ORAL ARGUMENT NOT YET SCHEDULED

No. 11-3080

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States of America,

Appellee,

v.

Fraser Verrusio,

Appellant.

On Appeal from the United States District Court

for the District of Columbia, Case No. 1:09-cr-00064

BRIEF FOR APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. PARTIES AND *AMICI*

The parties below and in this Court are the defendant-appellant, Fraser Verrusio, and the plaintiff-appellee, the United States of America. Non-party petitioners in the district court were the Committee on Transportation and Infrastructure for the House of Representatives, Paul Lewis, the Committee on Ethics for the House of Representatives, and Vivian Moeglein née Curry. There are no intervenors or *amici*, either in this Court or the district court.

II. RULINGS UNDER REVIEW

In this appeal, Mr. Verrusio challenges several rulings of the district court, the Honorable Richard W. Roberts. These include: the denial of Mr. Verrusio's motion for judgment of acquittal; the denial of Mr. Verrusio's pre-trial motion to dismiss the indictment; the quashing of a defense subpoena; and the exclusion of defense evidence at trial. The district court's rulings are not reported—they are reproduced at pages 170–82, 311–18, 326–38, and 427–438 of the Appendix filed with this brief.

III. RELATED CASES

There are no related cases of which Mr. Verrusio is aware, and this case has not been previously before this Court.

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. The notice of appeal having been timely filed, this Court has jurisdiction under 28 U.S.C. § 1291.

STATUTES AND RULES

Pursuant to Federal Rule of Appellate Procedure 28(f), the relevant statutes and rules are set forth in an addendum to this brief.

STATEMENT OF THE ISSUES

1. Whether the government proved and alleged that Mr. Verrusio accepted an item of value for or because of, an official act, performed or to be performed.

2. Whether the district court erred in granting Vivian Curry's motion to quash the subpoena *ad testificandum* served on her by Mr. Verrusio on the ground that her testimony was privileged under the Speech and Debate Clause, where that decision prevented Mr. Verrusion from exercising his right to present a defense and right to compulsory process because Curry's testimony was essential to his defense.

3. Whether the government met its burden of producing suffienct evidence with respect to the falsity, knowledge, intent, and materiality elements of its false statement charge under 18 U.S.C. § 1001.

4. Whether the district court erred in excluding from evidence the instructions to Schedule VII of Mr. Verrusio's financial disclosure form.

STATEMENT OF THE CASE

On March 6, 2009, a three-count indictment was filed against Mr. Verrusio, and on June 14, 2010, a superseding indictment was filed. *See* Appx. 33–49.[1]

Count One alleged that Mr. Verrusio conspired to give and to receive illegal gratuities, in violation of 18 U.S.C. § 371. Indictment ¶ 8–25; Appx. 36–43. Mr. Verrusio allegedly conspired with Trevor Blackann, Todd Boulanger, James Hirni, and Todd Ehrlich to provide himself and Blackann with things of value for or because of official acts favorable to United Rentals, an equipment rental company that employed Boulanger and Hirni as lobbyists. *Id.*

Count Two alleged that Mr. Verrusio accepted items of value for and because of an official act performed or to be performed, in violation of 18 U.S.C. § 201(c)(1)(B). *Id.* ¶¶ 26–28; Appx. 44–45. Mr. Verrusio allegedly accepted items of value "for and because of his official assistance provided and to be provided to [United Rentals'] efforts to secure favorable amendments to the Federal Highway Bill." *Id.*

Count Three alleged that Mr. Verrusio knowingly made a false statement on Schedule VI of his 2003 financial disclosure form, in violation of 18 U.S.C. §§ 1001(a)(2) and (c)(1) and 2. *Id.* ¶¶ 29–34; Appx. 46–47. Mr. Verrusio

[1] "Indictment," unless otherwise noted, refers to the Superseding Indictment. The only changes to the original indictment were in the charging language. "Appx." refers to the Appendix of Appellant filed with this brief.

allegedly failed to disclose items of value received from United Rentals as "gifts" on Schedule VI. *Id*.

Mr. Verrusio went to trial, which began on January 25, 2011. On February 10, 2011, the jury convicted him of all three charges. On August 5, 2011, the district court sentenced him to one day of incarceration, six months of home detention, fifty hours of community service, and two years' supervised release. *See* Tr. (8/5/2011) at 54–55; Appx. 439–40.[2]

On August 15, 2011, Mr. Verrusio filed a timely notice of appeal. Appx. 447.

[2] "Tr." refers to the transcripts from hearings and trial.

STATEMENT OF THE FACTS

I. KEY PLAYERS

At the time of the alleged offenses, the below individuals held the following positions.

Mr. Verrusio was the policy director for the Committee on Transportation and Infrastructure for the U.S. House of Representatives ("Transportation Committee"). Tr. (1/27/2011, afternoon) at 75:10–25; Appx. 213. Mr. Verrusio acted as a liaison between lobbyists and the members of the Transportation Committee. Tr. (1/26/2011, morning) at 67:25–68:14; Appx. 190; *see also id*. at 79:20–80:3; Appx. 193.

Trevor Blackann was a legislative assistant to Senator Kit Bond. Tr. (1/27/2011, afternoon) at 69:6–8; Appx. 212. During his employment, Blackann accepted various items totaling thousands of dollars from lobbyists in exchange for his legislative assistance. *Id*. at 82:14–83:14; Appx. 215; *id*. at 92:4–93:13; Appx. 217–18. Blackann pleaded guilty to filing a false tax return for the year 2003. *Id*. at 82:6–7; Appx. 215.

Todd Boulanger, a former Senate staffer, was a lobbyist for Greenberg Traurig. Tr. (1/26/2011, morning), at 44:2–4; Appx. 184. Boulanger provided Blackann with expensive meals, drinks, and tickets to sporting events. *Id*. at 93:4–11; Appx. 197. Boulanger described Blackann as a "champion." *Id*. at 93:15–

94:16; Appx. 197. A champion was someone who "did whatever [Boulanger] asked." *Id*. Boulanger did not view Mr. Verrusio as a champion. *Id*. Boulanger could not recall Mr. Verrusio ever asking him for anything. Tr. (1/27/2011, morning) at 41:12–42:11; Appx. 206. Boulanger pleaded guilty to conspiracy to commit honest services fraud. Tr. (1/26/2011, morning) at 43:18–19; Appx. 184.

James Hirni, a former Senate staffer, was a lobbyist at Sonnenschein, Nath & Rosenthal. Tr. (1/31/2011, afternoon) at 34:3–13; Appx. 238. Hirni pleaded guilty to conspiracy to commit honest services fraud. Tr. (1/31/2011, afternoon) at 37:25–38:2; Appx. 241–42.

Todd Ehrlich worked in the corporate security department at United Rentals and also had a role in United Rentals' efforts to establish a lobbying practice in Washington, D.C. *See* Tr. (2/2/2011, morning) at 5:17–25; Appx. 292.

Vivian Curry was the legislative director for Congressman John Boozman, a member of the Transportation Committee. Appx. 132.

II. UNITED RENTALS

United Rentals' primary business is renting construction equipment to builders. Tr. (1/26/2011, morning) at 50:16–51:6; Appx. 186. It has branches throughout the country. *Id*.

In 2003, United Rentals retained Boulanger and Hirni to act as its lobbyists with three goals in mind. *Id*. at 51:12–52:13; Appx. 186. First, it wanted to secure

a spot on the General Services Administration schedule, so that it would be eligible to provide services to the government. *Id*. at 51:21–52:9; Appx. 186. Second, it wanted to pursue "competitive advantages" in the next legislative cycle. *Id*. And, third, it wanted to build up its brand among policy makers. *Id*.

With regard to the second goal, United Rentals focused on the expected reauthorization of the Federal Highway Bill. *Id*. at 53:1–21; Appx. 187. The company and its lobbyists had three legislative ideas. *Id*. at 54:2–55:7. The first was aimed at encouraging state Departments of Transportation to rent construction equipment instead of buying it. *Id*. The second goal was to encourage states to use United Rentals' intelligent transportation system. *Id*. And the third concerned workzone safety—United Rentals wanted Congress to increase the level of liability insurance that was required in its industry, which would give it a competitive advantage over certain competitors. *Id*.

III. NEW YORK TRIP

On October 17, 2003, Hirni invited Mr. Verrusio and Blackann to come to New York City the following day. Tr. (1/31/2011, afternoon) at 57:14–18; Appx. 250. Hirni informed Mr. Verrusio and Blackann that the trip would involve a business dinner with himself, Ehrlich, and several executives from United Rentals, and would also include tickets to Game 1 of the World Series. *Id*. at 55:24–58:11; Appx. 248–51. Before inviting them, Hirni sought and received approval for the

trip, including the game, from the head of the lobbying group at Sonnenschein. Tr. (2/1/2011, morning) at 144:4–146:6; Appx. 279–81. Mr. Verrusio and Blackann accepted the invitation. Tr. (1/31/2011, afternoon) at 57:14–58:5; Appx. 250–51.

United Rentals paid for Mr. Verrusio's airfare, hotel, his share of the business dinner, his share of drinks and entertainment at a night club, and a baseball jersey. Tr. (1/28/2011, morning) at 70–72; Appx. 225. Ehrlich personally provided Mr. Verrusio with one ticket to Game 1 of the World Series. *Id.* Sonnenschein paid for Mr. Verrusio's transportation during the trip. *Id.*

It was Boulanger's idea to invite Mr. Verrusio and Blackann. Tr. (1/26/2011, morning) at 57:8–21; Appx. 188. Boulanger wanted to influence Mr. Verrusio in the hope that Mr. Verrusio would take unspecified, future actions that would be favorable to United Rentals. *See* Tr. (1/26/2011, morning) at 46:6–14; Appx. 185. Boulanger never testified that the trip was connected to any specific official acts to be performed by Mr. Verrusio.

Like Boulanger, Hirni viewed the New York trip as a relationship-building exercise meant to influence Mr. Verrusio generally. Tr. (2/1/2011, afternoon) at 141:14–22; Appx. 286; *see also* Tr. (2/1/2011, morning) at 146:7–16; Appx. 281. Hirni likewise never testified that the trip was connected to any official acts to be performed by Mr. Verrusio.

Boulanger and Hirni concurred that Mr. Verrusio's official position, as opposed to any expected official action, was the driving force behind the trip. *See* Tr. (1/26/2011, morning) at 65:10–23; Appx. 190; Tr. (1/31/2001, afternoon) at 50:18–51:3; Appx. 243–44. Blackann was clear that, in his opinion, the New York trip was provided to he and Mr. Verrusio because of "who we worked for, where we worked." Tr. (1/28/2011, morning) at 17:18–21; Appx. 223.

IV. MR. VERRUSIO'S PURPORTED OFFICIAL ACTS

After the New York trip, Hirni and Boulanger worked with Blackann to insert a "rent vs. buy" amendment favorable to United Rentals into the *Senate* version of the Highway Bill. Tr. (1/26/2011, morning) at 101:12–102:14; Appx. 199. On November 11, 2011, Blackann accomplished that goal. *Id*. Mr. Verrusio played no role in that process. *Id*. at 100:2–4; Appx. 198.

Shortly thereafter, opposition to the amendment developed. *Id*. at 108–09; Appx. 200. At some later time, Boulanger met with Mr. Verrusio to discuss the opposition. *Id*. at 115:8–12; Appx. 202. Boulanger informed Mr. Verrusio that competing companies were sending letters opposing the amendment to Members of Congress on the Transportation Committee. *Id*. at 115:13–116:23; Appx. 202. Mr. Verrusio suggested that United Rentals send similar letters in support of the amendment. *Id*. Hirni also testified that he met with Mr. Verrusio to discuss a letter-writing campaign. Tr. (1/31/2011, afternoon) at 99:11–100:6; Appx. 266–

67. Neither Boulanger nor Hirni testified that Mr. Verrusio took any further action related to fighting opposition to the amendment.

On October 22, 2003, Hirni sent Mr. Verrusio a white paper outlining the legislative ideas of United Rentals. *See* Gov't Ex. 62; Appx. 410; *see also* Tr. (1/31/2011, afternoon) at 95:9–18; Appx. 262. Hirni sent the document to Mr. Verrusio so that he was "kept in the loop." Tr. (1/31/2011, afternoon) at 97:10–17; Appx. 264. Mr. Verrusio responded five days later, "Looks like it needs a lot more work for anyone to be able to help with progress." *Id*. at 95:24–96:8; Appx. 262–63. The only contacts that Hirni and Mr. Verrusio had after that about United Rentals' white paper were "social conversations," because "most of the activity" was in the Senate (and Mr. Verrusio worked in the House). *Id*. at 96:5–21; Appx. 263. Mr. Verrusio's other communications with Hirni involved Mr. Verrusio providing him with publicly available information on the timing of legislation, the key players on the Transportation Committee, and the legislative process. *Id*. at 98:6–24; Appx. 265.

Hirni also contacted Vivian Curry regarding United Rentals because he had a relationship with her and other individuals in Representative Boozman's office. Tr. (1/31/2001, afternoon) at 100:24–103:16; Appx. 267–270. In an e-mail to Curry, he wrote:

> Vivian, I have spoken to Fraser and he is good to go. I am resending him the language in the Senate bill, with

> changes which would represent the 100 percent victory for [United Rentals.] Fraser asked us to give him the language plus what we would want in the perfect world . . . . The document attached includes the current language in the Senate bill and the perfect world bill that UR would love to end up with at the end of the day.

Gov't Ex. 88; Appx. 412; *see also* Tr. (1/31/2001, afternoon) at 104:4–16; Appx. 271.

In stating that Mr. Verrusio was "good to go," Hirni meant that he thought Mr. Verrusio was going to be "helpful with our legislative asks." Tr. (1/31/2001, afternoon) at 104:17–20; Appx. 271.[3] Hirni never testified that Mr. Verrusio's "help" would involve using his official position to influence governmental decision-making, as opposed to, for example, reviewing draft legislative ideas and passing on publicly available information. Nor did Hirni ever testify that Mr. Verrusio intended to perform any specific official acts. In fact, when Boulanger was pressed by the government to detail what, if any, specific actions Mr. Verrusio was going to perform, Boulanger could not identify any. Tr. (1/26/2011, morning) at 59:17–23; Appx. 188. Boulanger also admitted that he never personally discussed with Mr. Verrusio the idea of Mr. Verrusio taking any specific official action. Tr. (1/27/2011, afternoon) at 16:18–17:17; Appx. 209–10.

[3] As discussed below, Mr. Verrusio proffered that Curry would testify that she had no knowledge of Mr. Verrusio ever intending to take any action on behalf of United Rentals.

Further, although Blackann testified about conversations he allegedly had with Mr. Verrusio prior to the trip, Blackann never identified any official acts that Mr. Verrusio was going to perform. Instead, Blackann testified that he and Mr. Verrusio discussed strategy. *See* Tr. (1/28/2011, morning) at 7:3–10:25; Appx. 220–21. In fact, Blackann explicitly disagreed with the suggestion that part of their purported strategy was for Mr. Verrusio to effect the insertion of the amendments during conference committee. *See id*. at 65:4–18; Appx. 232.

V. PROCEDURAL HISTORY

Mr. Verrusio moved at the close of evidence for a judgment of acquittal on Counts One and Two of the Indictment because the government failed to prove the "official act" element of 18 U.S.C. § 201, and on Count Three because the government failed to prove the falsity, intent, and materiality elements of 18 U.S.C. § 1001. *See* Tr. (2/2/2011, afternoon) at 72–94; Appx. 462–84; Tr. (2/7/2011) at 7–18; Appx. 365–376. After the jury's verdict, Mr. Verrusio moved again for a judgment of acquittal on the same grounds. *See* Appx. 487–538. Mr. Verrusio also moved before trial to dismiss Counts One and Two of the Indictment for failure to allege an official act. *See* Appx. 69–92. The district court denied those motions. *See* Tr. (8/5/2011) at 3–12; Appx. 429–38; Tr. (2/10/2011) at 24; Appx. 400; Tr. (2/7/2011) at 18; Appx. 376; Tr. (9/1/2010) at 47:5–55:23; Appx. 173–181.

In denying Mr. Verrusio's post-trial motion with respect to Counts One and Two, the court relied on Boulanger's testimony that the intent of the trip was to "influence" Mr. Verrusio, Blackann's testimony that he and Mr. Verrusio discussed legislative strategy, and Hirni's testimony that he believed Mr. Verrusio would be helpful with United Rentals' legislative aims. Tr. (8/5/2011) at 6–7; Appx. 432–33. The court also observed that Mr. Verrusio's failure to disclose the trip on his financial disclosure form could reflect a consciousness of guilt with respect to the other counts. *Id*. at 7; Appx. 433. As to Count Three, the district court held that expert testimony was not necessary to explain what is a "gift" under the rules of the House, that Paul Lewis's attempts to reconcile the discrepancies on Mr. Verrusio's form evidenced materiality, and that the exclusion of the instructions to Schedule VII had no impact on the outcome of the case because they were not substantively different from the instructions to Schedule VI, which were admitted. *Id*. at 7–11; Appx. 433–437.

SUMMARY OF ARGUMENT

The government presented insufficient evidence to convict Mr. Verrusio of the gratuities counts. The government was only able to convict Mr. Verrusio of Counts One and Two because the district court greatly expanded the reach of 18 U.S.C. § 201(c) ("the anti-gratuity statute").

First, the district court effectively held that any *act* with *any* connection—no matter how tenuous—to governmental decision-making is an "official act." The proper test, however, is whether a public official is using his official position to influence governmental decision-making. Here, the government proved, at most, that Mr. Verrusio shared publicly available information with lobbyists. The sharing of information is not an official act because it does not implicate a public official using his position to influence decision-making.

Second, the district court failed to require the government to prove that Mr. Verrusio performed or was to perform a "specific" official act. The government must connect the item of value received by the public official to a specific official act. If the item of value was provided because of a public official's position or for future, unspecified acts, that is not sufficient.

Third, the district court ignored the requirement that the alleged official acts must have been contemplated when the public official accepted the illegal gratuity.

The government offered no evidence that Mr. Verrusio intended to take any action with regard to United Rentals when he received the New York trip.

The district court's erroneous "official act" findings were compounded when the court prevented Mr. Verrusio from fully meeting the charges against him. The district court incorrectly ruled that Vivian Curry's testimony was privileged under the Speech or Debate Clause. Because Mr. Verrusio had a right under the Fifth and Sixth Amendments to call Curry as a witness, notwithstanding any protections provided to Curry under the Speech or Debate Clause, the district court erred. However, even if the district court properly held that the Speech or Debate Clause takes precedence over a criminal defendant's rights, the court still erred when it failed to dismiss the Indictment given Mr. Verrusio's inability to call Curry as a witness.

With respect to Count Three, the government failed to establish the falsity, knowledge, intent, and materiality elements in part because there was no evidence defining a reportable "gift," and no evidence that the House relied on the allegedly false statement.

Further, the district court abused its discretion when it excluded on relevance grounds the instructions to Schedule VII of Mr. Verrusio's financial disclosure form. Those instructions explained that, even if a staff member accepts travel expenses from a third-party that are not related to an official fact-finding trip, as

long as the trip was not solely for the staff member's personal benefit, then the expenses should be disclosed on Schedule VII, and by implication, not on Schedule VI. That fact was significant considering that Mr. Verrusio was charged with making a false statement on Schedule VI, not Schedule VII. The instructions also clarified that, for trips lasting fewer than four days, a staff member was not required to obtain pre-approval from the Ethics Committee. Therefore, contrary to the district court's ruling, they were relevant to Mr. Verrusio's defense.

This was especially so where a repeated theme throughout the government's case, and heavily emphasized in closing, was that Mr. Verrusio's false statement on Schedule VI demonstrated his knowledge that the New York trip was illegal. If the jury concluded that Schedule VI did not contain a false statement, it would have completely changed the complexion of the case as to Counts One and Two.

STANDARD OF REVIEW

The district court's denial of Mr. Verrusio's motion for a judgment of acquittal is reviewable under a sufficiency of the evidence standard. *United States v. Wahl*, 290 F.3d 370, 375 (D.C. Cir. 2002). The conviction must be overturned if, upon a *de novo* review of the evidence, considered in the light most favorable to the government, the Court determines that a rational trier of fact could not have found the essential elements of the alleged crimes beyond a reasonable doubt. *See id.*

The district court's decision to deny Mr. Verrusio's pre-trial motion to dismiss, because it was based on a legal interpretation of 18 U.S.C. § 201, is reviewed *de novo*. *See United States v. Glover*, 681 F.3d 411, 417 (D.C. Cir. 2012).

The district court's decision to grant Vivian Curry's motion to quash her subpoena *ad testificandum* is also reviewed *de novo* because it turns on the proper legal interpretation of the Speech or Debate Clause. This issue involves Mr. Verrusio's constitutional right to present a defense and right to compulsory process, and accordingly, his convictions must be reversed unless the government can establish "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *United States v. Powell*, 334 F.3d 42, 45 (D.C. Cir. 2003).

The district court's partial exclusion of defense exhibit 149 is reviewed for abuse of discretion. *See United States v. Warren*, 42 F.3d 647, 655 (D.C. Cir. 1994). The government bears the burden of showing that any error "did not have a substantial and injurious effect or influence in determining the jury's verdict." *United States v. Stubblefield*, 643 F.3d 291, 296–97 (D.C. Cir. 2011).

ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT TO CONVICT ON COUNTS ONE AND TWO BECAUSE THE GOVERNMENT FAILED TO PROVE MR. VERRUSIO PERFORMED AN OFFICIAL ACT.

The Indictment identified the universe of supposed official acts taken by Mr. Verrusio, which were also the outer limit of what was proved at trial:

> [1] influencing the language of the Federal Highway Bill;
>
> [2] advising Blackann that Equipment Rental Company's amendments should be inserted at the Conference Committee stage;
>
> [3] meeting with Blackann, Ehrlich, and Hirni and discussing the Federal Highway Bill during the trip to New York City;
>
> [4] advising Hirni that Equipment Rental Company's amendments needed improvement, and offering to discuss the issue further; and
>
> [5] advising Boulanger and Hirni regarding how to overcome opposition to Equipment Rental Company's amendments.

Indictment ¶ 28; Appx. 44–45.[4] For the reasons discussed below, evidence of those five acts could not support a conviction on Counts One and Two, nor could they support an indictment that satisfies the Grand Jury Clause.

[4] Official act is defined as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." 18 U.S.C. § 201(a).

A. Official Duty is Not Synonomous With Official Action.

As this Court has explained, the purpose of the anti-gratuity statute is to prevent "the corruption of official decisions through the misuse of influence in governmental decision-making." *United States v. Valdes*, 475 F.3d 1319, 1324 (D.C. Cir. 2007) (en banc). It necessarily follows that an allegedly official act must have the capability of influencing governmental decision-making. That point was emphasized in *Valdes* when the Court rejected the argument that gratuities case law "[stood] for the proposition that every action within the range of official duties automatically satisfies § 201's definition" of official act. *Id*. at 1323. ("While numerous activities—hosting a ceremony, visiting a school, or delivering a speech, for example—are assuredly official acts in some sense, it would be absurd, the [Supreme] Court said, to consider them within the scope of § 201.").

In denying the motion to dismiss, however, the district court ocused almost exclusively on whether the official acts alleged were part of Mr. Verrusio's official's job responsibilities:

> The question of whether an act is official depends largely upon the nature of the defendant's position and job responsibilities, whether the defendant had the ability to influence a final decision, whether the final decision was a private or public venture, and what steps the defendant took to influence the final decision.

Tr. (9/1/2010) at 49:15–20; Appx. 175. The district court's improper focus on job responsibilities, as opposed to influence over the decision-making process, is well-

illustrated by the two cases primarily relied on by the district court, *United States v. Carson*, 464 F.2d 424 (2d Cir. 1972) and *United States v. Biaggi*, 853 F.2d 89 (2d Cir. 1988). *See* Tr. (9/1/2010) at 48–49; Appx. 174–75.

In *Carson*, the issue was not whether the official acts alleged could influence the governmental decision-making process. The allegations were clear on that point: the defendant, an administrative assistant to a Senator, was personally going to work to end a pending Department of Justice action. *See Carson*, 464 F.2d at 434. The dispute in that case turned on whether he was acting in his official capacity when he attempted to influence the process. *Id*. The defendant argued that he was not acting in his official capacity, but was instead on a "personal frolic of his own." *Id*. The Second Circuit rejected that defense, and held that exerting influence on government agencies was part of the defendant's job responsibilities. *Id*.

Similarly, the issue in *Biaggi* was not whether the defendant, a former Member of Congress, personally attempted to influence the decision-making process. The issue was whether "official acts" were limited to "acts in the legislative process itself." *Biaggi*, 853 F.2d at 97. The Second Circuit rejected that narrow interpretation of official duty, and held that all of the defendant's alleged acts were regularly engaged in by Members of Congress, and therefore, were part of the Congressman's official duties, even though they were not directly

related to his lawmaking responsibilities. *See id*. at 97–98. Those allegations were clear: the defendant, a former Congressman, wrote letters on his congressional stationery related to the payor's issue; he opened an office file and assigned an administrative assistant to handle the matter; he intended to introduce legislation to help the payor; and, he offered to attend meetings in his capacity as a Congressman for the payor's benefit. *Id*. at 98. Each of those alleged acts clearly involved the defendant using his official position to directly influence governmental decision-making. The defendant was not simply providing public information to third parties, as in the present case.

During proceedings on Mr. Verrusio's pre-trial motions to dismiss Counts One and Two, the government was specifically ordered to provide case law to support its official act allegations, but it could not identify a single case with analogous facts.[5] *See* Appx. 50–68. Every case cited by the government involved a public official who attempted to directly influence governmental decision-making. *See, e.g.*, *United States v. Brewster*, 506 F.2d 62, 66 (D.C. Cir. 1974) (public official was going to personally influence decision-making process with regard to proposed postal rate increase); *United States v. Heffler*, 402 F.2d 924,

[5] After the briefing on Mr. Verrusio's motion to dismiss the original Indictment was complete, the Court ordered the government to submit a supplemental brief identifying specific authorities that supported the proposition that the alleged official acts were cognizable under Section 201. *See* Tr. (May 4, 2010) at 14:12–21; Appx. 165. The government subsequently filed the Superseding Indictment, and submitted its supplemental brief in support of that indictment.

925-26 (3d Cir. 1968) (public official was going to personally influence decision-making process with regard to approving contract variances); *Wilson v. United States*, 230 F.2d 521, 523 (4th Cir. 1956) (public official was going to personally influence decision-making process so that payor could sell insurance on military base)).[6] The recurring theme involves a public official and the use of his position to directly influence governmental decision-making. *See Carson*, 464 F.2d at 434 ("the determinative factor is that the primary source of any conceivable influence on the Justice Department was the official position held by the [defendant]").

This Court's decision in *Valdes* also focused on direct influence on the decision-making process. There, the defendant, a former detective with the D.C. Metropolitan Police Department, was convicted of violating Section 201(c)(1)(B).

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[6] The government's reliance on Hobbs Act cases for support, *see* Appx. 64–65, was equally unavailing, as those cases also involved personal, direct influence. *See, e.g.*, *Evans v. United States*, 504 U.S. 255, 255 (1992) (public official was going to personally influence decision-making process by voting in favor of re-zoning); *United States v. Rivera-Rangel*, 396 F.3d 476, 480 (1st Cir. 2005) (public official was going to personally influence decision-making process by asking other officials to help the payor obtain permits); *United States v. Tucker*, 133 F.3d 1208, 1211 (9th Cir. 1998) (public official was going to personally influence decision-making process by voting for legislation); *United States v. Hill*, 70 F.3d 1280, at *2 (9th Cir. 1995) (Table) (public official was going to personally influence decision-making process by voting for legislation); *United States v. Freeman*, 6 F.3d 586, 589 (9th Cir. 1993) (public official was going to personally influence decision-making process by shepherding a bill through the legislative process, which included personally submitting language to be included in the bill); *United States v. Carpenter*, 961 F.2d 824, 827 (9th Cir. 1992) (public official was going to personally influence decision-making process by persuading fellow legislators to vote for legislation)).

Valdes, 475 F.3d at 1320. The detective allegedly engaged in an "official act" when he searched police databases to supply otherwise publicly available information to an FBI informant. *Id*. at 1320. The defendant challenged his conviction on the ground that his conduct did not constitute official action. *Id*. at 1321. The government asserted that Valdes's conduct was official action because his database searches were "actions" on "questions," namely, "Who owns this license plate and where does he or she live?" Once again, however, the government's expansive interpretation of the anti-gratuity statute was rejected. *See id*. at 1322 ("The government's position, however, both misinterprets the Supreme Court and ignores the plain text of the statute.").

Following the guidance provided by the Supreme Court in *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 412 (1999) (when the anti-gratuity statute can "linguistically be interpreted to be either a meat axe or a scalpel [it] should reasonably be taken to be the latter"), the *Valdes* court interpreted "official act" narrowly and held that it could not be extended to "any action that in effect answers any question." *Id*. at 1323. This Court explained that an answer to a question "not subject to resolution by the government" would not fit comfortably within the definition of official act, "especially if the law imposes no mandate on the official (or perhaps any official) to answer." *Id*. at 1324; *see also id*. ("It would be linguistically odd, at a minimum, to treat an answer to a question as a 'decision

or action' on a question unless the answer were one that the government had authority to decide."). Instead, the anti-gratuity statute is focused on the "corruption of official decisions through the misuse of influence in governmental decisionmaking." *Id*. For that reason, the Court expressed doubt as to whether the release of information could ever constitute an official act, and observed that *Sun-Diamond* "at least indirectly rejects the notion that sharing information about [issues pending before an official]—likely including at least a glimpse into some hitherto non-public features of the agency's decision-making—would violate the statute." *Id*. at 1329.

B. The Item of Value Received by a Public Official Must be Linked to a Specific Official Act.

It is not enough for the government to prove and to allege *generally* that a public official attempted to use his position to influence the decision-making process, however—the government must also prove a specific official act. *Sun-Diamond* is instructive on this point.

There, the defendant, a trade association, was charged with providing the former Secretary of Agriculture with $5,900 in illegal gratuities. 526 U.S. at 401. Although the indictment referred to matters that were pending before the former Secretary in which the defendant had a vested interest, the indictment did not allege a connection between those matters and any specific official action taken, or to be taken, by the former Secretary. *Id*. at 402.

The Supreme Court addressed the requisite link that must be shown between the "value" received by the public official and the "official act" performed "because of" the value. The government disputed that a nexus to a specific official act was required and instead argued that the anti-gratuity statute covered "any effort to buy favor or generalized goodwill from an official whether [he] has been, is, or may at some unknown, unspecified later time, be in a position to act favorably to the giver's interests." *Id*. at 405 (internal quotations, citation, and emphasis omitted). Similarly, the Solicitor General asserted that the anti-gratuity statute required "only a showing that a gift was motivated, at least in part, by the recipient's capacity to exercise governmental power or influence in the donor's favor without necessarily showing that it was connected to a particular official act." *Id*. (internal quotations, citation, and emphasis omitted). The Supreme Court categorically rejected those proposed interpretations.

The Court held that while "[i]t is linguistically possible, of course, for [section 201(c)(1)(A)] to mean 'for or because of official acts in general, without specification as to which one,'" the more natural reading of section 201(c)(1)(A) is that it means "'for or because of some particular official act of whatever identity.'" *Id*. at 406 (emphasis added). The Court explained that "[t]he insistence upon an 'official act,' carefully defined, seems pregnant with the requirement that some particular official act be identified and proved." *Id*.

That conclusion was not based solely on the language of the statute. The interpretation adopted by the Court also avoided the "peculiar results" that the government's interpretation would allow. *Id.* For example, the government's proposed reading "would criminalize . . . token gifts to the President based on his official position and not linked to any identifiable act—such as the replica jerseys given by championship sports team each year during ceremonial White House visits." *Id.*; *see also id.* (listing other examples).

The Court explained further that its narrow interpretation was "more compatible with the fact that § 201(c)(1)(A) is merely one strand of an intricate web of regulations . . . governing the acceptance of gifts and other self-enriching actions by public officials." *Id.* at 409. Many of those regulations include exceptions for "various kinds of gratuities given by various donors for various purposes," and absent a specific official act requirement, those exceptions would be "snares for the unwary" because there are no exceptions to the anti-gratuity statute. *Id.* at 411.

C. Mr. Verrusio's Alleged Conduct Does Not Constitute Official Action.

As discussed above, the Indictment alleged five supposed official acts performed by Mr. Verrusio.

1. *Acts # 1 and 3 do not include the requisite specificity.*

Act # 1 broadly and generically alleges that Mr. Verrusio "influenc[ed] the language of the Federal Highway Bill." Similarly, act # 3 vaguely alleges that Mr. Verrusio "discussed the Federal Highway Bill." At best, the government proved no more than that. The fatal flaw in both, however, is that they lack any specificity as to what Mr. Verrusio actually did. That level of specificity—"influence" and "discussion"—certainly cannot be what the Supreme Court intended. If the government is allowed to rely on "influence" or "discussion," then the government has a free hand to rely on whatever facts it chooses to prove a specific official act, and importantly, regardless of whether it presented those facts to the grand jury. Because Section 201(c)(1)(B) requires proof of not merely any conduct, but conduct of an official nature, the government was obligated to prove and to present to the grand jury evidence of a specific official act. Those requirements were not met in this case with respect to acts # 1 and 3.

2. *Acts # 2 through 5 do not suggest that Mr. Verrusio directly influenced a question pending before him in his official capacity.*

In assessing whether acts # 2 through 5 are official acts, there are two pertinent questions. First, what is the "question, matter, cause, suit, proceeding or controversy" that is implicated. Under *Valdes*, the possibilities are limited to matters before a public official in his official capacity. The second inquiry is

whether the act in question was "on" the identified "question, matter, cause, suit, proceeding or controversy." The government must identify (i) a question that Mr. Verrusio could address in his official capacity, and (ii) how the alleged official acts could influence the answering of that question.[7]

With regard to what the relevant question is in this case, the government in its opposition to the motion to dismiss the original Indictment asserted that the question being answered was "whether or not to insert the amendments into a piece of legislation pending before his committee." *See* Govt's Consol. Opp'n to Def's Mot. to Dismiss at 7 (Nov. 6, 2009) (Dist. Ct. Dkt. # 21). However, acts # 2 through 5 plainly do not support that assertion. In each one, Mr. Verrusio answers questions posed by other individuals, namely "What should Mr. Blackann do?"; "Do Mr. Hirni's amendments need improvement?"; "How should Mr. Hinri and Mr. Boulanger conduct their lobbying activities?" Those are not questions subject to resolution by the Government. *See Valdes*, 475 F.3d at 1324. Therefore, acts # 2 through 5 could not support a conviction on Counts One and Two, nor could they support a valid indictment.

[7] This Court provided illustrative examples of conduct that constituted official action: "a clerk's manufacture of official government approval of Supplemental Security Income benefit . . . ; a congressman's use of his office to secure Navy contracts for a ship repair firm . . . ; and a Veterans' Bureau official's activity securing a favorable outcome on a disability claims." *Valdes*, 475 F.3d at 1325. Mr. Verrusio's alleged conduct in no way resembles those examples.

Even assuming that the government was correct in its phrasing of the question, the government had to also prove and allege that Mr. Verrusio could influence the answer to that question through his official position. *See United States v. Muntain*, 610 F.2d 964, 969 (D.C. Cir. 1979) (holding that official act could not occur where issue could not be brought before defendant in his official capacity). But the government did not prove at trial, nor did the Indictment include any allegation that Mr. Verrusio was involved in the legislative drafting process, despite the fact that one of the main purposes in amending the original Indictment was apparently to supplement Mr. Verrusio's job description. *See* Indictment ¶ 7; Appx. 34–35. The reason for that gaping hole is a simple one: Mr. Verrusio in fact had no role in the legislative drafting process, nor did he assist any lobbyists in their alleged efforts to influence the legislation. The absence of evidence and allegations that Mr. Verrusio had a role in the drafting process precludes the government from claiming that Mr. Verrusio could or did influence a decision whether to insert amendments into the Highway Bill. That is an additional reason why acts # 2–5 could not support convictions on Counts One and Two, and do not satisfy the Grand Jury Clause.

Further, even assuming (i) that a viable question was whether the amendments should be inserted into the Highway Bill and (ii) that that question came before Mr. Verrusio in his official capacity, the alleged official acts still have

to be "on" the identified question. *Valdes* interpreted "on" to mean direct influence on the question, because otherwise "it would constitute an enormous expansion of the gratuities provision to define 'action' on a 'matter' as encompassing every question asked and answered." *Valdes*, 475 F.3d at 1326. Even a cursory look at acts # 2 through 5 reveals that they do not implicate Mr. Verrusio taking any action "on" the question of whether amendments should be inserted to the Highway Bill.

Act # 2 alleged that Mr. Verrusio advised Blackann that amendments to the Highway Bill should be added during the conference committee. Count Two does not allege that Mr. Verrusio agreed to insert the amendments, nor does it allege that Mr. Verrusio offered to insert the amendments. Instead, it simply alleges that Mr. Verrusio told someone that the amendments "should be" inserted during the conference committee. Act # 2 does not identify who would do the inserting and certainly does not allege that Mr. Verrusio would be involved. Paragraph 13 of the Indictment could arguably be read to allege that Mr. Verrusio agreed to insert amendments into the Highway Bill, but that paragraph is conspicuously absent from Count 2, despite the fact that the main reason for the Superseding Indictment was to bolster the official act allegations.[8] That allegation is missing because Mr.

[8] Paragraph 13.b. of the Indictment states, "Defendant VERRUSIO and Blackann, as Congressional staff members with the ability to influence the Federal Highway Bill, agreed to provide favorable official action to aid [United Rentals] by, among

Verrusio never offered or agreed to insert the amendments, as was demonstrated at trial.

Act # 3 requires little discussion. To allege that Mr. Verrusio discussed a piece of legislation says nothing about whether Mr. Verrusio took any action to directly influence decision-making related to that legislation. Therefore, act # 3 should be disregarded.

Act # 4 alleged that Mr. Verrusio reviewed Hirni's draft and offered to discuss the amendments with him further. That act appears to reference paragraph 22 of the indictment, but paragraph 22 includes nothing about Mr. Verrusio taking any direct action with regard to the Federal Highway Bill. *See* Indictment ¶ 22; Appx. 41. Instead, it alleges that Mr. Verrusio told Hirni that he would not be able to help with the amendment sought by Hirni because the amendment "needed more work 'for anyone to be able to help.'" *Id*. That observation by Mr. Verrusio was not an official act. The evidence at trial contradicted those allegations—Hirni sent Mr. Verrusio a "white paper," and the only evidence that Hirni may have sent Mr. Verrusio proposed amendments was an e-mail sent months after the above exchange, which occurred in October.

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other things, inserting, or causing others to insert, and protecting from removal, the three legislative amendments sought by Boulanger, Hirni, and [Ehrlich]." Indictment ¶ 13; Appx. 37–38. Count Two only incorporated paragraphs 1–7 and 14–25 of the Indictment. *Id*. ¶ 27; Appx. 44.

Act # 5 alleged that Mr. Verrusio "advis[ed] Boulanger and Hirni regarding how to overcome opposition to [United Rentals'] amendments." That act appears to reference paragraph 24 of the Indictment, but paragraph 24 alleged that steps were taken "to protect the Equipment Rental Amendment, which by that time had been inserted into the Senate version of Federal Highway Bill, from a challenge being mounted by small business owners." *See* Indictment ¶ 24; Appx. 41–42. The Indictment then purports to describe some of the acts taken to protect the amendment. Given that paragraph 24 appears to reference events in the Senate, and Mr. Verrusio worked in the House, it is unknown, and unspecified in the Indictment, how Mr. Verrusio could have possibly affected a bill pending in the Senate, much less taken an official act with respect to that bill.

Rather than provide any details as to what steps Mr. Verrusio allegedly took in relation to the amendment in the Senate, the Indictment merely alleged that Mr. Verrusio suggested separately to Hirni and Boulanger that each organize a letter writing campaign. Once again, to the extent that act # 5 concerns acts that might influence the Highway Bill, specifically a letter writing campaign, Mr. Verrusio is not alleged to have taken any of those acts, and therefore, it is impossible for him to have engaged in official action—a passing suggestion that a citizen engage in a "letter writing campaign" cannot rise to the level of an "official act."

In sum, if the Supreme Court's instruction on how to interpret the anti-gratuity statute—with a scalpel and not a meat axe—is to be given any weight, then the official acts allegedly taken by a public official must have some direct influence on governmental decision-making. To conclude otherwise would turn nearly every act of a public official that has a remote connection to legislative matters into official action. That result would be inconsistent with both *Sun-Diamond* and *Valdes*.

D. Even Assuming Count Two Does Reference Official Action, The Government Failed to Prove and to Allege That Any Official Act Was "To Be Performed" When Mr. Verrusio Accepted the New York Trip.

The government was also required to prove and allege that Mr. Verrusio had already contemplated an official act when the items of value were accepted. The language of section 201(c)(1)(B) makes clear that timing is important. It refers to "any official act performed or to be performed." 18 U.S.C. § 201(c)(1)(B). The Supreme Court emphasized the importance of timing by specifically rejecting the argument that the anti-gratuity statute can be violated if a thing of value is provided to a public official in order "to build a reservoir of goodwill that might ultimately affect one or more of a multitude of unspecified acts, now and in the future." *See Sun-Diamond*, 526 U.S. at 405 ("An illegal gratuity . . . may constitute merely a reward for some future act that the public official will take (and may have already determined to take), or for a past act that he has already taken.");

see also United States v. Gatling, 96 F.3d 1511, 1522 (D.C. Cir. 1996) (illegal gratuity includes payment for an act that "would have been performed in any event").

Thus, in order for a public official's conduct to fall within the ambit of the anti-gratuity statute, he must have had a present intent to perform an official act at the time he accepted a thing of value—the statute, by its plain language, only applies to acts that are "to be performed." It is a fundamental principle of statutory construction that all words of the statute be accorded meaning, and that principle must be applied to the phrase "to be performed." *See Ratzlaf v. United States*, 510 U.S. 135, 140–41 (1994) (explaining that courts should resist interpreting any words as surplusage and that "resistance should be heightened when the words describe an element of a criminal offense").

In accordance with the plain meaning of the anti-gratuity statute, courts have, in a variety of contexts, concluded that accepting an illegal gratuity entails a present intent on the part of the recipient to perform an act.[9] And, as this Court

[9] *See, e.g.*, *United States v. Anderson*, 517 F.3d 953, 961 (7th Cir. 2008) ("If . . . the payer intends the money as a reward for actions the payee has already taken, or is already committed to take, then the payment is a gratuity."); *United States v. Jennings*, 160 F.3d 1006, 1014 (4th Cir. 1998) ("[I]llegal gratuities . . . may be conveyed before the occurrence of the act (so long as the payor believes the official has already committed himself to the action).") (emphasis added); *United States v. Mariano*, 983 F.2d 1150, 1159 (1st Cir. 1993) ("[T]he gratuity guidelines presume a situation in which the offender gives the gift without attaching any

explained in discussing the predecessor to section 201(c), "[t]he gratuity sections . . ., dealing with the payment and receipt of a gratuity . . . , were primarily designed to take care of the case where the illegal payer offers a public official a gift for doing what the public official is paid to do anyway." *See Brewster*, 506 F.2d at 72 n. 26.

Here, the government clearly failed to link the New York trip to any official act that Mr. Verrusio had a then-existing intent to take. To the extent the evidence at trial suggested or alleged that Mr. Verrusio decided to take certain official acts because of the New York trip, that proof or allegation would not come within the purview of the anti-gratuity statute. Indeed, it would have it exactly backwards: The thing of value must be provided because of the official act; the official act is not taken because of the thing of value. Accordingly, the government failed to prove and allege that Mr. Verrusio had any intent to take any official acts when he accepted the New York trip.

E. The Evidence Introduced by the Government Was Insufficient to Support Convictions on Counts One and Two.

The evidence introduced by the government at trial was consistent with the allegations in the Indictment in several respects—there was testimony that Mr. Verrusio discussed Mr. Blackann on legislative strategy; that he discussed potential

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strings, intending it instead as a reward for actions the public official has already taken or is already committed to take.").

legislation with lobbyists; that he suggested that the lobbyists organize a letter-writing campaign; and that he offered his thoughts on a white paper prepared by a lobbyist. As explained above, that evidence could not support a finding that Mr. Verrusio ever performed or was to perform an official act, and therefore, Mr. Verrusio is entitled to a judgment of acquittal on Counts One and Two.

F. The Government Failed to Allege an "Official Act" in the Indictment.

It is well-established that the Grand Jury Clause of the Fifth Amendment requires that an indictment "contain[] the elements of the offense charged." *Hamling v. United States*, 418 U.S. 87, 117 (1974). If an indictment does not allege each and every element of the offense charged, then it must be dismissed. *United States v. Pickett*, 353 F.2d 62, 67 (D.C. Cir. 2004). "[T]he indictment must be considered as it was actually drawn, not as it might have been drawn." *United States v. Pirro*, 212 F.3d 86, 92 (2d Cir. 2000).

Because the Indictment failed to allege that any item of value was accepted for or because of an official act performed or to be performed, the district court erred in denying Mr. Verrusio's pre-trial motion to dismiss.

II. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR WHEN IT HELD THAT MR. VERRUSIO'S RIGHT TO PRESENT A DEFENSE AND RIGHT TO COMPULSORY PROCESS MUST YIELD TO THE SPEECH OR DEBATE CLAUSE.

One of the key pieces of evidence introduced by the government was an e-mail exchange between Hirni and Curry, *see* Gov't Ex. 88; Appx. 412, which was one of several communications they had about United Rentals, *see* Tr. (1/31/2011, afternoon) at 100:24–106:19; Appx. 268–73. In that exchange, Hirni explained that Mr. Verrusio had purportedly requested draft language from Hirni and he also described Mr. Verrusio as "good to go." *Id*. The government intended for the jury to infer from Hirni's statements that he expected Mr. Verrusio to take action on behalf of United Rentals. Mr. Verrusio subpoenaed Curry, expecting that she would testify that "Mr. Verrusio was not in fact inserting himself in the process, that he was not placing the pressure on her, that she independently was communicating with Hinri, and that she has no recollection of any pressure being put on her by Mr. Verrusio." Tr. (2/3/2011, afternoon) at 24:9–19; Appx. 342. Mr. Verrusio also expected Curry to testify about their roles in the legislative drafting process, as noted in Curry's motion to quash. *See* Appx. 134.

Curry moved to quash her subpoena on the ground that her testimony was privileged under the Speech or Debate Clause. *Id*. She argued that her conduct was within the legislative sphere, and therefore protected, because it involved information gathering for legislative purposes. Appx. 139–41; *see also* Tr.

(2/3/2011, afternoon) at 9–17; Appx. 327–335. The district court granted the motion to quash, finding that Curry "ha[d] appropriately invoked the Speech or Debate clause privilege." Tr. (2/3/2011, afternoon) at 20:9–14; Appx. 338. Mr. Verrusio argued that his inability to call Curry as a witness violated his "right to present indispensable evidence" under the Fifth Amendment, *i.e.*, due process rights, Tr. (2/7/2011, morning) at 7:18–8:1; Appx. 365–66, and "[his] right to call witnesses for the defense" under the Sixth Amendment, *id*. at 17:3–10; Appx. 375.

A. The Protections of the Speech or Debate Clause Are Not Absolute If They Prevent a Criminal Defendant from Exercising His Constitutional Rights.

This case presents an issue that has apparently never been directly confronted by any court—a potential conflict between a criminal defendant's constitutional rights and a Member of Congress's rights under the Speech or Debate Clause. In fact, this Court declined the opportunity to address the issue collaterally because it "pose[d] a complicated question with no bright line answer." *United States v. Levine*, 72 F.3d 920 (Table), 1995 WL 761834, at *5 (D.C. Cir. 1995).

A criminal defendant's right to present a defense, including access to compulsory process, is "fundamental and essential to a fair trial." *Washington v. Texas*, 388 U.S. 14, 17 (1967). "The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal

justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." *United States v. Nixon*, 418 U.S. 683, 709 (1974).

With regard to acts taken "within the legislative sphere," the Speech or Debate Clause provides Members of Congress and their staff with immunity from lawsuits or prosecutions as well as a testimonial privilege, which protects them from being questioned "in any other Place" about those acts. *See Doe v. McMillan*, 412 U.S. 306, 311–14 (1973). An act is within the legislative sphere if it is "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to legislative or other matters before the House." *Id*. at 314. Those acts include voting, drafting committee reports, conducting committee hearings, and authorizing investigations. *Id*. at 311–13. The purpose of the protection "is to insure that the legislative function the Constitution allocates to Congress may be performed independently, without regard to the distractions of private civil litigation or the perils of criminal prosecution." *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 415 (D.C. Cir. 1995).

Although the Supreme Court has referred to the protections of the Speech or Debate Clause as "absolute" in the context of civil litigation, *see Eastland v. United States Serviceman's Fund*, 421 U.S. 491, 501 (1975), the Court has

elsewhere recognized that "the authors of the Bill of Rights did not undertake to assign priorities" between amendments, "ranking one as superior to the other," and therefore, "[i]t is unnecessary . . . to establish a priority applicable in all circumstances." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976).[10]

That explains why courts often apply a balancing test when confronted with competing constitutional interests. For example, in *Branzburg v. Hayes*, 408 U.S. 665 (1972), a journalist argued that his First Amendment rights protected him from having to answer questions about his confidential sources before a grand jury. *Id.* at 667. The Supreme Court rejected that argument, but only after it balanced the potential burden on the freedom of the press against the purpose of the grand jury. *Id.* at 687–92. While the Court acknowledged that news gathering qualifies for First Amendment protection, it also recognized the limited nature of the burden that the government was seeking to impose. *Id.* at 679–80. On the other hand, the Court found that the grand jury has a "fundamental" role in the "fair and effective law enforcement," and that its authority to subpoena witnesses was "not only historic, but essential to its task." *Id.* at 688–90.

[10] *See also Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964) ("Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case."); *Prout v. Starr*, 188 U.S. 537, 543 (1903) ("The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity.").

The Court engaged in a similar balancing test in the criminal context when the President moved to quash a third-party subpoena he received from the government. *See Nixon*, 418 U.S. at 707. The Court rejected the President's claim that an absolute privilege attached to confidential Presidential communications, despite noting that such a privilege was "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *Id*. at 707–08. Instead, the communications were considered presumptively privileged, subject to the government demonstrating a specific need for the evidence in a pending criminal trial. *Id*. at 713. In support, the Court explained that evidentiary privileges are "exceptions to the demand for every man's evidence" and "are not lightly created nor expansively construed, for they are in derogation of the search for truth." *Id*. at 710; *see id*. at 711 ("It is the manifest duty of the courts to vindicate [a criminal defendant's Fifth and Sixth Amendment] guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced.").

And, in several instances, courts have expressly held that asserted privileges must yield in certain circumstances to a criminal defendant's constitutional rights. *See Roviaro v. United States*, 353 U.S. 53, 59–61 (1957) (holding that government's "informer privilege" must give way to a defendant's rights if the informer's identity would be "relevant and helpful" to the defense); *United States*

v. Moussaoui, 382 F.3d 453, 469–74 (4th Cir. 2004) (holding that any potential burden on the Executive branch's war-making power under Articles I and II does not outweigh a defendant's rights under the Fifth and Sixth Amendments, even though "no government interest is more compelling than the security of the Nation"); *United States v. Fernandez*, 913 F.2d 148, 154 (4th Cir. 1990) (holding that statutory protections given to classified information "cannot override the defendant's right to a fair trial").

With respect to the Speech or Debate Clause, this Court has implicitly, if not explicitly, recognized that the scope of its protections may differ in civil and criminal cases. In *Brown & Williamson Tobacco Corp. v. Williams*, the plaintiff in a civil lawsuit attempted to subpoena documents that were voluntarily provided to Congress by a third party. 62 F.3d at 412. The plaintiff argued that the documents were privileged and that they were illegally provided to Congress. *Id*. at 417. Although this Court affirmed the district court's decision to quash the subpoena, the Court did not hold that the Speech or Debate Clause should be applied blindly, without any regard for who is seeking the information and for what purpose. To the contrary, the Court explained that the scope of the privilege could depend on "who seeks the documents, and with what legal claim to entitlement." *Id*. at 422.[11]

[11] A similar principle emerged in *Zerilli v. Smith*, where this Court limited the scope of *Branzburg* to criminal proceedings, and proceeded to apply a balancing test to determine whether the public interest in protecting a newspaper's

In *Brown*, the plaintiff's claim failed in part because it could not show how the rights it was seeking to protect would be advanced by enforcing the subpoena. *Id.* at 422–23.

Accordingly, this Court should balance the impact on Congress of allowing Mr. Verrusio to compel the testimony of Curry against his fundamental constitutional rights.[12]

B. The Fifth and Sixth Amendments Should Guarantee a Criminal Defendant Access to Information Passively Collected by a Member of Congress Irrespective of the Speech or Debate Clause.

A criminal defendant's right to present relevant, material evidence should always trump the protections provided by the Speech or Debate Clause. However, this Court does not need to recognize that broad principle to resolve the balancing test in Mr. Verrusio's favor.

The potential burden that would be imposed on the functioning of Congress by requiring Curry to testify would be minimal to non-existent. Mr. Verrusio does

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confidential sources overcomes a civil litigant's interest in compelled disclosure. 656 F.2d 705, 712 (D.C. Cir. 1981). The Court also confirmed that it expected the privilege to have a greater reach in civil, as opposed to criminal, cases. *Id.*

[12] That approach also finds support in *United States v. Dean*, 55 F.3d 640 (D.C. Cir. 1995). There, a criminal defendant challenged the quashing on Speech or Debate grounds of a subpoena *duces tecum* to the Senate. *Id.* at 663 & n.14. The Court rejected the challenge because the defendant failed to show that the requested information was relevant to his defense. *Id.* If the Speech or Debate Clause was an absolute bar to the subpoena, the Court presumably would have relied solely on that basis.

not seek to question a Member of Congress about any votes he has cast, any statements he made during a committee hearing, or any formal decision to hold a hearing or initiate an investigation—all of which concern the actual operation of Congress and are much closer to the core legislative functions protected by the Speech or Debate Clause. Instead, Mr. Verrusio seeks information from Curry that she informally and passively received from a third party, and information that she may not have even requested. While Mr. Verrusio acknowledges that, in the civil context, information gathering has been found to come within the legislative sphere, *see Eastland*, 421 U.S. at 504–505, here, the character and nature of the information gathering activities should matter. This case does not involve any official information gathering, *e.g.*, Representative Boozman did not hold any hearings, nor did his committee issue any subpoenas. Thus, the actual question should be, "what is the potential burden on the functioning of Congress if a staff member is required to answer questions in a criminal proceeding regarding a lobbyist's efforts to influence the process?" The answer is none, and for that reason, the balancing test should turn solely on whether Mr. Verrusio can demonstrate the materiality of Curry's testimony, *i.e.*, whether he can establish a violation of his constitutional rights. *See United States v. Valenzuela-Bernal*, 458 U.S. 858, 868–72 (1982) ("[T]he respondent can establish no Sixth Amendment

violation without making some plausible explanation of the assistance he would have received from the testimony of the [unavailable] witnesses.").

There is no set standard for determining materiality. Instead, "the omission must be evaluated in the context of the entire record." *Id*. at 868. "[I]f the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create reasonable doubt." *Id*. Here, the evidence against Mr. Verrusio was far from overwhelming.[13] No evidence was admitted that Mr. Verrusio discussed any amendments with anyone who worked for the House before or after the trip; no evidence was admitted that he could have caused the amendments to be inserted into the Highway Bill; and no evidence was introduced that he discussed United Rentals, at all, with anyone other than Boulanger, Blackann, Hirni, and Ehrlich.

Further, the credibility of the central witness against him, Trevor Blackann, was certainly at issue. Blackann admitted taking thousands of dollars worth of bribes, yet he he pleaded guilty to filing a false tax return, not to bribery or even

[13] The district court's decision to not once, but twice, reserve ruling under Federal Rule of Criminal Procedure 29 on whether the government had met its burden as to Count Two also suggests that the government's case was weak, *see* Tr. (2/2/2011, afternoon) at 94:12–19; Appx. 322 (reserving at the close of the government's case-in-chief); Tr. (2/7/2011, morning) at 18:22–25; Appx. 376 (reserving at the close of all evidence), as does the fact that the jury deliberated for 3 days when there were only four witnesses with personal knowledge of the facts.

accepting illegal gratuities. Therefore, any evidence that would have called into question the government's theory would have been significant and material.

And, as discussed above, Hirni's e-mail to Curry was one of only a handful of pieces of evidence or testimony that connected Mr. Verrusio to United Rentals after the New York trip. If Curry, who was apparently an important player in Hirni's lobbying efforts, would have testified that she discussed United Rentals with Mr. Verrusio and he never told her that he intended to do anything to advance their agenda, as expected, that certainly would have aided Mr. Verrusio's defense.

Finally, Curry would have also testified about Mr. Verrusio's role in the process and was expected to explain that he had no substantive role or influence in the legislative drafting process, casting doubt on the idea that anyone familiar with Mr. Verrusio's job responsibilities would have ever thought he could or would act to insert amendments into a bill.

For all of these independent reasons, Curry's testimony was essential to Mr. Verrusio's defense, and as a result, the exclusion of her testimony violated his right to present a defense and right to compulsory process. Because the government cannot show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained," each of Mr. Verrusio's convictions should be reversed, and he should be granted a new trial.

C. If the Speech or Debate Clause Prevents a Criminal Defendant From Accessing Material Information, Then the Only Acceptable Remedy is to Dismiss the Indictment.

If this Court concludes that the district court was correct in holding that the Speech or Debate Clause precluded Mr. Verrusio from calling Curry as a witness, then the Court should find that the district court erred in not dismissing the Indictment. When a defendant is denied access to material evidence due to the invocation of a privilege by the government, the only acceptable response should be to dismiss the Indictment.[14]

This Court addressed that point in *Christoffel v. United States*, 200 F.2d 734 (1952). There, the defendant objected to his inability to obtain evidence from the House of Representatives. *Id*. at 730. In resolving the issue, the Court explained, "While the privilege of the House must be respected it might give rise to occasions when it would be necessary to forego conviction of crime because evidence is withheld. There is no doubt some discretion, to be carefully exercised so as not to invade the constitutional right of an accused to compulsory process." *Id*. at 730; *see also Roviaro*, 353 U.S. at 61 (approving dismissal where government invokes

[14] Mr. Verrusio moved to dismiss the Indictment on these grounds in the district court, *see* Tr. (2/7/2011, morning) at 7:18–8:1; Appx. 365–66, and that motion was denied, *see id*. at 18:22–25; Appx. 376; Tr. (2/10/2011, morning) at 25; Appx. 400–01. In light of the Court's quashing of Curry's subpoena, the parties did agree that certain testimony and portions of certain exhibits would be stricken from the record, *see* Stipulation dated February 4, 2011; Appx. 402, but that relief in no way cured the prejudice that Mr. Verrusio suffered from not being able to call Curry as a live witness.

informer's privilege); *Moussaoui*, 382 F.3d at 474 ("If the government refuses to produce the information at issue—as it may properly do—the result is ordinarily dismissal."); *United States v. Andolschek*, 142 F.2d 503, 506 (2d Cir. 1944) ("The government must choose: either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully.").

The government should not be allowed to have it both ways. It must either choose to pursue a criminal conviction and allow a defendant to exercise his rights, or it must not pursue a conviction and enjoy its evidentiary privileges.

III. THE GOVERNMENT FAILED TO INTRODUCE EVIDENCE SUFFICIENT TO SUPPORT A CONVICTION ON COUNT THREE.

To meet its burden under Count Three, the government was required to prove (1) that the information Mr. Verrusio provided on Schedule VI was in fact false, which also affected whether the allegedly false statement was made knowingly; and (2) that the information (or lack thereof in this case) was capable of influencing the action of Congress or a committee, such as the Ethics Committee.

A. The Government Failed to Introduce Evidence Explaining How Schedule VI Was Filled Out Incorrectly.

At trial, several government witnesses offered their personal opinions as to what they would consider permissible business travel by Congressional staffers. However, there was no testimony regarding the official rules, standards, and

practices of the House or the Transportation Committee with respect to official travel. The government did not call an expert, a Member of the Ethics Committee, or even Mr. Verrusio's supervisor, to address when travel paid for by a third-party is reportable on Schedule VII as opposed to Section VI (Gifts).

"Reportable gifts" and "reportable travel" are simply not lay terms that the jury or the government was free to define on its own. The government proved the point when it offered Mr. Kent Cooper as an expert in this area. The government argued that expert testimony was necessary for the jury to understand Schedule VI. And, at a pre-trial hearing, the district court repeatedly stated its belief that the financial disclosure form was difficult to understand. *See, e.g.*, Tr. (3/18/2010) at 11–12; Appx. 452–53 ("THE COURT: . . . . How is a juror supposed to know what 'the rule' is and how it affects what a filer is supposed to or not supposed to turn in or report? . . . . Does the fact that we've had this colloquy back and forth for six or seven questions suggest that perhaps it does mean that an ordinary juror may have the same kinds of questions?"); *id.* at 44; Appx. 455 ("THE COURT: . . . . To the extent I heard you both say at any point that the form is plain, I disagree with you both. I don't think that this is the kind of form that's so plain that an ordinary juror would be able to appreciate all the meanings, all of what it requires, and I don't think that it would be inappropriate to allow someone with proper qualifications and experience [to testify].").

Absent any evidence defining "gift" or explaining the difference between reportable gifts and reportable travel, no reasonable juror could have found beyond a reasonable doubt that Mr. Verrusio knowingly made a false statement on Schedule VI of his financial disclosure form.

B. The Government Failed to Introduce Evidence of Materiality.

The government also failed to meet its burden with respect to the materiality element of Count Three. There was no testimony as to how, if at all, the information disclosed in the statements could have influenced the action of the Ethics Committee (*e.g.*, What action could the Committee have taken upon discovering that a filer's statement was false and/or incomplete? What action could the Committee have taken if a filer disclosed a gift that should not have been accepted?). *See* Tr. (2/7/2011) at 93:19–22; Appx. 486 ("A statement is material if it had the effect or was capable of influencing the action of the Congress or a committee, such as the House Ethics Committee, or had the potential to do so.").

In its Rule 29 argument, the government seemed to contend that the fact that Mr. Lewis reviewed Mr. Verrusio's form "demonstrated quite clearly that it did affect the committee's determination, because Paul Lewis was acting as a designee of the committee in following up with the defendant on his form." Tr. (2/2/2011, afternoon) at 92; Appx. 464. But Mr. Lewis testified that in 2003, he was assigned to review all House Financial Disclosure Statements toward "the latter portion of

the alphabet, S through Z." *Id.* at 9–10; Appx. 459–60. He testified that in all situations where clarifications were necessary, "[t]he committee's guidance was if the reviewing attorney wanted additional information, we could request additional information. We usually did that with the filer. We might ask them to provide a financial statement from their broker or from the bank, but we would usually go to the filer." *Id.* at 10. In fact, Mr. Lewis specifically testified that it was not the "normal practice" to do independent investigation or "look for sources other than the filer." *Id.* at 10. The mere fact that Mr. Lewis simply reviewed Mr. Verrusio's Financial Disclosure Statement cannot be enough to satisfy the materiality element of 18 U.S.C. § 1001(a)(2).

The issue here is not whether the government could have shown that Mr. Verrusio's disclosures—if and when they were determined to be false—had the capability of influencing the actions of the Ethics Committee; the issue is whether the government did show such a capability, and it did not.

IV. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR WHEN IT EXCLUDED THE INSTRUCTIONS TO SCHEDULE VII OF THE HOUSE FINANCIAL DISCLOSURE FORM.

In Count Three, Mr. Verrusio was charged with making a false statement on his 2003 financial disclosure form in violation of 18 U.S.C. § 1001. Specifically, Mr. Verrusio allegedly failed to disclose on Schedule VI the "gifts" he received in connection with the New York trip. *Id.* To rebut that charge, Mr. Verrusio argued

that certain expenses associated with the trip were not properly classified as "gifts," but were instead travel-related expenses that were required to be disclosed on Schedule VII, not Schedule VI. *See* Tr. (2/7/2011, afternoon) at 111–16; Appx. 393–98. If correct, then Schedule VI did not contain any false statements. *Id*.

Mr. Verrusio sought to introduce the official instructions to Schedule VII, which were provided to filers by the Committee on Standards of Official Conduct for the U.S. House of Representatives ("Ethics Committee"), in support of his defense. The district court excluded those instructions on relevance grounds. Because the district court abused its discretion in excluding the instructions, and that error was not harmless, each of Mr. Verrusio's convictions should be reversed.

A. The Instructions to Schedule VII Were Plainly Relevant to Mr. Verrusio's Defense.

The instructions to Schedule VII were relevant to Mr. Verrusio's defense for three reasons. First, they provided critical insight into how the Ethics Committee differentiated between gifts (Schedule VI) and travel-related expenses (Schedule VII). Second, they rebutted the government's repeated suggestion that Mr. Verrusio's failure to seek pre-approval from the Ethics Committee evidenced his belief that the trip was improper. Third, they raised serious doubts about whether any false statement (if in fact false) was "knowingly" made.

The value of what Mr. Verrusio received during the New York trip was stipulated to by the parties: a roundtrip plane ticket ($228.50), transportation

($240), a hotel room ($301.27), a dinner ($105), the World Series ticket ($110), a baseball jersey ($130), and drinks and entertainment at a night club ($145). *See* Tr. (1/28/2011, morning) at 68–72; Appx. 224–25. Mr. Verrusio argued that the first four items—airfare, transportation, hotel, and dinner—were travel-related expenses that were not required to be disclosed on Schedule VI. *See* Tr. (2/7/2011, afternoon) at 111–16; Appx. 393–98. If that was the case, then Mr. Verrusio would not have been required to disclose the other items. As the form itself makes clear, gifts under $114 did not have to be disclosed at all, *i.e.*, the World Series ticket, and gifts of more than $114 only had to be disclosed if the aggregate exceeded $285 (here, drinks and entertainment plus baseball jersey = $275). *See* Gov't Ex. 15; Appx. 408.

Mr. Verrusio's ability to draw a line between gifts and travel-related expenses was critical to his defense on Count Three, and the instructions to Schedule VII were the best (and only) evidence available to Mr. Verrusio on this point.

The instructions to Schedule VII explained that travel unrelated to a staff member's official duties should still be reported on Schedule VII as long as the trip was not solely for the staff member's personal benefit, *i.e.*, it was not a gift. *See* Appx. 424–25 ("You must also disclose privately paid travel that, while not related to your official duties, was not provided merely for your personal

benefit."). The evidence at trial supported an argument that the New York trip was not provided to Mr. Verrusio "merely for his personal benefit."

Ehrlich testified that he thought inviting Mr. Verrusio and Blackann on the trip was a good idea so that he could discuss the Highway Bill with them. Tr. (2/2/2011, morning) at 21:20–22:13; Appx. 300–01. He also explained that the reason for the dinner was to discuss "business," *id*. at 33:23–25; Appx. 303, and that he paid for the dinner with his company credit card because the dinner was "business in [his] mind," *id*. at 35:4–11; Appx. 305. Hirni also referred to there being a "very important business dinner" on the trip. Tr. (1/31/2011, afternoon) at 61:13–62:18; Appx. 254–55. And he confirmed that the dinner did involve a significant amount of business-related discussion. *Id*. at 76:9–22; Appx. 260.

The instructions were also relevant to whether prior approval of the Ethics Committee was required for the trip. The government repeatedly asked its witnesses about whether Mr. Verrusio sought approval for the trip, clearly implying that approval was required. *See, e.g.*, Tr. (1/28/2011, morning) at 19:15–18; Appx. 223 ("Q. Okay. Well, was – among the information that Mr. Verrusio provided in that call, did he ever mention the need to run it by the Ethics Committee? A. No.") (testimony of Trevor Blackann); Tr. (1/31/2011, afternoon) at 59:6–8; Appx. 252 ("Q. Did either [Mr. Verrusio or Mr. Blackann] indicate to

you that they needed to obtain ethics approval? A. No, sir.") (testimony of James Hirni).

The instructions, however, directly contradicted the suggestion that prior approval was required: "In the case of travel within the continental United States, a maximum of four consecutive days (including travel time) may be accepted without prior written approval of the Committee on Standards of Official Conduct." Appx. 425. Finally, the instructions demonstrated, at the very least, that the line between gifts and travel was anything but crystal clear, calling into doubt whether Mr. Verrusio "knowingly" made a false statement on Schedule VI.

When Mr. Verrusio moved to admit the instructions to Schedules VI and VII (defense exhibit 149), the government objected on relevance grounds as to Schedule VII, and the district court sustained the objection, despite a clear explanation by Mr. Verrusio of their relevance.

> THE COURT: I've ruled you'll be able to get in the instructions that have to do with gifts. The charge in Count 3 has to do with gifts. There's nothing in there saying he didn't properly report on the schedule, the form that requires travel reporting [Schedule VII]. So you all figure out which ones pertain to the gifts, and then bring them back up and we'll make sure we know where we are.
>
> MR. BERMAN: I just want to make sure I understand your ruling. For a filer to know whether getting on an airplane is travel or a gift, the filer would have to look at the travel and the gift part of this. They go together, Your Honor. It's – they are not – if you take a look at

> Defense Exhibit 149 in the relevant pages, both are directly relevant and instructive to the conduct in this case. I understand the Government wants to argue that it was all just a big gift, but if a filer looks at this and sees, oh, travel, I didn't have to disclose travel under Schedule VI, that would change the amounts that have to be listed.
>
> THE COURT: Which one is 6? Is that gifts or travel?
>
> MR. BERMAN: 6 is gifts, Your Honor. 7 is travel. If a filer looked at this and said okay, I've taken a flight. Is a flight a gift or is a flight travel? They would look to this [*i.e.*, the instructions to Schedule VII] for guidance. Mr. Lewis has testified this is the document they'd look to for guidance. And if this gives guidance that says a plane flight or a meal or lodging, which have been directly at issue in this case, doesn't go on 6, then there's a question as to whether or not Mr. Verrusio even had to fill out 6. And if you look at it, it's very specific, 6, the amounts. Nothing over $114 goes in there, the aggregate of it is 285. We'd ask some leeway here, Your Honor. We're not asking for the other 30 or so pages to come in. It's just simply four pages.
>
> THE COURT: I understand that. My ruling stands. You all go compare notes and bring whatever you're going to put in up.

Tr. (2/2/2011, afternoon) at 51:12–52:22; Appx. 316–17.

The district court's apparent reliance on the fact that Mr. Verrusio was not alleged to have filled out Schedule VII incorrectly had it backwards. The relevance of the instructions was not to prove that Schedule VII was filled out correctly; it was to establish that Schedule VI was filled out correctly, as demonstrated by the interplay between Schedules VI and VII.

Because the instructions to Schedule VII were plainly relevant to whether Mr. Verrusio filled out Schedule VI correctly, this Court should find that the district court abused its discretion in excluding them.

B. The Instructions to Schedule VII Were Critical to Mr. Verrusio's Theory of Defense to All Counts.

If the district court erred in excluding the instructions to Schedule VII, then the government bears the burden of establishing that the exclusion did not have a "substantial and injurious effect or influence in determining the jury's verdict." *United States v. Smith*, 640 F.3d 358, 365–366 (D.C. Cir. 2011). The government cannot meet its burden here, so each of Mr. Verrusio's convictions should be reversed because the error permeated the case.

The importance of Count Three to the government's entire case against Mr. Verrusio cannot be understated. Although much of the evidence focused on the New York trip and the Highway Bill, the government presented that evidence through a prism of deceit—according to the government, Mr. Verrusio should have listed the trip on Schedule VI; he intentionally did not list the trip; and his failure to list the trip was compelling evidence that he knew he had accepted an illegal gratuity and that he knew he had entered into a conspiracy. *See* Tr. (2/7/2011, afternoon) at 22–33; Appx. 381–92. That argument was one of the pillars of the government's closing. *See id*. If the government was wrong, however, about Mr.

Verrusio filling out Schedule VI falsely, the complexion of the case would have changed dramatically.

The importance of the instructions should also be considered in light of the other evidence that went to how to differentiate between gifts and travel—none. The government repeatedly, and summarily, asserted that the travel expenses were "gifts," but no witness ever addressed that point, which made the instructions all the more important. As it was, the jury may have assumed that Mr. Verrusio was simply creating from whole cloth the idea that Schedule VII covered third-party travel beyond official fact-finding missions.

In sum, Mr. Verrusio's inability to rely on the instructions had a substantial impact on the jury's verdict on Count Three (and by extension on Counts One and Two as well) considering that the instructions were directly on point, wholly supported Mr. Verrusio's theory of defense, and would have been the only evidence introduced on that issue. Accordingly, Mr. Verrusio should be granted a new trial on all three Counts.

CONCLUSION

For all of the reasons discussed above, a judgment of acquittal should be entered on all Counts. Alternatively, for each reason alone, and especially when combined, this Court should reverse all three convictions and remand the case for a new trial.

Dated: October 5, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(B) because this brief contains 13,842 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14-point Times New Roman Font.

Dated: October 5, 2012

/s/ Richard Sobiecki

Richard Sobiecki

CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2012, I filed and served the foregoing Brief, in addition to the Statutory Addendum and Appendix, by electronic service through the CM/ECF system to all counsel of record.

In addition, pursuant to D.C. Circuit Rule 31(b) and this Court's Administrative Order Regarding Electronic Case Filing, I will cause to be mailed to the Court eight paper copies of this brief within two business days of this filing.

/s/ Richard Sobiecki

Richard Sobiecki

STATUTORY ADDENDUM

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§ 201. Bribery of public officials and witnesses

(a) For the purpose of this section—

(1) the term "public official" means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror;

(2) the term "person who has been selected to be a public official" means any person who has been nominated or appointed to be a public official, or has been officially informed that such person will be so nominated or appointed; and

(3) the term "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

(b) Whoever—

(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(A) to influence any official act; or

(B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person;

(2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act;

(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official or person;

(3) directly or indirectly, corruptly gives, offers, or promises anything of value to any person, or offers or promises such person to give anything of value to any other person or entity, with intent to influence the testimony under oath or affirmation of such first-mentioned person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or with intent to influence such person to absent himself therefrom;

(4) directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity in return for being influenced in testimony under oath or affirmation as a witness upon any such trial, hearing, or other proceeding, or in return for absenting himself therefrom;

shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

(c) Whoever—

(1) otherwise than as provided by law for the proper discharge of official duty—

(A) directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or

(B) being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person;

(2) directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person's absence therefrom;

(3) directly or indirectly, demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon any such trial, hearing, or other proceeding, or for or because of such person's absence therefrom;

shall be fined under this title or imprisoned for not more than two years, or both.

(d) Paragraphs (3) and (4) of subsection (b) and paragraphs (2) and (3) of subsection (c) shall not be construed to prohibit the payment or receipt of witness fees provided by law, or the payment, by the party upon whose behalf a witness is called and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing, or proceeding, or in the case of expert witnesses, a reasonable fee for time spent in the preparation of such opinion, and in appearing and testifying.

(e) The offenses and penalties prescribed in this section are separate from and in addition to those prescribed in sections 1503, 1504, and 1505 of this title.

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

§ 1001. Statements or entries generally

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years.

(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to—

(1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or

(2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.