UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-10588

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RICHARD G. RENZI,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Arizona
No. 08-cr-0212
Hon. David C. Bury, District Judge, Presiding

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INTRODUCTION

From its inception, one hallmark of this case has been the government's continually shifting positions—both on what exactly it is that Renzi supposedly did wrong and on why the evidence it wished to offer should be admitted. Remarkably, that pattern has persisted on appeal. To cite just a few examples:

- Whereas the government obtained an indictment on the theory that Renzi committed "honest services" fraud by virtue of a conflict of interest, it tried him on the theory that he received a bribe. And whereas the government tried Renzi on the theory that the "thing of value" he obtained was the money that Sandlin repaid him, on appeal it relies on no fewer than three *new* theories, at least one of which is squarely contrary to a concession it made at trial.
- As the House of Representatives' *amicus* brief details (at 4-12), the government conceded before trial that Joanne Keene's testimony was inadmissible under the Speech or Debate Clause; then took the position *during* trial that any Speech or Debate challenge had been waived; then argued *after* trial that the evidence was admissible to prove Renzi's "state of mind." On appeal, the government admits that it elicited this testimony to demonstrate "whether and to what extent

Renzi supported the RCC and Aries bills," GB35,[*] but claims that such testimony nevertheless was not covered by the Clause. It also adds waiver and materiality arguments for good measure.

- Whereas the government urged a narrow interpretation of the Speech or Debate Clause in questioning its own witness (Keene), it advocated a *broad* interpretation in opposing *Renzi's* questioning of *his* witness (Kevin Messner). On appeal, the government does not defend the disparate treatment, arguing instead that Renzi was not prejudiced.
- Whereas the district court calculated a Sentencing Guidelines loss of more than $120,000 on the basis of one theory, on appeal the government invokes three *different* theories to defend that calculation.

As the Supreme Court observed in another extortion case last year, the government's "shifting and imprecise" positions "betray[] the weakness of its case." *Sekhar v. United States*, 133 S.Ct. 2720, 2727 (2013). The government's arguments here are not only new but wrong. For these and many other reasons, Renzi's convictions must be reversed.

[*] We cite our opening brief as "RB__," our excerpts of record as "_RER__," and our supplemental excerpts of record as "RSER__." We cite the government's brief and the government's excerpts of record as "GB__" and "_GER__" respectively.

ARGUMENT

I. RENZI IS ENTITLED TO JUDGMENT OF ACQUITTAL OR A NEW TRIAL ON THE PUBLIC-CORRUPTION COUNTS

A. Renzi Did Not Obtain Any Specified "Thing Of Value"

Renzi is entitled to judgment of acquittal on the public-corruption counts because the evidence did not show that he obtained any money, property, or thing of value. *See* RB26-30. At trial, the government cited one "thing of value": the money Sandlin repaid to Renzi under the note. But it now asks this Court to affirm the convictions based on any of several uncharged, newly identified "things of value," relying in the process on an unprecedentedly broad reading of the public-corruption statutes. Because (1) the evidence was insufficient to permit a conviction under a proper reading of the statutes and (2) the jury in any event was not instructed on what the "thing of value" was, this Court must reverse.

1. a. To sustain Renzi's convictions, the Court would have to interpret the public-corruption statutes to reach transactions in which the official received only that which he was due and the supposed victim obtained property at or below its fair-market value. The statutes' text does not suggest such a result. Nor do the cases. Indeed, as our opening brief explains (at 28-29), no court has ever stretched the statutes to reach equal-value exchanges. The government argues otherwise, but its cases do not support its position.

For example, the government reads *Evans v. United States*, 504 U.S. 255 (1992), to mean that it need not prove a "loss" to sustain a Hobbs Act conviction, supposedly because common-law extortion was "not limited to the overpayment of fees." GB26 (quoting *Evans*, 504 U.S. at 268, 271 n.23). That is a misreading of *Evans*. Extortion is a theft offense, and many cases thus hold that the "gravamen" of the offense is "loss to the victim." *See* RB27. The government entirely ignores those cases. And *Evans* is entirely consistent with them.

In *Evans*, an undercover agent gave a public official $7,000 for help on zoning issues. The official never suggested that this was a fair-market payment for property. Rather, he argued that his conduct was not unlawful because the Hobbs Act applies only when a public official takes affirmative steps to induce a payment.

The Supreme Court disagreed, but it did not address, let alone decide, whether the Act reaches equal-value exchanges. The footnote stating that extortion is "not limited to the overpayment of fees" does not suggest otherwise. That footnote responded to the dissent's suggestion that Hobbs Act extortion is limited to wrongful taking under a false pretense of official right. The Court's point was that extortion charges could lie whether or not the official deceived the payor. It said nothing about whether one could "obtain property" by selling an asset at or below its fair-market price.

The government also claims that courts have rejected equal-value defenses in a series of cases involving loans. GB25-29. Those cases stand for the simple proposition that loans to public officials are "things of value" when they are extended to unqualified public-official borrowers or feature favorable terms, such as below-market interest rates. *See United States v. Kemp*, 500 F.3d 257, 285 (3d Cir. 2007) (loan to official at below-market rate or on terms for which official was not qualified); *United States v. Gorman*, 807 F.2d 1299, 1305 (6th Cir. 1986) (unsecured loans to public official who was not qualified to receive them); *see also United States v. White Eagle*, 721 F.3d 1108, 1115 (9th Cir. 2013) (loan modification is thing of value because "issued on irregular and favorable terms").

Nothing in these cases precludes an equal-value defense. Making a loan to an official at a below-market interest rate obviously is not a fair-market transaction, and repaying such a loan obviously cannot establish an equal-value exchange. The whole point of below-market loans or favorable modifications is to benefit the recipient. That is not what happened here.

Because neither the text of the statutes nor the cases interpreting them show that Congress intended to criminalize equal-value exchanges, the rule of lenity requires the Court to adopt the more restrictive reading of the statutes. *See, e.g.*, *Skilling v. United States*, 130 S.Ct. 2896, 2932-33 (2010); *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 408-09 (2003). That is especially so because the

Model Penal Code, on which the Supreme Court has relied in interpreting the Hobbs Act, would not impose liability when, as here, the money at issue represents a fair-market payment for property. *See* RB29 n.3.

b. The government argues, in the alternative, that it proved more than an equal-value exchange, either because the Aries Group somehow overpaid when it purchased the property or because Renzi subjectively valued "early repayment" under the loan. Neither contention withstands scrutiny.

Aries paid a fair price—$4.5 million—for the property; indeed, he paid a below-market price. The evidence shows that a third party, having no relation to anyone involved in this case and nothing to do with the events at issue, offered Aries $5.2 million for the property immediately after the original contract. This contemporaneous, arm's-length offer establishes a floor for the property's value. *See Schwab v. CIR*, 715 F.3d 1169, 1178 (9th Cir. 2013) (fair-market value is "[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's-length transaction" (internal quotation marks omitted)).

In light of this offer, the government conceded at trial that the purchase price was "not over value." 2RER142. Even Aries himself admitted that he did not pay an above-market price. 2RER232. Yet the government now claims that a jury could have found that the price was above market because one witness, Dave

Harris, testified that he thought it was too high. GB26. But it is the market—the aggregate of *all* interested buyers—that determines a property's fair-market value, not one layman's opinion. Harris' testimony would not permit a jury to disregard an independent third-party offer or to find that Aries paid an above-market price.

The government also presses another theory not advanced at trial: that Aries paid more than fair value because he gave Sandlin $100,000 for an escrow extension and an additional $153,000 in interest. GB26-27. But Aries bought something with that money—time to close the sale—and there is no evidence that he overpaid. More importantly, even if one pretended that Aries bought nothing, and allocated those costs to the land's purchase price, the resulting calculation would show that Aries paid $4,753,000 to acquire property worth at least $5.2 million. Under any view of the evidence, Aries paid less than the property was worth. He suffered no loss.

The government's final theory—that Renzi received a "thing of value" through early repayment of the loan, GB28-29—also fails. For one thing, that was not a theory charged in the indictment. For another, the argument ignores the fact that the loan bore interest. RSER15. By paying down the debt, Sandlin avoided interest charges. So while Renzi received money sooner than he might have, he also received *less money* than he would have. The government cannot cite a single

case suggesting that an early payment on an interest-bearing loan constitutes a thing of value.

2. The government concedes that the jury instructions did not identify the specific money, property, or other thing of value charged in this case—even though Renzi requested as much, and even though this Court's Model Jury Instructions provide that the "thing of value" charged in an indictment should be specified in the instructions to avoid a variance. GB30-31. The government nevertheless argues that this defect was not fatal because Renzi should have known the government's theories. This argument is meritless.

As an initial matter, the government's contention that Renzi forfeited his claim by not specifically objecting during the charging conference is mistaken. GB29. "The district court here was fully informed before trial of [Renzi's] arguments and had rejected them definitively before the close of evidence. Any further objection would have been superfluous and futile." *Obsidian Fin. Grp., LLC v. Cox*, 740 F.3d 1284, 1289 (9th Cir. 2014) (internal quotation marks and alterations omitted); *see also United States v. Castagana*, 604 F.3d 1160, 1163 n.2 (9th Cir. 2010). In any event, *United States v. Choy*, 309 F.3d 602 (9th Cir. 2002), makes clear that Renzi is entitled to reversal even under a plain-error standard.

A fatal variance occurs when the instructions allow a jury to return a guilty verdict on an uncharged and unforeseeable theory. *Choy*, 309 F.3d at 607. The

government's brief itself underscores that a fatal variance occurred here. As the brief acknowledges, the government claimed, both before and during the trial, that the case turned on the money paid to Renzi by Sandlin. GB30 (collecting representations). Yet the government now claims that the jury's verdict could properly be sustained based on fees or interest expenses paid to Sandlin (no part of which was ever paid to Renzi) or on whatever subjective value Renzi attributed to early repayment. GB28-29.

Neither of these theories was charged in the indictment. But because the instructions failed to identify the thing of value at issue, the jury could have relied on either of them. That the jury's verdict could rest on an uncharged and unforeseeable theory of liability convincingly demonstrates that the instructions prejudicially varied the nature of the charges.

This case is therefore like *Choy*. Although the government argues otherwise, GB30, the district court's instructions allowed the jury to return a verdict based on unforeseeable and legally untenable theories (*e.g.*, that Renzi unlawfully obtained money as a result of an equal-value exchange or that he obtained a thing of value because he subjectively valued an early repayment). Because the instructions allowed for a guilty verdict on that basis, Renzi's public-corruption convictions must be reversed.

B. Renzi's Constitutional Rights Were Violated

Our opening brief demonstrates three separate constitutional violations at trial: (1) the admission of evidence in violation of the Speech or Debate Clause; (2) the denial of Renzi's right to present a full defense; and (3) the government's presentation of false testimony. Our brief also explains that "'[w]here, as here, there are a number of errors at trial,'" a reviewing court should not engage in "'a balkanized, issue-by-issue harmless error review,'" but instead should "'analyz[e] the overall effect of all the errors in the context of the evidence introduced at trial.'" RB47 (quoting *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996)). The government would have this Court undertake just such a balkanized review, arguing that each individual error was harmless. The Court should reject this approach; acknowledge the impact of these errors, individually and collectively; and reverse the public-corruption convictions (even assuming that the admitted evidence was legally sufficient).

1. The government introduced evidence in violation of the Speech or Debate Clause

The government argues that the Speech or Debate Clause provides no basis for reversal because (a) the testimony at issue was not privileged, (b) any privilege was waived, and (c) the testimony was not prejudicial. GB31-39. Each argument is fundamentally erroneous.

a. In the government's own words, Keene testified about "whether and to what extent Renzi supported the RCC and Aries bills, respectively, within Congress." GB35. Deciding whether and to what extent to support legislation is "clearly a part of the legislative process—the due functioning of the process"—and thus protected by the Speech or Debate Clause. *United States v. Brewster*, 408 U.S. 501, 515-16 (1972).

The government elicited Keene's testimony about Renzi's private views of the RCC land-exchange bill, and her own conflicting assessment of the legislation's merits, to imply he was not acting in the public interest. That Keene testified to how Renzi "seemed" (as opposed to "was"), GB32, is immaterial. Keene testified in response to questions about whether she recalled any "conversations" "around April of 2005" regarding Renzi's "view of whether he should be involved in the Resolution land exchange." 2RER215-16. Her testimony thus revealed the *substance* of what Renzi said and did within his office—not in meetings with third parties—as well as his motivations for pursuing the exchange. The Speech or Debate Clause indisputably protects internal discussions regarding whether and to what extent to support a specific piece of legislation.

Regarding the "Duke Cunningham" testimony, the government argues that deciding not to introduce legislation is unprotected when it constitutes breach of an allegedly corrupt promise. GB33. That argument is foreclosed by *Brewster*, which

permits prosecution only when the corrupt exchange could be proved *without* reference to performance of the promised legislative act. 408 U.S. at 526. For the same reason, the government cannot distinguish *Yeldell v. Cooper Green Hospital, Inc.*, 956 F.2d 1056, 1063 (11th Cir. 1992), which holds that deciding not to introduce legislation is a protected legislative act, on the ground that it did not involve an allegedly corrupt promise, GB34.

An exception for instances of alleged misconduct would swallow the Clause. *See Tenney v. Brandhove*, 341 U.S. 367, 377 (1951). The government elicited Keene's "Duke Cunningham" testimony, which also revealed Renzi's confidential conversations with staff, to suggest that Renzi's motive for declining to introduce the legislation was that he feared the same fate as a notoriously corrupt politician. It was therefore covered by the Clause. The government conceded as much before trial, and this Court should so hold now.

b. Assuming that waiver of Speech or Debate protections is even possible, *United States v. Helstoski*, 442 U.S. 477, 490-91 (1979), requires that it be "explicit and unequivocal." The distinction the government offers—that the *Helstoski* defendant, unlike Renzi, did not "open[] the door at the trial itself," GB36—is one without a difference. The Clause's significance in our system of government does not vary by context, *see Helstoski*, 442 U.S. at 491-92 (emphasizing Clause's structural significance), and "[t]he ordinary rules for

determining the appropriate standard of waiver do not apply in this setting," *id.* at 491. Nor does *Helstoski*'s express exception to ordinary waiver rules constitute an improper "general exemption" from criminal process. GB36 (internal quotation marks omitted). For the same reasons, appeals to "full adversarial testing," GB13n.13, do not justify waiver. The Clause intentionally frustrates the adversarial process when it applies. *See, e.g.*, *Helstoski*, 442 U.S. at 488.

Contrary to the government's contention, GB35-36, dicta in *United States v. McDade*, 28 F.3d 283 (3d Cir. 1994), does not compel a finding of waiver. *McDade* should be read, consistent with *Helstoski*, to presume explicit waiver of the Clause's protections as a precondition of direct testimony about legislative acts. The hypothetical discussed in *McDade* is distinguishable. Renzi elicited responsive testimony on cross-examination, not in his case in chief. And Renzi elicited no testimony regarding internal discussions about whether and to what extent to support legislation. For example, he questioned Aries only about what Aries heard from his own lobbyist concerning why the Aries proposal had stalled. 1GER287-88. Such questions to third party witnesses cannot "open[] the door," GB35, to testimony about internal deliberations over legislation.

c. In arguing that Keene's testimony "did not affect the verdict," GB36, the government relies on *United States v. Swindall*, 971 F.2d 1531, 1548 (11th Cir. 1992), GB36-37. But the standard applied in that case for dismissing an indictment

does not apply to Keene's trial testimony. *Swindall* itself distinguishes between improper presentation of Speech or Debate "material" and of testimony, *see id.* (requiring automatic reversal for questioning a member), and it indicates that error in the grand jury is less significant because it can be cured at trial, *id.* This Court should order a new trial because the jury may have relied on protected legislative-act evidence in reaching its verdict—and likely did. *See United States v. Dowdy*, 479 F.2d 213, 227 (4th Cir. 1973).

Having emphasized Keene's testimony in its summation, and having specifically emphasized her "Duke Cunningham" testimony in both portions of it, the government cannot credibly disclaim this testimony as immaterial. The government did not present "overwhelming" proof of guilt, *Dowdy*, 479 F.2d at 227-28, and even now it relies on conduct of which Renzi was acquitted, GB38; *see* RSER2-6 ($533,000 payment). Thus, rather than limiting itself to evidence of the alleged "promise to support legislation and the circumstances surrounding that promise—the 'meetings' and 'negotiations' with RCC and Aries in which he pitched his offer," *United States v. Renzi*, 651 F.3d 1012, 1031 (9th Cir. 2011), the government chose to rely on mixed *evidence*, *cf.* GB37—*i.e.*, a mix of protected legislative-act evidence and unprotected evidence—to prove corrupt intent. The case was close and this protected evidence helped the government cast Renzi as another corrupt politician who did not care about the public interest. A new trial,

"wholly purged of elements offensive to the Speech or Debate Clause," must therefore be ordered. *United States v. Johnson*, 383 U.S. 169, 185 (1966).

2. Renzi was prevented from offering a full defense

a. *CIPA*

[Filed separately with the Court Information Security Officer.]

b. *Messner*

The government does not dispute that the district court should have applied the Speech or Debate Clause in the same way to Kolbe and to Renzi. The court did not do so. Instead, it violated Renzi's right to present a defense by excluding *any* testimony by Messner relating to his time in Kolbe's office, not just testimony relating to legislative acts. 2RER159. Had it applied the same standard to the government, the vast majority—if not all—of Keene's testimony would have been excluded.

Beyond this, the district court should, at a minimum, have determined whether "a narrower privilege"—*i.e.*, a rule that allowed Messner to testify about unprotected matters—"would adequately protect" Kolbe, *United States v. Vavages*, 151 F.3d 1185, 1192 (9th Cir. 1998), or dismissed the affected counts before limiting Renzi's defense, *see United States v. Moussaoui*, 382 F.3d 453, 474 (4th Cir. 2004). Those arguments go unaddressed by the government, which also does not explain why a rule intended to prevent executive-branch interference with the

legislature, *see Renzi*, 651 F.3d at 1038, should prohibit balancing the rights of criminal defendants and non-party legislators.

"A violation of the right to present a defense requires reversal of a guilty verdict unless the Government convinces [this Court] that the error was harmless beyond a reasonable doubt." *United States v. Stever*, 603 F.3d 747, 757 (9th Cir. 2010). The alternative standards offered by the government, GB41-42, are inapplicable. *See United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 873 (1982) (relating to Sixth Amendment's Compulsory Process Clause); *United States v. Lopez-Alvarez*, 970 F.2d 583, 588 (9th Cir. 1992) (relating to denial of Sixth Amendment rights through misapplication of hearsay rule); *see also* GB42 (suggesting that error is reversible only if Messner's testimony "could *** rule out" corrupt intent). And the exclusion of Messner's testimony clearly was not harmless beyond a reasonable doubt.

A close confidant of Renzi, Messner would have testified that he worked closely with Renzi's office to develop legislation to accomplish the exchange sought by the Aries Group; that Messner realized that Renzi likely would be unable to move both the RCC and Aries Group bills through Congress; and that—contrary to the government's arguments at trial, 2RER143-45—Renzi continued to support the Aries Group proposal throughout 2005 and 2006.

Messner's testimony about the 2003-2004 period, GB40-41, was no substitute for testimony about the discussions at the heart of this case. Nor does admission of the April 2005 e-mail on cross-examination of Keene, *id.*, excuse preventing Messner from testifying about it. A defense witness' testimony does not become immaterial whenever the government's star witness has addressed the topic. This Court should order a new trial.

3. The government presented false testimony

The government concedes that "it should have known" that Aries and Keene testified falsely when each suggested that Renzi introduced Aries to the Sandlin property for the first time at the April 15, 2005 meeting. GB43n.15. The government nonetheless argues that it did not violate Renzi's due-process rights because (a) the testimony was "honestly mistaken," GB43-44, and (b) it was immaterial, GB45-46. These arguments are baseless.

a. The government's assertion that "honestly mistaken witness recollections do not ordinarily satisfy *Napue*'s falsehood requirement," GB43, is simply incorrect, and the case it cites for that proposition, *Henry v. Ryan*, 720 F.3d 1073 (9th Cir. 2013), does not so hold. In *Henry* the distinction between the witness's knowledge and the government's knowledge disappeared, because the witness was a detective; the government (through the detective) could have known that the detective's testimony was false only if it was perjured. Thus, when the

Court rejected a *Napue* challenge because the defendant "has not established that [the detective] knowingly provided false testimony," *id.* at 1084, it was addressing *Napue*'s second prong (knowledge), not the first (falsity). This reading of *Henry* is the only one that is consistent with this Court's repeated holdings that the fact that "a witness may have been unaware of [the falsity of the statement] *** does not mean it is not false nevertheless." *Phillips v. Ornoski*, 673 F.3d 1168, 1184 (9th Cir. 2012).

As our opening brief explains, moreover, RB43-44, this is not an "ordinary" case of honestly mistaken testimony. The only reason the government can now claim that Keene's testimony was "honestly mistaken" is that it deliberately chose not to inform her of facts it indisputably knew, having seen Aries impeached just days before. This Court has repeatedly rejected such gamesmanship by the government. "It is reprehensible for the [government] to seek refuge in the claim that a witness did not commit perjury," the Court has said, "when the witness unknowingly presents false testimony at the behest of the [government]." *Hayes v. Brown*, 399 F.3d 972, 981 (9th Cir. 2005) (en banc)). The government's brief offers nothing in response.

b. In arguing that the repeated false narrative about the meeting between Aries and Renzi was immaterial, the government ignores the fact that false testimony is material under *Napue* if "there is *any* reasonable likelihood that the

false testimony *could* have affected the judgment of the jury." *Sivak v. Hardison*, 658 F.3d 898, 912 (9th Cir. 2011) (internal quotation marks omitted). Under this standard, reversal is "virtually automatic," *id.*, and is required here, *see* RB45.

The government also errs in suggesting that the materiality analysis "turns in part on what happened during cross-examination." GB45. "[T]he government's duty to correct perjury by its witnesses is not discharged merely because defense counsel knows, and the jury may figure out, that the testimony is false." *United States v. LaPage*, 231 F.3d 488, 491-92 (9th Cir. 2000); *accord Sivak*, 658 F.3d at 909 ("[i]t is irrelevant whether the defense knew about the false testimony" (internal quotation marks omitted)); *Belmontes v. Brown*, 414 F.3d 1094, 1115 (9th Cir. 2005) ("Whether defense counsel is aware of the falsity of the statement is beside the point."), *rev'd on other grounds*, 549 U.S. 7 (2006). The government claims that *Belmonte* supports *its* position, but that is not correct. The Court concluded that the false testimony there was immaterial because the evidence addressed only the credibility of a witness, not because of any cross-examination or defense conduct and "regardless of whether defense counsel should have known that a state witness testified falsely." *Belmontes*, 414 F.3d at 1115-16.

To the extent that the unpublished decision in *United States v. Garcia*, 502 F. App'x 663 (9th Cir. 2012), suggests the contrary, Renzi respectfully submits that the Court should follow *LaPage*, *Sivak*, and *Belmontes* instead. *See Obrey v.*

Johnson, 400 F.3d 691, 699-701 (9th Cir. 2005) (following earlier decision when there was intra-circuit conflict because of its "precedential pedigree" and because panel "believe[d] it to be correct on the merits"). The Court should follow those decisions, not only because they are published, but also because a defendant "cannot waive the freestanding ethical and constitutional obligations of the *** government to protect the integrity of the court and the criminal justice system." *Sivak*, 658 F.3d at 909. Inherent in the government's position is the untenable claim that Renzi made such a waiver merely by exercising his constitutional right to cross-examine witnesses.

Even if Renzi's cross-examination were relevant, the testimony would still be material, as the government's conduct at trial demonstrates. The government used what it now concedes to be false testimony to preserve the false narrative around the meeting. For example, even though Aries admitted that it was *he* who had raised the Sandlin property with Renzi, the government argued in summation that it was *Renzi* who had pushed Sandlin's land. *Compare* RSER17 ("Isn't it true that when you [Aries] were at that meeting, *you* raised the Sandlin property with Mr. Renzi? A. Yes." (emphasis added)) *with* RSER12-13 ("[I]t's Rick Renzi that's sitting in the room *** with Phil Aries *** pushing and pitching Sandlin's land."). In summation, moreover, the government not only endorsed Keene's testimony, but sought to confuse the jury about the provenance of a draft bill filed with the

Office of Legislative Counsel before the meeting that already included a reference to the Sandlin property. 2RER141. It then falsely claimed to have known about the critical phone records all along. 2RER144-45. The district court instructed the jury to disregard that argument, *see* RB46n.6, but the fact that the government felt compelled to address the point shows that it knew the testimony was material.

Finally, the government argues that the false testimony was immaterial to the RCC counts. GB46n.16. That is not correct. The government repeatedly argued that Renzi had a criminal intent with respect to RCC because of his conduct with Aries, and vice versa. *See, e.g.*, RSER12-13 ("[I]t's Rick Renzi that's sitting in the room with Bruno Hegner and his group, and with Phil Aries later, pushing and pitching Sandlin's land."). Indeed, just one page earlier in its brief on appeal, the government suggests that Renzi "pushed" the Sandlin property with Aries because of his conduct with Hegner. GB45. Given the government's efforts to link the two sets of charges, the false testimony plainly could have affected the jury's verdict on all of the public-corruption counts.

II. RENZI IS ENTITLED TO JUDGMENT OF ACQUITTAL OR A NEW TRIAL ON THE INSURANCE COUNTS

A. Section 1033 reaches only acts committed by "insurers," which is defined as entities "the business activity of which is the writing of insurance" and includes "any person who acts as, or is, an *** agent *** of that business." 18 U.S.C. §1033(f)(2). The government concedes that R&C did not write insurance

and that R&C was not Safeco's agent, but it claims that there was sufficient evidence that R&C "act[ed] as" Safeco's agent. GB48. None of the evidence cited by the government, GB48-49, would allow a jury to find that R&C acted as Safeco's agent. It all shows that R&C acted on behalf of the *insureds*.

Under Arizona law, R&C's duties as an agent ran to the insureds, not the insurer. *E.g., Webb v. Gittlen,* 174 P. 3d 275, 279 (Ariz. 2008). Moreover, R&C's contract with NIF, Safeco's agent, specifically provided that R&C was a "representative of the insured and not the agent or representative of [NIF]," and prohibited R&C from holding itself out as an agent of an insurer. 2RER292. R&C's actions were consistent with the contract: it acted at all times as the clients' representative. The government thus failed to prove that R&C acted as Safeco's agent.

The cases cited by the government, GB47-48, do not reach facts like these. *United States v. Peterson*, 288 F. App'x 727, 729 (2d Cir. 2008), found that the defendant "act[ed] as" an agent of Lloyd's of London by holding himself out as an authorized agent, even though he was not. R&C never held itself out as Safeco's agent. *United States v. Segal*, 495 F.3d 826, 836 (7th Cir. 2007), rejected a claim that the statute did not reach the defendant because he represented only clients, but it did so only after finding, based on the defendant's actions, that there was

sufficient evidence to prove that he had also acted an insurer's agent. There is no such evidence here.

B. Section 1033 reaches only "financial reports or documents." The modifier "financial" excludes a variety of documents from the statute's scope. *See United States v. Segal*, 2004 WL 2931331, at *3-4 (N.D. Ill. 2004) (license-renewal applications are excluded); 140 Cong. Rec. E748-01 ("applications for licenses *** and filings on mergers, consolidations, and acquisitions" are excluded). The letters at issue here are not financial documents because they did not convey financial information; they merely provided narrative information about a coverage dispute.

The government does not dispute these legal limitations, but claims that there was evidence that the letters were financial documents because they "bore on the financial condition of R&C." GB50. Even if that were true, it would prove far too much. As our opening brief explains, RB51-52, *every* document a company issues has some relationship to its financial position. But that does not make them "financial" documents. The license applications in *Segal*, for example, bore in some way upon that agency's financial condition, but the court found them not to be financial documents. Likewise here, the letters say nothing about money or finances and are therefore beyond the scope of the statute.

C. The government's defense of the jury instructions, GB50-51, is meritless for similar reasons. While any business document, including license applications or merger filings, in some way "relate[s] to the financial position of a business," 1RER91, not all such documents are financial. *See Segal*, 2004 WL 2931331, at *3-*4; 140 Cong. Rec. E748-01. The district court thus erred by instructing the jury that "financial documents include any documents *** that relate to the financial position of a business." 1RER90-91. Even if the language was technically accurate, this "unbounded" definition "may have caused the jury to eliminate [this element] as a factor affecting" its evaluation of Renzi's conduct. *United States v. Hughes*, 273 F. App'x 587, 594 (9th Cir. 2007) (internal quotation marks omitted).

III. RENZI IS ENTITLED TO JUDGMENT OF ACQUITTAL OR A NEW TRIAL ON THE RACKETEERING COUNT

Racketeering Act One charged Renzi with a scheme to defraud "by misappropriating insurance premium funds held in trust by [R&C] and diverting those funds"—which allegedly "were not the property of Renzi or [R&C]"—"to his own benefit and that of his congressional campaign." 3RER456-57. Renzi is entitled either to (A) judgment of acquittal, because he did not engage in the charged scheme, or (B) a new trial, because the jury instructions constructively amended the charge.

A. The government concedes that Renzi neither embezzled nor misappropriated trust funds, as alleged in the indictment, but argues that his RICO conviction should stand because it proved generic mail fraud. GB54. To prove mail fraud, however, the government needed to show, at a minimum, that Renzi's use of premium funds violated the property rights of *another*. *See* GB53 (acknowledging this). It did not. In light of *United States v. Lequire*, 672 F.3d 724 (9th Cir. 2012), it is now undisputed that R&C owned the funds at issue and was entitled to use them for any purpose. Renzi did not commit fraud by using funds his agency owned free and clear of any trust or fiduciary duties.

B. Even if the evidence proved fraud in a generic sense, it did not prove the fraud alleged in the indictment. The fraud alleged there was predicated on the grand jury's belief that "[a]ny premium monies received by [R&C] from clients *were required to be held in trust* to be passed on *** to NIF and Safeco." 3RER441-42 (emphasis added). The grand jury misapprehended the law; R&C was not required to, and did not, hold premium funds in trust.

Despite this critical error of law, the grand jury never had an opportunity to reconsider its charges. Instead, the district court allowed the government to proceed on a far broader theory. But by eliminating any requirement that the government prove the misappropriation of trust funds, the district court did not merely strike surplusage, as the government maintains, GB54; it constructively

amended the indictment. *See United States v. Marolda*, 615 F.2d 867, 870-71 (9th Cir. 1980) (rejecting surplusage argument and finding that charging language required government to prove that official used funds "without proper authorization" even though that was not element of offense). Because one cannot know whether the grand jury would have approved this change, the instructions amounted to a constructive amendment. *See, e.g.*, *United States v. Carlson*, 616 F.2d 446, 447-48 (9th Cir. 1980) (finding constructive amendment where indictment charged defendant with misapplying bank funds by causing loan to be made for personal use but instructions permitted conviction for misapplying bank funds by causing loan to be inadequately secured); *United States v. Dipentino*, 242 F.3d 1090 (9th Cir. 2001) (finding constructive amendment where indictment charged defendants with allowing asbestos-containing materials to dry out on floor but instructions permitted convictions for failing to timely deposit asbestos-containing materials at appropriate waste-disposal site).

The instructions also constructively amended the indictment by allowing the jury to convict on a "complex of facts" not alleged by the grand jury. *United States v. Adamson*, 291 F.3d 606, 615 (9th Cir. 2002). The instructions did not describe the alleged scheme, the means by which it was allegedly committed, or the identity of the alleged victim. Because the jury could have found, for example, that Renzi

defrauded Safeco or NIF by failing to make timely payment of premiums, even though the indictment alleged no such thing, reversal is required.

IV. RENZI IS ENTITLED TO BE RESENTENCED EVEN IF HIS CONVICTIONS STAND

As a matter of law, the district court should have considered the net value of the cash payment to Renzi in determining whether to impose any enhancement under Guidelines §2C1.1(b)(2). *See* RB56-58. The government defends the Guidelines calculation on the basis of theories that the district court did not rely upon, GB56-57, but those new theories neither excuse the district court's legal error nor support an enhancement.

First, there is no evidence of "what the Aries Group stood to gain" from the transaction. GB56. And any such figure would in any event be too speculative to support an enhancement.

Second, the evidence demonstrated that the fair-market value of the Sandlin property was $5.2 million. 2RER242. Sandlin would have received less than this amount even if the "extra $253,000," GB56, were included in the price. As for the change in value between the time Sandlin purchased the property and the time he sold it, *id.*, that has nothing to do with the offense conduct and is therefore immaterial.

Third, Sandlin's "early repayment" of the interest-bearing loan, GB57, provides no basis for an enhancement. Because of the timing of the payment,

Sandlin avoided interest charges and Renzi received less money than he otherwise would have.

The loss amount was zero, and there should have been no enhancement under §2C1.1(b)(2). *See* RB56-58.

CONCLUSION

Renzi is entitled to judgment of acquittal or a new trial on the public-corruption counts (1-5, 11-12, 14-15, and 26-27), insurance counts (28-30), and RICO count (32), or, in the alternative, to resentencing.

Dated: May 27, 2014

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