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14 **UNITED STATES DISTRICT COURT**
 15 **DISTRICT OF ARIZONA**

16 UNITED STATES OF AMERICA) 17) 18 v.) 19) 20 RICHARD G. RENZI, et al.,) 21) Defendants.)	No. 4:08-cr-00212-TUC-DCB (BPV) MOTION OF NON-PARTY KEVIN MESSNER FOR PROTECTIVE ORDER, AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
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22 Non-party witness Kevin Messner served at different times as a congressional aide
 23 to defendant Richard G. Renzi, former U.S. Representative for the 1st congressional
 24 district of Arizona, *and* to the Honorable James Kolbe, former U.S. Representative for
 25 the 5th and 8th congressional districts of Arizona. The legislative activities of both
 26 former Members are privileged against compelled disclosure by the Speech or Debate
 27 Clause, U.S. Const. art. I, § 6, cl. 1 (“for any Speech or Debate in either House, they [the
 28 Senators and Representatives] shall not be questioned in any other Place”).

1 Mr. Messner is the recipient of trial subpoenas issued by both the Department of
2 Justice (“DOJ”) and defendant Renzi. Copies of the two subpoenas are attached as Ex. A
3 and Ex. B, respectively. Because former Congressman Renzi is a defendant, and ably
4 represented at trial by his own counsel, he is fully capable of asserting or not asserting at
5 trial, as he sees fit, his Speech or Debate Clause rights with respect to Mr. Messner’s
6 testimony.

7 Former Congressman Kolbe is in a different position.¹ He has determined to not
8 waive his Speech or Debate protections with respect to Mr. Messner’s testimony and, on
9 the contrary, affirmatively to assert his Speech or Debate protections with respect to Mr.
10 Messner’s testimony – and he has so advised Mr. Messner.

11 Accordingly, Mr. Messner respectfully moves for a protective order barring the
12 parties from questioning him at trial about any of the legislative activities of former
13 Congressman Kolbe. A protective order in this circumstance will aid efficiency at trial
14 by defining the scope of permissible questioning of Mr. Messner in advance of his
15 testimony.²

16 Defendant Renzi’s counsel advised that Mr. Renzi is considering the motion and
17 any position he may take on the motion. DOJ consents in part to the proposed protective
18 order and declines to take a position on the remainder of the proposed order.³

19 A proposed order is attached, and oral argument is not requested.

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21 ¹ The undersigned also represent former Congressman Kolbe.

22 ² This motion is being filed before Mr. Messner testifies, in an attempt to clarify
23 the bounds of questioning beforehand and eliminate disruption during trial. Due to the
24 absolute prohibition against compelled testimony within the legislative sphere, *see*
25 *Eastland v. United States Serviceman’s Fund*, 421 U.S. 491, 501 (1975), it is necessary to
26 address this issue prior to Mr. Messner testifying at trial.

27 ³ DOJ consents to the proposed order insofar as it states, “the parties are barred
28 from questioning Kevin Messner at trial concerning the legislative activities of former
U.S. Representative James Kolbe.” DOJ takes no position on the remainder of the
proposed order.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **BACKGROUND**

3 From approximately 1997 through April 2003, Mr. Messner served as Staff
4 Assistant, Legislative Assistant, and Legislative Director to then-Congressman Kolbe,
5 and from approximately December 2004 through June 2006, Mr. Messner served as then-
6 Congressman Kolbe's Chief of Staff. In between, from approximately May 2003 through
7 November 2004, Mr. Messner served as then-Congressman Renzi's Chief of Staff.

8 In response to Mr. Messner's receipt of the two trial subpoenas, we, on behalf of
9 Mr. Messner, asked DOJ and Mr. Renzi to describe the scope of their proposed
10 questioning of Mr. Messner.⁴ In response, both acknowledged that some of the topics
11 about which they might wish to question Mr. Messner implicate the Speech or Debate
12 Clause privilege. *See* Exs. E, F.⁵

13 Topics of proposed testimony DOJ and Mr. Renzi identified in their responses that
14 concern the legislative activities of former Congressman Kolbe include, for example:

- 15 • Mr. Messner's review, revision, and circulation of draft legislation related to
16 one of the land exchanges at issue in the indictment, while serving in then-
17 Congressman Kolbe's office. *See* Ex. F.
- 18 • History of the Renzi Rider. *See* Ex. E.
- 19 • The reasons for the transfer of the PPFLI land exchange bill from Mr. Renzi's
20 office to Mr. Kolbe's office, and the circumstances surrounding the transfer.

21 *See id.*

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24 ⁴ *See* Ltr. from Eleni Roumel, Esq., to Gary Restaino, Esq. (Apr. 11, 2013),
25 attached as Ex. C; Ltr. from Eleni Roumel, Esq., to Kelly Kramer, Esq. (Apr. 16, 2013),
attached as Ex. D.

26 ⁵ *See* Ltr. from David Harbach, Esq., to Eleni Roumel, Esq. (Apr. 22, 2013),
27 attached as Ex. E; Ltr. from Kelly Kramer, Esq., to Kerry W. Kircher, Esq. (Apr. 22,
28 2013), attached as Ex. F.

- 1 • Who worked on the PPFLI land exchange bill in then-Congressman Kolbe’s
2 office. *See id.*
- 3 • To the extent such discussions occurred while Mr. Messner served in former
4 Congressman Kolbe’s office, any discussions Mr. Messner may have had with
5 Mr. Renzi concerning the Sandlin property, its inclusion in the PPFLI bill, or
6 Mr. Renzi’s sponsorship of it. *See id.*

7 ARGUMENT

8 As the Court is aware, the Speech or Debate Clause provides three broad
9 protections to Members of Congress with respect to activities that fall “within the
10 ‘legislative sphere,’” *Doe v. McMillan*, 412 U.S. 306, 312 (1973) (quoting *Gravel v.*
11 *United States*, 408 U.S. 606, 624-25 (1972)).⁶ Only one of those protections is pertinent
12 here: a testimonial privilege which operates to protect Members, among other things,
13 from being compelled to testify about legislative matters. *See, e.g., Dennis v. Sparks*, 449
14 U.S. 24, 30 (1980) (“[B]ased on the Speech or Debate Clause, we have held that
15 Members of Congress need not respond to questions about their legislative acts.”); *United*
16 *States v. Helstoski*, 442 U.S. 477, 488-89 (1979) (“[T]he Speech or Debate Clause was
17 designed to preclude prosecution of Members for legislative acts. The Clause protects
18 ‘against inquiry into acts that occur in the regular course of the legislative process and
19 into the motivation for those acts.’”); *Gravel*, 408 U.S. at 616 (“We have no doubt that
20 Senator Gravel may not be made to answer – either in terms of questions or in terms of
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22 ⁶ The “legislative sphere” includes all activities that are

23 “an integral part of the deliberative and communicative
24 processes by which Members participate in committee and
25 House proceedings with respect to the consideration and
26 passage or rejection of proposed legislation or with respect to
27 other matters which the Constitution places within the
28 jurisdiction of either House.”

Eastland, 421 U.S. at 504 (quoting *Gravel*, 408 U.S. at 625).

1 defending himself from prosecution – for the events that occurred at the subcommittee
2 meeting.”); *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 529 (9th Cir. 1983)
3 (privilege is an “absolute bar to interference” when Members are acting within the
4 “legitimate legislative sphere” (quoting *Eastland*, 421 U.S. at 503)).⁷

5 The Supreme Court has drawn no distinction between the application of the Clause
6 in the civil and criminal contexts. *See, e.g., Eastland*, 421 U.S. 491 (civil suit); *Johnson*,
7 383 U.S. 169 (criminal trial); *Gravel*, 408 U.S. 606 (criminal investigation). Rather, the
8 Court has said, “without exception,” that the Clause must be read “broadly to effectuate
9 its purposes,” *Eastland*, 491 U.S. at 501, and that, when the Clause applies, its
10 protections are “absolute.” *Id.* at 501, 503, 507, 509-10; *Gravel*, 408 U.S. at 623 n.14;
11 *Barr v. Matteo*, 360 U.S. 564, 569 (1959); *Schultz v. Sundberg*, 759 F.2d 714, 717 (9th
12 Cir. 1985) (“Once it is determined that legislators are acting within the ‘legitimate
13 legislative sphere,’ the clause is an absolute bar.”).

14 The Clause’s protections apply equally to former Members, *see, e.g., Miller*, 709
15 F.2d at 528, and to congressional staff. *See, e.g., Eastland*, 421 U.S. at 507 (“no
16 distinction between the Members and Chief Counsel”); *Gravel*, 408 U.S. at 616-18 (in
17 applying the Clause, a “Member and his aide are to be ‘treated as one;” “the conduct of
18 the [aide] would be a protected legislative act if performed by the Member himself.”);
19 *Miller*, 709 F.2d at 530 (“aides may invoke the privilege to the extent that the
20 Congressman may and does claim it”). To the extent a Member disagrees with an aide’s
21 assertion of the privilege, he or she can repudiate the aide’s assertion. *See Gravel*, 408
22 U.S. at 622 n.13.

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25 ⁷ The Clause also provides (i) an immunity from lawsuits or prosecutions for all
26 actions “within the ‘legislative sphere,’” *McMillan*, 412 U.S. at 312 (quoting *Gravel*, 408
27 U.S. at 624-25); and (ii) a non-evidentiary-use protection which bars prosecutors in a
28 criminal case – and parties in civil suits – from advancing their cases or claims against
Members by “[r]evealing information as to a legislative act,” *Helstoski*, 442 U.S. at 490
(1979); *see also United States v. Johnson*, 383 U.S. 169, 173 (1966).

1 As noted above, to the extent DOJ or counsel for former Congressman Renzi seek
2 to question Mr. Messner at trial about *former Congressman Renzi's legislative activities*,
3 Mr. Renzi and his counsel are fully capable of determining whether to permit or object to
4 such questioning. Mr. Messner defers to Mr. Renzi and his counsel – and this motion
5 seeks no relief – regarding any line of questioning that concerns former Congressman
6 Renzi's legislative activities.

7 However, both parties are barred from questioning Mr. Messner at trial about
8 *former Congressman Kolbe's legislative activities* as a result of former Congressman
9 Kolbe's unqualified assertion of his Speech or Debate privilege. It is appropriate for the
10 Court, in advance of Mr. Messner's appearance, to place this line of questioning out of
11 bounds for both parties because of the threshold nature of the Speech or Debate Clause
12 privilege, as evidenced by courts' recognition that the denial of Speech or Debate rights
13 generally are immediately appealable on an interlocutory basis. *See, e.g., Helstoski v.*
14 *Meanor*, 442 U.S. 500, 506-08 (1979); *United States v. Renzi*, 651 F.3d 1012, 1018-19
15 (9th Cir. 2011); *United States v. Jefferson*, 546 F.3d 300, 308-09 (4th Cir. 2008); *United*
16 *States v. Rostenkowski*, 59 F.3d 1291, 1297 (D.C. Cir. 1995); *United States v. McDade*,
17 28 F.3d 283, 288-89 (3d Cir. 1994); *McSurely v. McClellan*, 521 F.2d 1024, 1030-32
18 (D.C. Cir. 1975).

19 We wish to make clear that, since this motion is being filed in advance of Mr.
20 Messner's actual appearance at trial, Mr. Messner is not asking the Court to decide now
21 whether any particular question seeks to elicit from Mr. Messner information that is
22 Speech or Debate protected as to former Congressman Kolbe. The Court can and should
23 rule on particular questions if and as they are asked at trial when counsel for Mr. Messner
24 will be present to object and offer argument as appropriate.

25 However, we do note that because "the guarantees of th[e] [Speech or Debate]
26 Clause are vitally important to our system of government," they "are entitled to be treated
27 by the courts with the sensitivity that such important values require," *Helstoski*, 442 U.S.
28 at 506, and that the Supreme Court has repeatedly, and "[w]ithout exception . . . read the

1 Speech or Debate Clause broadly to effectuate its purposes.” *Eastland*, 421 U.S. at 501;
2 *see also McMillan*, 412 U.S. at 311; *Gravel*, 408 U.S. at 624.

3 We note also that the courts “have plainly not taken a literalistic approach in
4 applying the privilege.” *Gravel*, 408 U.S. at 617. Thus, the privilege has been held to
5 cover all facets of the legislative process, including “[c]ommittee reports, resolutions, and
6 the act of voting,” *id.* at 617; investigations and hearings, *Eastland*, 421 U.S. at 504-05;
7 *McMillan*, 412 U.S. at 313; information gathering in furtherance of legislative activities,
8 because “[a] legislative body cannot legislate wisely or effectively in the absence of
9 information respecting the conditions which the legislation is intended to affect or
10 change,” *Eastland*, 421 U.S. at 504 (quoting *McGrain v. Daugherty*, 273 U.S. 135, 175
11 (1927));⁸ and the drafting and introduction of legislation, and negotiating with other
12 Members regarding proposed legislation. *See, e.g., Fields v. Office of Eddie Bernice*
13 *Johnson*, 459 F.3d 1, 10-11 (D.C. Cir. 2006); *Jewish War Veterans of the U.S.A., Inc. v.*
14 *Gates*, 506 F. Supp. 2d 30, 53 (D.D.C. 2007).

15 The privilege also has been held to extend to preparations for specific legislative
16 activities. *See, e.g., Gravel*, 408 U.S. at 629 (Speech or Debate Clause precluded
17 questioning “concerning any act . . . performed by the Senator, or by his aides in course
18 of their employment, in preparation for the subcommittee hearing”); *Johnson*, 383 U.S. at
19 173-76 (Speech or Debate privilege precluded inquiring into the motivations for,
20 preparation of, and ingredients of speech delivered by Member on House floor);
21 *MINPECO, S.A. v. Conticommodity Serv., Inc.*, 844 F.2d 856, 861 (D.C. Cir. 1988)
22 (“preparation of the statement for publication in the subcommittee report was part of the
23 legislative process”).

24 Finally, the courts also have held that the Speech or Debate Clause protects
25 “against inquiry into . . . the motivation for those [legislative] acts.” *Helstoski*, 442 U.S.

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27 ⁸ *See also Miller*, 709 F.2d at 530; *Brown & Williamson Tobacco Corp. v.*
28 *Williams*, 62 F.3d 408, 421-23 (D.C. Cir. 1995); *Gov’t of the V.I. v. Lee*, 775 F.2d 514,
520-21 (3d Cir. 1985).

1 at 489 (quoting *United States v. Brewster*, 408 U.S. 501, 525 (1972)); *see also Johnson*,
2 383 U.S. at 184-85 (inquiry into Member’s motives for engaging in legislative activities
3 “necessarily contravenes the Speech or Debate Clause”).

4 In light of the courts’ broad construction of the parameters of the “legitimate
5 legislative sphere,” it seems likely that questioning concerning some of the topics
6 previously identified by DOJ and Mr. Renzi, *see* Exs. E, F, would be barred.

7 **CONCLUSION**

8 For all the foregoing reasons, the Court should grant this motion for a protective
9 order.

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Respectfully submitted,

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May 13, 2013

⁹ Attorneys in the Office of General Counsel are “entitled, for the purpose of performing the counsel’s functions, to enter an appearance in any proceeding before any court of the United States . . . without compliance with any requirements for admission to practice before such court.” 2 U.S.C. § 130f.

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CERTIFICATE OF SERVICE

I certify that on May 13, 2013, I served the foregoing Motion of Non-Party Kevin Messner for Protective Order, and Memorandum of Points and Authorities in Support, on all parties by CM/ECF.

/s/ Eleni M. Roumel
Eleni M. Roumel