* at 47. The court also rejected petitioner's argument that a criminal trial would require the government to rely on "evidence related to his speech regarding his understanding of House Rules." *Id.* at 46. The court explained that such evidence "is not necessary" here. *Id.* at 48. For the same reasons that most of the charges against petitioner can be adjudicated without relying on ambiguous House rules regarding reimbursement, the court held, "the Government need not establish the appropriateness of the House disbursements at issue" in order to prove the charged crimes. *Ibid.*

3. Petitioner filed an interlocutory appeal. The court of appeals affirmed in part and dismissed the appeal in part. Pet. App. 1-10.

The court of appeals recognized that, under this Court's precedent, appellate jurisdiction exists over the pretrial denial of petitioner's Speech or Debate Clause claim, as that clause provides an "immunity from litigation." Pet. App. 2 (citing *Helstoski* v. *Meanor*, 442 U.S. 500 (1979)). But the court of appeals rejected petitioner's claim on the merits because "the indictment arises out of applications for reimbursements, which are not speeches, debates, or any other part of the legislative process." *Ibid.* The court observed that "[c]harges of the kind brought against [petitioner] have featured in criminal prosecutions of other legislators, and Speech-or-Debate defenses to those charges have failed." *Id.* at 3 (citing *Rostenkowski*, 59 F.3d at 1302-1303; *United States* v. *Biaggi*, 853 F.2d 89, 104 (2d Cir. 1988), cert. denied, 489 U.S. 1052 (1989); and *United States* v.

James, 888 F.3d 42 (3d Cir. 2018)); see *ibid.* ("We have nothing to add to the analysis in those decisions.")

Next, the court of appeals determined that it lacked jurisdiction over petitioner's Rulemaking Clause claim. Pet. App. 3-10. The court rejected petitioner's argument that it could assert jurisdiction under the collateral-order doctrine recognized in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (2015). Pet. App. 7-9. The court of appeals observed that this Court has "interpreted the collateral order exception with the utmost strictness in criminal cases," *id.* at 8 (quoting *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794, 799 (1989)), and has limited the right to an interlocutory appeal in such cases to "litigants who have a personal immunity" from prosecution or trial, *id.* at 5. Applying that principle, the court of appeals found that it lacked interlocutory appellate jurisdiction over petitioner's Rulemaking Clause claim, explaining that "[n]either the separation of powers generally, nor the Rulemaking Clause in particular, establishes a personal immunity from prosecution or trial." *Ibid.*; see *id.* at 9 ("Arguments about the allocation of authority among different branches of government do not entail * * * personal rights.").

The court of appeals acknowledged that some other circuits had "concluded that criminal defendants may take interlocutory appeals to make arguments about the separation of powers." Pet. App. 4-5. But it determined that those decisions—most of which preceded this Court's decision in *Midland Asphalt Corp.* v. *United States*, *supra*—either failed to address relevant decisions from this Court, Pet. App. 7, or else involved the very different question whether federal judges had "personal immunity from prosecution," *ibid.*; see *id.* at 9

(noting that, in light of the perceived circuit conflict, the court of appeals' decision was circulated "to all judges in active service," but "[n]one favored a hearing en banc").

Finally, the court of appeals rejected petitioner's argument that, because the court had jurisdiction over his Speech or Debate Clause claims, it should "address his other arguments under the rubric of 'pendent appellate jurisdiction.'" Pet. App. 10. The court explained that, even assuming the pendant appellate jurisdiction doctrine survived *Swint* v. *Chambers County Commission*, 514 U.S. 35 (1995), it is "limited to compelling situations in civil cases." Pet. App. 10. The court observed that, in *Abney* v. *United States*, 431 U.S. 651, 662-663 (1977), this Court held that "legal defenses other than personal immunities could not be added to interlocutory criminal appeals," a principle that "effectively foreclosed [the doctrine's] use in criminal prosecutions." Pet. App. 10.

ARGUMENT

Petitioner contends (Pet. 16-22, 25-28) that the court of appeals erred in determining that it lacked appellate jurisdiction over his Rulemaking Clause claim, arguing that the court had jurisdiction both under the collateral-order doctrine and as a matter of pendent appellate jurisdiction. The decision below is correct, and any conflict with decisions from other circuits is narrow and does not warrant this Court's review.

Petitioner also contends (Pet. 28-33) that this Court should grant review to determine whether the Speech or Debate Clause provides immunity for conduct such as his. The court of appeals correctly rejected his argument on the merits, and its decision is consistent with this Court's decisions and those of other circuits. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly determined that petitioner was not entitled to interlocutory appellate review of his Rulemaking Clause claim, and that issue does not warrant this Court's review.

a. "'Federal courts are courts of limited jurisdiction,' possessing 'only that power authorized by Constitution and statute.'" *Gunn* v. *Minton*, 568 U.S. 251, 256 (2013) (quoting *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). Under 28 U.S.C. 1291, the courts of appeals have jurisdiction to review "final decisions of the district courts." The statute accordingly imposes a final-judgment rule, which "requires that a party must ordinarily raise all claims of error in a single appeal following final judgment on the merits." *Flanagan* v. *United States*, 465 U.S. 259, 263 (1984) (citation and internal quotation marks omitted). "In a criminal case the rule prohibits appellate review until conviction and imposition of sentence." *Ibid.*

The collateral-order doctrine, however, provides a limited exception to that rule. See *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 467-468 (1978) (citing *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)). To fall within the "small class" of immediately appealable collateral orders, a decision must "(1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment." *Van Cauwenberghe* v. *Biard*, 486 U.S. 517, 522 (1988) (citations and internal quotation marks omitted).

Because "the reasons for the final judgment rule are especially compelling in the administration of criminal justice," this Court has "interpreted the requirements of the collateral-order exception to the final judgment

rule with the utmost strictness in criminal cases." *Flanagan*, 465 U.S. at 264-265 (citation and internal quotation marks omitted); see *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794, 799 (1989). The Court has thus permitted appeal of the denial of a motion to dismiss an indictment under only two circumstances: where the motion was based on the Double Jeopardy Clause, *Abney* v. *United States*, 431 U.S. 651, 660-662 (1977), or on the Speech or Debate Clause, *Helstoski* v. *Meanor*, 442 U.S. 500, 506-507 (1979).

Interlocutory appeal is appropriate in those circumstances, the Court has explained, because the right being invoked is an "immunity from prosecution." *Midland Asphalt*, 489 U.S. at 801 (citation omitted). In permitting such appeals, the Court has emphasized the "crucial distinction between a right not to be tried and a right whose remedy requires the dismissal of charges." *Ibid.* (citation omitted). And it has repeatedly held that orders denying motions to dismiss on non-immunity grounds—including other constitutional grounds—are not immediately appealable collateral orders. See, *e.g.*, *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 270 (1982) (per curiam) (denial of motion to dismiss based on alleged prosecutorial vindictiveness); *United States* v. *MacDonald*, 435 U.S. 850, 863 (1978) (denial of motion to dismiss based on Sixth Amendment speedy trial right).

Applying this Court's legal framework, the court of appeals correctly determined that the collateral-order doctrine does not authorize interlocutory review of petitioner's Rulemaking Clause claim. Unlike the Speech or Debate Clause, which affords an express immunity against civil or criminal proceedings (by providing that a Member of Congress "shall not be questioned in any other Place" for "any Speech or Debate in either

House" of Congress, U.S. Const. Art. I, § 6, Cl. 1), the Rulemaking Clause merely allocates to "[e]ach House" the authority to "determine the Rules of its Proceedings," *id.* § 5, Cl. 2. In authorizing each House to "determine" its own rules, *ibid.*, the Rulemaking Clause does not confer on federal legislators any "right not to be tried," *Midland Asphalt*, 489 U.S. at 801 (citation omitted). Nor does it suggest that such legislators are immune from prosecution for violating federal statutes, merely because congressional rules may be relevant at trial.

b. Petitioner nevertheless asserts (Pet. 16-17) that he has raised a "Rulemaking Clause claim of immunity," which must be addressed before trial to fully vindicate his rights. He argues (Pet. 17-18) that he has "plausibly" alleged that the charges against him cannot be resolved without interpreting "ambiguous" rules of the House of Representatives; that interpretation of such rules "is nonjusticiable by any court under *Baker v. Carr*, 369 U.S. 186, 217 (1962)"; and that allowing the charges against him to proceed would "pose[ ] a severe threat to the autonomy of the legislative branch." Those assertions are unsound.

As a threshold matter, even if petitioner's nonjusticiability argument were correct, however, it would not provide a basis for authorizing an interlocutory appeal from the denial of his Rulemaking Clause claim. Petitioner's argument cannot be reconciled with the "crucial distinction" this Court has drawn "between a right not to be tried and a right whose remedy requires the dismissal of charges." *Midland Asphalt*, 489 U.S. at 801 (quoting *Hollywood Motor Car*, 458 U.S. at 269). "A right not to be charged in the sense relevant to the

Cohen exception rests upon an explicit statutory or constitutional guarantee that trial will not occur—as in the Double Jeopardy Clause * * * or the Speech or Debate Clause," both of which include express textual prohibitions against imposing legal consequences under certain circumstances. *Ibid.* The Rulemaking Clause, by contrast, merely authorizes each House of Congress to set its own rules. It does not speak of legal consequences, or of shielding any person from such consequences, let alone promise immunity from prosecution. Even if petitioner were correct that the Rulemaking Clause forbids a court from interpreting ambiguous House rules, therefore, it does not follow that the Clause confers on legislators an immunity from standing trial, of the sort that would necessitate an interlocutory appeal. As the court of appeals noted, "[i]f [petitioner] is convicted, he may assert his Rulemaking Clause arguments on appeal from the final decision." Pet. App. 10.

In any event, petitioner is incorrect that courts are forbidden under the political question doctrine from interpreting ambiguous House rules during the course of legal proceedings. "It has been long settled * * * that rules of Congress and its committees are judicially cognizable," *Yellin* v. *United States*, 374 U.S. 109, 114 (1963), and this Court has itself interpreted and applied such rules when necessary. In *United States* v. *Smith*, 286 U.S. 6 (1932), for example, the Court interpreted the Senate's procedural rules regarding reconsideration of a confirmation vote in a manner that directly conflicted with the Senate's own interpretation. See *id.* at 33. The Court explained that, although it is "not the function of the Court to say that another rule would be better," the question of the "*construction* to be given to

the rules affects persons other than members of the Senate" and is therefore "of necessity a judicial one." *Id.* at 33, 48 (emphasis added); see, *e.g.*, *Christoffel* v. *United States*, 338 U.S. 84, 88-89 (1949) (reversing conviction for perjury before a House committee where the defendant was not allowed to show that the committee failed to follow its own rules regarding a quorum); see also *Yellin*, 374 U.S. at 114-124 (reversing conviction for refusing to answer a House committee's questions where the committee did not abide by its own rules regarding non-public hearings).

Therefore, although the Rulemaking Clause evidences a "textually demonstrable constitutional commitment" to the House and Senate of the power to *make* rules, *Baker* v. *Carr*, 369 U.S. 186, 217 (1962), the Clause says nothing about the authority to interpret those rules. In a related context, this Court has recognized that courts may construe both treaties and executive proclamations involving foreign affairs, even when those "proclamations fall short of an explicit answer." *Id.* at 212. "[A]nd it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts," *Japan Whaling Ass'n* v. *American Cetacean Soc'y*, 478 U.S. 221, 230 (1986), even though Article I vests Congress with "[a]ll legislative Powers," U.S. Const. Art. I, § 1. Thus, even though the making of legislation, treaties, and executive proclamations is textually committed to the other Branches, courts may interpret them. It follows that the Rulemaking Clause's grant of authority to each House to make its own rules likewise does not foreclose judicial interpretation or otherwise suggest that only the enacting House itself may interpret those rules.

Nor does any ambiguity in a House rule suggest the absence of "'judicially discoverable and manageable standards for resolving' those ambiguities." Pet. 17 (quoting, *inter alia*, *Baker*, 369 U.S. at 217). Interpreting ambiguous language is a core part of the judicial function. See *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 566 U.S. 189, 196 (2012) (noting, in the context of the political question doctrine, that deciding whether a certain "interpretation of the statute is correct" is a "familiar judicial exercise"). And interpretation of already-enacted rules does not "require the court to make 'an initial policy determination of a kind clearly for nonjudicial discretion.'" Pet. 17 (quoting, *inter alia*, *Baker*, 369 U.S. at 217). The "question of what change, if any, should be made in the existing law is one of legislative policy," but courts properly may engage in the "more limited" task "of interpreting the law as it now stands." *Sinclair Ref. Co.* v. *Atkinson*, 370 U.S. 195, 214-215 (1962). A court engaging in that familiar interpretive task is in no sense "rewriting the rules for the legislative branch's own proceedings," Pet. 18; see Pet. 17, 20, nor does a court's interpretation bind the chamber that enacted the rule in its own internal proceedings. Cf. *Rivers* v. *Roadway Exp., Inc.*, 511 U.S. 298, 313 (1994) ("Congress, of course, has the power to amend a statute that it believes we have misconstrued.").

c. Petitioner contends that review is warranted to resolve an "acknowledged conflict" in the courts of appeals regarding whether appeal under the collateral-order doctrine may be permitted when a pretrial motion to dismiss based on the separation of powers is denied. Pet. 12 (emphasis omitted). But petitioner substantially overstates the degree of disagreement. The decision below does conflict with *United States* v. *Rostenkowski*,

59 F.3d 1291 (D.C. Cir. 1995), which permitted a defendant to pursue an interlocutory appeal from the denial of a motion to dismiss based on the Rulemaking Clause. *Id.* at 1296-1297; see *United States* v. *Durenberger*, 48 F.3d 1239, 1242 (D.C. Cir. 1995) (finding jurisdiction but rejecting the claim on the merits); *United States* v. *Rose*, 28 F.3d 181, 185-186 (D.C. Cir. 1994) (recognizing "claims of immunity based on the separation of powers doctrine as an additional exception to the general rule against interlocutory appeals").

The other decisions cited by petitioner (Pet. 14-15) do not directly conflict with the decision below. Two of those decisions addressed claims of judicial immunity. See *United States* v. *Claiborne*, 727 F.2d 842, 844-845 (9th Cir.) (per curiam), cert. denied, 469 U.S. 829 (1984); *United States* v. *Hastings*, 681 F.2d 706, 708-709 (11th Cir. 1982), cert. denied, 459 U.S. 1203 (1983). As the court of appeals explained below, such claims of immunity like those "fit the mold" of this Court's collateral-order cases in a way that a Rulemaking Clause claim does not. Pet. App. 7. The remaining case cited by petitioner, *United States* v. *Myers*, 635 F.2d 932 (2d Cir.), cert. denied, 449 U.S. 956 (1980), did not involve a claim under the Rulemaking Clause. Instead, the defendant there, a member of Congress, argued that his alleged acceptance of a bribe could only be addressed by the House under its authority to "punish its Members for disorderly Behaviour," U.S. Const. Art. I, § 5, Cl. 2. See *Myers*, 635 F.2d at 935. The Second Circuit found such a claim to be appealable under the collateral-order doctrine. *Id.* at 935-936. The claim at issue in *Myers*, which rested on constitutional language regarding who may "punish" certain misconduct, is closer to the assertion of immunity than petitioner's argument about who may

interpret ambiguous House rules under the Rulemaking Clause.

In any event, *Claiborne*, *Hastings*, and *Myers* all preceded *Midland Asphalt*, which made clear that, to fall within "the *Cohen* exception," a criminal defendant's claim must "rest[] upon an explicit statutory or constitutional guarantee that trial will not occur." 489 U.S. at 801. And the shallow conflict between the court below and the D.C. Circuit—the only two courts of appeals to address whether the collateral-order doctrine applies to a claim under the Rulemaking Clause, or to issue relevant rulings in the 30 years following *Midland Asphalt*—does not warrant this Court's intervention in this case.

d. This case would be a poor vehicle to determine whether an interlocutory appeal must be permitted for a claim based on the Rulemaking Clause, for several reasons.

First, as the government explained below, see Gov't C.A. Br. 36, the instructions in the Members' Congressional Handbook for obtaining reimbursement from the MRA are not properly considered "Rules of Proceedings" within the meaning of the Rulemaking Clause. The Member's Handbook was adopted pursuant to a federal statute, 2 U.S.C. 5341(a) (Supp. V 2017), which itself was enacted through the normal legislative process (*i.e.*, bicameralism and presentment). See House of Representatives Administrative Reform Technical Corrections Act, Pub. L. No. 104-186, § 101, 110 Stat. 1719. Any instructions in the Handbook are thus equivalent to regulations adopted by the Executive Branch pursuant to statutory authority. Although courts often interpret such regulations with deference to the promulgating agency's interpretation, see *Auer* v. *Robbins*,

519 U.S. 452, 461 (1997), no dispute exists that they are justiciable.

Second, the particular Handbook regulations at issue here are not ambiguous as applied to petitioner's alleged conduct. Even under the D.C. Circuit's decision in *Rostenkowski*, an indictment would be dismissed only if the defendant shows that "the trial court will be required to interpret ambiguous House Rules." 59 F.3d at 1307. There, the D.C. Circuit found the House rules to be ambiguous regarding whether certain functions performed by the defendant's congressional staff were reimbursable because they related to his "official" duties. *Id.* at 1309-1312. The court determined that services such as "mounting souvenirs on plaques," "picking up [the congressman's] laundry," and "driving his family members around Washington" were not clearly personal, and thus concluded that the indictment's allegations referencing those services were non-justiciable. *Id.* at 1310. But the court determined that the defendant's other alleged conduct—such as using House funds to purchase gifts, using House employees to "engrav[e] gifts items," submitting postage stamp vouchers in return for cash, "purchas[ing] a vehicle (titled in his name) with funds authorized for leasing a vehicle," and using House funds to store a personal vehicle—were impermissible "under any reasonable interpretation of the House Rules" and could therefore be prosecuted. *Id.* at 1310-1312.

Although petitioner sought below to identify various ambiguities in the House regulations, see Pet. C.A. Br. 28-40, he failed to demonstrate that the regulations were ambiguous as applied to the core conduct charged in the indictment, see Gov't C.A. Br. 43-54. The indict-

ment alleges that petitioner based his mileage reimbursement claims on the size of his monthly car payment; that he billed the House for 150,000 miles more than he actually traveled; that he sought reimbursement for $25,000 in redecorating and refurnishing expenses for his Washington, D.C., office and, knowing that reimbursement is not permitted for furniture or for decorations of more than "nominal value," falsely described the purpose of those expenditures; and that he billed the House approximately $29,000 for camera equipment, falsely indicating that the expense was for web development, web hosting, and email-related services. See pp. 3-4, *supra*. That conduct would not be permissible under any reasonable interpretation of the regulations in the Member's Handbook. See Pet. App. 68 (MRA disbursements must be used "to perform and support [members'] official and representational duties"); *id.* at 70 (MRA disbursements may not "directly benefit" House members); *id.* at 71 ("[E]ach Member must provide a certification as to the accuracy of the charge.").

Third, even if the relevant MRA regulations were ambiguous, the district court's decision in this case rests on the premise that it will not, in fact, be "required to interpret" them. *Rostenkowski*, 59 F.3d at 1307. The regulations do not provide the standard of criminal liability; they merely provide relevant evidence of the materiality of petitioner's statements and his intent to defraud. See *id.* at 1305. Thus, even though the district court *agreed* with petitioner that "a House Rule that is sufficiently ambiguous is nonjusticiable," Pet. App. 19, the court determined that the remaining counts of the indictment can be proven at trial "without any reliance on the House Rules," *id.* at 22. The court stated, for

instance, that "[t]he Government can prove that the mileage claims submitted by [petitioner] were false simply by establishing the amount of mileage claimed by [petitioner] and then producing evidence that the mileage claims were not truthful." *Ibid.* In requesting an interlocutory appeal here, petitioner is asking for review of a district court decision that adopted the very legal standard he advocates, on the theory that it misapplied the standard to the facts of his case. To the extent his request for interlocutory appellate review rests on a disagreement with the district court about how the trial is likely to proceed, that would provide yet a further reason why pretrial appellate review is inappropriate in the circumstances of this case.

2. a. Petitioner also contends (Pet. 22-25) that this Court should review whether, if the collateral-order doctrine does not apply, the court of appeals should nevertheless have exercised pendent appellate jurisdiction over his Rulemaking Clause claim. That contention likewise does not warrant this Court's review.

a. This Court has recognized that, in narrow circumstances, it would be proper for "a court of appeals, with jurisdiction over one ruling, to review, conjunctively, related rulings that are not themselves independently appealable." *Swint* v. *Chambers Cnty. Comm'n*, 514 U.S. 35, 50-51 (1995); see *Clinton* v. *Jones*, 520 U.S. 681, 707 n.41 (1997) (approving doctrine). The doctrine of pendant appellate jurisdiction, where it applies, permits review only where an appealable decision is so "inextricably intertwined" with an otherwise non-appealable decision that "review of the latter decision is necessary to ensure meaningful review of the former." *Clinton*, 520 U.S. at 707 n.41 (quoting *Swint*, 514 U.S. at 51) (brackets omitted).

However, as the decision below properly observed, Pet. App. 9-10, a court of appeals may not assume pendent jurisdiction over an appeal from an order denying a motion to dismiss a criminal indictment. In *Abney*, this Court permitted a defendant to "seek immediate appellate review of a district court's rejection of his double jeopardy claim" based on "special considerations" specific to the Double Jeopardy Clause. 431 U.S. at 663. But the Court further explained:

> Quite obviously, such considerations do not extend beyond the claim of former jeopardy and encompass other claims presented to, and rejected by, the district court in passing on the accused's motion to dismiss. Rather, such claims are appealable if, and only if, they too fall within *Cohen*'s collateral-order exception to the final-judgment rule. Any other rule would encourage criminal defendants to seek review of, or assert, frivolous double jeopardy claims in order to bring more serious, but otherwise nonappealable questions to the attention of the courts of appeals prior to conviction and sentence.

Ibid. The Court accordingly rejected the defendant's attempt to appeal, alongside his double jeopardy claim, the district court's ruling as to the sufficiency of the indictment. *Ibid.*; see *MacDonald*, 435 U.S. at 857 n.6 ("The argument that respondent's Sixth Amendment [speedy trial] claim was 'pendent' to his double jeopardy claim is vitiated by *Abney* v. *United States*.").

Petitioner argues (Pet. 25) that this Court's more-recent decision in *Swint* indicates that *Abney* is "best read only as foreclosing any sort of automatic piggybacking" and also (Pet. 27) that "[t]he criteria set forth in *Swint* adequately guard against overly expansive appellate jurisdiction." But *Swint* involved a civil suit for

damages, 514 U.S. at 37, and did not address the possibility of pendant appellate jurisdiction in the criminal context. This Court "ha[s] interpreted the collateral order exception with the utmost strictness in criminal cases," *Midland Asphalt*, 489 U.S. at 799 (citation and internal quotation marks omitted), and all the reasons "for a strict application of the collateral-order doctrine in criminal cases apply equally well to a request that [a court of appeals should] entertain pendant appellate jurisdiction." Pet. App. 10.

b. Petitioner argues (Pet. 23) that this Court's review is necessary to resolve a "split" regarding whether courts of appeals may exercise pendent appellate jurisdiction in criminal cases. In addition to the court below, a number of circuits have concluded, based on *Abney*, that "there is no pendent appellate jurisdiction in criminal cases." *United States* v. *Ferguson*, 246 F.3d 129, 138 (2d Cir. 2001); see, *e.g.*, *United States* v. *Wittig*, 575 F.3d 1085, 1095 (10th Cir. 2009) (concluding that "we have no 'pendent' appellate jurisdiction" in an appeal based on the double jeopardy clause); *United States* v. *Hsia*, 176 F.3d 517, 526 (D.C. Cir. 1999), cert. denied, 528 U.S. 1136 (2000). In *United States* v. *Lopez-Lukis*, 102 F.3d 1164 (1997), the Eleventh Circuit determined that its power to review a district court order suppressing evidence, made appealable by 18 U.S.C. 3731 (1994), gave it authority to review an order striking part of the indictment that was "closely related to [the] exclusion of the Government's evidence," 102 F.3d at 1167 n.10. But the Eleventh Circuit's determination that it had statutory jurisdiction under Section 3731's interlocutory-review authority does not indicate that the court would necessarily expand the collateral-order doctrine through

the exercise of pendant appellate jurisdiction in a case like this. See *ibid.*

And in *United States* v. *Menendez*, 831 F.3d 155 (2016), cert. denied, 137 S. Ct. 1332 (2017), the Third Circuit stated (without explanation) that it had pendant appellate jurisdiction to review the defendant's separation-of-powers claim alongside his Speech or Debate Clause claim, *id.* at 164. Any conflict with *Menendez* does not warrant this Court's intervention. The decision neither discussed *Abney* nor considered whether pendent appellate jurisdiction is available in the criminal context in particular. Indeed, petitioner has identified no court of appeals decision that has embraced his argument (Pet. 26) that *Swint* can be interpreted merely as "the natural result of an extension of *Abney*."

c. Even if pendent appellate jurisdiction does apply in criminal cases, moreover, petitioner's Rulemaking Clause claim would not satisfy that doctrine's stringent requirements for review. The claim is not "inextricably intertwined" with petitioner's Speech or Debate Clause claim, nor is review of the former "necessary to ensure meaningful review" of the latter. *Jones*, 520 U.S. at 707 n.41 (citation omitted). An appellate court could readily decide whether petitioner's alleged actions in submitting false or fraudulent vouchers were or were not "legislative acts," protected by the Speech or Debate Clause, without also resolving whether the Rulemaking Clause prohibits a court from interpreting ambiguous congressional rules. Indeed, the court below was able to consider and reject petitioner's Speech or Debate Clause claim, Pet. App. 2-3, without resolving his Rulemaking Clause claim, *id.* at 4. If this Court were inclined to consider the availability of pendant appellate

jurisdiction in criminal cases, it should do so in a case in which the doctrine's requirements would actually be met.

3. Finally, petitioner contends (Pet. 28-33) that the Speech or Debate Clause precludes his prosecution for fraud and other federal charges. Petitioner is incorrect, and no conflict on this issue exists among the courts of appeals.

a. The Speech or Debate Clause provides that, "for any Speech or Debate in either House," Senators and Representatives "shall not be questioned in any other Place." U.S. Const. Art. I, § 6, Cl. 1. The Clause strikes a balance, providing protection "broad enough to insure the historic independence of the Legislative Branch, essential to our separation of powers, but narrow enough to guard against the excesses of those who would corrupt the process by corrupting its Members." *United States* v. *Brewster*, 408 U.S. 501, 525 (1972). As this Court has explained, the clause "does not purport to confer a general exemption upon Members of Congress from liability or process in criminal cases." *Gravel* v. *United States*, 408 U.S. 606, 626 (1972). Although it shields the legitimate prerogatives of the Legislative Branch, it does not go so far as to "make Members of Congress super-citizens, immune from criminal responsibility." *Brewster*, 408 U.S. at 516.

Consistent with its text, "[t]he heart of the Clause is speech or debate in either House." *Gravel*, 408 U.S. at 625. This Court has also extended the Clause's protection beyond its literal terms to include acts "generally done in a session of the House by one of its members in relation to the business before it," such as voting, issuing committee reports, and participating in committee hearings. *Id.* at 624 (quoting *Kilbourn* v. *Thompson*, 103 U.S. 168, 204 (1880)). "The gloss going beyond a

strictly literal reading of the Clause has not, however, departed from the objective of protecting only *legislative activities*." *Hutchinson* v. *Proxmire*, 443 U.S. 111, 125 (1979) (emphasis added). The Clause thus reaches only acts that are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel*, 408 U.S. at 625. As a result, "the courts have extended the privilege to matters beyond pure speech or debate in either House, but only when necessary to prevent indirect impairment of such deliberations." *Ibid.* (citation and internal quotation marks omitted). The Clause "does not prohibit inquiry into activities that are casually or incidentally related to legislative affairs but not a part of the legislative process itself." *Brewster*, 408 U.S. at 528.

The court of appeals correctly determined that the indictment here does not charge petitioner with any conduct protected by the Speech or Debate Clause. Petitioner is accused of "presenting false claims" for reimbursement, and of conducting fraudulent schemes in support of those claims. Pet. App. 3. Such behavior cannot plausibly be described as "legislative activit[y]," *Hutchinson*, 443 U.S. at 125, or as an "integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings," *Gravel*, 408 U.S. at 625. Nor, contrary to petitioner's argument (Pet. 30), is he immune from prosecution under the indictment because it references "communications between [petitioner] and his aides about the scope and application of [the] relevant House rules."

In directing his subordinates to falsify documents, petitioner was not exercising any part of the House's constitutional "power to make rules" for itself. Pet. 31 (citation omitted); see Pet. App. 47 ("[Petitioner] is not alleged to have engaged in any conduct related to the 'execution of internal rules.' In fact, the Indictment does not allege any facts in which [petitioner], or anyone else, was acting within their authority or the authority of Congress to make or enforce congressional rules.").

b. As the court of appeals noted, "[c]harges of the kind brought against [petitioner] have featured in criminal prosecutions of other legislators, and Speech-or-Debate defenses to those charges have failed." Pet. App. 3; see, *e.g.*, *Menendez*, 831 F.3d at 175 (filing false disclosures, in violation of Ethics in Government Act and 18 U.S.C. 1001, "is not a legislative act"); *Myers*, 692 F.2d at 849 (similar); see also *Rostenkowski*, 59 F.3d at 1303 (fraudulent reimbursement of congressional staff not protected by Clause); *Durenberger*, 48 F.3d at 1244-1247 (similar); *United States* v. *Diggs*, 613 F.2d 988, 994-999 (D.C. Cir. 1979) (similar), cert. denied, 446 U.S. 982 (1980); cf. *United States* v. *James*, 888 F.3d 42, 46-47 (3d Cir. 2018) (statute providing immunity for legislators of the Virgin Islands did not protect retaining legislative funds for personal use or submitting false invoices). Petitioner has not pointed to any decision that has accepted his expansive view of the Speech or Debate Clause or that conflicts with the decision below. Nor has petitioner identified a sound reason for this Court to grant certiorari, in the absence of a circuit conflict, to review the determination of both courts below that the specific allegations of his particular indictment do not involve activity protected by the Speech or Debate Clause.

c. Moreover, even if the Speech or Debate Clause applied to petitioner's communications about the meaning of House rules, the remedy would be to exclude those communications from evidence at trial, not to dismiss the indictment. Where it applies, the Clause affords three protections. First, it grants civil and criminal immunity for "actions within the 'legislative sphere.'" *Doe* v. *McMillan*, 412 U.S. 306, 312 (1973) (citation omitted). Second, it provides a testimonial privilege for legislative activities, ensuring that members "may not be made to answer" for their legislative acts. *Gravel*, 408 U.S. at 616. Third, it ensures that "evidence of a legislative act of a Member may not be introduced" in a prosecution or lawsuit against that member. *United States* v. *Helstoski*, 442 U.S. 477, 487 (1979). Of those protections, only the third is even arguably implicated by petitioner's communications with his staff and with House officials. Yet this case, which involves an appeal from the denial of a motion to dismiss the indictment, does not present the question whether any protected communications should be excluded from trial. Nor, at this pretrial stage, would it be feasible or appropriate for the Court itself to seek to determine whether particular communications should be excluded.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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* The Solicitor General is recused in this case.